No. 22-____

In the
Supreme Court of the United States

REV. FATHER EMMANUEL LEMELSON
(F/K/A GREGORY LEMELSON) AND
LEMELSON CAPITAL MANAGEMENT, LLC,
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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 10(b) of the Securities Exchange Act of 1934 prohibits any "manipulative or deceptive device or contrivance," as defined by Securities and Exchange Commission rule, in connection with the purchase or sale of any security. SEC Rule 10b-5—which this Court has repeatedly held cannot create or expand liability beyond what § 10(b) prohibits—purports to make it unlawful not only "[t]o employ any device, scheme, or artifice to defraud" or "[t]o engage in "any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person," but also "[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading."

The jury in this case found no "device, scheme, or artifice to defraud" and no "act, practice, or course of business which operates or would operate as a fraud or deceit." But it did find that three sentences or sentence fragments, embedded within Petitioners' five published written reports and four online interviews about a publicly traded corporation, were intentionally or recklessly made "untrue statements of material fact or [omissions] to state material facts necessary in order to make the three statements made not misleading." The First Circuit affirmed the district court's judgment that rejected Petitioners' First Amendment defense, held Petitioners liable

under § 10(b) and Rule 10b-5, imposed a $160,000 penalty, and enjoined Petitioners for five years.

The questions presented are:

1. Absent proof of fraud or deception, does the First Amendment protect a securities market participant from being punished and enjoined by the government for intentionally or recklessly making untrue statements or omissions of material fact while criticizing a publicly traded corporation?

2. Absent proof of fraud or deception, do untrue statements or omissions of material fact, even if made intentionally or recklessly, constitute a "manipulative or deceptive device or contrivance" punishable under § 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5?

PARTIES TO THE PROCEEDINGS

Petitioners Rev. Father Emmanuel Lemelson (f/k/a Gregory Lemelson) and Lemelson Capital Management, LLC were defendants in the U.S. District Court for the District Massachusetts and appellants in the U.S. Court of Appeals for the First Circuit.

Respondent Securities and Exchange Commission was the plaintiff in the district court and the appellee in the First Circuit.

The Amvona Fund, LP, was a "relief defendant" in the U.S. District Court for the District of Massachusetts but is not a party to the proceedings in this Court.

On March 18, 2020, the district court "[a]llowed as unopposed" a motion by Ligand Pharmaceuticals, Inc. for joinder as an interested party. Ligand is not a party to the proceedings in this Court.

RELATED PROCEEDINGS

SEC v. Gregory Lemelson, et al., No. 18-cv-11926 (D. Mass.), judgment entered March 30, 2022.

SEC v. Gregory Lemelson, a/k/a Father Emmanuel Lemelson, No. 22-1630 (1st Cir.), judgment entered January 3, 2023.

In the Matter of Gregory Lemelson, SEC Administrative Proceeding File No. 3-20828, order instituting proceedings issued April 20, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the First Circuit is reported at 57 F.4th 17 and is reproduced at App. 3a-31a. The verdict form returned by the jury in the district court is reproduced at App. 55a-56a, and the district court's judgment is reproduced at App.53a-54a.

JURISDICTION

The First Circuit denied Petitioners' timely motion for rehearing en banc on March 6, 2023. App. 1a-2a. On May 19, 2023, Justice Jackson extended the time to file a petition for a writ of certiorari until July 31, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides in relevant part:

> *Congress shall make no law … abridging the freedom of speech, or of the press … .*

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), provides in relevant part:

> *It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange …*

(b) To use or employ, in connection with the purchase or sale of any security, … any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

SEC Rule 10b-5, 17 C.F.R. § 240.10b-5, provides:

It shall be unlawful for any person, directly or indirectly …,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

INTRODUCTION

Nobody likes being criticized. Criticism can seem unfair, inaccurate, and even ill-motivated. But the default response to unwelcome criticism, and the one the First Amendment demands, is robust debate and counter-speech—not federal prosecution and prior restraint.

Powerful, publicly traded corporations don't like criticism either. Criticism can hurt sales and corporate brands, depress stock prices, expose corporate misconduct or mismanagement, and threaten executives' compensation and job security. But unlike many targets of criticism, publicly traded corporations have no shortage of resources or platforms to refute their critics. They can issue press releases or social media posts. They can hold press conferences. They can organize conference calls with market analysts. They can enlist friendly market analysts to challenge naysayers with positive and optimistic counter-analysis. Their executives can appear for TV, radio, or online interviews. They can demand corrections or retractions and, if they have sufficient proof, they can even sue their critics for damages.

