Team No. P03

**Docket No. 19-508**

IN THE

# Supreme Court of the United States

THE STATE OF FORDHAM FIREMEN'S PENSION FUND, *et al.*,

*Petitioners*,

v.

HORIZONS, INC. & THATCHER LYON

*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Fourteenth Circuit**

**BRIEF FOR PETITIONERS**

## QUESTIONS PRESENTED

1. Whether those who buy shares in a direct listing have standing to bring a claim under Section 11 of the Securities Act of 1933, even though those buyers cannot trace their shares to a registration statement.
2. Whether investment bankers acting as financial advisors in a direct listing are statutory underwriters for purposes of Section 11 liability.

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This case turns on the meaning of two provisions: 15 U.S.C. §§ 77*b*(a)(11), 77*k*(a). These provisions are reproduced in the appendix.

## INTRODUCTION

This case presents a clash: one meaning of a statute, which accomplishes that statute's manifest purpose, versus another meaning, which renders the statute's primary enforcement provision inoperable. The latter meaning, the court of appeals conceded, makes it "impossible" to apply Section 11 of the Securities Act of 1933 to an entire category of transactions. R. at 16. But this Court has, for centuries, construed statutes to avoid rendering key provisions inoperable. There is no reason to change course here.

This case also presents a complex question of fact: whether the investment banking firm Thatcher Lyon acted as a statutory underwriter when it arranged with Horizons to sell its securities to the public using a new instrument called a direct listing. To see the forest through the trees, this Court should bear one thing in mind: "[a]n investment banking firm which arranges with an issuer for the public sale of its securities is clearly an 'underwriter' under [the Act]." 17 C.F.R. § 230.144.

## STATEMENT OF THE CASE

***Maxfield Creates Horizons***. Soon after graduating college, Peter Maxfield created a business plan for a medical technology ("MedTech") company called Horizons. R. at 2. At first, Horizons developed MedTech for pediatric cognitive dispositions, such as attention difficulties. R. at 2. Two years later, Horizons expanded its business and began marketing new a new technology, this time for early-stage dementia. R. at 4. And that paid dividends. Horizons's valuation soared from $ 250 million in 2016 to $ 3.1 billion during its final fundraising round in April 2018. R. at 4. The next month, the SEC charged Theranos—a MedTech company whose key product was a portable blood analyzer—and its founders with a "massive" scheme to defraud investors.[1] That was also the point when Horizons's investors became antsy to cash in on their shares. R. at 4. The Horizons team thus sought out the investment bank Thatcher Lyon, which is second to none when it comes to bringing companies' shares to public stock exchanges. R. at 4.

***The Advent of the Direct Listing***. At around the same time, Spotify became the first company to sell shares on the New York Stock Exchange ("NYSE") using a "direct listing."[2] Unlike a traditional IPO, an issuer does not sell new shares in a direct listing. R. at 5. Instead, the issuer's shareholders list their already-existing shares on the New York Stock Exchange ("NYSE"). R. at 5. This made the direct listing particularly attractive for Horizons, which was flush with cash from its latest funding round. R. at 5.

Direct listings differ from traditional IPOs in other ways too. In an IPO, an investment bank such as Thatcher would buy Horizons's new shares at a discount before reselling them to investors. R. at 6. In a direct listing, by contrast, Horizons's shareholders would simply list their shares on the NYSE.

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[1] Press Release, SEC, *Theranos, CEO Holmes, and Former President Balwani Charged with Massive Fraud* (Mar. 14, 2018), https://www.sec.gov/news/press-release/2018-41.

[2] *See* Maureen Farrell & Anne Steele, *Spotify Kicks Off its Unusual IPO*, THE WALL STREET JOURNAL (Feb. 28, 2018), https://perma.cc/7HNM-2CFW.

R. at 5. The selling efforts also differ between the two transactions. Whereas Thatcher would embark on a roadshow and meet with investors in an IPO, Thatcher would draft materials for Horizons's executives to present to investors during a two-hour livestream in a direct listing. R. at 6–7. That livestream, called an Investor Day, informs investors about the company, here Horizons, and the investment opportunity. R. at 7.

Direct listings and traditional IPOs are also similar in many ways.[3] In an IPO, Thatcher would gauge investors' interest during the roadshow and use that information to price the securities. R. at 6. Similarly, in a direct listing, Thatcher would gauge buying interest and use that information to advise a Designated Market Maker, who is charged with facilitating the first day of trading, on how to price the shares. R. at 8. And in both transactions, Thatcher would help prepare the registration statement and prospectus. R. at 6–7.

***Horizons Chooses to Direct List***. After a series of meetings with Thatcher Lyon and the law firm Whitmore Davis, Maxfield Horizons's team decided on the direct listing. R. at 7. As with any company that sells shares to the public for the first time, Horizons would need to file a registration, though some shares would be exempt from registration under Section 4(a)(1). R. at 5.[4]

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[3] Indeed, Spotify's Investor Day was treated as a roadshow. *See* Spotify Tech. S.A., SEC Staff No-Action Letter, 2018 WL 1531993, at *6 (Mar. 23, 2018).

[4] Section 4(a)(1) exempts from registration "transactions by any person other than an issuer, underwriter, or dealer." 15 U.S.C. § 77*d*(a)(1). The SEC interprets "underwriter," as used in Section 4(a)(1), broadly to exempt from registration shares owned for more than one year by persons who are not controlled by, or who do not control the issuer. *See* 17 C.F.R. 230.144. At bottom, this provision was intended to distinguish "isolated" sales to particular persons, which the Act exempts from registration, from distributions made

This means that Horizons would inject registered and unregistered shares into the NYSE at the same time. R. at 5.

