Team No. P05

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

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GLOSSARY OF ABBREVIATIONS

DMM	Designated Market Maker
IPO	Initial Public Offering
RRS	Resale Registration Statement
SEC	Securities and Exchange Commission
SPO	Secondary Public Offering

QUESTIONS PRESENTED

1. Whether, under the Securities Act of 1933, purchasers of shares of stock issued in a direct listing may bring a claim under Section 11 of that Act, despite the fact that they cannot trace their shares to a registration statement, and in consideration of the fact that in a direct listing it is virtually impossible to distinguish shares issued under a registration statement from those that are not.
2. Whether, under the Securities Act of 1933, financial advisors in a direct listing are statutory underwriters under Section 11 and may therefore be held liable for errors in the registration statement, despite the fact that there is no formal underwriting arrangement and in consideration of the substantial role they play in an offering.

STATEMENT OF THE CASE

Statement of Facts

In early January 2019, the State of Fordham Firemen's Pension Fund, Petitioner, bought seven million shares of stock from what they thought to be a promising new company called "Horizons," one of the Respondents. R. 9. Petitioner bought the stock four days after Horizons' stock became available in a direct listing, paying $68 per share and expecting to hold the block of stocks as a long-term investment. *Id.* Only six months later, on July 8, 2019, Horizons released a statement detailing a study that was produced by Oxbridge University Medical Research Institute. *Id.* The study showed that Horizons' technology for treating dementia, the company's primary innovation, was associated with brain cancer in 13% of patients that had used the technology for treatment of their early-stage dementia. *Id.* Horizons' stock, which had been trading at $73 a share, fell to only $37 per share. *Id.* The next day, Petitioner sold all its shares of Horizons stock at $38 per share, losing $30 per share for a total loss of $210 million. *Id.*

Horizons was created 6 years ago, in August 2014, by Peter Maxfield, who came up with the concept for a medical company that would hopefully create technology systems to treat memory loss and dementia. R. 2. In starting his venture, Maxfield received capital from Geoffrey Robbins, an angel investor who received 6% of Horizons' common stock in exchange for $10 million in startup capital. R. 3. In 2016, Ashford and Franklin, two venture capital firms, provided $30 million in capital to Horizons for a total of 12% of Horizons' common stock. R. 4. Horizons engaged in additional funding rounds, eventually aggregating $900 million. *Id.* By April 2018, various venture capital firms held a total of 47% of Horizons' common stock. *Id.*

In May 2018, some investors expressed to Maxfield that they were anxious to liquidate their positions in Horizons' stock. *Id.* Maxfield, along with Robbins, who had become a business advisor to Maxfield, sat down with Robert Folk, a lawyer from the law firm Whitmore Davis, and Lawrence Forbes, a partner at investment bank Thatcher Lyon (another one of the Respondents), to discuss their options. R. 4, 5. After learning that Horizons did not have a need to raise additional capital for some time, Folk suggested that Horizons engage in a direct listing, a newly developed alternative to an IPO. R. 5. In a direct listing, rather than a company offering newly issued shares, already-existing shareholders are permitted to sell their shares to the public. R. 5. Shares of stock held by affiliates and those that have been held by non-affiliates for less than a year are required to be registered with the United States Securities and Exchange Commission ("SEC") by filing a 1933 Securities Act Registration Statement ("RRS"); shares of stock that have been held by non-affiliates for more than a year are exempt from registration, per Rule 144. R. 5. In a direct listing, shares of stock linked to a registration statement, and those exempt under Rule 144 are available for trading simultaneously. R. 5. This differs from an initial public offering ("IPO"), where early investors typically have to sign a lock-up agreement and cannot sell their shares for six months, meaning that the only shares of stock available for public purchase immediately after an IPO are those that are linked to a registration statement. R. 5.

Two days after the meeting, Maxfield and Robbins decided to go ahead with a direct listing for Horizons. R. 7. Horizons hired Thatcher Lyon to serve as "financial advisor" for the direct listing and Whitmore Davis as their lawyers

for the direct listing. *Id.* Horizons, Thatcher Lyon and Whitmore Davis began the process of conducting due diligence. *Id.* The three entities also began to draft the Resale Registration Statement, prospectus, and the materials that were to be used at Investor Day, the direct listing alternative to a road show. *Id.* Thatcher Lyon reviewed Horizons' financial statement, their physical plant and business operations, and their contingent liabilities. R. 8.

