No. 25-465

In the Supreme Court of the United States

TIMOTHY BARTON, PETITIONER,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, RESPONDENT.

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

REPLY BRIEF FOR THE PETITIONER

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The United States Securities and Exchange Commission sought—and the lower courts ordered and affirmed—a receivership over all Mr. Barton's assets. It did so while the federal Government—of which the Commission is a part—was pursuing a coordinated, parallel criminal prosecution against Mr. Barton. The receivership has deprived the petitioner of the resources to defend himself in both cases.

The Fifth Circuit's standard for determining what assets may be seized prior to judgment equitable powers is infinitely flexible. It authorizes seizing entire companies when they have received any benefit, of whatever amount, from assets that are the subject matter of the litigation, here the proceeds of loans that the Commission alleged to

violate the securities laws. In this case, that meant taking companies worth tens of millions for thousands of dollars in often abstract alleged benefits. And the Fifth Circuit did so without any expressed concern about consequences on the Petitioner's ability to defend himself in the parallel criminal case.

This Court has struck down under the Sixth Amendment pre-judgment seizures that were not carefully limited to assets that are the proceeds of criminal conduct, even when Congress commanded those forfeitures. *See Luis v. United States*, 578 U.S. 5, 12–16 (2016). And this Court has reined in administrative agency claims that general statutory grants of access to equitable remedies authorize all manner of creative measures against citizens. *See, e.g.*, *Starbucks Corp. v. McKinney*, 602 U.S. 339, 346 (2024). By the same token, the Commission unspecific statutory authority to seek "any equitable relief that may be necessary or appropriate for the protection of investors," 15 U.S.C. § 78u(d)(5), is not a congressional invitation to press constitutional limits. When the Fifth Circuit declined to place meaningful constraints on the equitable authority to seize a criminal defendant's assets before judgment, it improperly approached or transcended those constitutional boundaries.

The Court should grant review in this case to ensure the lower courts and administrative agencies are not misusing their equitable authority. Doing so has been a high priority for this Court in recent years, Pet. at 24, and it should also be in this case.

1. The respondent claims that the Court should deny certiorari because (according to the respondent) Mr.

Barton never argued in the court of appeals that the receivership was unauthorized by 15 U.S.C. § 78u(d)(5) or that the receivership implicated his Sixth Amendment rights. Opp. 5, 8–9. That is untrue; Mr. Barton fully preserved all of his claims and arguments in his Fifth Circuit briefing and they were all pressed below.

Mr. Barton's appellate brief raised all of the issues with the issuance and scope of the district court's receivership that he discusses in his petition for certiorari. His Fifth Circuit brief denied that the district court should have imposed any type of receivership, contending that the SEC had failed to show that a receivership was clearly necessary to protect an interest in property, and insisting that "less drastic equitable remedies" than a receivership would have been adequate to protect the SEC's interests in this case. *See* 23-11237 Pet. C.A. Br. 52–65.

Mr. Barton's appellate brief also contested the *scope* of the district court's receivership and raised each of the points discussed in his certiorari petition. He faulted the district court for seizing all of his assets. *See id.* at 18–21; *id.* at 19–20 ("[A] pre-judgment receivership is not a remedy in personam. . . . Instead, a receivership is a remedy in rem, against property."). He faulted the district court for allowing entire companies to be seized if they benefitted in the slightest from any of the lender funds, even if the seized companies did not possess any of those funds. *See id.* at 21–24; *id.* at 24 ("The District Court's legal rule—that even a marginal benefit from lender funds is enough to seize a whole corporate entity and all its assets—is a recipe for the Government avoiding any adversarial testing of its allegations of wrongdoing."). Mr.

