No. 22-200

IN THE

Supreme Court of the United States

SLACK TECHNOLOGIES, LLC,
(F/K/A SLACK TECHNOLOGIES, INC.), *et al.*,

Petitioners,

—v.—

FIYYAZ PIRANI,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR *AMICI CURIAE* THE HONORABLE JAY CLAYTON AND THE HONORABLE JOSEPH A. GRUNDFEST IN SUPPORT OF PETITIONERS

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Exchange Act	Securities Exchange Act of 1934
IPO(s)	Initial Public Offering(s)
Panel	Thomas, C.J.; Restani, J. (Ct. Int'l Trade); and Miller, J. (dissenting)
SEC	United States Securities and Exchange Commission
Securities Act	Securities Act of 1933
Petitioners' Brief	Brief of Petitioners, *Slack Techs., LLC et al. v. Fiyyaz Pirani*, No. 22-200 (Jan. 27, 2023)

INTEREST OF *AMICI CURIAE* THE HON. JAY CLAYTON AND THE HON. JOSEPH A. GRUNDFEST[1]

Amici Curiae are the Honorable Jay Clayton and the Honorable Joseph A. Grundfest.

Jay Clayton is a former Chairman of the SEC (2017-2020), Senior Policy Advisor and Of Counsel at Sullivan & Cromwell LLP, and Adjunct Professor at the University of Pennsylvania Carey Law School and Wharton School of Business. Prior to his Chairmanship, Mr. Clayton practiced securities and corporate law for more than two decades, advising issuers, underwriters, investors, and regulatory authorities on a wide variety of securities offering, trading, and public policy matters.

Joseph A. Grundfest is a former Commissioner of the SEC (1985-1990), and the William A. Franke Professor of Law and Business (Emeritus) at Stanford Law School, where he is also senior faculty of the Rock Center on Corporate Governance. Professor Grundfest has published a detailed academic analysis of the tracing requirement and Section 11 liability,[2] and has taught the subject matter for decades.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authorized this brief in whole or in part and that no persons other than *amici* and their undersigned counsel made a monetary contribution to its preparation or submission.

[2] Joseph A. Grundfest, *Morrison, the Restricted Scope of Securities Act Section 11 Liability, and Prospects for Regulatory Reform*, 41 J. CORP. L. 1 (2015).

The views expressed herein do not necessarily reflect the views of the institutions with which *amici* are or have been affiliated.

INTRODUCTION

Pirani v. Slack Technologies, LLC invents an entirely new definition of Section 11 standing that conflicts with all precedent on point.[3] *Pirani*'s proposed definition extends liability far beyond the distribution of securities in and around the direct listing that animates the controversy now before this Court. If literally applied, *Pirani*'s definition of standing would dramatically expand Section 11 liability across a vast array of situations that are entirely unrelated to direct listings. It would achieve those results by substituting a judicially implied remedy for the judgment of Congress, regulators, and sophisticated market participants.

Pirani also conflicts with the statute's plain text. Its holding cannot be reconciled with the statute's damages formula, with the statute's fundamental structure, including its exemptive provisions, or with governing SEC regulations. *Pirani* further fails to consider sixty other instances in which the phrase "such security" appears in the statute, and proposes a definition that is inconsistent with the same term's meaning in those sixty instances.

Legislative history offers no support for *Pirani*'s divergence from established precedent, and *Pirani*'s purposive rationale conflicts with norms of statutory

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[3] *Pirani v. Slack Techs., Inc.*, 13 F.4th 940, 946-49 (9th Cir. 2021).

construction urged by this Court. If tracing creates a challenge that requires correction through government action, a plaintiff can, of course, petition Congress for relief. But, more fundamentally, the SEC can take a variety of administrative actions to address the tracing challenge that arises in direct listings, and in all other forms of Section 11 litigation. A radical judicial rewrite of Section 11 has no support at law and is even more inappropriate when the matter of purported concern could be addressed by market practice, administrative action, or legislation.

Pirani should be reversed.

ARGUMENT

I. *PIRANI* SIGNIFICANTLY EXPANDS SECTION 11 STANDING IN A MANNER THAT CONFLICTS WITH ALL RELEVANT PRECEDENT

Pirani's reinterpretation of Section 11 standing is radical. *Pirani's* implications reach far beyond the distribution of securities in and around the direct listing that gives rise to the controversy at hand. Every precedent on point,[4] until *Pirani*, requires that plaintiffs demonstrate that they purchased shares issued pursuant to the registration statement they

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[4] *See* Petitioners' Brief at 31-33 (until *Pirani*, "every court of appeals to weigh in had agreed with the Second Circuit in *Barnes* that plaintiffs must prove that they bought registered shares."); *Barnes v. Osofsky*, 373 F.2d 269, 272-73 (2d Cir. 1967).

challenge. This is Section 11's "tracing requirement."[5]

Pirani is different. It is the only opinion holding that tracing is irrelevant to Section 11 standing. *Pirani* concludes that "Slack's unregistered shares sold in a direct listing are 'such securities' within the meaning of Section 11 because their public sale cannot occur without the only operative registration [statement] in existence."[6] *Pirani* reasons that "any person who acquired Slack shares through its direct listing could do so only because of the effectiveness of its registration statement."[7] *Pirani* further reasons that Plaintiff thus has "standing to bring his claim even under Section 11 … because *Pirani*'s shares could not be purchased without the issuance of Slack's registration statement, thus demarking these shares, whether registered or unregistered, as 'such security' under Section 11…."[8]

Pirani thus propounds a novel "but-for" test to govern Section 11 standing, and in doing so eviscerates the distinction between registered and exempt sales. *Pirani* reasons: if the existence of the

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[5] For a description of the tracing requirement and its challenges in the modern clearance and settlement system, *see, e.g.*, Grundfest, *supra* note 2, at 14 n.67; DAVID A. WESTENBERG, INITIAL PUBLIC OFFERINGS: A PRACTICAL GUIDE TO GOING PUBLIC, chs. 15-17 (Paul Matsumoto ed., 2d ed. 2013); *Inside the CGS Identification System*, CUSIP Glob. Servs. 4-5 (Aug. 2010), https://web.archive.org/web/20220119193414/https://www.cusip.com/pdf/CUSIP%20Intro_%2008.09.10.pdf.

[6] *Pirani*, 13 F.4th at 947.

[7] *Id.*

[8] *Id.* at 943.

allegedly defective registration statement is a necessary precondition for a plaintiff's ability to purchase her shares on a securities exchange, then the plaintiff has Section 11 standing. Standing exists, according to *Pirani*, even if the plaintiff concedes that she cannot trace her shares to the allegedly defective registration statement. Remarkably, under *Pirani*, standing also exists even if the sale of shares to the plaintiff are demonstrably exempt from registration.

Pirani also fails to recognize the implications of its novel "but-for" definition of Section 11 standing. If literally applied, its definition dramatically expands the class of purchasers with Section 11 standing to securities exempt from registration, regardless of whether the company becomes publicly listed by direct listing, traditional IPO, or otherwise.

Leading exchanges do not require that securities be sold pursuant to a registration statement to trade on the exchange. The exchanges do, however, require that a registration statement that covers securities of the class being sold be on file with the SEC. Accordingly, no share can ever trade on these platforms "but-for" the existence of an effective registration statement on file with the SEC.[9]

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[9] NASDAQ Rule 5210 and NYSE Listing Company Manual Rule 702.01 prevent trading unless an effective registration statement is on file as to the class of securities transacted in that marketplace. NASDAQ LISTING R. 5210; N.Y. STOCK EXCH. R. 702.01; *cf.* N.Y. STOCK EXCH. R. 703.01(A).