Horizons filed its RRS on September 15, 2018. *Id.* At the time, Horizons had 132,581,994 shares outstanding, 83,526,656, or 63%, of which were under the RRS and 49,055,338 of which were exempt from registration under Rule 144. *Id.* The RRS and the prospectus both stated that Thatcher Lyon had not acted as an underwriter throughout the process. *Id.* Horizons held its Investor Day on November 10, 2018 via live stream; around 8,000 people tuned in to watch. *Id.* Before the RRS became effective, Thatcher Lyon advised the Designated Market Maker ("DMM") on how the Horizons listing should be priced based on factors that were unavailable to the DMM. *Id.* The RRS became effective on January 10, 2019; three days later, the DMM set the opening trading price at $67 after its consultation with Thatcher Lyon. R. 8, 9.

Procedural History

On July 16, 2019, the Petitioner filed a putative class action suit in the District Court for the District of Fordham against the Respondents, asserting that the Respondents committed securities fraud, violating Section 11 of the Securities Act of 1933. R. 9. Petitioner argued that Horizons was liable because they were an issuer, and that Thatcher Lyon was liable because they acted as

an underwriter. *Id.* In their complaint, the Petitioner alleged that the Resale Registration Statement that Horizons issued contained material misstatements and omissions, specifically related to the findings from the Oxbridge Study. *Id.* The Petitioner sought damages based on the losses suffered in the value of their shares. *Id.*

On July 28, 2019, both Horizons and Thatcher Lyon filed Rule 12(b)(6) motions, claiming that Petitioner had failed to state a claim for which relief can be granted. R. 10. In their motion, Respondents argued that Petitioner was unable to trace their shares to the RRS and that Thatcher Lyon was not an underwriter as defined by the Securities Act of 1933. *Id.* On November 30, 2019, the District Court rejected the Rule 12(b)(6) motions, holding that tracing is not required in a direct listing and that Thatcher Lyon did act as an underwriter pursuant to the definition in the Securities Act. *Id.* Respondents sought interlocutory appeal, asserting that the District Court erred, both in finding that tracing is not required in a direct listing and that Thatcher Lyon was an underwriter. *Id.* The Circuit Court certified the two issues pursuant to U.S.C. § 1292 (b). *Id.* The Circuit Court reversed both decisions of the District Court, holding that tracing is still required in a Section 11 case brought in relation to a direct listing and holding that Thatcher Lyon did not act as a statutory underwriter. R. 11, 18. Petitioner appealed to the Supreme Court of the United States; certiorari was granted January 11, 2021. R. 30.

Standard of Review

On appeal, the standard of review for an order dismissing a 12(b)(6) motion to dismiss is *de novo. Rombach v. Chang, 3*55 F.3d 164, 169 (2d Cir. 2004).

SUMMARY OF THE ARGUMENT

Congress created Section 11 of the Securities Act of 1933 to incentivize companies to refrain from making inaccurate or misleading statements or omissions in their registration statements, and to give investors an avenue for relief against companies should they make such statements or omissions. Traditionally, in order to bring a Section 11 claim, courts have held that the phrase "such security" from the statute means that investors must be able to directly "trace" their shares back to a RRS. However, this tracing requirement has only been applied to Section 11 claims brought after an IPO or in the aftermarket. Recently, a new alternative to an IPO became available: a direct listing. A direct listing differs from an IPO in that there is no "lock up" period. In an IPO, previously held shares of stock are typically "locked up" for a period of 6 months so that the only shares initially available for purchase on the market are those that are linked to a registration statement. In a direct listing, both registered shares and those that are exempt from registration under Rule 144 are available for purchase simultaneously. This means that while tracing is relatively easy in an IPO, it is nearly impossible in a direct listing, as registered and unregistered shares are sold alongside each other with virtually no way to distinguish between them. Tracing should not be required in a direct listing. First, it is within the plain meaning of the term "such security" that investors need not directly trace their shares to a registration statement but merely hold

the same type of security that can be linked to the registration statement. Second, the case law that requires tracing in IPOs and the aftermarket does not apply to direct listings, as direct listings are functionally different. Last, to require tracing in a Section 11 claim brought under a direct listing would frustrate the very purpose of the Securities Act, and would lead to an absurd result: companies would be able to get away with making misleading statements in their registration statements linked to a direct listing, as virtually no investor would ever be able to bring a Section 11 claim if tracing were required.

