No. 23-98

In the

Supreme Court of the United States

GREGORY LEMELSON,
A/K/A FATHER EMMANUEL LEMELSON, ET AL.,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I. THE QUESTIONS PRESENTED WERE RAISED BELOW AND WARRANT REVIEW

In opposing certiorari, SEC makes little effort to explain how the government's punishment of Lemelson for speaking out against a publicly traded corporation, or the court injunction restraining him from similar speech in the future, could possibly survive First Amendment scrutiny on the merits. Instead, SEC urges the Court to forgo the opportunity to address important First Amendment and securities law issues of national importance because Lemelson allegedly did not adequately preserve his arguments in the courts below and there is no identifiable circuit split on the precise questions presented.

The Court should rebuff SEC's attempt to duck this Court's scrutiny of the agency's profound violation of Lemelson's free speech rights and of its punishment of his nonfraudulent speech as purported securities fraud. Lemelson indisputably argued throughout the lower court proceedings that SEC's prosecution violated his free speech rights under the First Amendment, and those courts had ample opportunity to vindicate his rights but declined to do so at SEC's urging. He moved to dismiss the complaint on First Amendment grounds; he pled a First Amendment defense in his answer to the complaint; he moved for summary judgment on First Amendment grounds; he argued at trial that his speech was protected by the First Amendment; he moved for post-trial relief on First Amendment grounds; and he led his appellate briefing with First Amendment objections to the district court's judgment.

SEC does not dispute any of this. Instead, it faults Lemelson for framing his First Amendment objections slightly differently in his petition for certiorari than he did in the courts below, where he understandably sought to maximize his chances of success under existing First Circuit precedent.[1] But this Court has repeatedly held that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

A good example of the Court's application of this commonsense approach is *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995). There, the petitioner Lebron argued in the lower courts that Amtrak was subject to First Amendment constraints because, although it was a private entity, it was closely connected with governmental entities. In those courts, Lebron expressly disavowed an alternative argument that Amtrak was itself a federal entity subject to the First Amendment. It was not until after this Court granted certiorari that Lebron first explicitly presented—in his brief on the merits—the alternative argument he had expressly disavowed in the lower courts. Yet this Court not only considered the argument but ultimately agreed with Lebron.

Writing for the majority (and citing *Yee*), Justice Scalia explained why Lebron's alternative First

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[1] Thus, for example, Lemelson argued in the courts below that SEC's small handful of cherry-picked sentences and sentence fragments were constitutionally protected statements of opinion, particularly when viewed in the proper context of being only a minute fraction of Lemelson's otherwise unchallenged 56 pages of opinionated written reports and oral interviews criticizing Ligand.

Amendment argument was properly before the Court on certiorari:

> Lebron's contention that Amtrak is part of the Government is in our view not a new claim within the meaning of that [issue preservation] rule, but a new argument to support what has been his consistent claim: that Amtrak did not accord him the rights it was obliged to provide by the First Amendment.

Id. at 379 (citing *Yee*); *accord Yee*, 503 U.S. at 534–35 (dictum) (where petitioners argued in the state courts that a local rent control ordinance constituted a physical taking in violation of the Fifth Amendment, the question of whether it was also a regulatory taking was "properly before us"); *Crawford v. United States*, 212 U.S. 183, 193–94 (1909) (where defendant sought at trial to disqualify a juror only on ground that he was a salaried government employee, Court allowed him to present on certiorari an alternative basis for disqualification). *See generally* Stephen M. Shapiro, Kenneth S. Geller, Timothy S. Bishop, Edward A. Hartnett, & Dan Himmelfarb, *Supreme Court Practice* § 6.26(b) (11th ed. 2019).

Here, as in *Lebron*, Lemelson pressed his First Amendment objections early, often, and relentlessly throughout the lower court proceedings. The first Question Presented by the petition is therefore properly before the Court and worthy of review.