Barton is advancing the same contention in this Court, as his petition criticizes the Fifth Circuit for adopting the same standard as the district court. Pet. at 19 ("Under the Fifth Circuit's standard, if those loan proceeds 'benefited' a company to the slightest degree, that company and all of its assets may be seized at the beginning of the case. A

As for the Sixth Amendment issue, Mr. Barton's appellate brief specifically called out the district court for refusing to consider his request to set aside a portion of the frozen assets to pay for his defense lawyers. In its statement of issues, Mr. Barton's Fifth Circuit included the following: "Did the District Court err in not making funds available from the receivership estate to pay for the Appellant's civil and criminal defense?" 23-11237 Pet. C.A. Br. 2. And an entire section of the brief was devoted this point, with the heading: "The District Court Should Have Permitted Use of Receivership Estate Resources for the Appellant's Defense." Mr. Barton presented the following argument to the court of appeals:

> In his opposition below, Mr. Barton requested that the District Court set aside a portion of assets for Mr. Barton to pay his defense costs. Again, the District Court failed to even consider this issue. That was error.
>
> Government-sought injunctions freezing assets must permit for payment of defense costs, as "the court cannot assume the wrongdoing before judgment in order to remove the defendants' ability to defend themselves." A receivership is no different than an asset freeze, as it has the same effect of draining the defendant of all

> assets. The Commission should not be heard to cry that the Defendant should not be able to use lender money to fund his defense. After all, the District Court expressly held it was entitled to, and in fact did, seize whole companies because they had ostensibly received a small amount of lender funds or a small benefit from them. That was error. *See supra* Section I. But it also means the receivership estate includes loads of assets that are not lender funds.
>
> The risk of Mr. Barton being unable to access funds to defend himself is especially pointed in light of the ongoing, parallel criminal proceeding. As the Seventh Circuit explained when approving the use of seized funds for a criminal defense, "the wound could be deep: wrongful imprisonment."

23-11237 Pet. C.A. Br. 77–78 (citations omitted).

In addition, Mr. Barton argued that, if meaningful content were not assigned to the Fifth Circuit's existing constraints on imposing receiverships, constitutional problems would arise. *See*, *e.g.*, Pet. C.A. Br., *Barton I*, No. 22-11132 at 14-15 ("This Court's legal standard for placing a defendant's property into receivership, before trial, is crucial to constitutional liberty. . . . To protect core constitutional rights, this Court forbids receiverships unless the Government shows the property would otherwise be secreted away and there is no other way to stop it."); *Id.* at 56 ("This Court's requirement that a corporation be shown to have received ill-gotten funds before being placed in receivership is a crucial protection against the

unconstitutional deprivation of property without due process of law."). Indeed, he specifically argued that the proposed seizure—not limited to the proceeds of alleged improper conduct—would blow through limitations on constitutionally motivated limits on prejudgment seizures in criminal cases "to property that is involved in the particular offenses" charged. *Id.* at 46. And he argued the district court gave insufficient regard to the parallel criminal proceedings, and the effects of the receivership on them. *See*, *e.g.*, *id.* at 32–33 (arguing that the Government was seeking to leave Mr. Barton with "no assets with which to defend himself against the Government's criminal charges. . . . So much more likely that the Appellant, lacking the resources to counter armies of FBI agents and prosecutors plowing through hundreds of thousands of documents, will capitulate to some inequitable resolution of criminal charges that threatens his liberty. Using prejudgment asset seizure and forfeiture to gain leverage in a criminal prosecution is hardly an appropriate invocation of the court's 'equitable' authority; it is a threat to the fair administration of justice."); *id.* at 40, 42–43, 45; No. 22-11132 Reply Br. at 9–10, 14; No. 23-11237, Pet. C.A. Br. at 64. 68.

So how can the respondent tell this Court that Mr. Barton failed to press these arguments in the court of appeals? The respondent's forfeiture argument rests on its observation that Mr. Barton's appellate briefs did not cite or discuss 15 U.S.C. § 78u(d)(5) or the Sixth Amendment. But it was not necessary to mention 15 U.S.C. § 78u(d)(5) in the lower-court briefing because everyone knows that section 78u(d)(5) supplies the statutory source of

authority for the imposition of a receivership in proceedings brought or instituted by the SEC. It is akin to arguing whether a district court properly granted summary judgment without citing Rule 56, and a litigant does not forfeit or waive his objections to summary judgment by presenting his arguments without citing Rule 56 in his brief. *Any* argument from Mr. Barton that contests the issuance or the scope of the district court's receivership will necessarily rely on section 78u(d)(5) and the authorities conferred by that statute. So all of the arguments against the issuance and scope of the district court's receivership were made and fully preserved.