The mechanism by which Section 11 ensures accurate and full disclosures in public offerings is the imposition of liability on parties that play a particular role in an offering. Under Section 11, there are three different ways an investment bank can become a statutory underwriter: purchasing a security from an issuer with a view to distribution; offering or selling on behalf of an issuer in a distribution; and participating in a distribution, directly or indirectly. A formal underwriting arrangement is not necessary to a finding of underwriter liability under Section 11. Underwriter, as defined by precedent, is a person who is necessary to the distribution. Thatcher Lyon is a statutory underwriter n the Horizons direct listing because it played a necessary role in price-setting and Investor Day. Thatcher Lyon played a critical role in preparing the presentation materials and presented at Investor Day. Additionally, Investor Day was a more expansive and intense form of offer than in conventional offerings—-many more people attended, and the event lasted twice as long as a conventional road show. Thatcher Lyon's representatives, in

a meeting with Horizons on June 15, 2018, stated Investor Day would be used "in place of a road show", which suggests Thatcher Lyon and Folk viewed it as the functional equivalent of a road show. The role that Thatcher Lyon played in Investor Day was necessary and ultimately resulted in the sale of securities. Price-setting role was necessary to the distribution of Horizons securities under a broad reading of "participation." Thatcher Lyon's role in the offering easily meets the broad definition of "necessary" embraced by the Harden court. By definition, Thatcher Lyons' actions were necessary to the direct listing. Without Thatcher Lyon, Horizons shareholders would have had no market on which to list their shares, rendering the distribution impossible. Harden is particularly relevant precedent given the factual similarity to this case. Thatcher Lyon played a critical part in preparing the registration statement — the primary mechanism by which the SEC enforces its disclosure regime. Thatcher Lyon's price-setting role was necessary to the distribution of Horizons securities under a narrow reading of "participation." The only route to the direct listing was through appointing a price-setter, demonstrating the necessity of the role. Finding financial advisors are underwriters under Section 11 is consistent with Congressional intent and achieves the SEC policy goals of investor protection and capitalization. Congress sought to ensure that persons influencing investment decisions are liable.

ARGUMENT AND CITATION OF AUTHORITIES

1. Tracing is Not Required in a Section 11 Claim Brought Under a Direct Listing Because to Require Tracing Would Lead to Absurd

Results and Thwart the Legislative Intent Behind the Securities Act of 1933.

Congress passed the Securities Act of 1933 to protect investors against fraudulent, untrue, and misleading statements made by companies, and to ensure that investors have all the necessary information that they may need to make informed investment decisions. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976). The Act was passed in the aftermath of the stock market crash in 1929, which was precipitated by companies making insubstantial and deceitful promises to investors. *Securities Law History*, Legal Information Institute, https://www.law.cornell.edu/wex/securities_law_history. In passing the Act, Congress emphasized the importance of people having access to material information about companies before they take the leap to invest. *Id.* Under the Securities Act of 1933, certain securities that are publicly sold must be registered with the Securities and Exchange Commission through the filing of a registration statement. 15 U.S. Code § 77f. If any part of the registration statement for a particular security contains "an untrue statement of a material fact or omit[s] to state a material fact," Section 11 of the Act allows "any person acquiring such security" to sue those liable for the false or omitted statements. 15 U.S. Code § 77k.

Traditionally, courts have held that the phrase "such security" means that a plaintiff must be able to "trace" their shares of purchased stock back to a registration statement in order to bring a Section 11 claim in the first place. *Barnes v. Osofsky*, 373 F.2d 269, 271 (2d Cir. 1967). However, this tracing requirement has only been applied in cases involving IPOs and the aftermarket.

Pirani v. Slack Technologies, Inc., 445 F. Supp. 3d 367, 378 (N.D. Cal. 2020). Recently, the SEC has allowed the issuance of stock to occur in an entirely new way, through something called a direct listing. *Id.* Unlike in an IPO, where shares of stock subject to a registration statement go on the market for sale first, and unregistered shares are typically subject to a "lock-up" period, in a direct listing, both registered and unregistered shares go for sale on the market simultaneously. *Id.* at 379. It is virtually impossible for purchasers of shares of stock in a direct listing to trace their shares back to a registration statement, meaning that Section 11 is essentially unavailable to such investors if tracing is required. *Id.* at 380.

