

[Securities Regulation Daily Wrap Up, SECURITIES OFFERINGS—U.S.: Slack cert petition says Ninth Circuit ignored 50 years of Section 11 precedent, \(Sept. 7, 2022\)](#)

Securities Regulation Daily Wrap Up

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By [Rodney F. Tonkovic, J.D.](#)

Is "such security" any share or only shares registered under the registration statement claimed to be misleading? A petition for certiorari asks the Supreme Court to consider the text of Sections 11 and 12(a)(2) of the Securities Act. At issue is whether Securities Act Sections 11 and 12(a)(2) require plaintiffs to plead and prove that they bought shares registered under the registration statement they claim is misleading. The petition contends that the Ninth Circuit inappropriately relied on policy concerns to disregard over 50 years of appellate precedent, including Supreme Court decisions, reading Section 11 as authorizing only buyers of registered securities to sue. The court should grant certiorari to resolve the circuit conflict and reinforce the principle that courts interpreting statutes should focus on the text, the petition says ([Slack Technologies, LLC \(FKA Slack Technologies, Inc.\) v. Pirani](#), August 31, 2022).

Rather than conduct an IPO, Petitioner Slack Technologies went public through a direct listing on the NYSE in 2019. Unlike an IPO, Slack simultaneously issued both registered and unregistered shares, but no new shares. There were 283 million shares that could be sold by existing shareholders, and the registration statement covered 118 million of those shares, while the other 165 million shares were exempt from registration. There was also no underwriter, and the usual lock-up period for unregistered shares did not apply. Slack's direct listing was enabled by the SEC's approval in 2018 of changes to the NYSE Listed Company Manual.

"Such security." The Respondent, Fiyaz Pirani, bought Slack shares soon after the company went public. He ultimately purchased a total of 250,000 shares. After Slack's share price dropped, Pirani sued under Sections 11, 12(a)(2), and 15 of the Securities Act, claiming that Slack's registration statement was misleading. Slack countered that Pirani lacked standing because his shares could not be traced to the registration statement, but the district court disagreed. At issue was the phrase "any person acquiring such security" referring to who may sue over a misleading registration statement under Section 11. The [district court](#), in a case of first impression, read the phrase broadly as meaning "acquiring a security of the same nature as that issued pursuant to the registration statement." The same logic applied to Pirani's claims under Section 12(a)(2), which also contains the phrase "such security."

Ninth Circuit affirms. In an interlocutory appeal, the [Ninth Circuit](#) upheld the district court's partial denial of Slack's motion to dismiss. Simply put, the panel [concluded](#) that Pirani had standing because his shares could not be purchased without the issuance of Slack's registration statement. The majority noted that the Ninth Circuit had historically used "such securities" to mean securities offered via a specified registration statement, but found that the nature of Slack's offering could fit within the language of Section 11. The panel rejected the district court's broad reading, however, and looked directly at the text of Section 11 to concluded that Slack's unregistered shares sold in a direct listing were "such securities" within the meaning of Section 11 because their public sale could not occur without the existence of an effective registration statement. The majority also concluded that Pirani met the sold "by means of a prospectus" requirement of Section 12 for the same reasons that the registered or unregistered shares Pirani had purchased in Slack's direct listing were "such shares" under Section 11.

A dissenting judge would have reversed the district court and dismissed the case in its entirety. Pirani's inability to prove that his shares were issued under the registration statement was outcome-determinative based on a

long line of precedent holding that "such security" means shares issued under the registration statement at issue. The dissent said that the majority based its decision on NYSE rules instead of the statutory text and ignoring the legislative history of Section 11, which focused on registered securities. The dissent also accused the majority of relying on policy concerns that, whatever their merit, are no basis for changing the settled interpretation of the statutory text.

The petition's argument. The petition argues at the outset that the Ninth Circuit's holding conflicts with the decisions of seven other circuits as to the scope of Section 11. Since 1967, each court to consider the question has given the same answer: the only shareholders who may sue are those who bought shares registered under the registration statement challenged as misleading. The Ninth Circuit's holding is directly contrary to this line of cases, the petition says, and there is no basis in the statute for its erasure of the distinction between registered and unregistered shares.

While the Ninth Circuit gave weight to the facts of this particular case, the long line of precedent did not turn on facts, but on a consistent interpretation of the statute. The panel's reasoning was flawed, the petition suggests, because its logic applies to any case where registered and unregistered shares trade on an exchange after the filing of a single registration statement. Courts have uniformly held, however, that Section 11 cannot be interpreted differently simply because new developments in the marketplace might limit its application. The Court should grant review to resolve this circuit conflict, the petition concludes.

The Ninth Circuit's holding also conflicts with past Supreme Court decisions. For example, the petition points to a 1983 case, *Herman & MacLean v. Huddleston*, stating that Section 11 is "limited in scope," allowing only "purchasers of a registered security to sue." According to the petition, the Court has similarly held that Section 12(a)(2) applies to a prospectus distributed in connection with a public offering, and that the obligation to distribute a prospectus applies only to registered shares.

Finally, if the Ninth Circuit's holding stands, it will have far-reaching consequences, the petition asserts. Because its logic cannot be limited to direct listings, the holding can be applied to any case in which unregistered and registered shares are trading on an exchange as a result of the filing of a registration statement; this dramatically expands liability and will also invite litigation over previously-settled issues. There is also a separation of powers issue: the policy concerns identified by the Ninth Circuit should be settled by Congress or the SEC.

The petition is [No. 22-200](#).

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