The same is true for Lemelson's consistent position in the lower courts that his speech was not fraudulent and thus did not violate § 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and SEC Rule 10b-5 thereunder. He repeatedly

argued below, among other things, that his speech was truthful rather than untruthful, that the isolated speech snippets in question were not material, and that he did not act with scienter—*i.e.*, with "a mental state embracing intent to deceive, manipulate, or defraud," *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). That he has now further honed the precise framing of these arguments—particularly in light of the jury verdict finding no fraudulent scheme, act, practice, or course of business and not even a negligent violation of the Investment Advisers Act—is neither surprising nor a reason to deny certiorari.

SEC also asserts the lack of a circuit split on the precise questions presented in the petition and faults Lemelson for allegedly citing no precedent squarely on point in his favor. But the petition cited plenty of precedent—mostly opinions from this Court—to support Lemelson's central contentions that: (i) even untrue speech is constitutionally protected; (ii) when a lawsuit seeks relief that abridges a defendant's free speech rights, the plaintiff must prove culpable intent by clear and convincing evidence; and (iii) reviewing courts in such cases must carefully and independently scrutinize any factual determinations that undergird a judgment in the plaintiff's favor. Pet. 17–20. It also cited more than three decades' worth of this Court's consistent holdings that SEC may neither prohibit nor criminalize through Rule 10b-5 what is not already prohibited by the rule's enabling statute, Exchange Act § 10(b). *Id.* at 25–26.

As for the asserted lack of precedent directly supporting Lemelson's arguments in the context of a quasi-criminal SEC enforcement prosecution like this one, SEC cites no directly relevant precedent in support of its position either. And the reason for the

dearth of directly controlling precedent is simple: SEC's particular mode of abridging Lemelson's free speech rights in this case was *unprecedented*. SEC had never before prosecuted an activist short seller for issuing public reports criticizing a publicly traded corporation in the absence of, among other things, intentionally fraudulent deception—such as willful concealment or misrepresentation of the speaker's identity or of the speaker's personal financial interest in the subject matter. *See, e.g.*, Bill Alpert, *Hedge Fund Alleges SEC Bias in Short-Selling Case*, *Barron's*, Feb. 19, 2020 ("it's unusual for the SEC to go after a money manager who publicly discussed why they are short a stock," and in the rare cases against short sellers, "the agency charged traders with spreading negative rumors while hiding their identities and then quickly exiting their short positions, according to the case records"), *available at* www.barrons.com/articles/hedge-fund-manager-alleges-sec-bias-in-short-selling-case-51582111800 (last visited Nov. 15, 2023). Indeed, as confirmed by a recent media report, rather than fly-specking negative reports issued by fully transparent short sellers and scouring them for potential isolated errors, SEC often recognizes that such reports play a critical whistleblower role in keeping public companies honest and exposing potential corporate malfeasance and fraud. Austin Weinstein, *Carson Block, Nate Anderson Become SEC Tipsters for Cash Payouts*, *Bloomberg*, Nov. 15, 2023 ("a good short report can cut months or years off of an investigation at a time when the agency has been characterized as understaffed and overworked"), *available at* https://www.bloomberg.com/news/articles/2023-11-

15/nate-anderson-carson-block-become-sec-tipsters-for-cash-payouts (last visited Nov. 15, 2023).[2]

The unprecedented nature of SEC's assault on free speech rights here is hardly a reason to deny review; SEC's specific mode of free-speech abridgement was uniquely direct and brazen here, but the governing constitutional and legal principles are as old and familiar as time itself. Nor should the Court allow SEC to get away with abridging free speech rights until a circuit split develops on the specific fact pattern presented here. History confirms that unless and until restrained by court order, SEC's wont is to persist in free speech deprivations for as long as the agency can get away with them. *Cf. SEC v. Novinger*, 40 F.4th 297, 308 (5th Cir. 2022) (Jones, J., concurring) (noting, with respect to SEC's inflexible and longstanding policy of demanding gag orders as a condition of every settlement, "[a] more effective prior restraint is hard to imagine"); *SEC v. Moraes*, No. 22-cv-8343, 2022 WL 15774011, at *5 (S.D.N.Y. Oct. 28, 2022) (reluctantly approving settlement containing SEC's required gag order because defendant did not object, while criticizing "SEC's continued and misguided practice of restraining speech"). And given that most SEC enforcement cases settle long before trial or appeal, a better opportunity to address the important First Amendment and securities law questions presented here—especially in a case featuring a particularized jury verdict after trial—is not likely to come along any time soon.