Horizons hired Thatcher to serve as the financial advisor and Whitmore as counsel. R. at 7. Thatcher and Whitmore then launched the due diligence process before helping to prepare Horizons's registration statement. R. at 8. After the duo probed Horizons's financials, business operations, and contingent liabilities, the prospectus said that Horizons had "no material contingent liabilities," among other disclosures. R. at 8. Within six months of Horizons's final fundraising round, the company filed its registration statement and draft prospectus with the SEC. R. at 8.

Thatcher was also drafting the materials for Horizons's Investor Day during this time. R. at 7. Held on November 10, 2018, that event attracted about 8,000 viewers. R. at 8. All this while, Thatcher was also identifying a market for Horizons' shares and keeping an eye on pre-list selling, buying interest, and other factors. R. at 8. Thatcher then used that information to advise the DMM on how to price the shares for the first day of trading. R. at 8.

***Horizons's Shares Enter the Market***. Nine months after fundraising on a $ 3.1 billion evaluation, the SEC declared Horizons's registration statement effective. R. at 4, 8. Three days later, the Designated Market Maker—after consulting exclusively with Thatcher—opened trading at a near $ 9 billion evaluation, i.e., $67 per share. R. at 8–9. Petitioners, a pension fund for

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generally to the public, which "shall come within the purview of the act." H.R. Rep. No. 73–85, at 15–16.

Firemen in the State of Fordham, bought seven million shares of Horizons common stock at $ 68 per share. R. at 9.

***Horizons's Technology Linked with Cancer***. Six months after Horizons's registration statement became effective, the firm's shares plummeted. R. at 9. This, after a newly released study by Oxbridge University linked Horizons's "principal" technology—the one used for treating early-stage dementia—to brain cancer in 13% of the patients. R. at 9. Petitioners sold their shares at a $ 210 million loss the next day. R. at 9.

***The SEC Addresses Investors' Concerns***. About one year after Horizons' direct listing, the SEC began accepting comments in response to a plan that would expand the use of direct listings.[5] Dismayed by recent scandals, investor groups expressed concerns about the plan's potential for abuse, emphasizing the need for "robust" due diligence to uncover companies' "vulnerabilities" before they sell their shares to the public.[6] Those concerns echo the issues presented by this case.[7] The SEC responded to those concerns with these two points: First, "[t]racing is not set forth in Section 11 and is a judicially-developed doctrine" and, as such, is subject to change; second, "financial advisors to issuers in [direct listings] have incentives to engage in

[5] *See* Exchange Act Release No. 34,87821, 84 Fed. Reg. 72065 (Dec. 30, 2019).
[6] *See, e.g.*, Letter from Christopher A. Iacovella, CEO, American Securities Association, to Jay Clayton, Chairman, SEC (Mar. 5, 2020), https://perma.cc/8M9F-V2M8.
[7] *See* Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, to SEC (July 16, 2020), https://perma.cc/3668-JN6Y.

robust due diligence, given their . . . potential liability, including as statutory underwriters under the broad definition of that term."[8]

## STANDARD OF REVIEW

A complaint need only allege sufficient facts to state a facially plausible claim for relief to survive a motion to dismiss under Rule 12(b)(6). *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* On appeal, a District Court's denial of a motion to dismiss is reviewed *de novo*. *Solow v. Citigroup, Inc.*, 507 F. App'x 81, 82 (2d Cir. 2013). In reviewing the lower court's order *de novo,* this Court deliberates the question anew, yielding no deference to the decisions of the lower court.

## SUMMARY OF THE ARGUMENT

This Court should reverse the Fourteenth Circuit's decision on the issue of standing for two reasons. First, the tracing doctrine contravenes this Court's centuries-old practice of interpreting statutes to avoid rendering key provisions inoperable. As the court below rightly noted, the tracing doctrine makes it "impossible" for any plaintiff to bring a Section 11 claim based on a direct listing. R. at 16. Yet that court applied the tracing doctrine anyway, reasoning that it prevents "unlimited" standing by denying a right of action to plaintiffs who bought their shares "months after" the initial distribution. R. at 17. But

[8] Exchange Act Release No. 34,90768, 85 Fed. Reg. 85807, 85815–16 (Dec. 29, 2020).

courts continuously apply the tracing doctrine to confer Section 11 standing on post-distribution buyers. And that is the second reason this Court should eliminate the tracing doctrine: it creates expansive liability—liability rooted in neither the Act's text nor purpose. Indeed, the number of post-distribution buyers who can "trace" their shares is infinite, while the number of initial-distribution buyers, i.e., the investors for whom the Act serves to protect, cannot exceed the number of shares distributed.

This Court should also reverse the Fourteenth Circuit's holding that Thatcher Lyon is not a statutory underwriter. The Act's text, structure, history, and purpose establish that conducting due diligence for the offering documents confers statutory underwriter status. In addition, the regulations show that, by preparing materials for Horizons' Investor Day, Thatcher Lyon participated in offering Horizons' securities to investors. The Act defines underwriter to include one who "offers" "for an issuer" in connection with a distribution, or one who participates in such an undertaking. Thatcher's role in Investor Day therefore crowns the bank a statutory underwriter. Finally, the Act's text simply cannot bear a meaning that requires participation in the actual distribution of securities. No court, save for the one below, imposes such a requirement. The investment bank is thus a true statutory underwriter.