Pirani reasons that *exempt* Slack common shares can trade on one of these exchanges only because there is a registration statement on file with the SEC covering at least some of the shares of that class of securities, and as a result, purchasers of those exempt shares should have Section 11 standing, effectively turning exempt sales into registered sales.

However, because no share can trade on the Nasdaq or NYSE platforms but-for the existence of an effective registration statement, if only one registration statement exists, and if that registration statement is allegedly defective, then every share traded on either the Nasdaq or NYSE markets has Section 11 standing under *Pirani*.

To illustrate, consider the implications of *Pirani*'s rule as applied to a traditionally underwritten IPO. In an IPO, large holdings of shares that could be sold under an exemption are generally subject to a lock-up[10] agreement, to limit the supply of shares and thus ensure stock price stability. The precedent is unanimous that purchasers of the shares in the IPO have Section 11 standing until the lock-up expires

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[10] After an IPO, "[a]n investment bank then helps the company market these [registered] shares and, if necessary, commits to purchasing the new shares at a pre-determined price. Because the bank wants to ensure that the stock price remains stable, it typically insists on a lock-up period, a months-long period during which existing shareholders may not sell their unregistered shares …. If someone purchases a share of the company's stock during the lock-up period, the shares are necessarily registered because no unregistered shares can be sold during that period. This period, however, is not required by law." *Pirani*, 13 F.4th at 943 (citation omitted).

because the only shares available in the market to that point are shares sold pursuant to the allegedly defective registration statement.[11] Accordingly, purchasers are generally able to successfully trace their shares before the lock-up expires. But when the lock-up expires and exempt shares legally enter the market, all subsequent purchasers lose Section 11 standing because no purchaser can then trace her shares to the allegedly defective registration statement.[12]

Pirani, however, forces a dramatically different result. Under *Pirani*, the expiration of the lock-up cannot cause any purchaser to lose Section 11 standing because every purchase of post-lock-up exempt shares on a securities exchange depends on the existence of the only existing registration statement just as surely as every purchase of pre-lock-up shares. Put another way, the expiration of the lock-up has no effect on the extent to which any purchase depends on the only existing registration statement.

The class of purchasers with Section 11 standing could thus explode under the *Pirani* test, commingling registered and exempt shares, without regard to the simple fact that exempt shares can be sold without being registered. This might well be the result that the two-judge majority in *Pirani* intended. But, if so, *Pirani* cannot claim to be a narrow opinion carefully tailored to address a case of "first

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[11] *See* Petitioners' Brief at 31-33.

[12] For an explanation of why tracing generally becomes impossible at that point, *see* Grundfest, *supra* note 2, at 5.

impression."[13] *Pirani* should then be seen as an aggressive first attack in a fundamental revolution against traditional Section 11 tracing jurisprudence with implications for virtually every public listing of securities.

Pirani's supporters might respond that this literal application of the *Pirani* test is not what the Court intended. They might argue that the *Pirani* test should be applied only if shares sold in a registered public offering can avoid Section 11 liability because of the operation of the traditional tracing doctrine.

But there are two fatal problems with this defense of *Pirani*'s holding. First, it is revisionist history. *Pirani*'s holding is, on its face, not limited to situations in which Section 11 standing is, in effect, defeated as a consequence of tracing difficulties. *Pirani* suggests no such limitations on the application of its novel definition.

Second, interpreting "such security" to mean one thing when Section 11 standing is, in effect, defeated for all potential plaintiffs as a consequence of tracing challenges, but as something else when Section 11 standing is preserved for at least some plaintiffs, violates a basic principle of statutory construction. As the *Pirani* majority itself conceded, "[t]he words of a statute do not morph because of the facts to which they are applied,"[14] and, as the dissent observes, a statute is not "a chameleon, its meaning subject to change" based on the varying facts of different

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[13] *Pirani*, 13 F.4th at 946.

[14] *Id.* (quoting *Clark v. Martinez*, 543 U.S. 371, 382 (2005)).

cases."[15] For this reason too, *Pirani*'s purposive reinterpretation of Section 11 established law cannot stand.

II. *PIRANI* CONFLICTS WITH THE STATUTORY TEXT

"Statutory construction is … a holistic endeavor."[16] Courts are instructed to interpret statutes "as a symmetrical and coherent regulatory scheme,"[17] and "fit, if possible, all parts into an harmonious whole."[18]

Justice Scalia explains that "[t]he imperative of harmony among provisions is more categorical than most other canons of construction because it is invariably true that intelligent drafters don't contradict themselves … Hence, there can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously."[19]

Pirani generates cacophony not harmony. Its interpretation of "such security" conflicts with the statute's damages rule, with its exemptive structure, with its definition of "registration statement," and

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[15] *Id.* at 952 (Miller, J., dissenting) (*quoting Clark*, 543 U.S. at, 382.

[16] *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (Scalia, J.).

[17] *Gustafson* v. *Alloyd Co.,* 513 U. S. 561, 569 (1995).

[18] *FTC* v. *Mandel Bros., Inc.*, 359 U. S. 385, 389 (1959); *see also FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 133 (2000).

[19] Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 180 (2012).

with the sixty other instances in which the phrase "such security" appears in the statute.[20]

A. *Pirani* Conflicts with the Statutory Damage Cap

Pirani eviscerates Section 11's carefully constructed damages formula by creating liability that far exceeds the statutory maximum. Section 11 damages are defined as the difference between the "amount paid for the security (not exceeding the price at which the security was offered to the public) and … the value thereof …."[21] If registered shares become completely worthless the maximum damages for each individual share cannot exceed "the price at which the security was offered to the public …."[22] An issuer's Section 11 liability is thus limited to the registered offering's total proceeds.[23] Consistent with this observation, "Section 11(e) also caps each individual underwriter's liability at the total price of the securities underwritten by it."[24]

Pirani extends standing to sales of both registered and exempt shares and therefore expands Section 11

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[20] *Pirani* also violates the related presumption of consistent usage. *See id.* at 170 ("[A] word or phrase is presumed to bear the same meaning throughout a text ….").

[21] 15 U.S.C. § 77k(e).

[22] *Id.*

[23] *See id.* at § 77k(g) ("In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.").

[24] John C. Coffee, Jr., Hillary A. Sale & Charles K. Whitehead, SECURITIES REGULATION: CASES AND MATERIALS 975 (14th ed. 2020).

damages far beyond the statutory design. Consider the facts of this case. Slack's direct listing offered 118 million shares, with another 165 million shares exempt from registration simultaneously entering the market.[25] These 165 million exempt shares were not "sold in a direct" listing, as *Pirani* mistakenly states.[26] They are exempt shares that could have been sold before, during, or after the direct listing.

Had Slack registered those 118 million shares as in a traditional IPO at a price of $38.50,[27] and had those shares subsequently declined to $0, Slack's maximum Section 11(e) exposure would have been approximately $4.5 billion. But the opinion below grants Section 11 standing to the 165 million exempt shares that were not covered by any registration statement. *Pirani* thereby generates damage exposure to a total of 283 million shares, not just the 118 million registered shares.

Put another way, *Pirani* expands the number of shares with Section 11 standing by a factor of 2.398 (283 million shares / 118 million shares), causing the issuer to be liable for $2.398 in damages to an expanded class for every $1 of damages that would otherwise be due only to holders of registered shares, in accordance with Section 11(e)'s clear text.

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[25] Slack Tech., Inc. Prospectus (Form 424B4), at i, 162 (June 20, 2019).

[26] *Pirani*, 13 F.4th at 947.