The tracing requirement does not apply to those who are making a Section 11 claim pursuant to purchased shares of stock from a direct listing. The plain meaning of "such security" is ambiguous enough that it allows for a broader reading which would permit claimants to sue under Section 11 even if they cannot trace their particular shares to a registration statement, a broader reading that existing case law does not preclude and one which the legislative intent behind the passing of the Securities Act of 1933 demands. Additionally, the case law that requires tracing in IPOs and the aftermarket does not apply to direct listings, as direct listings are fundamentally different. Furthermore, to require purchasers of shares of stock in a direct listing to trace their shares to a registration statement before they can make a Section 11 claim would entirely frustrate the purpose of the Securities Act of 1933 and would make it impossible for purchasers of stocks in a direct listing to ever make Section 11 claims in court.

A. The plain meaning of "such security" in Section 11 does not require purchasers to trace their shares in a direct listing.

In determining the meaning of a phrase in a particular statute, the first relevant analysis is to examine the plain meaning of the text; if the text is ambiguous, one must next look at the legislative intent behind the test to determine the correct understanding. *United States v. Pub. Utils. Comm'n of Cal.*, 345 U.S. 295, 315 (1953). The text that is in dispute in the current case comes from Section 11 of the Securities Act of 1933. 15 U.S.C. § 77k(a). Section 11 reads, in part, that "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*… may… sue." *Id.* (emphasis added). In *Barnes,* a case involving a Section 11 claim arising from shares bought in a Secondary Public Offering ("SPO"), Judge Friendly read the phrase "such security" as requiring the person bringing a Section 11 action to be able to "trace" their shares to a registration statement. 373 F.2d at 271. In effect, Friendly created the Section 11 tracing requirement which was later widely adopted. *Id.* However, Friendly acknowledged that there was ambiguity in the text and that it was possible to read the phrase "such security" in both a narrow and broad fashion. *Id.* While Friendly adopted the narrower reading, that the word "such" attached to the word "security" meant "acquiring a security issued pursuant to the registration statement," he expressly left open the possibility that a court might choose to adopt a broader reading in different circumstances. *Id.* Friendly admitted that

this broader interpretation, that the phrase meant "acquiring a security of the same nature as that issued pursuant to the registration statement," would "not be such a violent departure from the words that a court could not properly adopt it if there were good reason for doing so." *Id.*

Holding that the tracing requirement does not apply to Section 11 claims that occur under a direct listing fits within the plain meaning of the Securities Act of 1933. In *Barnes*, Judge Friendly chose to adopt the narrower reading of the phrase "such security" but explicitly held open the door to the possibility that the broader reading would be appropriate in some other fact pattern. 373 F.2d at 271 The Act itself does not elaborate further on what the term "such security" means, and as Friendly admits, it is an entirely reasonable interpretation to read the plain meaning as suggesting that "such security" was not added to require purchasers to forensically trace their shares but simply show that they had "acquir[ed] a security of the same nature as that issued pursuant to the registration statement." *Id.* As the SEC itself admitted, "tracing is not set forth in Section 11 and is a judicially-developed doctrine." "Order Setting Aside Action by Delegated Authority and Approving a Proposed Rule Change, as Modified by Amendment No. 2, to Amend Chapter One of the Listed Company Manual to Modify the Provisions Relating to Direct Listings," 85 FR 85807 (Dec. 22, 2020). A direct listing is the appropriate situation in which to adopt the broader reading of the phrase "such security;" failure to do so would obviate the abilities of purchasers to pursue Section 11 claims in direct listings.

B. The case law that requires tracing for purchasers of shares in IPOs and the aftermarket does not apply to direct listings.

Cases decided after *Barnes* have declined to wrestle further with the language of "such security," instead focusing on the phrase "any person" and whether Section 11 claims can be brought in the aftermarket or are only available to those who purchased shares during an IPO or SPO. *Lee v. Ernst & Young, LLP*, 294 F.3d 969, 976-77 (8th Cir. 2002) (considering whether "any person" includes those who purchased shares in the aftermarket); *Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076, 1080 (9th Cir. 1999) (determining what the limitation is on 'any person'); *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1107 (9th Cir. 2013) (deciding if purchasers in the aftermarket may bring a suit under Section 11). Courts have consistently held that individuals that purchase shares of a security in the aftermarket do fit under the definition of "any person" in Section 11 of the Act. *Lee,* 294 F.3d at 976-77 (holding that purchasers of securities in the aftermarket may bring Section 11 claims); *In re Century Aluminum Co. Sec. Litig.,* 729 F.3d at 1106 (holding that plaintiffs need not have bought shares of stock in an IPO to bring a Section 11 action). The limitation on "any person" is merely that they "must have purchased 'such security'" which "only means that the person must have purchased a security issued under that, rather than some other, registration statement." *Hertzberg* 191 F.3d at 1080. Although tracing is still required for those who purchase shares in the aftermarket, the only case that has looked at Section 11 claims arising under a direct listing is *Pirani*. *Lee,* 294 F.3d at 974 (holding that aftermarket purchasers must be able to "trace" their shares to bring a Section