## ARGUMENT

### I. This Court Should Eradicate the Tracing Doctrine from Section 11 Jurisprudence.

The Securities Act of 1933, 15 U.S.C. § 77a *et seq.*, protects investors by requiring extensive disclosure from issuers before they go public. *Omnicare v. Labs. Dist. Council Indus. Pension Fund*, 575 U.S. 175, 178 (2015). The Act's "linchpin" "is its registration requirement." *Id.* With limited exceptions, *see* 15 U.S.C. § 77d, an issuer cannot sell securities to the public until its registration statement becomes effective. *Id.* § 77e. A registration statement is a long, detailed document that contains information about the issuer and the security for sale. *See* 17 CFR §§ 210, 229. And that information, the enacting Congress thought, is "indispensable" to an investor's judgment of a given security. H.R. Rep. No. 73-85, pt. 1, at 3 (1933). Section 11 promotes the accuracy of that information by making issuers and underwriters, among others, liable for flaws in the registration statements. 15 U.S.C. § 77k(a). If the registration contains such a flaw, then the issuer and underwriter are liable to "any person acquiring *such security*." *Id.* (emphasis added).

The phrase "such security" can bear two meanings. *Barnes v. Osofsky*, 373 F.2d 269, 271 (2d Cir. 1967). Under the first, an investor may only sue if they acquired a registered security; under the second, an investor may sue if they acquired a security issued in the same offering or "of the same nature," as the registered securities. *Id.* Noting the absence of a "good reason" to adopt the second reading, the *Barnes* court adopted the first and established the tracing doctrine. *Id.* at 271–73. The time has come to reject the tracing doctrine, however. And there are two "good reason[s]" for doing so. First, it eviscerates the Act's manifest purpose by rendering Section 11 a nullity, at least for direct listings. And second, it departs from the Act's text, framework, and purpose by extending Section 11 standing to a never-ending class of plaintiffs while excluding the class of plaintiffs that the Act aims to protect.

### A. The presumption against ineffectiveness canon counsels against applying the tracing doctrine to direct listings.

First, this Court should adopt a reading of "such securities" that confers Section 11 standing on those who buy securities in the initial distribution because the tracing doctrine eviscerates Section 11 and, by extension, the Act's manifest purpose. The starting point for "every case involving construction of a statute is the language itself." *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985) (citation omitted). For centuries, this Court has construed ambiguous text to further, not hinder—let alone eviscerate—the statute's manifest purpose. *See, e.g.*, *City of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1473 (2020) (citation omitted) (avoiding an interpretation that would "create such a large and obvious loophole in one of the key regulatory innovations of the Clean Water Act"); *The Emily*, 22 U.S. (9 Wheat.) 381, 389 (1824) (avoiding an interpretation that would render a law "nugatory, and enable offenders to elude its provisions in the most easy manner."); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law* 63 (2012) (explaining that the "presumption against ineffectiveness ensures that a text's manifest purpose is furthered, not hindered"). There is no reason to depart from that course here.

The purpose of the 1933 Act is "to promote full and fair disclosure of information" in initial public offerings. *Pinter v. Dahl*, 486 U.S. 622, 646 (1988).

If the information is neither full nor fair, Section 11 provides a cause of action, which not only compensates the investor but also deters such flaws altogether. 15 U.S.C. § 77*k*; Harry Shulman, *Civil Liability and the Securities Act*, 43 Yale L.J. 227, 227 (1933) (describing Section 11 as "*in terrorem*"). Some transactions, however, are exempt from the registration requirement under Section 4(a)(1). *See* 15 U.S.C. 77*d*(a)(1). And those transactions usually inject shares into the market before or after the initial offering. *See, e.g.*, *Lilley v. Charren*, 936 F. Supp. 708, 716 (N.D. Cal. 1996). That makes it feasible for an investor to trace their shares to the registration statement. *Id.*

But interpreting "such securities" in a way that requires investors to "trace" their shares in a direct listing to the registration statements would pervert the Act's full and fair disclosure regime. Unlike in an IPO, shares that are exempted from registration under Section 4(a)(1) and registered shares enter the market at the same time in a direct listing. R. at 5. That makes it impossible for investors to trace their shares to the registration statement. R. at 15. And that renders Section 11 a nullity, at least for direct listings. Moreover, because Section 11 enforces the Act's full and fair disclosure regime by supplying a deterrence mechanism, *see* Shulman, *supra*, at 227, the tracing doctrine eviscerates the Act's manifest purpose. Indeed, an issuer would have little incentive to ensure the accuracy of its registration statement if the tracing requirement serves as a liability shield in direct listings.

Not only does that result rob the Act of its purpose, but it also distorts the intent behind Section 4(a)(1). That provision exempts from registration "transactions by any person other than an issuer, underwriter, or dealer." 15

U.S.C. 77*d*(a)(1). The purpose of that provision was to exempt "isolated" sales of securities to a "particular person," while still "insisting" that offerings "made generally to the public" "come within the purview of the act." H.R. Rep. No. 73–85, pt. 3, at 15–16. Despite Congress' intent that transactions like a direct listing "come within the purview of the act," the court of appeals substituted its own policy judgment for that of Congress', noting doing away with the tracing requirement would confer "automatic standing in all cases." *Id.*; R. at 17. As a result, the court of appeals would make it impossible for direct listings to "come within the purview of [Section 11]." H.R. Rep. No. 73–85, pt. 3, at 16.

Whether or not the court of appeals policy judgment is the right one is beside the point: this Court should apply the statute that Congress enacted, leaving it to that branch to amend the statute if it so desires.

**B. The tracing doctrine confers standing on a never-ending class of plaintiffs.**

Second, this Court should adopt a reading of "such securities" that confers standings on those who buy in the initial distribution because the standing doctrine creates expansive liability for issuers—liability rooted in neither the Act's text nor purpose. In this sense, it is the *tracing doctrine*, not the lack of one, that confers "unlimited" section 11 standing. R. at 17. The 1933 Act is mainly concerned with the "initial distributions" of securities; the Securities Exchange Act of 1934, with post-distribution trading. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 752 (1975).