In this case, however, publicly traded pharmaceutical corporation Ligand Pharmaceuticals, Inc. eschewed those conventional options and took a different tack: It enlisted federal law enforcement to punish, silence, and deplatform its critic. When Petitioner Rev. Father Emmanuel Lemelson and his eponymous investment fund (collectively referred to herein as "Lemelson") publicly announced in 2014 that they had taken a "short" position in Ligand stock,

and then explained their reasons for doing so in a series of detailed reports and online interviews, Ligand lobbied agents at Respondent Securities and Exchange Commission ("SEC") and demanded that the agency investigate and prosecute Lemelson. That lobbying eventually paid off.

After four years of investigation, SEC charged Lemelson with securities fraud in 2018, claiming his criticism of Ligand in 2014 was part of a fraudulent scheme to profit from his fully disclosed short position in Ligand stock. After trial, a jury rejected all of SEC's fraud allegations. But the jury nevertheless found that one isolated sentence and a second isolated sentence fragment—both embedded within Lemelson's 56 pages of published written reports about Ligand—along with a two-second, unscripted sentence fragment in one of Lemelson's four online interviews about the company, were "untrue" statements or omissions of material fact made "intentionally or recklessly." Based on that finding, the district court held Lemelson liable for using or employing a "manipulative or deceptive device or contrivance" under § 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and SEC Rule 10b-5 "Rule 10b-5"). The district court imposed a $160,000 penalty and enjoined Lemelson from making similar statements or omissions for five years.

This petition comes to the Court at a time when free speech rights are under increasingly relentless assault. Given the unusual clarity of the jury verdict, the petition offers the Court an ideal opportunity to decide whether, absent proof of fraud or deception, the First Amendment prohibits SEC from penalizing and enjoining commentary about publicly traded

corporations and other financial matters of public concern any time that commentary contains a few purported inaccuracies or omissions later deemed intentional or reckless. It also presents the Court, in the alternative, with an ideal opportunity to clarify that, absent proof of fraud or deception, even intentional or reckless "untrue statements" and omissions, do not amount to a "manipulative or deceptive device or contrivance" punishable under Exchange Act § 10(b) or Rule 10b-5.

STATEMENT OF THE CASE

1. Lemelson is an ordained Greek Orthodox priest, an activist investor, and a whistleblower on publicly traded corporations. During the period relevant here, he also managed an investment fund called the Amvona Fund. App. 5a. Lemelson is a prolific analyst and commentator on topics related to public securities markets and the companies whose securities trade in those markets, including some in which his investment fund invested. *Id*. Over the past 13 years, he has published scores of written reports concerning publicly traded corporations and related matters of public concern, has been interviewed dozens of times to offer his perspective and expertise on such matters, and has been widely cited and quoted in the global media for his analyses and opinions.

2. In May 2014, on behalf of the investment fund he managed, Lemelson began building a "short" position in the stock of Ligand Pharmaceuticals, Inc. *Id*. A short position is typically taken by someone who believes the market is overvaluing a company's stock, or overlooking corporate mismanagement or

misconduct, and who then stands to profit if and when the stock price declines. Ligand is a publicly traded pharmaceutical corporation whose principal product at the relevant time was Promacta, an FDA-approved orphan drug for treating the side effects of certain therapies for hepatitis C. App.5a-6a. Ligand had recently sponsored the creation of, and entered into a licensing agreement with, another pharmaceutical company called Viking Therapeutics, Inc., which was not yet a publicly traded corporation but was in the process of registering its shares with SEC to allow them to trade in public markets. *Id*.

3. Between June and August 2014, Lemelson wrote five detailed reports about Ligand, which he published and made available to the general public without charge on the website of his investment fund and then republished through the investment news and commentary website Seeking Alpha (www.seekingalpha.com). App. 7a. As was true with his reports about other companies and topics, his opinion and analysis were at times covered by other media outlets including USA Today, Benzinga, Street Insider, and others. In his written reports concerning Ligand, which collectively totaled 56 pages, Lemelson fully disclosed his short position; questioned in detail Ligand's finances, accounting, business prospects, solvency, integrity, management competence, 2014 bond offering, and licensing arrangement with Viking; and explained why he believed Ligand's stock was vastly overvalued and had no intrinsic value.

