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

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

MEGAN BARBERO
General Counsel
MICHAEL A. CONLEY
Solicitor
JOHN W. AVERY
Deputy Solicitor
PAUL G. ÁLVAREZ
Senior Appellate Counsel
EZEKIEL L. HILL
Appellate Counsel
Securities and Exchange Commission
Washington, D.C. 20549

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the First Amendment protects untrue statements and omissions of material fact made with scienter in connection with the purchase or sale of a security.

2. Whether untrue statements and omissions of material fact made with scienter constitute a "manipulative or deceptive device or contrivance" under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-31a) is reported at 57 F.4th 17. The opinion and order of the district court (Pet. App. 32a-52a) is reported at 596 F. Supp. 3d 227.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 2023. A petition for rehearing was denied on March 6, 2023 (Pet. App. 1a-2a). On May 19, 2023, Justice Jackson extended the time within which to file a petition for a writ of certiorari to and including July 31,

2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Securities and Exchange Commission (SEC or Commission) brought this civil enforcement action, alleging that petitioner Gregory Lemelson had engaged in securities fraud. Pet. App. 4a. Following a trial, the jury found that petitioner had made three untrue statements of material fact in connection with the purchase or sale of a security, in violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5(b), 17 C.F.R. 240.10b-5(b). Pet. App. 4a. The district court ordered petitioner to pay a civil penalty and enjoined him and his investment firm from violating Section 10(b) and Rule 10b-5 for five years. *Ibid.* The court of appeals affirmed. *Id.* at 5a.

1. Petitioner Gregory Lemelson, a self-described "activist investor" (Pet. 5), worked as an investment adviser and fund manager at petitioner Lemelson Capital Management, LLC. Pet. App. 5a.[1] Among other things, petitioner managed investments for a hedge fund called the Amvona Fund. *Ibid.* In that role, petitioner published online reports and gave interviews about companies in which Amvona had invested. *Ibid.*

In May 2014, Amvona began to build a short position in the stock of Ligand Pharmaceuticals, Inc., a small biotechnology company that would "acquire the economic rights to new drug candidates, license those candidates to other companies for development, and partner with other entities to manufacture and market approved drugs." Pet. App. 5a-6a. "To take a short position in a

[1] Further references to "petitioner" in this brief refer to petitioner Gregory Lemelson.

stock means to sell borrowed stock at the current price in the hope that the stock price will decline and the borrower will be able to return the borrowed stock by purchasing it at the later, lower price." *Id.* at 5a n.1 (citation omitted).

In 2014, Ligand's principal product was Promacta, a drug approved to treat several disorders, including side effects associated with hepatitis C treatment. Pet. App. 6a. Ligand had also recently entered a licensing agreement with Viking Therapeutics, Inc., under which Viking, a biopharmaceutical development company, would develop certain drug candidates and Ligand would acquire royalty rights and equity in Viking. *Ibid.* According to Viking's Form S-1,[2] Viking "intend[ed] to rely on third parties to conduct [its] preclinical studies and clinical trials." *Id.* at 6a-7a (brackets in original).

Consistent with Amvona's short position in Ligand, between June and August 2014, petitioner published reports and gave interviews in which "he criticized Ligand's finances, prospects, and management and argued that Ligand stock was vastly overvalued." Pet. App. 7a. Among other things, petitioner stated that Ligand "'face[d] it[s] biggest existential threat' from 'what is likely to be a momentous impairment of its largest royalty generating asset, Promacta,' due largely to a competitive threat from a new drug called Sovaldi." *Ibid.* (brackets in original).

Three of the statements that petitioner made during that period—one relating to Promacta, and two relating to Viking—were untrue. Pet. App. 7a-11a.

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[2] "A Form S-1, or a 'Registration Statement Under the Securities Act of 1933,' is filed by a company making a public stock offering." Pet. App. 6a n.2 (citation omitted).

Petitioner's first false statement occurred in a radio interview he gave on June 19, 2014. Pet. App. 7a. The day before the interview, petitioner discussed Promacta on a phone call with Bruce Voss, Ligand's investor relations representative. *Ibid.* On that call, petitioner told Voss he believed that Promacta's sales were going away, then asked Voss "don't you agree?" *Id.* at 17a. Voss later testified that he did not respond to petitioner's rhetorical question other than to predict that "Promacta had a 'bright future.'" *Ibid.* During the June 19 interview, however, petitioner falsely claimed that Voss had affirmatively said that Promacta was "going away": "I mean I had discussions with [Ligand] management just yesterday—excuse me, [Ligand's investor relations] firm[.] [A]nd they basically agreed. *And they said, look, we understand Promacta is going away.*" *Id.* at 7a-8a.

The second and third misstatements occurred in a July 2, 2014, report that petitioner published about Ligand's recently announced licensing deal with Viking. Pet. App. 8a. The report asserted that Viking was a "single-purpose vehicle" and that Ligand appears to be using Viking as a "shell company" to "generate paper profits to stuff [Ligand's] own balance sheet." *Id.* at 10a (brackets in original). To support that assertion, the report stated that Viking "has not yet even consulted with [its auditor] on any material issues," so that "*[t]he financial statements provided on the [Viking S-1] accordingly are unaudited.*" *Id.* at 9a (second set of brackets in original). But Viking's S-1—which petitioner admitted at trial he had read and "carefully researched," and which had been filed two days before this report—stated that Viking's financial statements *were* audited. *Id.* at 14a, 25a.

