No. 25-3127

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOHAN R. SUNDARAM, Individually and on Behalf of All Others Similarly Situated,

*Plaintiff-Appellant*,

*v.*

FRESHWORKS, INC.; RATHNA GIRISH MATHRUBOOTHAM; TYLER SLOAT; ROXANNE S. AUSTIN; JOHANNA FLOWER; SAMEER GANDHI; RANDY GOTTFRIED; MR. ZACHARY NELSON; BARRY PADGETT; JENNIFER TAYLOR; MORGAN STANLEY & CO. LLC; JP MORGAN SECURITIES, LLC; BOFA SECURITIES, INC.; JEFFERIES LLC; BARCLAYS CAPITAL, INC.; ROBERT W. BAIRD & CO. INCORPORATED; CANACCORD GENUITY, LLC; JMP SECURITIES, LLC; NEEDHAM & COMPANY, LLC; NOMURA SECURITIES INTERNATIONAL, INC.; OPPENHEIMER & CO. INC.; PIPER SANDLER & CO.; RAYMOND JAMES & ASSOCIATES, INC.; AMERIVET SECURITIES, INC.; CASTLEOAK SECURITIES, LP; SAMUEL A. RAMIREZ & COMPANY, INC.; R. SEELAUS & CO., LLC,

*Defendants-Appellees*.

On Appeal from the United States District Court for the Northern District of California, Case No. 3:22-cv-06750-CRB, Honorable Charles R. Breyer

## BRIEF OF WASHINGTON LEGAL FOUNDATION, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES


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## INTEREST OF AMICI CURIAE[1]

**Washington Legal Foundation** ("WLF") is a nonprofit, public-interest law firm and policy center with supporters nationwide. Founded in 1977, WLF promotes free enterprise, individual rights, limited government, and the rule of law. WLF often appears as an amicus in important disputes over the proper scope of the federal securities laws. *See, e.g.*, *Slack Techs., LLC v. Pirani*, 598 U.S. 759 (2023); *Goldman Sachs Grp., Inc. v. Arkansas Teacher Ret. Sys*., 594 U.S. 113 (2021). And WLF's Legal Studies Division routinely publishes papers by outside experts on federal securities law. *See, e.g.*, Taylor et al., Pirani v. Slack Techs., Inc., et al.*: Ninth Circuit Cuts Securities Plaintiffs Slack on Standing*, WLF Legal Backgrounder (Mar. 25, 2022), https://perma.cc/FP4J-3A3M.

**The Chamber of Commerce of the United States of America** (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs

[1] No person other than Amici Curiae, their members, and their counsel drafted or contributed money for preparing or submitting this brief. All parties have consented to the filing of this brief.

in cases, like this one, that raise issues of concern to the nation's business community, including cases involving securities.

**The Securities Industry and Financial Markets Association** ("SIFMA") is a securities industry trade association representing the interests of hundreds of securities firms, banks, and asset managers. Its mission is to support a strong financial industry, while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in financial markets. SIFMA often appears as an amicus curiae before federal appellate courts over the proper scope of the federal securities laws. *E.g.*, *Goldman Sachs Grp., Inc. v. Arkansas Teacher Ret. Sys.*, 594 U.S. 113 (2021); *Arkansas Teacher Ret. Sys. v. Goldman Sachs Grp., Inc.*, 77 F.4th 74 (2d Cir. 2023). SIFMA has a substantial interest in the issues presented in this case because of its implications for securities litigation and the costs of pursuing initial public offerings ("IPOs").

Amici are concerned that Plaintiff's novel theory of Section 11 liability, if adopted on appeal, will create great uncertainty for public companies. Under Plaintiff's rule, even if a company's stock price surges well above its IPO level and stays there, any subsequent drop—even at prices above the IPO—could still trigger Section 11 damages if the price later dips below the IPO price for entirely unrelated reasons. Embracing that theory of liability would be a calamity for public companies and their shareholders and would harm the American economy.

## SUMMARY OF ARGUMENT

For nearly a century, Section 11 of the Securities Act of 1933 has held issuers accountable only when their securities fall below the original offering price due to misstatements or omissions. This clear and sensible rule has allowed companies to go public without unpredictable and unjust exposure to litigation.