11 claim); *Pirani*, 445 F. Supp. 3d 367 (examining if plaintiffs need to be able to "trace" their shares for a Section 11 claim related to a direct listing).

Virtually all of the case law that followed *Barnes* is not on point to the present claim, as those cases dealt with Section 11 claims in relation to IPOs and the aftermarket. Those cases do not apply here; tracing is easily achieved in an IPO where registered shares of stock are sold first and unregistered shares are held in a "lock up" period before they are allowed to enter the market. *Pirani*, 445 F. Supp. 3d at 379. In an IPO unregistered shares typically are not sold on the market for six months; therefore all shares bought during that initial IPO period are linked to the RRS, which by default makes tracing almost automatic. *Id.* However, it is virtually impossible to trace shares back to a RRS in a direct listing as shares issued pursuant to a RRS and those that are exempt under Rule 144 are released at the same time, and are held in a pool that does not distinguish between those pursuant to a RRS and those that are not. *Id.* at 380. Although it is difficult to trace shares in the aftermarket for the same reasons it is difficult to trace in a direct listing, companies in those situations still face the possibility of liability for misleading statements made in a RRS during their IPOs, where tracing is easily established. *Id.* at 379. Direct listings are not preceded by IPOs; rather they are meant to be a substitute or alternative to them. *Id.* Thus, the purchase of shares in a direct listing cannot be compared to the purchase of shares in the aftermarket; it would be a false equivalency.

C. Requiring tracing in a direct listing would frustrate the very purpose for which the Securities Act of 1933 was passed and would lead to absurd results.

When the words in a statute are ambiguous or unclear, "the judiciary may properly use the legislative history to reach a conclusion." *United States v. Pub. Utils. Comm'n of Cal.*, 345 U.S. 295, 315 (1953). The purpose of the Securities Act of 1933 is to prevent corporations and brokers taking advantage of people purchasing securities on the stock market. *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). Courts have consistently emphasized the fact that the legislative history of the Act shows that it was passed to protect investors "against fraud," and to provide them "with full disclosure of material information concerning public offerings of securities." *Ernst & Ernst*, 425 U.S. at 195. Furthermore, Congress passed the Act to "promote ethical standards of honesty and fair dealing," and "to deter negligence by providing a penalty for those who fail in their duties." *Ernst & Ernst*, 425 U.S. at 195; *Globus v. Law Rsch. Serv., Inc.*, 418 F.2d 1276, 1288 (2d Cir. 1969). More than just requiring disclosure, Congress wanted to ensure that companies would face real-world consequences if they failed to disclose material information, and that investors would have an avenue to remedy any harm that companies might have caused them by withholding material information that they would have needed to make informed investment decisions. *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S 175, 179 (2015). Indeed, guaranteeing compliance was a primary concern for Congress when they passed the Act; "Section 11… promotes compliance with these disclosure provisions by giving

purchasers a right of action against an issuer… for material misstatements or omissions in the registration statements." *Id.* Congress' explicit intent to hold companies accountable can be seen by the fact that Section 11 of the Act imposes "a stringent standard of liability on the parties who play a direct role in a registered offering… liability against the issuer of a security is virtually absolute." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381–82 (1983). The Act does not require plaintiffs bringing an action under Section 11 to plead such things as *scienter*, making it far easier for plaintiffs to hold corporations accountable under Section 11 than it would be to hold them accountable under a 10b-5 claim, for example. *Id.* at 382. Congress intended the Act to curb corporations from engaging in fraudulent behavior and to incentivize them not to mislead investors. *Barnes*, 373 F.2d at 271. Section 11's "stringent penalties" were put in place to "insure full and accurate disclosure through registration." *Id.*