Lemelson's reports also included prominent and extensive disclosures cautioning readers that he could not guarantee the accuracy, timeliness, or completeness of the information presented. Thus,

immediately after the initial "Overview" paragraph of his written reports appeared the following "Disclaimer":

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[1] The full disclaimer read as follows:

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During the relevant period, Lemelson also participated in at least four separate interviews (collectively consuming more than an hour of airtime) that were broadcast by the online investment website Benzinga (www.benzinga.com). In those interviews, Lemelson offered a similarly negative assessment of Ligand and its financial prospects. App. 7a.

4. Lemelson's negative assessment of Ligand ultimately proved prescient. The company's stock price declined by approximately one-third in the months after Lemelson began publishing his warnings, although the district court found insufficient evidence to tie this overall stock price decline even to Lemelson's entire body of criticism over that period, much less the three isolated sentences and sentence fragments the jury ultimately found untruthful or misleading, App.46a, 47a, 51a. Those who found Lemelson's research and commentary persuasive and heeded his warnings

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realized significant investment gains or avoided significant investment losses, whereas those who didn't either lost money or missed the opportunity for investment gains. In short, free speech in the marketplace worked as our founders intended.[2]

5. Unsurprisingly, Ligand did not appreciate Lemelson's unflattering commentary and whistleblowing, nor the decline in its stock price in 2014. But instead of using its many available platforms to publicly refute Lemelson's criticism, the company directed its lawyers, including a former high-ranking SEC official, "to lean on the SEC to get an injunction on Lemelson's activities." *SEC v. Lemelson*, 532 F. Supp. 3d 30, 36-37 (D. Mass. 2021) (district court recitation of undisputed facts on summary judgment). As Ligand's chief executive officer acknowledged in his trial testimony, the company wanted Lemelson "silenced for good."

Ligand's lawyers then filed two written complaints with SEC (one in 2014 and the other in 2015); met with one team of SEC staff in Boston in September 2014 (using a PowerPoint presentation that "included

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[2] Even after covering his short position at a profit in October 2014, Lemelson continued to speak out against Ligand. For example, he published several additional written reports and interviews about Ligand from 2015 through 2018 (none of which SEC ever challenged), filed five whistleblower reports with SEC over the same period, and wrote two detailed open letters to Congress—one in December 2016 and the other in July 2018—in which he accused Ligand of, among other things, ongoing securities fraud and abuse of the Orphan Drug Act of 1983. The July 2018 letter, which preceded SEC's filing of the complaint in this case by two months, also accused SEC of incompetency and financial illiteracy in failing to detect and prosecute Ligand's misconduct.

photos of Lemelson in his priestly robes" and baselessly accused him of engaging in an "affinity fraud" against his parishioners); met with a different team of SEC staff in June 2015 (after the Boston staff declined Ligand's entreaties to investigate and prosecute Lemelson); and "communicated with SEC staff by email and telephone between September 2014 and March 2018." *Id.* Ligand also enlisted a then-sitting member of Congress (who was later criminally indicted for unrelated reasons) to write a letter to the SEC Chair, coincident with the June 2015 meeting between the company's lawyers and SEC staff, urging that the SEC investigate Lemelson. *See SEC v. Lemelson*, 334 F.R.D. 359, 361 (D. Mass. 2020) (denying SEC motion for protective order).

6. Ligand's relentless campaign to "lean on" SEC eventually paid off. After four years of Ligand's lobbying and the resulting SEC investigation, SEC filed a complaint against Lemelson that singled out a small handful of sentences and sentence fragments scattered among Lemelson's 56 pages of written reports and four online interviews during 2014 as allegedly containing factual assertions that were either untrue or, if true, incomplete and thus misleading.