[27] $38.50 is Plaintiff's alleged "opening public price" from the first trading day. *Pirani v. Slack Techs., Inc.*, 445 F. Supp. 3d 367, 381 (N.D. Cal. 2020).

Pirani's interpretation of Section 11 standing also introduces a level of randomness to the damages calculation that is further incompatible with the law's plain text. Nothing in the statute makes the Section 11 damage award contingent on the number of exempt shares that simultaneously enter the market. There is no legal, financial, or other constraint that governs that ratio. Thus, if a future direct offering brings 1 million registered shares to market simultaneously with 100 million exempt shares, *Pirani* will expose Section 11 defendants to aggregate damages 100 times greater than the statutory design.

Pirani nullifies the Sections 11(e) and (g) damage caps, and does so in a random manner that bears no rational relationship to the statutory design.

B. *Pirani* Conflicts with the Statute's Exemptive Structure

The Securities Act's logical, exemptive structure, and SEC rules implementing that structure, conflict with *Pirani*'s interpretation of Section 11 standing.

1. *Pirani* Conflicts with the Statutory Text

The statute's exemptive structure is logical and straightforward.

Section 5 defines conditions under which securities must be registered prior to sale.[28]

Section 4 exempts certain transactions from Section 5's registration requirement.[29]

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[28] 15 U.S.C. § 77e(a).

Section 11 creates an express private right of action, but only for material misrepresentations or omissions in a registration statement as declared effective by the SEC.[30]

Section 6(a) provides that a "registration statement shall be deemed effective only as to the securities specified therein as proposed to be offered."[31]

Section 4 transactions are exempt from registration requirements—but remain subject to anti-fraud liability under multiple provisions of federal law, including Section 17(a) of the Securities Act and Sections 10(b) and 18(a) of the Exchange Act.[32] They are also subject to criminal prosecution under federal securities laws and under the mail and wire fraud statutes,[33] as well as to state Blue Sky anti-fraud provisions,[34] to common law fraud claims,[35] and to state criminal prosecution.[36]

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[29] *Id.* at § 77d(a).

[30] *Id.* at § 77k(a).

[31] *Id.* at § 77f(a).

[32] *Id.* at §§ 77q(a), 78j(b), 78r(a).

[33] 18 U.S.C. §§ 1341, 1343, 1348.

[34] *See, e.g.*, KY. REV. STAT. ANN. § 292.480(1) (West 2023); VA. CODE ANN. § 13.1-522(A)(ii) (West 2022); N.C. GEN. STAT. ANN. § 78A-56(a)(2) (2022); 70 PA. STAT. AND CONS. ANN. § 1-501 (West 2022); CAL. CORP. CODE § 25401 (West 2022); ARIZ. REV. STAT. ANN. § 44-1991(A) (2022).

[35] *See, e.g.*, *Fox v. Kane-Miller Corp.*, 542 F.2d 915, 919 (4th Cir. 1976) (affirming finding of common-law fraud in the acquisition of securities); *Barnard v. Verizon Commc'ns, Inc.*, 451 F. App'x 80, 86 (3d Cir. 2011) (considering common-law fraud

The Section 4 exemption is thus not an omnibus exemption from liability. It is, instead, a carefully drafted provision that exempts only certain transactions from the registration requirement and liabilities that arise only because of the requirement to file a registration statement. Because Section 11 strict liability attaches only to defective registration statements, there can be no Section 11 liability for transactions exempt from the registration requirement and that are not covered by any registration statement.

This is precisely the result Congress intended: exempt transactions are subject to multiple forms of anti-fraud liability that are not contingent on filing a registration statement. It makes no sense to exempt a transaction from the registration requirement, only then to impose strict liability for a defect in a registration statement that the seller is expressly exempt from filing. But that illogical interpretation is precisely the result *Pirani* demands.

2. *Pirani* Conflicts with Rule 144, Thereby Violating Securities Act Section 19(a)

Rule 144 was crafted to provide certainty to sellers seeking to qualify for the Section 4(a)(1) exemption.[37] Rule 144's introductory statement

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"substantially similar to Appellants' securities fraud claim under section 10(b) and Rule 10b-5.").

[36] *See, e.g.*, CAL. CORP. CODE § 25540(a) (West 2022); N.Y. GEN. BUS. L. § 352-c (McKinney 2022); FLA. STAT. § 517.301-302.

[37] 17 C.F.R. § 230.144 (1972).

explains that sellers who comply with its safe harbor are exempt from registration requirements.[38] The SEC amended Rule 144 in 2007 to expand the safe harbor provisions to allow even greater freedom in the sale of securities pursuant to this exemption.[39] Rule 144's safe harbor is thus today available both to affiliates and non-affiliates of reporting and non-reporting issuers, subject to different holding requirements, volume limitations, and availability of public information.[40] Rule 144 nowhere hints that sellers who comply with the rule can nonetheless be subject to, or cause others to become subject to, Section 11 liability as though their shares sold were registered. This concept is entirely alien to the rule's structure and to the statutory design.

More precisely, Rule 144 permits non-affiliates of non-reporting issuers (such as Slack), who have not been affiliates for at least three months, to sell their stock to the public without registering the transaction.[41] These sales are not subject to the requirement that adequate, current information regarding the issuer be publicly available.[42] The only requirement is that the non-affiliate seller holds the stock for at least one year.[43] The sellers of exempt

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[38] *See* SEC Release No. 33-5223, 37 Fed. Reg. 591, 591-92 (Jan. 14, 1972).

[39] *See* SEC Release No. 33-8869, 72 Fed. Reg. 71546 (Dec. 17, 2007).

[40] *See generally* 17 C.F.R. § 230.144.

[41] *See id.* at § 230.144(b)(1)(ii) (2022).

[42] *See id.* at § 230.144(c).

[43] *See id.* at § 230.144(d)(1)(ii).

shares in the Slack direct listing qualified under Rule 144, and therefore were not required to file a registration statement. *Pirani* thereby effectively nullifies the registration exemption that is central to Rule 144 in the context of Section 11 liability.

At the time of Slack's direct listing, approximately 165 million shares could be sold by non-affiliates under the exemption created by Section 4(a)(1) and Rule 144.[44] These 165 million unregistered shares legally available for sale without registration represent 142% of the 118 million registered shares sold in Slack's direct listing. These 165 million exempt shares were not "sold in a direct listing" as the Ninth Circuit mistakenly stated.[45] These shares could, instead, have been sold to anyone, before, during, or after the direct listing, without the presence of a registration statement on file with the SEC.

The Ninth Circuit completely ignored the fact that this massive volume of shares—larger than the actual shares registered in the direct listing—was exempt from registration.[46] By extending Section 11

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[44] *See* Slack Tech., Inc. Prospectus (Form 424B4), at 162 (June 20, 2019).

[45] *Pirani*, 13 F.4th at 947.

[46] The possibility that large exempt sales occur at or around the time of a registered offering is not rare in modern capital markets. For example, in its direct listing, Spotify disclosed that "[i]n addition to sales made pursuant to this prospectus, the ordinary shares … may be sold by the Registered Shareholders in private transactions exempt from the registration requirements of the Securities Act." Spotify Tech. S.A., Prospectus (Form 424B4), at 49, 186 (April 3, 2018) (178,112,840 ordinary shares outstanding (substantially all could immediately be sold) and only registered 55,731,480 shares).

liability, which requires a false registration statement, to securities expressly exempt from registration, the Ninth Circuit nullified the very purpose of the Rule 144 exemption and adopted an interpretation obviously inconsistent with plain statutory text creating exemptions from the registration requirements, and therefore also from Section 11 liability.