To abandon this approach and adopt Plaintiff's interpretation of Section 11 would wreak havoc on the already fragile landscape for public offerings. Issuers could be penalized for stock declines below arbitrary post-IPO highs, regardless of the offering price set by the issuer. Even successful IPOs—where stocks continually trade above the initial offering price—would subject companies to strict liability for events beyond their control and inflate the costs and uncertainties of going public. The chilling effect of such an approach cannot be overstated. With IPO activity already languishing near 30-year lows and the number of U.S. public companies cut in half since the late 1990s, further increasing litigation risk would only deepen this troubling trend. If the Court were to endorse Plaintiff's position, it would discourage companies from entering public markets, stifle innovation, and undermine the vitality of the U.S. economy.

Plaintiff's position threatens to upend decades of sound legal doctrine and inflict lasting harm on American capital formation. The Court should preserve the

established boundaries of Section 11 liability and affirm the district court's judgment.

## ARGUMENT

### I. PLAINTIFF'S POSITION WOULD WORK AN UNPRECEDENTED AND UNSUPPORTED EXPANSION OF SECTION 11 LIABILITY.

For nearly a century, Section 11 of the Securities Act of 1933 has imposed a simple rule: An issuer of new registered securities must set an offering price and make disclosures, and then faces almost strict liability for material misstatements or omissions that cause the stock price to fall below the carefully chosen offering price. *See, e.g.*, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983). There have been countless IPOs. Yet neither Plaintiff nor his amici have identified a single example, across over 90 years of case law, where a Section 11 plaintiff recovered damages based on a stock price decline occurring *above* the offering price. And for good reason: Subsection (e) makes clear that the offering price sets the top of the damages window, and the starting point of any damages calculation may "not exceed[] the price at which the security was offered to the public." 15 U.S.C. § 77k(e). Consistent with the statutory text, the district court correctly held that, under Section 11, a plaintiff "can recover only for losses he sustained by … stock dropping below the IPO price" where the drop is caused by an alleged misrepresentation. 1-ER-8.

The rule that Plaintiff advances in this case would usher in a new era in which issuers are answerable on a strict liability basis not merely for movement below the offering price, but also for movement below a *higher* price that the stock reached after the IPO. From the perspective of an issuer, such a rule would mean that, even if a stock performs well and trades above its offering price, the issuer faces liability under the blunt instrument of Section 11, which has no scienter requirement and inverts the causation requirement by placing the burden on the defendant to disprove causation. That, in turn, would vastly increase the risk of IPOs and subject an entirely new category of IPO issuers—those whose IPOs were *successful*—to more burdensome legal liability, increasing transaction costs for already costly IPOs and further compromising an already fragile IPO market. It would also make issuer liability turn on fortuitous, unrelated events up to a year after the fact, *see* 15 U.S.C. § 77m (one-year statute of limitations), since entirely exogenous price shocks that eventually cause a stock to dip below the IPO price would, on Plaintiff's theory, allow recovery for an alleged misrepresentation, even though the misrepresentation was unconnected to the cause of the dip below the IPO price. By introducing greater risk and greater uncertainty, this outcome would predictably result in fewer public companies and would harm U.S. capital markets.

## II. PLAINTIFF'S POSITION RISKS DISINCENTIVIZING IPOS BY INCREASING LITIGATION RISKS AND IMPOSING OTHER COSTS ON GOING PUBLIC.

If the Court endorses Plaintiff's unprecedented reading of Section 11, litigation costs and other risks associated with IPOs, which are already high, will increase still further, chilling IPO activity and harming the U.S. economy.

### A. IPOs Are At Near 30-year Lows.

IPO activity is near 30-year lows. Highlighting the "ever-growing divide between the public and private markets," SEC Commissioner Caroline Crenshaw observed in 2022 "an increasing trend … that fewer companies are going public, small- and mid-sized IPOs are less frequent, and companies are staying private for longer."[2] Strikingly, there were more domestic U.S. firms listed on major U.S. stock exchanges in 1980 than in 2024.[3] Indeed, the number of public companies in the United States has declined by around half since the late 1990s.[4] While there were around 8,000 public companies in 1996, by 2025 there were fewer than 4,000:[5]