As for the Sixth Amendment, Mr. Barton's appellate briefs clearly and unequivocally state that the district court erred by failing to set aside assets for Mr. Barton to pay his defense lawyers, that, if the limits on which assets could be seized were not enforced, constitutional problems would arise, and that the receivership would violate even the prejudgment seizure limits in criminal cases. *See* pp. 3–7, *supra*. That Mr. Barton did not cite the Sixth Amendment or the cases such as *Luis v. United States*, 578 U.S. 5 (2016), does not mean that he failed to preserve the *claim* that the receivership should have left Mr. Barton with sufficient assets to pay the costs of his defense. *See Yee v. Escondido*, 503 U.S. 519, 534 (1992) ("Once 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."). Litigants are not required to cite every relevant case in their lower-court briefing to preserve their claims, and they are permitted to offer additional *arguments* in this Court in

support of the claims that they made below. *See id.* This is especially so when Mr. Barton was urging the Court to provide meaningful content to its existing limits on equitable receivership, including those enforced in the Fifth Circuit's first opinion in this case, to avoid resulting constitutional problems. All of Mr. Barton's claims were raised and fully preserved in his Fifth Circuit's briefing, and the respondent's claim that they were not "pressed or passed upon" below is specious.

2. The respondent tries to defeat certiorari by pointing to the long pedigree of receiverships. Opp. 9–13. But Mr. Barton is not contending that the SEC categorically lacks authority to seek receiverships under 15 U.S.C. § 78u(d)(5), or that district courts categorically lack authority to impose them. He is making a far more modest claim: That a receivership of this scope, which implicates constitutional concerns by (1) seizing every company owned by Mr. Barton that benefitted to the slightest degree from the proceeds of his allegedly illegal acts; and (2) depriving Mr. Barton of the resources needed to defend himself in a parallel criminal proceeding, should be clearly authorized by Congress before the general equitable powers conferred by 15 U.S.C. § 78u(d)(5) are construed to allow it. That Congress has clearly and expressly recognized "the equitable mechanism of receiverships," as the respondent insists throughout his brief, Opp. 12, does not mean that Congress has clearly and expressly authorized a receivership *of this scope* under section 78u(d)(5).

3. The respondent argues that Mr. Barton's Sixth Amendment arguments are foreclosed by *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989), and

United States v. Monsanto, 491 U.S. 600 (1989) (similar). Opp. 13. But the assets seizures in *Caplin* and *Monsanto* were specifically authorized by congressional legislation, which allowed the seizure *only* of property "constituting" or "derived from" the proceeds of a drug offense. *See Caplin,* 491 U.S. at 620 (quoting 21 U.S.C. § 853(a)(1)); *Monsanto*, 491 U.S. at 603 (same). The statutes at issue in *Caplin* and *Monsanto* did not permit the seizure of property if it merely receives a benefit from the proceeds of the defendant's illegal activities, so the Court had no occasion in those case to rule on whether such a seizure would violate or implicate the Sixth Amendment. The respondent appears to think that *Caplin* and *Monsanto* establish that asset seizures can never violate the Sixth Amendment, but this Court subsequent holding in *Luis v. United States*, 578 U.S. 5 (2016), makes clear that is not the case. In all events, Mr. Barton is *not* claiming that the Sixth Amendment bars the government from seizing property constituting the proceeds of a crime, or property that is derived from the proceeds of a crime, even if such a seizure leaves a criminal defendant unable to pay his lawyers. He is making a more limited claim: That section 78u(d)(5) should not be construed to authorize seizures of assets that merely *benefitted* from the proceeds of an allegedly illegal act when that seizure would leave a criminal defendant unable to pay for his defense. *Caplin* and *Monsanto* have nothing to say about the legality or constitutionality of seizures in that situation.