The Ninth Circuit's purposive interpretation is unmoored from the statutory text and upsets a well-understood and well-functioning regulatory framework that has governed the federal securities regime for the last ninety years.

Securities Act Section 19(a) provides that "[n]o provision of this [Act] imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the Commission …."[47] *Pirani,* however, imposes Section 11 liability on exempt shares sold "in good faith in conformity with" Rule 144. Thus, even if *Pirani* perceives a rationale for imposing Section 11 liability on shares that were registered for sale as part of Slack's direct listing, *Pirani* cannot also impose Section 11 liability on shares that are exempt from registration pursuant to Rule 144 without also violating Section 19(a).

[47] 15 U.S.C. § 77s(a).

C. *Pirani* Conflicts with the Statutory Definition of an Effective Registration Statement

Securities Act Section 6(a) provides that a registration statement "shall be deemed effective **only** as to the securities specified therein as proposed to be offered."[48] The Slack registration statement was therefore effective only as to the 118 million shares covered by that registration statement. By subjecting the 165 million Slack exempt shares to Section 11 liability, *Pirani* treats those exempt shares as though they were also declared effective pursuant to the registration statement that covered only the 118 million registered shares.

But Section 6(a) is crystal clear: a registration statement is effective only as to the shares covered by that registration statement.[49] *Pirani*'s decision to treat exempt shares as though they were registered is inconsistent with the plain meaning of the word "only" as used in Section 6(a), and is therefore further inconsistent with the text.

D. *Pirani* Conflicts with Sixty Other Instances in Which "Such Security" Appears in the Securities Act of 1933

Pirani claims it "look[ed] directly to the text of Section 11 and the words 'such security'" that appear in that section.[50] The doctrine of consistent usage,[51]

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[48] *Id.* § 77f(a).

[49] *Id.*

[50] *Pirani*, 13 F.4th at 947.

however, suggests that the *Pirani* court should have looked more broadly and should also have considered the Securities Act's usage of "such security" in other portions of the same section and elsewhere in the statute.

Even a cursory examination of the full statutory text would have revealed that the Securities Act uses the phrase "such security" at least sixty-one times.[52]

Throughout the Securities Act, the phrase "such security" refers to a specific security (or type of securities) at issue in the relevant provision. *Pirani* reinterprets "such security" in Section 11(a) to refer far more expansively both to a specific type of security (registered securities) at issue *and* to fungible but exempt securities. *Pirani*'s interpretation of "such security" in the first paragraph of Section 11 conflicts with every other instance in which the statute employs the phrase.

For example, Section 5 states that "Unless a registration statement is in effect as to a security[,]" it is "unlawful … to sell **such security**" or "to carry

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[51] *See, e.g.*, *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019) ("This Court does not lightly assume that Congress silently attaches different meanings to the same term in the same or related statutes."); *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1722-23 (2017) (interpreting statute by "[l]ooking to other neighboring provisions in the Act," and applying the "usual presumption that 'identical words used in different parts of the same statute' carry 'the same meaning.'") (quoting *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005)).

[52] *See* Appendix A (listing all occurrences of the phrases in the Securities Act).

… through the mails or in interstate commerce … any **such security** for the purpose of sale ….”[53]

In Section 5, “such security” refers to securities that require registration before sale. These securities are distinct from exempt securities, which, under Section 4 of the Securities Act,[54] may be sold without registration, even if they are entirely fungible. In Sections 4 and 5, Congress explicitly limited liability to securities that must be registered before sale, and “such security” in Section 5 logically can refer only to non-exempt securities. If *Pirani* is correct that “such security” means both registered and exempt securities, then Section 5 is incoherent: it would extend Section 5 liability to shares that are explicitly exempted by Section 4. That cannot be correct.

Section 11(a)(5) extends liability to “every underwriter with respect to **such security**.”[55] But under *Pirani*, “such security” would also extend to exempt shares that were not even part of an offering and therefore involved no underwriters. Underwriters then become liable for shares they did not underwrite. Worse still, the Ninth Circuit’s faulty reading could extend to shares that enter the market through an earlier underwritten offering that is conducted independently of the direct listing. Surely the Ninth Circuit does not propose to extend liability for the direct listing registration statement to the underwriters of an earlier offering on a *different* registration statement.

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[53] 15 U.S.C. § 77e(a).

[54] *Id.* § 77d.

[55] *Id.* § 77k(a)(5).

Section 11(e) caps damages at the total proceeds of the registered offering.[56] This damages formula refers to "the price at which **such security** shall have been disposed of in the market."[57] If "such security" also encompasses fungible shares that are exempt from registration, then the statutory damage cap unravels for the reasons already described. As one court noted, "the necessity of determining a mathematical 'difference'" makes it "untenable" to argue that "the phrase 'the security' and the phrase 'such security' refers to different security lots …."[58] But *Pirani*'s expansive interpretation of "such security" to include securities that are fungible with—but not identical to—the covered securities, cannot be reconciled with Section 11(e)'s damages formula.

Section 12 creates liability for sellers of unregistered, non-exempt securities, or sellers of securities who use a misleading prospectus "to the person purchasing **such security**" for "the consideration paid for **such security** with interest thereon…."[59] Section 12, however, "limits liability to those who offer or sell **the security**."[60] *Pirani*'s interpretation of "such security" would expand Section 12 liability to sellers of exempt securities as

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[56] *Id.* § 77k(e).

[57] *Id.*

[58] *Colonial Realty Corp. v. Brunswick Corp.*, 257 F. Supp. 875, 878-79 (S.D.N.Y. 1966).

[59] 15 U.S.C. § 77*l*(a)(2).

[60] *Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 179 (1994).

well as to sellers of securities that entered the market through other listings.

Pirani's interpretation also conflicts with Section 12's damages rule, which is rescissory. Purchasers recover only "upon the tender of **such security**…."[61] The statute explicitly requires the return of the security at issue, but *Pirani*'s reading of "such security" would erroneously amend Section 12 to permit recovery upon the return of *different* securities by individuals who did not even purchase in the direct listing.

In their submissions below, Plaintiff's *amici* contend that the 60 other instances of "such security" should be ignored because *amici* believed they are all preceded by an antecedent use of the term "security" that qualifies the meaning of the phrase "such security."[62] Plaintiff's *amici* are wrong for three reasons.

First, Plaintiff's *amici's* argument reduces to the bald claim that "Section 11 is different," but they do not explain why. That is especially true of Section 12, which provides for a cause of action for sales of a security by means of a faulty prospectus.[63] *Amici* would be content to limit Section 12 to a *specific* security sold under a prospectus, but would deny the same limitation in Section 11, although every

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[61] 15 U.S.C. § 77*l*(a)(2).

[62] Brief of Investor *Amici Curiae* in Opposition to Defendants'-Appellants' Petition for Rehearing En Banc at 15, *Pirani v. Slack Techs., Inc.*, 13 F.4th 940, 943 (9th Cir. 2021) (No. 20-16419).

[63] 15 U.S.C. § 77*l*(a)(2).

registration statement includes a prospectus. *Amici* fail to address this distinction, and their interpretation of the statute is implausible: why would Congress use "such security" to refer to specific registered securities throughout the Securities Act, and then use the same phrase, with no further qualification, to mean something entirely different in Section 11(a)?