SEC's complaint alleged no inaccuracies in any of the other hundreds of sentences contained in Lemelson's reports and interviews about Ligand. Nor did the complaint question the prescience of Lemelson's overall assessment of Ligand, as it specifically acknowledged that Ligand's stock price fell by approximately 34 percent from June 2014 through October 2014 for reasons the district court ultimately found could not be causally connected to

any of the three statements the jury found untrue or misleading. App. 46a, 47a, 51a (refusing to award SEC any disgorgement of Lemelson's profits because "it is difficult to see how Lemelson is responsible for the entirety of the drop in Ligand's stock price" and because "SEC has not presented a reasonable approximation of the pecuniary gain" attributable to the three isolated untrue statements ultimately found by the jury).

Still, SEC's complaint repeatedly positioned Ligand as a victim and faulted Lemelson for the perceived offenses of "attacking Ligand with the intent to convince the investing public that Ligand's stock was overvalued;" publishing reports and interviews "intended to create a negative view of the company and its value and, consequently, to drive down the price of the company's stock;" publishing reports about Ligand that "were negative and took a dim view of the company's value and prospects;" and publishing reports and interviews for the purpose of "shak[ing] investor confidence in Ligand and driv[ing] down Ligand's share price." Despite the precipitous fall in Ligand's stock price as Lemelson had warned, SEC's complaint alleged that Lemelson's criticism of Ligand involved "fraud, deceit, manipulation, and/or deliberate disregard of regulatory requirements and directly resulted in losses to other persons," and thus that Lemelson violated Exchange Act § 10(b), 15 U.S.C. § 78j(b), and SEC Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5. The complaint further alleged that Lemelson engaged in fraudulent, deceptive, or manipulative conduct in violation of § 206(4) of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-6(4),

and SEC Rule 206(4)-8 thereunder, 17 C.F.R. § 275.206(4)-8.

7. After a nine-day trial in the fall of 2021, a jury rejected nearly all of SEC's allegations. More specifically, the jury found that SEC did *not* prove, by even a preponderance of the evidence, that Lemelson "intentionally or recklessly engag[ed] in a scheme to defraud, or any act, practice, or course of business which operates or would operate as a fraud or deceit." App. 55a-56a. It also found that SEC did *not* prove any intentional or even negligent fraud in violation of the Investment Advisers Act or the relevant SEC rule thereunder. *Id*. And it further found that SEC did *not* prove that Lemelson's harshest statements about Ligand—claiming the company was effectively insolvent—were intentional or reckless misstatements or omissions. *Id*.

Despite rejecting all of SEC's charges of fraud and deceit, the jury found that, with respect to three of the isolated sentences and sentence fragments SEC had singled out from Lemelson's five written reports and four oral interviews, Lemelson had "intentionally or recklessly made untrue statements of material fact or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." *Id*.[3] Only one of the three statements directly concerned Ligand; the other two were about Ligand's affiliated licensee, Viking, whose securities

[3] Although Lemelson vehemently disagrees with the jury's findings of untruthfulness and intent (or recklessness), for purposes of this petition he accepts and does not dispute those findings.

Lemelson never traded. The three statements were: (1) a two-second, unscripted sentence fragment from one of Lemelson's four internet radio interviews concerning Ligand, in which he asserted that in a telephone interview the day before—as reflected in his contemporaneous handwritten notes from the call—Ligand's investor relations representative had "basically agreed" with Lemelson's opinion that Ligand's main product, Promacta, was "literally going to go away;" (2) Lemelson's assertion in a written report, after quoting directly from a public SEC filing made by Viking, that the Viking financial statements included within its SEC filing were "unaudited;" and (3) Lemelson's assertion in the same written report—when referring to a Viking risk disclosure in the same public SEC filing that said "[w]e intend to rely on third parties to conduct our preclinical studies and clinical trials"—that "Viking does not intend to conduct any preclinical studies or trials." App. 7a-10a.

The jury was not asked to further specify, and did not specify, whether it found these three statements to be untrue or, as explicitly permitted by the jury instructions, literally true but nevertheless materially incomplete and misleading. Upon the jury's verdict, and after denying Lemelson's various post-trial motions, the district court held Lemelson liable for violating Exchange Act § 10(b) and SEC Rule 10b-5 thereunder. App. 53a-54a. As punishment, the district court entered final judgment imposing a $160,000 penalty and, without further specificity or elaboration, enjoining Lemelson from violating those provisions for a period of five years. *Id.* The entire text of the court's injunction reads: "Defendants are enjoined from violating Section 10(b) of the Exchange