But courts constantly apply the tracing doctrine to confer Section 11 standing on post-distribution buyers. *See Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076, 1078, 1080 (9th Cir. 1999) (holding that an investor had standing to bring a Section 11 claim under tracing doctrine, "regardless of whether he bought in the initial offering, a week later, or a month after that"); *Joseph v. Wiles*, 223 F.3d 1155, 1160 (10th Cir. 2000) (applying the tracing doctrine to allow post-distribution buyers to sue under Section 11 if they show they bought their securities pursuant to the registration statement), *rev'd on other grounds*, 137 S. Ct. 2042.

Not only does that reading conflict with the regulatory framework embodied by the two statutes, but it also renders Section 10(b) of the 1934 Exchange Act superfluous. *See* 15 U.S.C. § 78*j*. While Section 10(b) of the 1934 Exchange Act gives "any" buyer a right of action for post-distribution manipulation, Section 11 affords "special" protections to buyers in an initial offering. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382–83 (1983). In other words, the two provisions remedy different wrongs. *Id.* And while it is true that some conduct "actionable under Section 11 may also be actionable under Section 10(b)," *id.*, the converse is not true. Simply put, a buyer who buys stock in an initial offering might have a claim under Sections 11 and 10(b). *Id.* But a buyer who buys *after* the initial offering is limited to a claim under Section 10(b) because that can appeal to Section 11's "special" protections apply only to initial distributions. *Id.*; *see also* H.R. Rep. No. 73–85, pt. 3, at 15–16 (stating the 1933 Act's main concern is "the problem of distribution as distinguished from trading"). In sum, Section 10(b) is the exclusive remedial provision for post-distribution buyers. And the tracing doctrine simply snubs that fact.

On top of that, Section 11's cap on damages shows that the provision avails itself to those who buy stock in the initial distribution, rather than those who can "trace" their shares to the registration statement. This Court has "repeatedly recognized" that the 1933 Act "should be construed" "to effectuate" its "remedial purposes." *Herman*, 459 U.S. at 386–87 (citation omitted). Section 11 limits a plaintiff's damages to "the price at which the security was offered to the public." 15 U.S.C. § 77*k*(e). Suppose Investor buys a share of XYZ Co. for $ 200 after the initial offering when the shares cost $ 50. Days later, news breaks that cause shares of XYZ Co. to plummet below $ 25. Investor then sues, alleging that they can trace their shares to the registration statement, which contained a material misstatement. Although Investor has standing under the tracing doctrine, Section 11(e)'s cap on damages prevents Investor from being made whole. Given the Act's "remedial purpose[]," *see Herman*, 459 U.S. at 386–87, it is only logical to assume that Congress meant to afford a remedy under Section 11 to those who bought stock during the initial offering.

Fortunately, the legislative history states that assumption with clarity. The House Report explains that Section 11 affords a "remedy to all purchasers who may reasonably be affected by any statements in the registration statement." H.R. Rep. No. 73-85, pt. 3, at 22. Just because an investor can trace their shares to the registration statement does not mean they were "reasonably [] affected" by the registration statement. *Id.* The point of the registration statement is to provide investors with information that is "indispensable" to their judgment of a security's value. *Id.* at 3. But an investor who buys their securities months after the distribution has access to a wealth of information, not the least of which includes the issuer's periodic public filings. *See* 15 U.S.C § 78*m* (requiring that issuers file periodic reports and information with SEC). Even though such an investor can "trace" their shares to the registration statement, they are wholly unaffected by its information.

Perhaps the strongest rebuke of the tracing doctrine is the fact it burdens investors and issuers alike by creating a never-ending class of plaintiffs and by increasing the costs of litigation. *See* Paul C. Curnin & Christine M. Ford, *The Critical Issue of Standing Under Section 11 of the Securities Act of 1933*, 6 FORDHAM J. CORP. & FIN. L. 155, 204 (2001) ("The propensity for vexatious litigation in this area of the law, without regard to the merits, strongly favors the imposition of clear rules governing standing."). In theory, an infinite number of buyers can 'trace' their shares to the registration statement.[9] A rule that confers standing only on those who buy stock in the initial offering, by contrast, would confine the number of plaintiffs with standing to the number of shares issued in the offering.[10] Moreover, such a rule would reduce the costs of litigating the tracing issue. *See id.* at 203 ("The

[9] Indeed, many courts simply accept general allegations from buyers that "their shares were purchased in [the issuer's] public offerings or were traceable to the public offerings at issue," *see In re AES Corp. Sec. Litig.*, 825 F. Supp. 578, 592 (S.D.N.Y. 1993); *see also In re Crazy Eddie Sec. Litig.*, 747 F. Supp. 850, 854–55 (E.D.N.Y. 1990) (refusing to dismiss complaint when plaintiffs alleged they "purchased or otherwise acquired" securities traceable to defective registration statement, even though the plaintiffs failed to plead the dates on which they bought their shares).

[10] Moreover, Section 11's limit on damages would subject issuers to liability only for the funds produced by the initial distribution, which equals the number of shares issued multiplied by the "price at which the security was offered to the public," *see* 15 U.S.C. § 77*k*(e) (limiting recovery to "the price at which the security was offered to the public").

need for predictability and substantive rules that can be applied at the early stages of litigation are particularly necessary in this area of the law."). Above all, such an interpretation is faithful to text and to Congress' intent.