When analyzing the meaning of a statute, absurd meanings and results should be avoided at all costs. *United States v. Am. Trucking Ass'n*, 310 U.S. 534, 543 (1940). If a statute has a plain meaning that "would lead to 'absurd or futile results'" that "interpretation need not be adopted." *Pirani*, 445 F. Supp. 3d at 380. Moreover, even "when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole,'" courts have followed the purpose for which the statute was passed, "rather than the literal words." *Am. Trucking Ass'n,* 310 U.S. at 543. The Supreme Court itself has recognized that "Congress intended… securities legislation [to be construed]… not technically and

restrictively, but flexibly to effectuate its remedial purposes." *SEC v. Cap. Gains Rsch. Bureau, Inc.*, 375 U.S. 180, 195 (1963). The Northern District of California recognized that there would be an absurd outcome that would contradict the purpose for which Section 11 of the Securities Act was enacted if tracing were to be required in a case that flows from a direct listing. *Pirani*, 445 F. Supp. 3d at 380. In the only case that has dealt with a Section 11 claim following a direct listing, the court referred to Judge Friendly's opinion where he opined that there might be a situation where a broader reading of the phrase 'such security' is warranted. *Id.* The court held that "in this unique circumstance- a direct listing in which shares registered under the Securities Act becomes available on the first day simultaneously with shares exempted from registration," the broader interpretation of 'such security' was warranted. The court further held that "applying the narrower reading of 'such security' [for a direct listing] would… completely obviate the remedial penalties of Section 11." *Id.* at 381. The court concluded that the only way to achieve the goals of the Securities Act of 1933 in the context of a Section 11 claim connected to a direct listing was to suspend the tracing requirement; otherwise, corporations would essentially be able to avoid liability under Section 11 for disclosures made in their registration statements by always engaging in direct listings, rather than IPOs. *Id.* Requiring tracing would patently frustrate the very reason that Congress passed the Act in the first place; to hold companies liable and to ensure their compliance with the proper disclosure requirements. *Id.*

Requiring stockholders who purchased shares in a direct listing to trace those shares to a RRS would frustrate the legislative purpose of the Securities Act of 1933 and would lead to an absurd result; namely, that virtually no shareholder would ever be able to bring a Section 11 claim in relation to a direct listing. Congress passed the Securities Act of 1933 and implemented Section 11 to hold corporations accountable for false and misleading statements or omissions in their registration statements; in essence they wanted to protect investors and to incentivize corporations to be honest. *Barnes,* 373 F.2d at 272. Section 11 holds no weight or any threat of enforcement if tracing is required in a direct listing; to require tracing in a direct listing would allow companies to skirt liability all together, while still allowing them to get the benefits of having their stock publicly traded. Tracing is virtually impossible in a direct listing. *Pirani*, 445 F. Supp. 3d at 380. If tracing were required to bring a Section 11 claim in a direct listing, investors would virtually never be able to do so. Companies would be able to get away with making material omissions or misstatements in their registration statements as they would not face any litigation for doing so. This would be an absurd result. Corporations should not be allowed to skirt responsibility purely because the way that a direct listing is set up makes it almost impossible to trace shares of stock to a RRS. The difficulty of tracing shares in a direct listing should not be a bar to bringing Section 11 claims; if it were, companies might be incentivized to choose to go public through direct listings rather than IPOs, in order to avoid having any Section 11 claims brought against them. Section 11 would be virtually meaningless when it comes to direct listings; investors

would not be protected and corporations would face no adverse consequences for taking advantage of those investors. The entire purpose behind the Securities Act of 1933 would be thwarted.

Accordingly, this Court should reverse the Opinion and Judgment below and hold that the Petitioner has standing to bring a Section 11 claim without having to trace their purchased shares of stock to a registration statement.

2. Thatcher Lyon must be held liable as an underwriter.

The 1933 Securities Act was passed to protect investors and promote investment in public markets. *Regulation of Securities*, S. Rep No. 47-73 (1933) ("The purpose of this bill is to protect the investing public and honest business. The basic policy is that of informing the investor of the facts concerning securities to be offered for sale in interstate and foreign commerce and providing protection against fraud and misrepresentation.") Recognizing protecting investors and public markets required information flowing into the market be full and accurate, Congress incentivized responsible disclosures by those seeking to enter the public markets by explicitly imposing strict liability on parties playing a particular role in the offering.