Act and Rule 10b-5 for a period of five years." App. 52a, 54a.[4]

8. The First Circuit affirmed in all respects. Notwithstanding Lemelson's principal contention that the district court judgment abridged his free speech rights under the First Amendment, the appeals court applied conventional principles of review for appeals from civil cases determined by a jury, such as "constru[ing] facts in the light most favorable to the jury verdict;" "draw[ing] any inferences in favor of the [prevailing party];" "abstain[ing] from evaluating the credibility of the witnesses or the weight of the evidence;" "asking whether a rational jury could have found in favor of the party that prevailed;" and "set[ting] aside the jury verdict only if the jury failed to reach the only result

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[4] Less than a month after the district court entered its judgment, SEC initiated a follow-on administrative proceeding—assigning itself as final adjudicator and citing the district court's injunction as its statutory predicate—in which the same two SEC prosecutors who served as the agency's lead counsel in the district court have requested that the agency now summarily bar Lemelson from ever again participating in the securities industry. *See In re Lemelson*, SEC Investment Advisers Act Rel. No. 6000 (Order Instituting Proceedings Apr. 20, 2022), https://www.sec.gov/litigation/admin/2022/ia-6000.pdf. That non-jury proceeding remains pending, but Lemelson might be forgiven for suspecting that SEC is unlikely to rule against both itself and the lawyers who served as its lead counsel throughout the contentious proceedings in the district court, and in favor of its erstwhile litigation adversary. *See Axon Enterprise, Inc. v. FTC*, 143 S. Ct. 890, 907 n.1 (2023) (Thomas, J., concurring) (noting SEC's "tendency to overwhelmingly agree with" its own decisions).

permitted by the evidence." App. 12a (citations and internal quotations omitted).

Applying those deferential review principles, the First Circuit found no fault with the jury's verdict. Following established circuit precedent, the court categorically rejected Lemelson's First Amendment arguments because the three specific sentences the jury found untruthful (or, as the court acknowledged, perhaps literally true but nevertheless misleading "half-truths") were, in the court's view, statements of fact rather than opinion. App. 13a-16a. The court then found sufficient evidence in the record to establish the materiality and scienter elements required for liability under Exchange Act § 10(b) and Rule 10b-5. App. 16a-27a. It subsequently denied Lemelson's timely petition for rehearing en banc. App. 1a-2a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S ESTABLISHED FIRST AMENDMENT PRECEDENT IN THREE DISTINCT WAYS

The district court's judgment, affirmed by the First Circuit, directly and profoundly abridges Lemelson's freedom of speech.[5] At the behest of a publicly traded pharmaceutical corporation,

[5] The First Amendment forbids the government from so much as "abridging" (*i.e.*, reducing) the freedom of speech, and thus provides broader protection from government restriction than would a bar against "prohibiting" speech. Philip Hamburger, *How the Government Justifies Its Social-Media Censorship*, Wall St. J. (Jun. 12, 2023), https://www.wsj.com/articles/how-the-government-justifies-its-social-media-censorship-free-speech-supreme-court-doctrine-precedent-biden-laptop-twitter-fbi-facebook-af57b191

Lemelson was prosecuted and penalized by the federal government for criticizing that corporation, and he was enjoined for five years—under threat of contempt—from engaging in similar criticism. This Court and others frequently confront relatively indirect First Amendment threats that are clad, so to speak, in sheep's clothing, where the hand of government is more insidious. Here, by contrast, the free speech threat is straightforward and obvious; there is nothing subtle about it. To borrow Justice Scalia's poignant metaphor, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

The First Circuit nevertheless dismissed Lemelson's First Amendment defense because, in its view, the three isolated statements the jury found untruthful (or half-truthful) were assertions of fact rather than opinion. That holding conflicts with this Court's established First Amendment precedent for at least three reasons.

A. Even False Statements of Fact Are Protected by the "Breathing Space" the First Amendment Requires

Contrary to the First Circuit's foundational premise, there is no categorical exception to the First Amendment for even deliberately untrue statements of fact. *United States v. Alvarez*, 567 U. S. 709 (2012) (plurality opinion) (habitual liar's knowingly false factual claim of having been awarded Congressional Medal of Honor protected). As the plurality opinion in *Alvarez* confirmed, "[t]he remedy for speech that is false is speech that is true." *Id.* at 726.