## II. This Court Should Find that Thatcher Lyon is a Statutory Underwriter.

Thatcher is an underwriter because, as discussed more fully below, the bank participated in the distribution of Horizons's securities. The Act defines underwriter to include anyone who has a "direct or indirect participation" in two distribution-related activities. 15 U.S.C. § 77b(a)(11). Those two activities are "purchas[ing] from an issuer with a view to" "the distribution of any security," and, notably, "offer[ing] or sell[ing] for an issuer in connection with" the distribution of any security. *Id.*

### A. Thatcher is an underwriter because it conducted due diligence and prepared the offering documents.

Thatcher is an underwriter because it participated in drafting Horizons's offering documents and, most importantly, conducted due diligence for those documents. As stated above, the starting point for the 1933 Act is the text. *Landreth*, 471 U.S. at 685. From there, this Court looks to the enacting context, which, in this case, was the Great Depression. *See Blue Chip Stamps,* 421 U.S. at 728–29. Moreover, this Court has long recognized that "words are inexact tools at best" and, for that reason, resort to legislative history is often necessary. *Harrison v. N. Trust Co.*, 317 U.S. 476, 479 (1943).

1. <u>Conducting due diligence and preparing the offering documents confers statutory underwriter status.</u>

When the Act first became law, soon-to-be Justice Douglas expressed surprise at the Act's "sweeping" definition of an underwriter. William O.

Douglas & George E. Bates, *The Federal Securities Act of 1933*, 43 YALE L.J. 171, 200 & n.162 (1933). "Sweeping," indeed. According to the Act's text, an underwriter includes someone who helps an issuer solicit investors. 15 U.S.C. § 77*b*(a)(11) (emphasis added) (defining "underwriter" to include one who has an "*indirect participation*" in making "*offers* for an issuer"); *id.* § 77*b*(a)(3) (emphasis added) (defining "offer" to include "every" "solicitation of an offer to buy" a security); *Participate*, *The Oxford English Dictionary* (2d Ed. 1989) (defining "participate" to mean "to take part . . . in a thing"); *Indirectly*, *The Oxford English Dictionary*, *supra* (defining "indirectly" to mean "through some intervening person or thing").

A prospectus, this Court held, serves the purpose of "soliciting the public to acquire securities." *Gustafson v. Alloyd Co.*, *Inc.*, 513 U.S. 561, 574 (1995); *see also* 15 U.S.C. § 77j(a)(1) (with exceptions not relevant here, a prospectus "shall contain the information contained in the registration statement"). On top of that, the enacting Congress understood the prospectus and registration statement to form "the basis" of "information by which the public is solicited." H.R. Rep. No. 73–85, at 9. And the "essential characteristic" of Section 11 is to impose a fiduciary-like standard on those "responsible for" those offering documents *Id.* at 5.

Moreover, Section 11(b) establishes that conducting due diligence is the necessary participation in the offering documents for underwriter liability to attach. *See also* Exchange Act Release No. 34,90768, 85 Fed. Reg. 85807, 85815 (Dec. 29, 2020) (explaining that "financial advisors to issuers in [direct listings] have incentives to engage in robust due diligence, given their" "potential liability, including as statutory underwriters"). In particular, Section 11(b)(3) sets forth a defense that exempts underwriters from liability if, "after reasonable investigation," they had "reasonable ground to believe and did believe" that the registration statement contained no material misstatements or omissions when it became effective. 15 U.S.C. § 77*k*(b)(3). Section 11 further defines a "reasonable investigation" as "the standard of reasonableness shall be that required of a prudent man in the management of his own property." *Id.* § 77*k*(c). In other words, an underwriter is liable for flaws in the registration statement unless they establish that they acted with prudence during the due diligence process. By implication, conducting due diligence is both necessary and sufficient for Section 11 liability to attach.

So too does the Act's history show that investment banks are liable as underwriters when they conduct due diligence for the offering documents. *See* Michael P. Dooley, *The Effects of Civil Liability on Investment Banking and the New Issues Market*, 48 VA. L. REV. 776, 793 & n.89 (1972) (explaining that the English Companies Act, which "served as the prototype for the 1933 Act," subjected investment banking firms to Section 11-like liability when they "participated in the preparation of the prospectus."); *see also* H.R. Rep. No. 73-85, pt. 2, at 9 ("The committee is fortified in [Sections 11 and 12] by similar safeguards in the English Companies Act of 1929."). Few persons made liable under Section 11, Professor Douglass explained, occupied "as strategic a position to investigate and to dictate the form of the registration statement as the originators." Douglas & Bates, *supra*, at 201. At the time, an "originating house" was the "one investment banker," which dealt with the prospective issuer. *Id.* at 199 n.160. For that reason, the expectation was that the bank would "compel disclosure of embarrassing facts uncovered during the course of its investigation." Dooley, *supra*, at 786.

The legislative history also shows that conducting due diligence in connection with the offering documents brings a bank within Section 11's ambit. During the Great Depression, the offering documents were "too often deliberately misleading and illusive." H.R. Rep. No. 73-85, pt. 1, at 3. Worse still, underwriters sought to evade liability "by disclaiming responsibility for the accuracy of the prospectus." Dooley, *supra*, at 794 n. 94. When Congressional hearings pulled back the curtains on the "irresponsible and outright fraudulent practices on the part of investment bankers," they "presented a political target too tempting to ignore." *Id.* at 794–95. With their target in sight, Congress acted swiftly, imposing liability on an array of persons "and other professionals" who prepare or otherwise participate in the offering documents, and exempting only those who can prove that "they could not have found that flaw 'after a reasonable investigation . . . ." H.R. Rep. No. 73-85, pt. 2, at 9.