At issue in this case is Section 2(a)(11) of the Securities Act of 1933, which defines an underwriter as “[A]ny 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.” 15 U.S.C. § 77b(a)(11). Therefore, the plain text of Section 2(a)(11) creates three different distribution actions that

result in statutory underwriter liability: purchasing from an issuer, offering or selling on behalf of an issuer, and participating in a distribution, directly or indirectly. § 77b(a)(11).

The first kind of statutory underwriter, the "issue-purchaser", engages in “firm commitment” offerings, where an underwriting bank purchases a number of shares at a set price, resells the shares at a higher public offering price, and keeps the difference in price as the underwriter fee. *National Association of Securities Dealers, Inc., Exchange Act Release No. 17,371, 1980 WL 22136 (Dec. 12, 1980).* Because Thatcher Lyon did not purchase any securities, this definition of statutory underwriter does not apply, and the following discussion will focus on whether Thatcher Lyon offered on behalf of Horizons or participated in a distribution

The second kind of statutory underwriter offers securities on behalf of the issuer. Significantly, the statute does not require that parties have a formal connection to an issuer to offer on behalf of an issuer. Instead, parties become underwriters under the statute when they engage "in steps necessary to the distribution." *SEC v. Chinese Consol. Benevolent Soc’y*, 120 F.2d 738, 741 (2d Cir. 1941). Thus, whether a party acted as an underwriter turns on the relationship between the relevant party and the offering. In *Chinese Consol.*, the Second Circuit held that an association that promoted the sale of Chinese government bonds was an underwriter because it marketed the bonds to potential customers and assisted in distributing the bonds. F.2d 738. The association received no compensation, did not have a contract with the issuer, and did not purchase any bonds. *Id.* Because these marketing efforts

ultimately resulted in a distribution, the court held they were a necessary part of the distribution and therefore the association's efforts constituted an "offer" under the statute. *Id.*

The final kind of statutory underwriter participates, indirectly or directly, the distribution, offer, or sale of securities. A survey of decisions interpreting this part of the statute reveals a multitude of approaches. In the “public expertise” approach, courts hold that if the investing public would rely on the party's expertise in evaluating the security’s registration statement, the expert party is an underwriter. *McFarland v. Memorex Corp.*, 493 F. Supp. 631 (N.D. Cal. 1980), modified on other grounds, 581 F. Supp 878 (N.D. Cal. 1984). In *McFarland*, the court considered whether institutional investors exercising registration rights in a securities offering constituted "participation." *Id* at 644. In holding that investors were not underwriters, the court emphasized the fact that the third party had no control over the registration process and therefore the public would not rely on their expertise in making decisions about the offering, and their role did not rise to the level of participation. Importantly, the court reasoned that "underwriters are subjected to liability because they hold themselves out as professionals who are able to evaluate the financial condition of the issuer." *Id* at 646; *In re Activision Sec. Lit.*, 621 F. Supp. 415, 424 (N.D. Cal. 1985) ("[U]nderwriters who participate in the preparation of the registration statement are liable [under § 11].").

Some courts apply *Chinese Consol.*, approach to the interpretation of “participation”, and hold that if the actor's role was "necessary to the distribution,” they participated in the distribution. *SEC v. Kern,* 425 F.3d at

152-53 (holding a corporation who "engaged in steps necessary to the distribution" to be a statutory underwriter); *SEC v. N. Am. Research & Dev. Corp.*, 424 F.2d 63, 71 (2d Cir. 1970) (observing that "joining in the common effort" to sell unregistered shares subjects one to "the powers of the SEC and the federal courts").

Some circuits adopt expansive interpretation of "participates", that asks whether the act at issue was an important part of the distribution process. *Harden v. Raffensperger, Hughes & Co,* 65 F.3d 1392 (7th Cir 1995). In *Harden*, the Seventh Circuit considered whether a qualified independent underwriter was a statutory underwriter. 65 F.3d 1392. The issuer, a financial services company, issued debt securities and was required by industry rules to retain a "qualified independent underwriter" to perform due diligence on the registration statement and recommend a minimum price for the offering. *Id* at 1394. In rejecting the defendant's argument that it was not an underwriter because it did not participate directly in the offering, the court held that the independent underwriter's acts were a necessary predicate to the distribution and therefore constituted participation. *Id* at 1400. The Ninth Circuit takes a similarly broad approach to the Seventh Circuit. *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072 (9th Cir. 2010) (interpreting "underwriter" to include "[a]ny intermediary between the issuer and the investor that is an essential cog in the distribution process").