Second, *amici*'s argument fails within the structure of Section 11(a) itself. Section 11(a)(5) allows plaintiffs to name as defendant "every underwriter with respect to **such security**."[64] But underwriters are never liable for damages attributable to exempt shares that come to market. Section 11(e) makes this crystal clear when it states that "in no event shall any underwriter … be liable in any suit … for damages in excess of the total price at which securities underwritten by him … were offered to the public."[65] To implement their vision of the statute, *amici* would then have to interpret "such security" as used in Section 11(a) as including exempt securities, but when the same phrase is used in Section 11(a)(5), which is part of the same legislative *sentence,* it would exclude exempt securities, lest there be a conflict with Section 11(e). It strains credulity to argue that *in the same sentence* a phrase would refer to two vastly different categories of securities.

Third, Plaintiff's *amici* cherry-picked the qualifiers they asked the Ninth Circuit to consider.

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[64] *Id*. § 77k(a)(5).

[65] *Id*. § 77k(e).

They do not explain why courts should ignore the use of other antecedent phrases, such as "registration statement," to limit the scope of "such security." Indeed, all other Circuits but the Ninth have interpreted the antecedent "registration statement" to limit the meaning of "such security" in Section 11(a) to securities registered under the defective registration statement.[66] Nor do *amici* explain why only *antecedent* uses of "security" matter, and *subsequent* uses of the term should be ignored. Such unidirectional statutory construction has no basis in law, and *amici* provide none.

The Ninth Circuit's opinion and Plaintiff's proposed reading of the statute thus violate a fundamental canon of statutory construction: courts should "avoid interpretations that would 'attribute different meanings to the same phrase.'"[67] Far from avoiding such conflicts, *Pirani* invites sixty of them.

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[66] *See, e.g.*, *APA Excelsior III L.P. v. Premiere Techs.*, 476 F.3d 1261, 1271 (11th Cir. 2007) (plaintiff must definitively show that "the security was issued under, and was the direct subject of, the prospectus and registration statement being challenged"); *Krim v. PCOrder.com*, 402 F.3d 489, 497 (5th Cir. 2005) (affirming dismissal where 0.15% of shares in the market were exempt, which prevented tracing); *DeMaria v. Andersen*, 318 F.3d 170, 176 (2d Cir. 2003) (plaintiff must have purchased security "originally registered under the allegedly defective registration statement—so long as the security was indeed issued under *that* registration statement and not another").

[67] *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1512 (2019) (quoting *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 329 (2000)).

III. LEGISLATIVE HISTORY DOES NOT SUPPORT *PIRANI*'S INTERPRETATION OF "SUCH SECURITY"

Pirani claims that legislative history supports its expansive interpretation of "such security."[68] The dissent draws precisely the opposite conclusion from the identical text.[69] The dissent clearly has the better of the argument, and for multiple reasons in addition to those it states.

In particular, *Pirani* incorrectly concludes that its revision of the law governing Section 11 standing is necessary to effectuate congressional opposition to fraud. The federal securities laws, however, have multiple anti-fraud provisions that apply to shares not covered by registration statements.[70] Thus, even if Congress opposes fraud, as the majority emphasizes is clearly the case, it does not follow that Congress always adopts maximalist policies. To the contrary, federal securities law anti-fraud provisions are highly modulated. They balance multiple competing interests, including capital formation, investor protection, and fair trading in a sophisticated and predictable manner that is entirely inconsistent with the maximalist interpretation upon which *Pirani* relies.

A Congress maximally opposed to fraud would impose strict liability on all material misrepresentations and omissions in all securities

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[68] *Pirani*, 13 F.4th at 947-48.

[69] *Id.* at 953.

[70] *Supra* at 15-16.

transactions, and for all market participants, not just issuers in registered offerings.[71] Congress's refusal to legislate in this manner effectively rebuts *Pirani's* maximalist interpretation.

Further, even if one assumes, without any evidence, that Congress would want to add to the antifraud provisions that already apply to the exempt shares by addressing the purported "loophole" that troubles the *Pirani* majority, Congress might simply support Section 11 liability for registered shares that come to market, and do so in a manner consistent with the overall statutory design. There is, however, absolutely no support for the proposition that Congress would want to address this challenge by dramatically expanding liability to include exempt shares in a manner that could expand issuer liability by very large multiples. When *Pirani* suggests that there is any legislative support for its novel formulation of Section 11 liability, it is engaging in simple speculation. And should Plaintiff believe that *Congress* would want to legislate in this manner, it seems strange indeed to ask *courts* to step into the legislative role that Congress is charged to fulfill.

These deficiencies arise in large part because *Pirani* fails to recognize that "limitations on a

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[71] For examples of provisions that significantly limit defendant exposure and that are clearly not maximalist, *see, e.g.*, 15 U.S.C. §§ 78u-4(c) (sanctions for abusive litigation); 78u-4(b)(3)(B) (discovery stay); 78u-4(b)(1) and (2) (heightened pleading requirements, including for misleading statements, omissions, and state of mind); 78u-4(a)(2) (class certification); 78u-5 (safe harbor for forward-looking statements).

statute's reach are as much part of the statutory purpose as specifications of what is to be done."[72]

Pirani's approach to legislative history is additionally problematic because it rests on a characterization of history that has never existed. When Congress adopted Section 11 of the Securities Act of 1933, the anti-fraud provisions of Section 10(b) of the Securities Exchange Act of 1934 did not yet exist. When Congress adopted Section 10(b) in 1934, it did not intend to create an implied private right of action.[73] And when the SEC, in 1942, adopted Rule 10b-5, it too did not intend to create a private right of action.[74] Further, when the courts in 1946 first

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[72] Scalia & Garner, *supra* note 19, at 168 (2012).

[73] *See* Joseph A. Grundfest, *Damages and Reliance Under Section 10(B) of the Exchange Act*, 69 BUS. LAW. 307, 321, n.65 (2014) ("Congress never intended that Section 10(b) would support a private right of action under any circumstances.") (citing *Cent. Bank, N.A.*, 511 U.S. at 73); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson* 501 U.S. 350, 358-59 (1991) ("Although this Court repeatedly has recognized the validity of such claims, we have made no pretense that it was Congress' design to provide the remedy afforded.") (citations omitted); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 196 (1976) ("[T]here is no indication that Congress … contemplated [an express civil] remedy" adopting Section 10(b)); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975) ("[I]t would be disingenuous to suggest that either Congress in 1934 or the [SEC] in 1942 foreordained the present state of the law with respect to Rule 10b-5.").

[74] Joseph A. Grundfest, *Disimplying Private Rights of Action Under the Federal Securities Laws, the Commission's Authority*, 107 HARV. L. REV. 961, 979 (1994) (quoting 7 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 3486-87 ("[N]obody at the [SEC] table gave any indication that he was remotely thinking

implied a Section 10(b) private right of action,[75] the class action mechanism did not exist in its current robust form.[76] The 1933 Congress could not have known any of this. The current securities antifraud regime is thus built on a series of unknowable and unintended consequences.

How would Congress in 1933 have crafted Section 11 to address direct listings had it known of the implied Section 10(b) private right of action and of the growth of class action litigation? Every answer to that question is purely speculative. Contrary to *Pirani's* suggestions, legislative history offers no meaningful support for its novel interpretation of Section 11 standing, and, to the contrary, supports the opposite view.

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of civil liability."). Rule 10b-5 "was instead adopted to fill a gap in the federal securities laws that allowed purchasers, but not sellers, to engage in fraud without fear of [SEC] prosecution." *Id.* at 979; *see also Ernst & Ernst*, 425 U.S. at 196 ("There is no indication that … the Commission when adopting Rule 10b-5 …contemplated [an express civil] remedy….")

[75] The Rule 10b-5 implied private right of action was first recognized in *Kardon v. National Gypsum Co.*, 69 F. Supp. 512, 513-14 (E.D. Pa. 1946). For a description of the propagation of that implied right in the federal courts, *see* Grundfest, *supra* note 73, at 981 n.75.