2. <u>Thatcher Lyon conducted due diligence and prepared the offering documents for Horizons's direct listing.</u>

Applying these principles here, Thatcher is an underwriter because it conducted due diligence and drafted the offering documents for Horizons's direct listing. R. at 7–8. Indeed, Thatcher participated in "soliciting the public to acquire securities" when it helped draft those documents. *Gustafson*, 513 U.S. at 574; R. at 7–8. And though one might argue that Whitmore Davis played a similar part, the text is apathetic to that fact because it does not subtract from Thatcher's participation. *See Participate*, *The Oxford English*

*Dictionary*, *supra* (defining "participate" to mean "to take part . . . in a thing"); *Indirectly*, *The Oxford English Dictionary*, *supra* (defining "indirectly" to mean "through some intervening person or thing"). R. at 8.

Moreover, Thatcher's role in the due diligence process was the necessary participation in the offering documents for underwriter liability to attach. *See* Exchange Act Release No. 34,90768, 85 Fed. Reg. 85807, 85815 (Dec. 29, 2020) (explaining that "financial advisors to issuers in [direct listings] have incentives to engage in robust due diligence, given their" "potential liability, including as statutory underwriters"). During its investigation, Thatcher "thoroughly reviewed" Horizons's ongoing business operations and contingent liabilities. R. at 8. A pleading stage inference arises, therefore, that Thatcher's investigatory role led to the flaw that prompted Appellee's Complaint—the one relating to the Oxbridge study. R. at 8–9. Indeed, that study revealed that Horizons's "principal" technology was linked to brain cancer. R. at 8–9. It is in situations like this that Section 11 requires a fact finder to determine whether a prudent person in Thatcher's shoes would, "after a reasonable investigation," omit from the offering documents the fact that Horizons's "principal" technology was the subject of an ongoing research study. 15 U.S.C. §§ 77*k*(b)(3), 77*k*(c); *see also* Dooley, *supra*, at 796 (explaining that underwriters can "compel disclosure of embarrassing facts" uncovered during due diligence); R. at 8–9.

To be sure, not everyone who so much as comments on the offering documents is subject to underwriter liability. *See In re Lehman Bros. Mortg.-Backed Secs. Litig.*, 650 F.3d 167, 184–85 (2d Cir. 2011). In *Lehman Bros.*, the plaintiffs alleged that credit-rating agencies were underwriters. *Id.* at 182. Those agencies issued ratings that spoke "merely to the Agency's opinion of the creditworthiness of a particular security." *Id.* at 183. As the Second Circuit explained, this role was more like that of an "expert," who is also liable under Section 11, than an underwriter, who participates in the offering. *Id.* at 183 & n.11. But the SEC exempted these rating agencies from Section 11 expert liability when it required disclosure of their ratings on the registration statements. *Id.* As a result, the Second Circuit declined to find that those rating agencies were underwriters because they commented on and helped draft the offering documents. *Id.* at 185. Notably, those ratings agencies did not take part in the due diligence process. *See generally id.*

Thatcher's role in preparing Horizons's offering documents bears no resemblance to that of the credit-rating agencies in *Lehman Bros.* For one, Thatcher's efforts did not lead to an "opinion" about Horizons's securities. *See Lehman Bros.*, 650 F.3d at 183. Rather, Thatcher based its conclusions on its review of Horizons's financials, ongoing business operations, and contingent liabilities. R. at 8. In this sense, Thatcher's efforts produced facts about Horizons itself—facts that represented by the prospectus, thus forming "the basis information by which the public [was] solicited" to buy Horizons's securities. H.R. Rep. No. 73–85, pt. 2, at 6; R. at 8.

To that end, Thatcher's role in preparing Horizons's offering documents was precisely the role Congress had in mind when it drew and adopted the Act. *See* Dooley, *supra*, at 793 & n.89 (explaining that Section 11's "prototype" imposed liability on investment banking firms that "participated in the preparation of the prospectus"); *see also* H.R. Rep. No. 73-85, pt. 2, at 9 ("The committee is fortified in [Sections 11 and 12] by similar safeguards in the English Companies Act of 1929."). Just like an "originating house" was the "one investment bank" that dealt with a prospective issuer during the 1930s, Thatcher was the sole investment bank to deal with Horizons throughout the entire direct listing process. Douglas & Bates, *supra*, at 199 n.160; R. at 4–9. And as with those originating houses, Thatcher occupied a "strategic position to investigate and to dictate the form of the registration statement," as evidenced by Thatcher's "thorough[] review" of Horizons's financials, business operations, and contingent liabilities. Douglas & Bates, *supra*, at 201; R. at 8. For that reason, the Act expected Thatcher to "compel disclosure of embarrassing facts uncovered during" "its investigation." Dooley, *supra*, at 786.

All in all, Thatcher's participation—which included conducting due diligence before preparing the offering documents—places the investment bank squarely within the statute's definition of an underwriter, as evidenced by that term's plain meaning, purpose, and history.

### B. Thatcher is an underwriter because it drafted the materials for Investor Day, which served to solicit investors.

In any case, Thatcher's participation in Horizons's direct listing extends beyond the offering documents and includes the materials used to solicit investors on Investor Day. Again, an underwriter includes anyone who "*offers* or sells for an issuer in connection with" "the distribution of any security" or "has a direct or indirect participation" in such an undertaking. 15 U.S.C. § 77(b)(a)(11) (emphasis added). The Act also defines "offer" to include (a) "*every* *attempt* or offer to dispose of" "a security" and (b) "*every*" "solicitation of an offer to buy" a security. *Id.* § 77b(a)(3) (emphasis added). 15 U.S.C. § 77(b)(a)(11).