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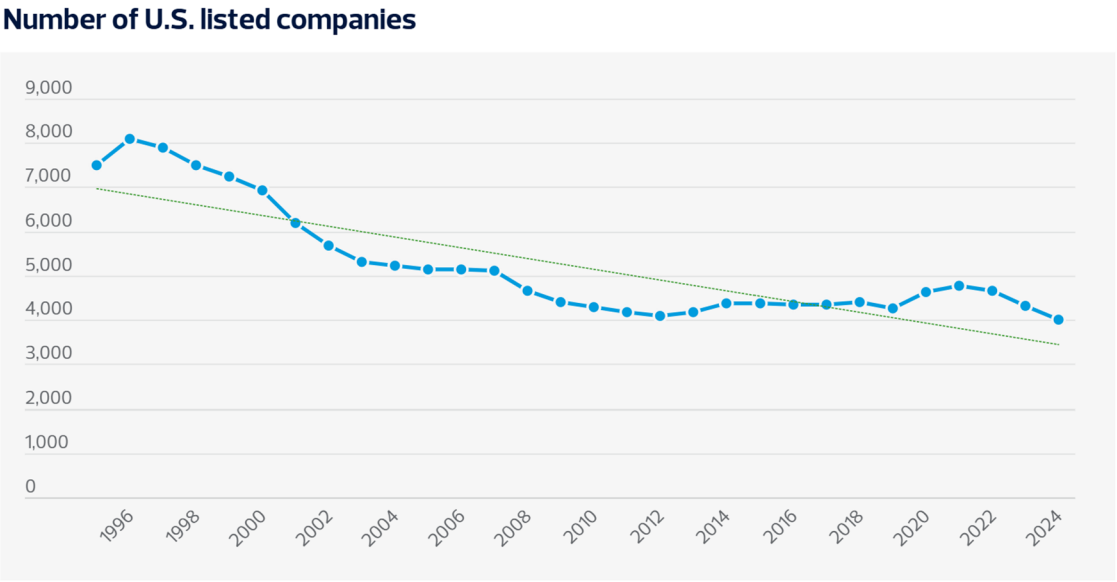
[2] Crenshaw, *Remarks at Virtual Roundtable on the Future of Going Public and Expanding Investor Opportunities: A Comparative Discussion on IPOs and the Rise of SPACs* (Apr. 28, 2022), https://perma.cc/X5WH-AMFC.

[3] Ritter, *Number of Domestic Companies Listed on Major U.S. Exchanges, 1980-2024*, https://perma.cc/3PKN-U7T6 (last visited Oct. 29, 2025).

[4] *See also* U.S. Chamber of Commerce, *Unlocking America's Capital Markets: Fueling Economic Growth and Innovation*, at 6 (June 3, 2025), https://perma.cc/LQJ9-TULD.

[5] RSM, *Public markets regain shine: Key forces driving a potential IPO reawakening* (Sept. 4, 2025), https://perma.cc/N7Z6-CN8P.




Despite an uptick in IPOs in 2025,[6] the overall trend reflects relatively stagnant IPO numbers for decades (excepting the low-rate, pandemic-era upswell in IPO activity during 2020-2021). From 2014 through 2024, the number of IPO filings has fluctuated, depending on the exact figures used, between around 155 and 355 (again, except for 2020-2021).[7] Expanding the time horizon to a quarter-century reflects the same general pattern, as confirmed by SEC data, with the number of IPO filings ranging from roughly 60 to 450:[8]

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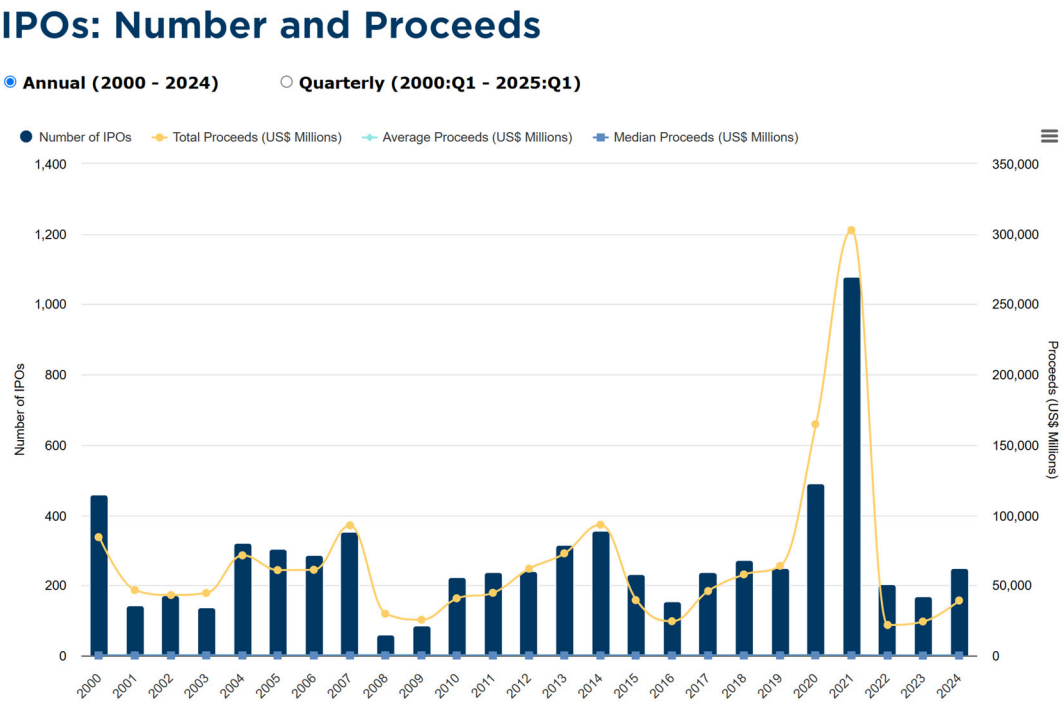
[6] *See* pwc, *IPO market faces renewed uncertainty* (Apr. 9, 2025), https://perma.cc/42SJ-HBQN.