[76] David Marcus, *The History of The Modern Class Action, Part II: Litigation and Legitimacy, 1981-1994*, 86 FORDHAM L. REV. 1785, 1785 (2018) ("The first era of the modern class action began in 1966, with revisions to Rule 23 of the Federal Rules of Civil Procedure.").

IV. *PIRANI*'S PURPOSIVE LOGIC HAS BEEN FORCEFULLY REJECTED BY THIS COURT ON MULTIPLE OCCASIONS

Pirani subjects Section 11 defendants to judicially invented liabilities that Congress never intended. It is analytically indistinguishable from the judicial implication of a novel private right of action. The separation-of-powers concern raised by these judicial inventions is obvious, and has frequently been noted by this Court.[77] Thus, for the same reasons that private rights are today not implied absent evidence of clear Congressional intent,[78] express rights are also not to be expanded absent equivalently clear

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[77] *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016) ("In order to remain faithful to this tripartite structure, the power of the Federal Judiciary may not be permitted to intrude upon the powers given to the other branches."); *Egbert v. Boule*, 142 S. Ct. 1793, 1802 (2022) ("[W]e have come 'to appreciate more fully the tension between' judicially created causes of action and 'the Constitution's separation of legislative and judicial power'. At bottom, creating a cause of action is a legislative endeavor.") (citation omitted).

[78] *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 165, 167 (2008) ("Concerns with the judicial creation of a private cause of action caution against its expansion[,]" and "[t]his conclusion is consistent with the narrow dimensions we must give to a right of action Congress did not authorize…." *See also, e.g.*, *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1015 (2020) (referencing *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001) and *Blue Chip Stamps*, 421 U.S. at 736 in narrowly construing a judicially-created private cause of action in the civil rights context); *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2017) (noting "this Court's general reluctance to extend judicially created private rights of action.").

evidence of congressional intent, which does not here exist.

The dissent suggests that "[w]hat appears to be driving today's decision is not the text or history of section 11 but instead the court's concern that it would be bad policy for a section 11 action to be unavailable when a company goes public through a direct listing."[79] *Pirani* amplifies the dissent's concern when it explains that its interpretation of Section 11 is necessary to prevent "creat[ion] [of] a loophole large enough to undermine the purpose of Section 11 as it has been understood since its inception."[80]

Whatever the merits of these concerns, the dissent properly observes that there is "no basis for changing the settled interpretation of the statutory text."[81] If we "alter our statutory interpretations from case to case, Congress [has] less reason to exercise its responsibility to correct statutes that are thought to be unwise or unfair."[82] Instead, "[t]he place to make new legislation, or address unwanted consequences of old legislation, lies in Congress."[83]

Notwithstanding repeated references to text and legislative history, the dissent suggests that *Pirani* is purposivism masquerading as textualism. For the reasons this Court has rejected overt purposivism in

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[79] *Pirani*, 13 F.4th at 953 (Miller, J., dissenting).

[80] *Id.* at 948.

[81] *Id.* at 953.

[82] *Neal v. United States*, 516 U.S. 284, 296 (1996).

[83] *Pirani*, 13 F.4th at 953 (Miller, J., dissenting) (citing *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1753 (2020)).

several other contexts,[84] it should reject covert purposivism here as well.

V. ADMINISTRATIVE ACTION CAN PRESERVE SECTION 11 DIRECT LISTING LIABILITY

Litigants disappointed with this Court's holdings on questions of statutory interpretation can petition Congress for redress.[85] New legislation is, however, unnecessary to preserve Section 11 standing in direct listings because administrative action can preserve standing through at least three different techniques.

First, the SEC can require that registered and exempt shares offered in a direct listing trade with differentiated tickers, at least until expiration of the relevant Section 11 statute of limitations.[86] This mechanism might require two distinct opening auctions, one for registered shares and another for exempt shares. The shares could trade at different prices reflecting the differential value of potential Section 11 claims that could be brought only by

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[84] *See, e.g.*, *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself) (quoting *Aldridge v. Williams*, 44 U.S. 9, 24 (1845)); *Bostock* 140 S. Ct. at 1766-67.

[85] *See, e.g.*, *Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896, 1905 (2022) ("[I]f the statute's requirement of an acquisition cost survey is bad policy or is working in unintended ways, HHS can ask Congress to change the law.").

[86] Each publicly-traded *company* in the United States has a unique stock ticker. *Ticker*, U.S. SEC. & EXCH. COMM'N, https://www.investor.gov/introduction-investing/investing-basics/glossary/ticker (last visited Feb. 1, 2023).

purchasers of the registered shares. Also, because differentiated tickers prevent aftermarket commingling of registered and exempt shares, purchasers of registered shares would not lose standing when exempt shares enter the market.[87]

This same technique could be applied more broadly to resolve a larger set of tracing challenges. Shares issued in registered follow-on offerings could, for example, also have a unique ticker, thereby resolving the challenge raised in *Century Aluminum*,[88] a precedent frequently cited in *Pirani*.[89] Most aggressively, all exempt shares that come to market could also have tickers that differ from the same issuer's registered shares. That approach, combined with unique tickers for each registered offering, could resolve all tracing challenges.

Alternatively, the SEC could adopt a narrower approach that resolves the tracing challenge only for direct offerings by requiring that exempt shares not

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[87] Grundfest, *supra* note 2, at 64-67.

[88] In *In re Century Aluminum Co. Se. Litig.*, 729 F.3d 1104, 1106-07 (9th Cir. 2013), plaintiffs alleged that a prospectus supplement contained false and misleading statements, violating Section 11. The 9th Circuit *held* that plaintiffs' allegation that they had "purchased Century Aluminum common stock directly traceable to the Company's secondary offering" failed to "give rise to a reasonable inference that plaintiffs' shares [were] traceable to the secondary offering" as required under the *Twombly*/*Iqbal* pleading standard. *Id.* at 1107, 1108. Plaintiffs needed to allege facts "tending to exclude … the alternative explanation" that the shares came from the pool of previously issued shares. *Id.* at 1108.

[89] *Pirani*, 13 F.4th at 943-44, 946-49.

trade until the day after an initial auction that is limited to registered shares. This would, in effect, impose a regulatory one-day lock-up as a method of preserving issuer Section 11 liability.[90]

Most ambitiously, as many commenters have observed,[91] the SEC could migrate the entire clearance and settlement system to a distributed ledger system or to other mechanisms that would allow the tracing of individual shares as individual shares, and not as fractional interests in larger commingled electronic book entry accounts. These techniques would also resolve tracing challenges in all situations, not just in direct listings.

The SEC might consider all these alternatives and conclude that the costs of preserving Section 11 standing exceed the corresponding benefits, especially in light of alternative private and public

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[90] Marc Steinberg, Radford Professor of Law at Southern Methodist University, observes that "the SEC could end confusion by enacting a waiting period before unregistered shares could be released for trading in a direct listing, making them easier to distinguish from registered shares." Tom Zanki, *High Court Ruling on Direct Listing Appeal Could Be Pivotal*, Law360 (Dec. 22, 2022, 3:46 PM), https://www.law360.com/articles/1560664/high-court-ruling-on-direct-listing-appeal-could-be-pivotal.

[91] *See, e.g.*, George S. Geis, *Traceable Shares and Corporate Law*, 113 NW. U. L. REV. 227, 255-57, 270-71 (2018) (distributed ledgers solving tracing challenges); Richard Pan, *Blockchains, Securities, and Sections 11 and 12 of the Securities Act*, 15 N.Y.U. J.L. & BUS. 453, 468 (2019) (using blockchain, "investors will be able to trace the transaction history of each share back to their respective genesis blocks, and thus the specific offering under which the shares were issued.").

enforcement mechanisms that do not require tracing. But the possibility that the SEC declines to act on any of these alternatives cannot justify *Pirani*'s reading of the statutory text.