1. Drafting materials for an Investor Day amounts to participation in soliciting investors, thus conferring statutory underwriter status.

Communicating information about an issuer's securities is an offer when the person so communicating has an "arrangement" with the issuer. *Cf.* 17 C.F.R. § 230.137. For a while, this rule troubled broker-dealers—who often work within investment banks—when they passed on a chance to underwrite or otherwise take part in a distribution. Securities Act of 1933 Release, No. 33,5009, 34 Fed. Reg. 16870, 16870 (1969). The trouble was that broker-dealers wanted to publish information about upcoming offerings, which they had no part in. *Id.* Those broker-dealers refrained, however, from publishing such information, lest doing so render them statutory underwriters. *Id.* In response, the SEC promulgated Rule 137, which exempts from the definition of "offers" "participates" and "participation," as used in Section 2(a)(11), broker-dealers who publish "research reports" about offerings that they take no part in. *See* Securities Act of 1933 Release No. 33,5101, 34 Fed. Reg. 18456 (1970). Notably, the person publishing the "report" cannot have any "arrangement" with the issuer of the securities to invoke this exclusion. 17 C.F.R. § 230.137(b)(1).

If supplying information for an Investor Day is not a research report, then it is a roadshow. *See id.* §§ 230.137(e), .405.[11] On the one hand, a research report is a communication about an issuer's securities. *Id.* §

[11] Spotify's Investor Day was treated as a roadshow. *See* Spotify Tech. S.A., SEC Staff No-Action Letter, 2018 WL 1531993, at *6 (Mar. 23, 2018).

230.137(e). It includes a range of formats, but it excludes a livestream. *See id.* (defining research report as a "written communication" that includes information about an issuer's securities); *id.* § 405 (defining "written communication" as any written communication, radio, or television broadcast, or "graphic communication"); *id.* (defining "graphic communication" to include "messages widely distributed" over "computers," but to exclude any communication to a live audience). On the other hand, a roadshow is a presentation by an issuer that includes a discussion about the issuer's securities. *Id.* 17 C.F.R. § 230.433(h)(4). And a roadshow is indeed an offer. *Id.* To recap, both types of "offers" entail a communication about an issuer and its securities, though only a roadshow includes a live presentation.

2. <u>Thatcher participated in soliciting investors by drafting the materials for Investor Day.</u>

So understood, Thatcher's role in Horizons's Investor Day makes the bank an underwriter one way or another. On the one hand, Thatcher "draft[ed]" information about Horizons and its direct listing. R. at 7. Because that information was presented over the livestream, R. at 8, it fits the definition of a roadshow. 17 C.F.R. § 230.433(h)(4). True enough, Thatcher did not present on Investor Day. R. at 7. But even under that view, Thatcher prepared a research report by "draft[ing]" information about Horizons's securities, and that information was eventually communicated to investors. *See* 17 C.F.R. §§ 230.137(e), .405; R. at 7. Because Horizons "hired" Thatcher—thus implying that the bank had an "arrangement" with Horizons—that research report is an offer, which, in turn, makes Thatcher an underwriter. *Id.* § 230.137(b)(1); R. at 7. It makes no difference that Horizons's executives presented that 'report.' R.

at 7. If it did, anyone could skirt the research-report rule by, for example, "draft[ing]" a report and giving it to a journalist. R. at 7.

The Act says as much in plain English: Thatcher did not need to present the Investor Day materials to have an "*indirect participation*" in Investor Day. 15 U.S.C. § 77b(a)(11) (emphasis added); *see also Participate*, *Oxford English Dictionary*, *supra* (defining participate to mean "to take part"); *Indirectly*, *Oxford English Dictionary*, *supra* (defining "indirectly" to mean "through some intervening person or thing"). And yet the court below still thought it necessary for Thatcher to have "direct, continuous" communications with investors. R. at 21. But the text requires only that an underwriter "offers *for*" an issuer. 15 U.S.C. § 77b(a)(11) (emphasis added). In other words, the text focuses on whether the offering efforts were on the issuer's behalf, without concern for the continuity of the efforts. *Id.* And Thatcher did, in fact, "draft materials to be used by Horizons" executives to solicit investors. R. at 7. Even under the court of appeals' quantity-focused approach, Thatcher participated in many offers on Investor Day—*eight thousand* offers to be exact. *See* 17 C.F.R. §§ 230.137(e), .405, .433(h)(4); R. at 8. The bottom line is that, directly or indirectly, Thatcher made offers when it "draft[ed] materials" *for* Horizons to solicit eight thousand investors. R. at 7. And for that reason, Thatcher is a statutory underwriter.

### C. Participation in the "actual distribution" of an issuer's securities is not necessary to achieve underwriter status.

Finally, this Court should shun the Courts of Appeals' interpretation that an underwriter must participate in the "actual distribution" of securities. R. at 22. Such an interpretation attributes a meaning to the words, which they simply cannot bear. So let us start there. An underwriter is any person "who" "offers or sells for an issuer" "in connection with" "the distribution of any security, or participates or has a direct or indirect participation" in such an undertaking. 15 U.S.C. § 77b(a)(11). Those words mean what they say: a person can indirectly participate in making offers for an issuer and, although that person does not participate in the "actual distribution" of the securities, they are still an underwriter if their efforts are "in connection with" a distribution. And that is a good jumping-off point.

1. The text cannot support an "actual distribution" requirement.

Time and time again, this Court has said that the phrase "in connection with" is "essentially indeterminate because connections, like relations, stop nowhere." *E.g.*, *Maracich v. Spears*, 570 U.S. 48, 59 (2013); *see also Merril Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006) (explaining that this Court and the SEC have adopted broad constructions of "in connection with" as used in the Securities Exchange Act).