4. The respondent attempts to distinguish *Luis* on several grounds. It first contends that *Luis* is inapposite because (according to the respondent) the receivership in

this case "covers only corporate entities rather than any of petitioner's personal assets." Opp. 14. But that is simply untrue. Mr. Barton's personal assets, including his only home, were placed into the receivership. What's more, Mr. Barton owns the corporate entities that are subject to the receivership, so those entities are as much his "personal assets" as the property seized in *Luis*.

The respondent also notes that the district court found that Mr. Barton's assets benefitted from funds traced to the alleged illegal activities, while the assets seized in Luis were not even remotely tainted by an alleged improper benefit. Opp. 14. But that is very issue that Mr. Barton is contesting in this case—whether the mere fact that an entity received a benefit, however slight, from the proceeds of allegedly illegal activities is sufficient to justify the imposition of a receivership that leaves him unable to pay his criminal-defense lawyers. Mr. Barton is not claiming that the holding of *Luis* compels a judgment in his favor; otherwise he would be seeking summary reversal. What Mr. Barton is contending is that the holding of *Luis* raises serious constitutional questions with regard to the adequacy of the Fifth Circuit's standard for the scope of this receivership, because it extends beyond the assets "constituting" or "derived from" the proceeds of the alleged securities fraud and leaves Mr. Barton unable to pay for his defense.

Finally, the respondent tries to distinguish *Luis* by claiming that Mr. Barton, unlike the criminal defendant in *Luis*, has alleged or never shown that the receivership has left him unable to retain the attorney of his choice in the parallel criminal proceeding. Opp. 15. As an initial matter,

neither the plurality opinion nor the concurrence in *Luis* purports to demand proof that an inability to pay would leave the defendant unable to retain his preferred lawyers. Instead, the plurality opinion took the criminal defendant at his word that he needed the funds to pay for the "the lawyer of his choice." *Luis*, 578 U.S. at 18 (plurality) ("Luis needs some portion of those same funds to pay for the lawyer of her choice."). And Justice Thomas's concurrence went further by insisting that the Sixth Amendment prohibits all pretrial freezes of a criminal defendant's untainted assets, regardless of whether he had proven that he needed those funds to pay for his first-choice attorney. *See id.* at 28 (Thomas, J., concurring in the judgment) ("The longstanding rule against restraining a criminal defendant's untainted property before conviction guarantees a meaningful right to counsel."); *id.* at 33 ("The Sixth Amendment guarantees the right to counsel of choice. As discussed, a pretrial freeze of untainted assets infringes that right. This conclusion leaves no room for balancing."). Everyone knows that criminal-defense lawyers cost money unless the defendant is using the public defender or court-appointed counsel. The mere fact that Mr. Barton is facing criminal prosecution and wants to retain his own lawyer is enough to show that a pretrial receivership imposed on all his assets will leave him unable to pay.

In any event, Mr. Barton has repeatedly asserted that the receivership has left him incapable of funding his defense in the Fifth Circuit and elsewhere. *See*, *e.g.*, Pet. C.A. Br. No. 23-11237 at 63.

The respondent also suggests that Mr. Barton should "ask" the district court to release money from the receivership to pay his criminal-defense lawyers. Opp. 16. But Mr. Barton already has asked the district court to do exactly that when litigating the propriety of the receivership—and the district court ignored his request and never even discussed the issue when imposing the receivership. *See* p. 3, *supra*. Mr. Barton assigned error to this in the Fifth Circuit. *Id.* The district court has already made clear that it will not consider a request along these lines; indeed it has shown it is unwilling to deign to discuss Mr. Barton's request. The respondent's suggestion is simply a delay tactic to maximize the government's leverage in the civil and criminal proceedings and force Mr. Barton to settle or plead while he remains unable to fund his defense.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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