It also bears emphasis that U.S. equity markets are populated by sophisticated participants who are well aware of the challenges posed by Section 11 tracing doctrine. Myriad contractual mechanisms might be employed by private parties to address Section 11 tracing problems. The market has, however, apparently determined not to adopt any of these self-help mechanisms. The wisdom of regulatory intervention in a situation susceptible to a free-market solution raises further analytic challenges for proponents of legislative or administrative action.

CONCLUSION

Pirani's interpretation of "such security" should, for the reasons stated above, be rejected, and the opinion should be reversed.

Respectfully submitted,

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APPENDIX A

"Such Security" in the Securities Act of 1933
(15 U.S.C. § 77a *et seq.*)

Section	Relevant Excerpt
2(a)(3)	"DEFINITIONS.-- When used in this title, unless the context otherwise requires-- . . . The issue or transfer of a right or privilege, when originally issued or transferred with a security, giving the holder of **such security** the right to convert **such security** into another security of the same issuer or of another person, or giving a right to subscribe to another security of the same issuer or of another person, which right cannot be exercised until some future date, shall not be deemed to be an offer or sale of such other security; but the issue or transfer of such other security upon the exercise of such right of conversion or subscription shall be deemed a sale of such other security . . . Any offer or sale of a security-based swap by or on behalf of the issuer of the securities upon which **such security**-based swap is based or is referenced, an affiliate of the issuer, or an underwriter, shall constitute a contract for sale of, sale of, offer for

	sale, or offer to sell **such securities**."
2(a)(4)	"DEFINITIONS.-- When used in this title, unless the context otherwise requires-- . . . [T]he term 'issuer' means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which **such securities** are issued; . . . . "
3(a)(2)	"Except as hereinafter expressly provided, the provisions of this title shall not apply to any of the following classifications of securities: . . . (2) . . . or any security which is an industrial development bond (footnote omitted) . . . the interest on which is excludable from gross income under section 103(a)(1) of such Code if, by reason of the application of paragraph (4) or (6) of section 103(c) of such Code (footnote omitted) . . . paragraph (1) of such section 103(c) does not apply to **such security**; . . . ."
3(a)(11)	"Except as hereinafter expressly provided, the provisions of this title shall not apply to any of the

	following classifications of securities: . . . (11) . . . Any security which is a part of an issue offered and sold only to persons resident within a single State or Territory, where the issuer of **such security** is a person resident and doing business within or, if a corporation, incorporated by and doing business within, such State or Territory."
3(b)(1)	"ADDITIONAL EXEMPTIONS.-- (1) SMALL ISSUES EXEMPTIVE AUTHORITY.-- The Commission may from time to time by its rules and regulations … add any class of securities to the securities exempted as provided in this section, if it finds that the enforcement of this title with respect to **such securities** is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering; . . . ."
3(b)(2)(D)	"ADDITIONAL EXEMPTIONS.-- ADDITIONAL ISSUES.-- (2) The Commission shall by rule or regulation add a class of securities to the securities exempted pursuant to this section in accordance with the following

	terms and conditions: . . . (D) The civil liability provision in section 12(a)(2) of this title shall apply to any person offering or selling **such securities**."
3(b)(3)	"ADDITIONAL EXEMPTIONS.-- LIMITATION.-- Only the following types of securities may be exempted under a rule or regulation adopted pursuant to paragraph (2): equity securities, debt securities, and debt securities convertible or exchangeable to equity interests, including any guarantees of **such securities**."
3(c)	"The Commission may from time to time by its rules and regulations and subject to such terms and conditions as may be prescribed therein, add to the securities exempted as provided in this section any class of securities issued by a small business investment company under the Small Business Investment Act of 1958 (footnote omitted) if it finds, having regard to the purposes of that Act, that the enforcement of this subchapter with respect to **such securities** is not necessary in the public interest and for the protection of investors."

4(a)(3)(C)	"(a) The provisions of section 5 shall not apply to-- . . . (3) transactions by a dealer (including an underwriter no longer acting as an underwriter in respect of the security involved in the transaction), except-- (C) transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of **such securities** by the issuer or by or through an underwriter."
4(c)(1)(A)-(C)	"(c)(1) With respect to securities offered and sold in compliance with Rule 506 of Regulation D under this Act, no person who meets the conditions set forth in paragraph (2) shall be subject to registration as a broker or dealer pursuant to section 15(a)(1) of this title (footnote omitted), solely because-- (A) that person maintains a platform or mechanism that permits the offer, sale, purchase, or negotiation of or with respect to securities, or permits general solicitations, general advertisements, or similar or related activities by issuers of **such securities**, whether online, in person, or through any other

	means; (B) that person or any person associated with that person co-invests in **such securities**; or (C) that person or any person associated with that person provides ancillary services with respect to **such securities**."
4(c)(2)(A), (B)	"The exemption provided in paragraph (1) shall apply to any person described in such paragraph if-- (A) such person and each person associated with that person receives no compensation in connection with the purchase or sale of **such security**; (B) such person and each person associated with that person does not have possession of customer funds or securities in connection with the purchase or sale of **such security**; and (C) such person is not subject to a statutory disqualification as defined in section 3(a)(39) of this title and does not have any person associated with that person subject to such a statutory disqualification."
4(c)(3)(A)	"(3) For the purposes of this subsection, the term "ancillary services" means-- (A) the provision of due diligence services, in connection with the offer, sale,

	purchase, or negotiation of **such security**, so long as such services do not include, for separate compensation, investment advice or recommendations to issuers or investors; and . . . ."
4A(b)(1)(H)(i), (iv)	"(b) REQUIREMENTS FOR ISSUERS.-- For purposes of section 4(6), an issuer who offers or sells securities shall-- (1) file with the Commission and provide to investors and the relevant broker or funding portal, and make available to potential investors-- . . . (H) a description of the ownership and capital structure of the issuer, including-- (i) terms of the securities of the issuer being offered and each other class of security of the issuer, including how such terms may be modified, and a summary of the differences between **such securities**, including how the rights of the securities being offered may be materially limited, diluted, or qualified by the rights of any other class of security of the issuer; . . . (iv) how the securities being offered are being valued, and examples of methods for how **such securities** may be valued by the issuer in the

	future, including during subsequent corporate actions; . . . ."
4A(c)(1)(A)	"LIABILITY FOR MATERIAL MISSTATEMENTS AND OMISSIONS.-- (1) ACTIONS AUTHORIZED -- (A) IN GENERAL-- Subject to paragraph (2) a person who purchases a security in a transaction exempted by the provisions of section 4(6) may bring an action against an issuer described in paragraph (2), either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for **such security** with interest thereon, less the amount of any income received thereon, upon the tender of **such security**, or for damages if such person no longer owns the security."
4A(e)(1)	"RESTRICTIONS ON SALES.-- Securities issues pursuant to a transaction described in 4(6)-- (1) may not be transferred by the purchaser of **such securities** during the 1-year period beginning on the date of purchase, unless such securities are transferred-- (A) to the issuer of the securities; (B) to an accredited investor; (C) as part

	of an offering registered with the Commission; or . . . ."
5(a)(1), (2)	"(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly-- (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell **such security** through the use or medium of any prospectus or otherwise; or (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any **such security** for the purpose of sale or for delivery after sale."
5(b)(2)	"(b) It shall be unlawful for any person, directly or indirectly-- . . . (2) to carry or cause to be carried through the mails or in interstate commerce any **such security** for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of Section 10."
5(c)	"(c) It shall be unlawful for any person, directly or indirectly, to make use of any means or

	instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to **such security** . . . ."
5(d)	"LIMITATION.-- Notwithstanding any other provision of this section, an emerging growth company or any person authorized to act on behalf of an emerging growth company may engage in oral or written communications with potential investors that are qualified institutional buyers or institutions that are accredited investors, as such terms are respectively defined in section 230.144A and section 230.501(a) of title 17, Code of Federal Regulations, or any successor thereto, to determine whether such investors might have an interest in a contemplated securities offering, either prior to or following the date of filing of a registration statement with respect to **such securities** with the Commission, subject to the requirement of subsection (b)(2)."