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[2] During the relevant period Lemelson filed several whistleblower tips with SEC about Ligand in addition to issuing his public reports about the company.

II. THIS CASE PRESENTS AN IDEAL VEHICLE BECAUSE THE JURY FOUND LEMELSON'S SPEECH NONFRAUDULENT

To the extent SEC briefly alludes to the merits of the petition, its opposition evinces an inexplicable state of denial about the jury's verdict rejecting all its fraud allegations against Lemelson. Notwithstanding the clarity of that verdict, SEC insists that "the jury *did* find fraud." Opp. 8 (emphasis added). SEC's apparent logic is entirely circular and tautological. SEC seems to think that because SEC and others sometimes colloquially refer to SEC Rule 10b-5 as an "anti-fraud" rule, anything covered by a literal reading of the rule must, by definition, be fraudulent. But simply calling something fraud does not make it so, no matter how earnestly SEC might wish it nor how often SEC might repeat it. *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 617 (2003) ("Simply labeling an action one for 'fraud,' of course, will not carry the day.").[3]

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[3] In two separate media releases issued after the jury verdict (which remain on the agency's official website to this day over Lemelson's objection), SEC repeated its false claim that the jury found Lemelson liable for securities fraud. SEC Press Rel. No. 2021-224, "SEC Wins Jury Trial: Hedge Fund Adviser Found Liable for Securities Fraud" (Nov. 5, 2021), *available at* www.sec.gov/news/press-release/2021-224 (last visited Nov. 15, 2023); SEC Litigation Rel. No. 25353, "SEC Obtains Final Judgment Against Hedge Fund Adviser Who Jury Found Liable for Securities Fraud" (March 31, 2022), *available at* www.sec.gov/litigation/litreleases/lr-25353 (last visited Nov. 15, 2023). The initial iteration of SEC's November 2021 release went even further, falsely claiming that the jury had found Lemelson liable for a "manipulative short scheme." *See* Bill Alpert, *The SEC Wins Mixed Verdict Against a Short Seller Who Wouldn't Settle, Barron's*, Nov. 11, 2021 (noting the disconnect between

On its face, Rule 10b-5(b) purports to prohibit (and criminalize) "untrue" speech whether it is fraudulent or not. *See* 17 C.F.R. § 240.10b-5. That is something the First Amendment forbids, and something that exceeds the scope of the rule's enabling statute. Exchange Act § 10(b) authorizes SEC to prohibit (and criminalize) through rulemaking only "manipulative or deceptive device[s] or contrivance[s]." 15 U.S.C. § 78j(b).

Here, the jury specifically found that SEC did *not* prove Lemelson "intentionally or recklessly engage[d] in a scheme to defraud, or *any* act, practice, or course of business which operates or would operate as a fraud or deceit." Pet. App. 55a (emphasis added). It further found that Lemelson did not commit even *negligent* fraud under the Investment Advisers Act. *Id*. at 56a. And it did so after the district court, following prevailing law in the First Circuit and elsewhere, had already excused SEC from having to allege or prove several core elements of common law fraud, including reliance, causation, or that anyone was deceived or harmed by the speech at issue. The absence of this proof, coupled with the jury's explicit finding of no fraudulent scheme, act, practice, or course of business, renders implausible SEC's insistence that Lemelson's speech was fraudulent—and thus unprotected by the First Amendment—or that it constituted a "manipulative or deceptive device or contrivance" punishable under Exchange Act § 10(b) or SEC Rule 10b-5.

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reality and SEC's initial press release headline), *available at* https://www.barrons.com/articles/sec-trial-shortseller-51636584385 (last visited Nov. 17, 2023).

Despite SEC's fastidious cherry-picking and hair-splitting of Lemelson's prolific commentary about Ligand, the jury ultimately found only three purportedly untrue speech snippets "and nothing more"—the very kind of speech this Court has held protected under the First Amendment, even when intentional. *Cf. United States v. Alvarez*, 567 U.S. 709, 719 (2012).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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