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SECTION 11'S TRACING DOCTRINE GOES UP TO THE SUPREME COURT

The Supreme Court has agreed to hear an appeal in Pirani v. Slack Technologies, Inc., *a case where the Ninth Circuit rejected Defendants' argument that the SEC's recent rule change allowing a company to issue both registered and unregistered shares simultaneously when going public prevents* any *investor from bringing claims under the Securities Act of 1933 on the grounds that the judicially created "tracing" requirement cannot be satisfied. The authors caution that a reversal of the Ninth Circuit's decision could weaken significantly, and perhaps even vitiate, investors' rights to challenge misrepresentations made in connection with IPOs and other public offerings — rights that have existed since 1933.*

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On December 13, 2022, the Supreme Court granted a request by Defendants in a case pending in California federal court recently take up the application of the Securities Act of 1933's "tracing doctrine" to direct listing initial public offerings after a shareholder plaintiff prevailed in the District Court and in the Ninth Circuit. In September 2022, Defendant Slack Technologies, Inc. ("Slack") filed a petition for a writ of certiorari on the issue of whether a new IPO mechanism will strip shareholders of any ability to enforce liability under the Securities Act. This case, *Pirani v. Slack Technologies, Inc.*, was first decided in shareholders' favor by Judge Susan Illston of the Northern District of California.[1] Upon appeal to the Ninth Circuit, defendants again sought to avoid all strict liability under the Securities Act by commingling both registered and unregistered shares in initial public offerings. A split panel of the Ninth Circuit rejected defendants' appeal,[2] a decision that the Circuit refused to hear en banc.[3] Now that the Supreme Court has granted certiorari,[4] the highest court will decide whether to side with defendants, a result that would erode nearly 100 years of Securities Act protections, all made possible by a dramatic and rapid rule change approved by the Securities and Exchange Commission at the end of 2020.

Between 2018 and 2020, the SEC revolutionized the way companies are permitted to go public, allowing them to avoid the traditional IPO format by issuing securities through a direct listing on one of the major stock exchanges.[5] While the new regulations have

[1] *Pirani v. Slack Techs., Inc.*, 445 F. Supp. 3d 367, 376 (N.D. Cal. 2020).

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

[3] *Pirani v. Slack Techs., Inc.*, No. 20-16419, 2022 U.S. App. LEXIS 11846 (9th Cir. May 2, 2022).

[4] *Slack Techs., LLC v. Pirani*, No. 22-200, --- S.Ct. ----, 2022 WL 17586972, at *1 (Dec. 13, 2022) (Mem.).

[5] Exchange Act Release No. 90768 (Dec. 22, 2020); SEC Commissioners Caroline Crenshaw and Allison Lee voted against the 2020 rule approving the use of direct listings in

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