[7] *See* SEC, *IPOs: Number and Proceeds*, https://perma.cc/FAC3-KWAQ (last visited Oct. 29, 2025); *see also* pwc, *IPO market faces renewed uncertainty*, *supra* note 6.

[8] SEC, *IPOs: Number and Proceeds*, *supra* note 7.




## B. Newly Public Companies Face Daunting Litigation Risks.

While many costs and risks are associated with IPOs—including heavy regulatory burdens, insurance costs, and underwriting fees—the specter of class-action litigation is significant and growing. Indeed, "the threat of protracted and often frivolous securities class action litigation has contributed to a decades-long decline in IPOs."[9] To avoid "becoming the target of vexatious securities litigation," more and more companies "are choos[ing] private capital transactions or strategic combinations in lieu of going public, a phenomenon that has had significant detrimental effects on both the economy in general and small investors in

[9] Smilan & Locker, *Saying So Long to State Court Securities Litigation*, Harvard Law School Forum on Corporate Governance (Feb. 11, 2019), https://perma.cc/E3QN-Q2QC.

particular."[10]

As then-SEC Commissioner Elad Roisman observed in 2019, while "the risk of shareholder litigation has always been a cost that public companies have to anticipate," "today such litigation is less of a risk and *more of a certainty*."[11] He quoted the founder of Blue Bottle Coffee—which sold a majority stake to Nestlé in 2017—as saying that taking a company public "seems like a way of living in hell without dying."[12] The data bear out the simile.

After the 2008 financial crisis, IPOs began facing a higher likelihood of litigation, with 20 percent of companies subjected to a core litigation filing within four years of an IPO, compared to 14 percent in 2001-2008 and 12.6 percent in 1996-2000.[13] Since 2015, there have been at least 168 securities lawsuits per year, with a

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[10] *Id.*

[11] Roisman, *Remarks at SEC Speaks: Encouraging Smaller Entrants to Our Capital Markets* (Apr. 8, 2019) (emphasis added), https://perma.cc/E6XE-7MKG.

[12] *Id.* An influential early study of securities settlements found that settlement values secured by plaintiffs' lawyers are often unconnected to the merits of the underlying claims. This "amounts to a grotesquely inefficient form of insurance against large stock market losses by giving investors, in effect, a legally mandated 'partial put' that entitles them to recover a portion of such losses from issuers. The social value of a system of compulsory insurance for market losses is dubious at best." Alexander, *Do the Merits Matter: A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497, 501 (1991).

[13] Cornerstone Research, *Securities Class Action Filings: 2019 Year in Review*, at 28, https://perma.cc/W8S8-RJMW.

high of 268 in 2019.[14] Securities class actions increased 23 percent between 2022 and 2024.[15] Litigation continues to ensnare a substantial percentage of new public companies, with higher-value IPOs disproportionately subjected to suit. "In recent years, between 1/4 to 1/3 of new public companies have been hit with some form of securities class action within five years of IPO."[16] Between 2019 and 2023, IPOs valued between $250 million and $1 billion had a 21 percent chance of suit, whereas those valued at over $1 billion had a *49 percent chance* of being targets of a lawsuit.[17]

Misrepresentation claims, in particular, are common in securities class actions. Between 2021 and 2025, the largest subcategory of Rule 10b-5, Section 11, and/or Section 12 suits—representing between 29 and 39 percent of allegations in federal class actions—included misrepresentations claims about future performance.[18] Federal and state Section 11 filing activity increased 18 percent between the second half of 2024 and the first half of 2025.[19]

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[14] Woodruff Sawyer, *D&O Databox 2024 Year-End Report*, at 2, https://perma.cc/LY3F-YK68.