The Second Circuit has taken a very narrow view of "participation," which excludes activities that are not part of the distribution itself. In *In re Lehman Bros. Mortg.-Backed Sec. Litig.*, 650 F.3d 167 (2d Cir. 2011), the court

declined to address whether structuring mortgage-backed securities were necessary to the distribution, insisting that the proper question was whether the party itself engaged in a distribution. *Id*. The court held that structuring mortgage-backed securities was not "distribution-related" and was therefore not "participation." The court attempted to distinguish the case from *Harden* by reasoning that the credit agencies merely facilitated the participation of others in the offering, and actions so far removed from the actual distribution did not fall within the statutory definition of participation. *Id*. In so holding, the court emphasized that the credit agencies' activity was not necessary to the distribution, because they had little control and did not play an active role in the offering after their passive evaluation of security risks was complete. *Id*.

3. Thatcher Lyon Is a Statutory Underwriter In the Horizons Direct Listing Because It Played a Necessary Role In Price-Setting and Investor Day.

Thatcher Lyon played a critical role in preparing the presentation materials and presented at Investor Day. R. 4. Additionally, Investor Day was a more expansive and intense form of offer than in conventional offerings—-many more people attended, and the event lasted twice as long as a conventional road show. R.8. Thatcher Lyon's representatives, in a meeting with Horizons on June 15, 2018, stated Investor Day would be used "in place of a road show", which suggests Thatcher Lyon and Folk viewed it as the functional equivalent of a road show. R. 8. The role that Thatcher Lyon played in preparing the statement and prospectus, the influence and control over Investor Day materials, as well as the magnitude of Investor Day compared to a traditional

road show, easily meet the definition of “offers” under *Chinese Consol.,* because a court could find that Thatcher Lyon’s involvement before Investor Day ultimately led to sales of Horizons’ stock.

A. Thatcher Lyon's Price-Setting Role Was Necessary to The Distribution of Horizons Securities Under a Broad Reading of "Participation"

Thatcher Lyon's role in the offering easily meets the broad definition of "necessary" embraced by the *Harden* court. By definition, Thatcher Lyons' actions were necessary to the direct listing. To protect investors in a novel public offering, the New York Stock Exchange (“NYSE”), the public market on which the Horizons securities would be listed, changed their rules to require companies using a direct listing to appoint a financial advisor that works with a Designated Market Maker to set the price. R. 7. Without Thatcher Lyon, Horizons shareholders would have had no market on which to list their shares, rendering the distribution impossible. *Harden* is particularly relevant precedent given the factual similarity to this case. In both cases, the issuer was required by industry rules to retain an "independent" third party to act as a disinterested price-setter. *Id* at 1400. In both cases, the presence of a traditional underwriter in the transaction did not preclude participation by third party statutory underwriters in the distribution. *Id.* Additionally, in both cases, the independent third party was responsible for conducting due diligence on the registration statement. Like the "qualified independent underwriter" in *Harden*, Thatcher Lyon played a critical part in preparing the

registration statement — the primary mechanism by which the SEC enforces its disclosure regime and protects investors by holding drafters liable. In both cases, the role played in price-setting amounts to “participation.”

B. Finding Financial Advisors Are Underwriters Under Section 11 Is Consistent with Congressional Intent and Achieves the SEC Policy Goals of Investor Protection and Capitalization

In the House report accompanying the Securities Act, Congress explicitly stated its intent to impose Section 11 liability on those who are "responsible for" the disclosure in registration statements. Indeed, Congress sought to ensure that persons "who sponsor the investment of other people's money [are] held up to the high standards of trusteeship. [The] essential characteristic [underlying § 11 liability] consists of a requirement that all those responsible for statements upon the face of which the public is solicited to invest its money shall be held to standards like those imposed by law upon a fiduciary.") (emphasis added).” H.R. Rep No 85-73 73d Cong, (1933). Because Thatcher Lyon was explicitly retained to prepare the registration statement in the Horizons Direct Listing, liability is justified given Congress's clear statement of intent.

Accordingly, this Court should reverse the Opinion and Judgment below and hold that Thatcher Lyon is a statutory underwriter for purposes of Section 11 liability.

CONCLUSION

For all of the foregoing reasons, Petitioner State of Fordham Firemen's Pension Fund requests that this Court reverse the Circuit Court of Appeals' Opinion and Order below.