First Amendment protection is especially critical when the government cherry-picks for prosecution and punishment a few isolated factual statements from a voluminous trove of opinionated and otherwise factually accurate commentary on a matter of public interest. *See, e.g.*, *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984) (false factual assertion made within a larger article evaluating the quality of loudspeaker systems); *Time, Inc. v. Pape*, 401 U.S. 279 (1971) (knowing failure, in an article describing a government report on police brutality, to acknowledge that factual statements from the report about a certain police supervisor were mere allegations from a private lawsuit rather than the government's own findings). As this Court has repeatedly recognized, "[the] erroneous statement is inevitable in free debate" and "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *N.Y. Times v. Sullivan*, 376 U.S. 254. 271-72 (1964)) (quoting *NAACP v. Button*, 371 U. S. 415, 433 (1963)); *Bose Corp.*, 466 U.S. at 513 (same; quoting *Sullivan*); *accord Alvarez*, 567 U.S. at 718 ("some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee").

The First Circuit's zero-tolerance approach to misstatements and omissions—focusing on two isolated sentences about a Ligand affiliate plucked from 56 pages of opinionated written commentary and a two-second, unscripted soundbite from one of four oral interviews—turned these longstanding First Amendment presumptions upside down.

B. Abridgements of Free Speech Demand Clear and Convincing Proof of Falsity and Intent—and Rigorous Appellate Scrutiny

The First Circuit's extreme deference to the jury verdict likewise contravened this Court's established First Amendment precedent. Where, as here, free speech rights hang in the balance, this Court has consistently demanded proof of falsity and intentionality by "clear and convincing evidence." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *accord Sullivan*, 376 U.S. at 285-86 (1964) (proof of falsity and intent must be of "convincing clarity"). The Court has also demanded searching independent appellate examination of that evidence to ensure "that the judgment does not constitute a forbidden intrusion on the field of free expression," *Sullivan*, 376 U.S. at 285; *accord Bose Corp.*, 466 U.S. at 499 (quoting *Sullivan* and citing additional cases). Even when speech falls into one of the "limited areas" beyond First Amendment protection, this Court has repeatedly recognized the need for "strategic protection" to ensure that protected speech is not chilled or self-censored. *Counterman v. Colorado*, 143 S. Ct. 2106, 2115 (2023).

C. Lemelson's Speech Fell Outside Any "Fraud" Exception to the First Amendment

Lemelson's speech did not fall within any of the limited areas this Court has placed beyond First Amendment protection. Specifically, it was outside any exception for fraudulent speech—for at least two independent reasons. First, the jury specifically found that Lemelson, in speaking out about Ligand, did *not*

"intentionally or recklessly engage in a scheme to defraud, or any act, practice, or course of business which operates or would operate as a fraud or deceit." 35a. The jury found three untrue (or half-true) statements, but unanimously rejected every SEC allegation of fraud. App. 55a-56a.

Second, the district court's jury instructions—consistent with prevailing law in the First Circuit and elsewhere—specifically excused SEC from having to prove several essential elements traditionally required to establish a common law fraud claim, including reliance, causation, or compensable harm. See also *SEC v. Lemelson*, 355 F. Supp. 3d 107, 109 (D. Mass. 2019) (denying in substantial part Lemelson's motion to dismiss). Indeed, it would have been impossible to prove these elements here, because any hypothetical investor who heeded Lemelson's warnings and sold Ligand stock—whether by liquidating an existing long position or taking a short position—would have realized a sizable financial *benefit* given the stock price *decline* over the ensuing weeks and months. Not surprisingly, therefore, SEC proved no deception or losses and the district court specifically found that "SEC has not provided any evidence that it could identify victims." 51a. Thus, even if the jury had found the watered-down version of "fraud" that courts have allowed in the SEC enforcement context—which it did not—that finding would have been woefully insufficient to sweep Lemelson's speech into any recognizable fraud exception to the First Amendment. *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").

II. FEDERAL SECURITIES REGULATION NEEDS THIS COURT'S FIRST AMENDMENT GUIDANCE

This Court has never weighed in on the intersection of securities regulation and freedom of speech, and the decision below effectively grants SEC an exemption from First Amendment restrictions. Review is warranted to make clear to lower courts that no such exemption exists and to provide them with necessary guidance regarding constitutional limits on SEC's power to abridge free speech.