6(a)	"Any security may be registered with the Commission under the terms and conditions hereinafter provided . . . by filing a registration statement in triplicate, at least one of which shall be signed by each issuer, its principal executive officer or officers, its principal financial officer, its comptroller or principal accounting officer, and the majority of its board of directors or persons performing similar functions . . . except that when such registration statement relates to a security issued by a foreign government, or political subdivision thereof, it need be signed only by the underwriter of **such security**."
6(b)(1)	"REGISTRATION FEE.-- (1) FEE PAYMENT REQUIRED.-- At the time of filing a registration statement, the applicant shall pay to the Commission a fee at a rate that shall be equal to $92 per $1,000,000 of the maximum aggregate price at which **such securities** are proposed to be offered, except that during fiscal year 2003 and any succeeding fiscal year such fee shall be adjusted pursuant to paragraph (2)."

7(b)(1)(C)	"(b)(1) The Commission shall prescribe special rules with respect to registration statements filed by any issuer that is a blank check company. Such rules may, as the Commission determines necessary or appropriate in the public interest or for the protection of investors- - . . . (C) provide a right of rescission to shareholders of **such securities**."
11(a)(5)	"Sec. 11. (a) In case any part of the registration statement, when such part became effective (footnote omitted), contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring **such security** (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue-- . . . (5) every underwriter with respect to **such security**."
11(e)	"The suit authorized under subsection (a) may be to recover such damages as shall represent the difference between the amount

	paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which **such security** shall have been disposed of in the market before suit, or (3) the price at which **such security** shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: *Provided*, That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of **such security** resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable."
12(a)(2)	"IN GENERAL-- Any person who- - . . . (2) Offers or sells a

	security . . . by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable subject to subsection (b), to the person purchasing **such security** from him . . . to recover the consideration paid for **such security** with interest thereon, less the amount of any income received thereon, upon the tender of **such security**, or for damages if he no longer owns the security."
12(b)	"LOSS CAUSATION.-- In an action described in subsection (a)(2), if the person who offered or sold **such security** proves that any portion or all of the amount recoverable under

	subsection (a)(2) represents other than the depreciation in value of the subject security resulting from such part of the prospectus or oral communication, with respect to which the liability of that person is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statement not misleading, then such portion or amount, as the case may be, shall not be recoverable."
17(b)	"It shall be unlawful for any person . . . to publish, give publicity to, or circulate any notice . . . which, though not purporting to offer a security for sale, describes **such security** for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof."
18(b)(1)	"COVERED SECURITIES.-- For purposes of this section, the following are covered securities: (1) EXCLUSIVE FEDERAL REGISTRATION OF NATIONALLY TRADED

	SECURITIES.-- A security is a covered security if **such security** is-- (A) a security designated as qualified for trading in the national market system pursuant to section 11A(a)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78k– 1(a)(2)) that is listed, or authorized for listing, on a national securities exchange (or tier or segment thereof); or (B) a security of the same issuer that is equal in seniority or that is a senior security to a security described in subparagraph (A)."
18(b)(2)	"COVERED SECURITIES.-- For purposes of this section, the following are covered securities: . . . (2) EXCLUSIVE FEDERAL REGISTRATION OF INVESTMENT COMPANIES.-- A security is a covered security if **such security** is a security issued by an investment company that is registered, or that has filed a registration statement, under the Investment Company Act of 1940."
18(b)(4)(A)	"COVERED SECURITIES.-- For purposes of this section, the following are covered securities: . . . (4) EXEMPTION IN CONNECTION WITH CERTAIN

	EXEMPT OFFERINGS.-- A security is a covered security with respect to a transaction that is exempt from registration under this title pursuant to-- (A) paragraph (1) or (3) of section 4, and the issuer of **such security** files reports with the Commission pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 . . . ."
18(b)(4)(D)	"COVERED SECURITIES.-- For purposes of this section, the following are covered securities: . . . (4) EXEMPTION IN CONNECTION WITH CERTAIN EXEMPT OFFERINGS.-- A security is a covered security with respect to a transaction that is exempt from registration under this title pursuant to-- . . . (D) a rule or regulation adopted pursuant to section 3(b)(2) and **such security** is-- (i) offered or sold on a national securities exchange; or (ii) offered or sold to a qualified purchaser, as defined by the Commission pursuant to paragraph (3) with respect to that purchase or sale . . ."
18(b)(4)(E)	"COVERED SECURITIES.-- For purposes of this section, the

	following are covered securities: . . . (4) EXEMPTION IN CONNECTION WITH CERTAIN EXEMPT OFFERINGS.-- A security is a covered security with respect to a transaction that is exempt from registration under this title pursuant to-- . . . (E) section 3(a), other than the offer or sale of a security that is exempt from such registration pursuant to paragraph (4), (10), or (11) of such section, except that a municipal security that is exempt from such registration pursuant to paragraph (2) of such section is not a covered security with respect to the offer or sale of **such security** in the State in which the issuer of **such security** is located; . . ."
19(d)(4)	"In order to carry out these policies and purposes, the Commission shall conduct an annual conference as well as such other meetings as are deemed necessary, to which representatives from **such securities** associations, securities self-regulatory organizations, agencies, and private organizations involved in capital formation shall be invited to participate."

23	"Neither the fact that the registration statement for a security has been filed or is in effect nor the fact that a stop order is not in effect with respect thereto shall be deemed a finding by the Commission that registration statement is true and accurate on its face or that it does not contain an untrue statement of fact or omit to state a material fact, or be held to mean that the Commission has in any way passed upon the merits of, or given approval to, **such security**."
28, Sched. A (16)	"[T]he price at which it is proposed that the security shall be offered to the public or the method by which such price is computed and any variation therefrom at which any portion of **such security** is proposed to be offered to any persons or classes of persons, other than the underwriters, naming them or specifying the class."
28, Sched. A (17)	"All commissions or discounts paid or to be paid, directly or indirectly, by the issuer to the underwriters in respect of the sale of the security to be offered. Commissions shall include all cash, securities, contracts, or anything else of value,

	paid, to be set aside, disposed of, or understandings with or for the benefit of any other persons in which any underwriter is interested, made, in connection with the sale of **such security**. A commission paid or to be paid in connection with the sale of **such security** by a person in which the issuer has an interest or which is controlled or directed by, or under common control with, the issuer shall be deemed to have been paid by the issuer."
28, Sched. A (19)	"[T]he net proceeds derived from any security sold by the issuer during the two years preceding the filing of the registration statement, the price at which **such security** was offered to the public, and the names of the principal underwriters of **such security**; . . ."
28, Sched. B (10)	"[A]ll commissions paid or to be paid, directly or indirectly, by the issuer to the underwriters in respect of the sale of the security to be offered. Commissions shall include all cash, securities, contracts, or anything else of value, paid, to be set aside, disposed of, or understandings with or for the