To further support his claims that the Ligand-Viking deal was a sham and that Viking was a worthless shell company, petitioner's report also stated that "*Viking does not intend to conduct any preclinical studies or trials*." Pet. App. 8a-9a. Viking's S-1, however, repeatedly stated that such studies and trials would be conducted, and that Viking would "rely on third parties to conduct [its] preclinical studies and clinical trials." *Id.* at 6a-7a, 14a.

After making these false statements, petitioner published additional reports criticizing Viking and Promacta, and he continued to build Amvona's short position in Ligand. Pet. App. 10a. Ligand's stock price declined, and Amvona's short position was covered for a profit. *Ibid.*

2. The SEC brought this civil enforcement action against petitioner in federal district court. Pet. App. 10a. The Commission alleged that petitioner's false statements concerning Promacta and Viking constituted fraud in connection with the purchase or sale of securities, in violation of Section 10(b) and Rule 10b-5. *Id.* at 10a, 53a.

Following a trial, the jury found that petitioner's false statement about Promacta "going away" and his two false statements about Viking violated Section 10(b) and Rule 10b-5(b). Pet. App. 4a, 8a, 53a.[3] The district court ordered petitioner to pay a civil penalty and enjoined him and Lemelson Capital Management from

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[3] The SEC also alleged that petitioner had violated subsections (a) and (c) of Rule 10b-5, as well as Section 206(4) of the Investment Advisers Act of 1940, 15 U.S.C. 80b-6(4), and Rule 206(4)-8 of the Advisors Act, 17 C.F.R. 275.206(4)-8. Pet. App. 10a & n.3. The jury found petitioner not liable on those counts. *Id.* at 11a n.4, 53a-54a.

violating Section 10(b) and Rule 10b-5 for five years. *Id.* at 11a.

3. The court of appeals affirmed. Pet. App. 3a-31a. As relevant here, petitioner argued that his statements about Viking were statements of opinion, rather than statements of fact, and therefore were protected by the First Amendment. *Id.* at 13a-16a. The court rejected that argument, finding that "[a] reasonable jury could have concluded that the Viking Statements 'expresse[d] certainty about . . . things,' and thus were actionable statements of fact," not protected opinions. *Id.* at 14a (quoting *Omnicare, Inc.* v. *Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 183 (2015))).[4]

4. Petitioner sought en banc review, again contending that the statements about Viking for which he had been held liable were statements of opinion and thus protected by the First Amendment. C.A. Pet. 9-12. The court of appeals denied rehearing en banc. Pet. App. 1a-2a.

ARGUMENT

Petitioner no longer argues, as he did in the court of appeals, that the statements for which he was held liable were properly understood as statements of opinion. Instead, he now contends (Pet. 16-20) that false statements of material fact made in connection with the purchase or sale of securities are protected by "[b]reathing [s]pace" under the First Amendment. Pet. 17 (emphasis omitted). He further argues (Pet. 21-27) that

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[4] Petitioner also argued that the SEC had "failed to introduce sufficient evidence to support the jury's determination that the statements were (1) of fact rather than opinion, (2) material, and (3) made with scienter." Pet. App. 4a. The court of appeals rejected that argument. *Id.* at 5a. Petitioner does not assert a sufficiency-of-the-evidence challenge here.

Section 10(b) of the Exchange Act and Rule 10b-5 "do not reach non-fraudulent false statements." Pet. 24 (capitalization and emphasis omitted). Those contentions were neither presented to nor passed on by the court of appeals, and they lack merit. In addition, petitioner does not identify any conflict between the decision below and any decision of this Court or another court of appeals. The petition for a writ of certiorari should be denied.

1. Petitioner's current arguments were neither presented to nor passed on by the court of appeals.

In the court of appeals, the only First Amendment argument petitioner advanced was that "the Viking Comments were opinions protected by the First Amendment," not statements of fact. Pet. C.A. Br. 29 (capitalization altered; emphasis omitted); see *id.* at 29-32. That, accordingly, is the only First Amendment argument the court of appeals addressed. See Pet. App. 13a-16a. Petitioner now asserts a different First Amendment argument: that his statements about both Viking and Promacta were protected by the First Amendment even if they are viewed as untrue statements of fact. The court of appeals had no occasion to address that argument, and petitioner identifies no reason for this Court to do so in the first instance. See *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 110 (2001) (per curiam) (observing that this Court "is a court of final review and not first view") (citation omitted); *Glover* v. *United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course we do not decide questions neither raised nor resolved below.").