[15] *Id.*

[16] Woodruff Sawyer, *Strict Liability Energy: IPO Litigation and Risk Management* (Mar. 2024), https://perma.cc/22NF-8TLD.

[17] *Id.*

[18] Flores & Starykh, *Recent Trends in Securities Class Action Litigation: H1 2025 Update*, at 7, NERA (July 29, 2025), https://perma.cc/X97V-4BGA.

[19] Cornerstone Research, *2025 Midyear Assessment: Securities Class Action Filings*, at 14, https://perma.cc/PY4K-9WFD.

### C. Securities Litigation Settlement Price Tags Have Ballooned.

The price tag of securities settlements has also ballooned. In 2018, the median cost of settled securities class actions (excluding merger objections) was $13 million, which was "a near record and more than twice the $6 million median" in 2017.[20] Meanwhile, the average securities settlement cost was more than double the median cost at $31 million (in 2018 dollars).[21] Settlement costs have risen steadily since then. Average securities litigation settlements increased by around 133 percent in just the last four years in inflation-adjusted terms, jumping (in 2025 dollars) from $24 million in 2021 to $41 million in 2022, $36 million in 2023, $44 million in 2024, and then $56 million by the first half of 2025.[22]

Other metrics reflect similar trends. While the percentage of securities settlements valued at over $20 million held steady at 27 to 31 percent between 2015 and 2021, year-on-year increases have been the norm ever since.[23] Securities settlements over $20 million grew to 33 percent in 2022; 39 percent in 2023; and 44

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[20] Chubb, *From Nuisance to Menace: The Rising Tide of Securities Class Action Litigation*, at 4 (June 2019), https://perma.cc/QJN2-GXF9.

[21] Flores & Starykh, *Recent Trends*, *supra* note 18, at 15 (excluding settlements of $1 billion or more, merger objections, crypto unregistered securities, and settlements for $0 to the class).

[22] *Id.*

[23] Woodruff Sawyer, *D&O Databox 2024 Year-End Report*, *supra* note 14 at 8.

percent in 2024.[24] The consulting firm Woodruff Sawyer described 2024 as a "record-breaking year for settlements," noting that "settlement activity in 2024 was a head-turner."[25] In 2024 alone there were 80 securities settlements totaling $4.1 billion, "the highest annual dollar amount paid out in securities class action settlement history (excluding settlements of a billion dollars or more)."[26]

### D. A Ruling For Plaintiff Would Disincentivize IPOs, Harming The Investing Public.

Were this Court to endorse Plaintiff's unprecedented reading of Section 11, it would increase the litigation risk, anticipated settlement costs, and other expenses associated with going public (such as D&O insurance) for newly public companies. These higher costs would disincentivize IPOs at a time when they are already near 30-year lows and face several other barriers.[27] In such an environment, given that "stability and reliance are essential components of valuation and expectation for financial actors," *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 582 U.S. 497, 515 (2017), executives will be more likely to keep

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[24] *Id.*

[25] *Id.* at 2, 8.

[26] *Id.* at 8. NERA puts the 2024 securities class action settlement figure at $3.9 billion. *See* Flores & Starykh, *Recent Trends*, *supra* note 18, at 2.

[27] *See* U.S. Chamber of Commerce, *Unlocking America's Capital Markets*, *supra* note 4, at 20 ("A 2022 report from the American Council for Capital Formation found that at the end of 2019 there were at least 800 fewer public companies in the U.S. because of the high cost of mandatory reporting under our securities laws.").

companies private and pursue private financing. Stronger incentives to keep companies private, in turn, would deprive public markets and ordinary investors of opportunities to trade in and benefit from new, potentially successful business ventures. It would also mean less transparency and publicly available information about those companies. Simply put, a ruling by this Court that embraces Plaintiff's unprecedented construction of Section 11 would make IPOs in the United States costlier and less likely, to the detriment of American capital markets.

## CONCLUSION

The Court should affirm the district court's judgment.

Respectfully submitted,

/s/ *Mark C. Fleming*


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October 30, 2025

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

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## CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ *Mark C. Fleming*
MARK C. FLEMING