Moreover, courts uniformly agree that the term "distribution" is a term of art, which "refers to the entire process" of going public. *Geiger v. SEC*, 363 F.3d 481, 487 (D.C. Cir. 2004); *accord Berckeley Inv. Grp., Ltd. v. Colkitt*, 455 F.3d 195, 215 (3d Cir. 2006); *Ackerberg v. Johnson*, 892 F.2d 1328, 1337 (8th Cir. 1989); SEC v. Dolnick, 501 F.2d 1279, 1282 (7th Cir. 1974); *Quinn & Co. v. SEC*, 452 F.2d 943, 946 (10th Cir. 1971); *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 466 (2d Cir. 1959). Indeed, the Act provides as much by identifying that certain transactions are not "a distribution for purposes of section 77b(a)(11) of this title." 15 U.S.C. § 77d(e)(1)(B) (emphasis added). This makes sense because the Act's main concern is disclosure in connection with initial public offerings. *Blue Chip Stamps*, 421 U.S. at 752.

So understood, an "underwriter" includes those who participate in offering or selling an issuer's securities when that issuer is going public. *See* 17 C.F.R 230.144 ("An investment banking firm which arranges with an issuer for the public sale of its securities is clearly an 'underwriter' under [Section 2(a)(11)].") That necessarily includes those who, for example, conduct due diligence for the registration statement, which is a condition precedent that an issuer must fulfill *before* it offers or sells its securities. *See* 15 U.S.C § 77*aa* (listing thirty-two items that must be part of the registration statement); *id.* § 77*h*(b) (precluding a registration statement, which is "incomplete or inaccurate in any material respect," from becoming effective until amended). In other words, an underwriter can participate in the sale of an issuer's securities by conducting due diligence because that participation, though not necessarily connected to the "actual distribution" of the securities, is "in connection with" the public offering and thus the distribution.

2. <u>Aside from the Court below, courts do not require participation in the "actual distribution" of shares.</u>

Indeed, courts have found that actors "participated" in a distribution on an array of facts, none of which involve the "actual distribution" of securities. *See Geiger*, 363 F.3d at 487 (holding that one who finds buyer, negotiates terms, and facilitates resale "cannot escape [underwriter] liability by avoiding direct involvement in the final act"); *Sirianni v. SEC.*, 677 F.2d 1284, 1287 (9th Cir. 1982) (finding an employee at a life-insurance employee who answered his client's questions about an issuer, which paid the employee fees, participated "in the sales that followed from his references"); *SEC v. Int'l Chem. Dev. Corp.*, 469 F.2d 20, 31 (10th Cir. 1972) (concluding defendant participated in a distribution by publicizing issuer and arranging with a transfer agent, despite not selling any stock).

Much like the underwriter in *Geiger*, who found buyers, negotiated terms, and facilitated the resale, *Geiger*, 363 F.3d at 487, Thatcher gauged buying interest and used that interest to advise the DMM on how to price Horizons's securities. R. at 8. Based on the record's vague description of those activities, a pleading stage inference arises that Thatcher's participation "facilitated" the resale—whatever Thatcher did during that process led to Horizons's stock opening at a valuation that was triple what it was nine months earlier. *Geiger*, 363 F.3d at 487; R. at 4, 8–9. As a result, Thatcher "cannot escape [underwriter] liability by avoiding direct involvement in the final act." *Geiger*, 363 F.3d at 487.

In the same way, Thatcher's participation matches, if not exceeds, that of the underwriter in *Sirianni*. There, the underwriter was an employee at a life-insurance agency who answered his clients' questions about an issuer. *Sirianni*, 677 F.2d at 1287. Like that underwriter, Thatcher impliedly received fees from Horizons, which "hired" the bank as its financial advisor. *Id.*; R. at 7. But Thatcher did more than just answer investors questions, though it effectively did that also by drafting materials used to inform investors about Horizons. R. at 7. Thatcher also conducted due diligence, prepared Horizons's registration statement, compiled information about buying interest and pre-list selling, and used that information to advise the DMM on how to price the stock. R. at 7–8. Thatcher thus participated in "the sales that followed from [its efforts]." *Sirianni*, 677 F.2d at 1287.

Finally, Thatcher's participation equaled that of the underwriter in *Int'l Chem. Dev. Corp.*, 469 F.2d at 31. Like that underwriter, whose participation included publicizing the issuer and arranging with a transfer agent, *id.*, Thatcher's participation included drafting materials used to "familiarize[e]" investors with Horizons and advising the DMM, who, in essence, acted as a transfer agent when facilitating the first day of trading. R. at 7–8. As a result, Thatcher acted as an underwriter, despite not selling any stock. *Int'l Chem. Dev. Corp.*, 469 F.2d at 31.

For all these reasons, Thatcher's role in Horizons's direct listing renders the investment bank a statutory underwriter.

## **CONCLUSION**

For the reasons stated, Respondent respectfully requests this Court reverse the decision of the United States Court of Appeals for the Fourteenth Circuit.

Respectfully Submitted,

____________________/s/

Team P03

Counsel of Record for Petitioner

# APPENDIX

## APPENDIX

### 15 U.S.C. §§ 77*b*(a)(11) (2012)

(a) Definitions

When used in this subchapter, unless the context otherwise requires—

(11) The term “underwriter” means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term “issuer” shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

### 15 U.S.C. §§ 77*k*(a) (2012)

(a) Persons possessing cause of action; persons liable

In case any part of the registration statement, when such part became effective, 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--

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.