In the court of appeals, petitioner also failed to raise the second argument that he now includes in his certiorari petition—that false statements of material fact,

made in connection with the purchase or sale of securities, are not actionable under the securities laws absent a finding that they were part of a fraudulent scheme or course of business, Pet. 26-28. To the contrary, in the court of appeals petitioner affirmatively recognized that establishing a Rule 10b-5 violation in a civil enforcement action requires only a false statement "that is: (1) one of fact (rather than opinion), (2) material, and (3) made with scienter." Pet. C.A. Br. 29; see 15 U.S.C. 78j(b); 17 C.F.R. 240.10b-5. Accordingly, the court of appeals likewise did not address petitioner's second contention, and this Court should not either.

2. In any event, petitioner's current arguments lack merit. The entire petition rests on the erroneous premise that the jury did not find securities fraud. See, *e.g.*, Pet. ii ("Absent proof of fraud or deception"); Pet. 4 (same); Pet. 5 (same); Pet. 24 ("The decision below upheld liability * * * based on speech that the jury found untrue but not fraudulent.").

But the jury did find securities fraud. To be sure, the jury did not find liability for engaging in a fraudulent scheme or course of business under subsection (a) or (c) of Rule 10b-5, 17 C.F.R. 240.10b-5(a) and (c). See Pet. App. 11a n.4, 53a-54a; note 2, *supra*. Rule 10b-5, however, proscribes "manipulative and deceptive devices," including but not limited to, fraudulent schemes and courses of business. See 17 C.F.R. 240.10b-5; *Lorenzo* v. *SEC*, 139 S. Ct. 1094, 1102 (2019) (recognizing the "considerable overlap among the subsections of the Rule and related provisions of the securities laws" in prohibiting fraudulent and deceptive practices within the securities industry). Here, the jury found that petitioners had "ma[d]e * * * untrue statement[s]" of "material fact" in violation of Rule 10b-5(b), and the court of

appeals upheld the jury's verdict. See Pet. App. 13a, 16a-27a; 17 C.F.R. 240.10b-5(b) (making it unlawful "[t]o make any untrue statement of a material fact or to omit to state a material fact necessary * * * to make the statements made, in the light of the circumstances under which they were made, not misleading"). Regardless of whether liability in a particular case is imposed under under subsection (a), (b), or (c) of Rule 10b-5, "using false representations to induce the purchase of securities would seem a paradigmatic example of securities fraud." *Lorenzo*, 139 S. Ct. at 1103.

3. Petitioner does not identify any conflict between the decision below and any decision of this Court or another court of appeals.

Petitioner does not identify a single judicial decision that has addressed any of the contentions he raises here. Petitioner does not point to any decision suggesting, let alone holding, that the First Amendment limits liability for "deliberately untrue statements" of material fact made with scienter in connection with the purchase or sale of securities. Pet. 17. Indeed, petitioner suggested the opposite in the court of appeals, arguing that the "First Amendment protections" afforded statements of opinion, combined with "Rule 10b-5's requirement[s] that the SEC prove materiality and scienter," "provide the breathing space necessary to avoid * * * chilling [speech]." Pet. C.A. Br. 43. Petitioner likewise identifies no authority for the propositions that the First Amendment requires falsity to be proven by clear and convincing evidence; that any such finding must be given "rigorous appellate scrutiny" to establish liability under Rule 10b-5(b); and that the SEC's alleged failure to establish all the elements of a common-law fraud claim placed his misstatements "outside any [First

Amendment] exception for fraudulent speech." Pet. 19-20 (capitalization and emphasis omitted). And petitioner identifies no authority suggesting that a jury cannot, consistent with Section 10(b) of the Exchange Act, find liability under subsection (b) of Rule 10b-5 but not subsection (a) or (c). See Pet. 24-28.

Petitioner cites two decisions in which this Court discussed the fundamental First Amendment right to receive and communicate ideas. See Pet. 28 (citing *Board of Educ.* v. *Pico*, 457 U.S. 853 (1982), and *Lamont* v. *Postmaster Gen.*, 381 U.S. 301 (1965)). But neither *Pico* nor *Lamont* suggests that Congress is foreclosed from restricting the knowing dissemination of materially false or misleading statements of fact in connection with the purchase or sale of securities. See *Pico*, 457 U.S. at 872 (plurality opinion) (concluding that local school board does not have absolute discretion to remove books from school library "simply because they dislike the ideas contained in those books"); *Lamont*, 381 U.S. at 306-307 (holding that Congress could not make addressee's receipt of mail contingent on his written request that it be delivered). Section 10(b) and Rule 10b-5, moreover, do not restrict the receipt of information or ideas in the securities marketplace. Rather, those provisions potentially impose liability only where the information disseminated is false or misleading. 15 U.S.C. 78j(b); 17 C.F.R. 240.10b-5; see *Basic Inc.* v. *Levinson*, 485 U.S. 224, 238 (1988) ("[I]n order to prevail on a Rule 10b-5 claim, a plaintiff must show that the statements were *misleading* as to a *material* fact.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

MEGAN BARBERO
General Counsel
MICHAEL A. CONLEY
Solicitor
JOHN W. AVERY
Deputy Solicitor
PAUL G. ÁLVAREZ
Senior Appellate Counsel
EZEKIEL L. HILL
Appellate Counsel
Securities and Exchange Commission

ELIZABETH B. PRELOGAR
Solicitor General

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