More than most other federal agencies, SEC is largely in the business of regulating speech. *E.g.*, Sean J. Griffith, *What's 'Controversial' About ESG? A Theory of Compelled Commercial Speech Under the First Amendment*, 101 NEB. L. REV. 876, 901-02 (2023) (securities laws "consist primarily of rules either prohibiting or compelling speech"); Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 58 WM. & MARY L. REV. 613, 641 (2006) ("securities regulation primarily involves restrictions on speech," with rules that "both compel and prohibit corporate speech" and "regulate the content, form, and scope of corporate communications"); James C. Goodale, *The First Amendment and Securities Act: A Collision Course?*, N.Y.L.J. Apr. 8, 1983 at 1 ("there is no greater statutory regulation of speech than the [federal securities laws].")[6] Indeed, a significant

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[6] A former SEC commissioner once said that "[s]ecurities regulation is essentially the regulation of speech," including both censorship and "a fair amount of prior restraint." Roberta S. Karmel, *The First Amendment and Government Regulation of Economic Markets*, 55 BROOK. L. REV. 1, 1 (1989), while a

portion of SEC regulatory and enforcement activity is directed at telling companies and individuals what they must, may, or may not say about an increasing number of subjects. Griffith, 101 NEB. L. REV. at 902 Many SEC rules—including the one Lemelson was punished and enjoined for violating—overtly regulate and criminalize speech. 17 C.F.R. § 240.10b-5(b); *see* Schauer, 117 HARV. L. REV. at 1779 (securities actions "produce a milieu in which materials pertaining to a company's securities are written and distributed under the threat of sanction for false, misleading, or omitted disclosure").

Notwithstanding that securities regulation entails significant restrictions on free speech, SEC has been largely immune from First Amendment challenges. This has led some academics and commentators to infer (sometimes approvingly) that the agency and its regulatory mission enjoy the functional equivalence of an exemption from First Amendment scrutiny. *E.g.*, Griffith, 101 NEB. L. REV. at 902 ("There is [among securities law professors] a claim for a kind of constitutional exceptionalism for securities law," with some even arguing that "securities regulation somehow lies out of [First Amendment] bounds."); Schauer, 117 HARV. L. REV. at 1769 ("It is not that such regulation satisfies a higher burden of justification imposed by the First Amendment. Rather, the First Amendment does not even show up in the analysis."). While that may slightly overstate

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prominent First Amendment scholar once said it "would not be wholly inaccurate" to describe SEC as the "Content Regulation Commission," Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1778-79 (2004).

the case, appellate decisions addressing First Amendment rights in the context of federal securities law are noticeably rare. *See, e.g.*, Karl M. F. Lockhart, *A 'Corporate Democracy'?: Freedom of Speech and the SEC*, 104 VA. L. REV. 1593, 1624 (2018) ("Courts have almost never seen challenges based on freedom of speech to proxy regulations and securities regulation in general."); Wendy Gerwick Couture, *The Collision Between the First Amendment and Securities Fraud*, 65 ALA. L. REV. 903, 905-06 (2014) ("these regulations have been only rarely challenged in court" on First Amendment grounds).

The last time this Court granted certiorari to address the interplay between securities regulation and free speech—nearly 40 years ago—the Court ultimately declined to rule on a newsletter publisher's First Amendment objection to registering with SEC as an investment adviser after holding that the publisher fit within a statutory exception to the registration requirement. *Lowe v. SEC*, 472 U.S. 181, 208-11 (1985).[7] Three concurring justices would have reached the constitutional question and sustained the publisher's First Amendment challenge in that case. 472 U.S. at 228-36 (White, J., concurring).[8]

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[7] As discussed below, the Court could similarly avoid the First Amendment issue here by holding that untruthful speech, without more, does not constitute a "manipulative or deceptive device or contrivance" within the meaning of Exchange Act § 10(b).

[8] *See also Pirate Investor LLC v. SEC*, 561 U.S. 1026 (2010) (denying certiorari petition of investment newsletter, supported by more than 20 media organizations as amici, which was penalized in an SEC enforcement case for making false statements); *Nike, Inc. v. Kasky*, 539 U.S. 654, 655 (2003) (per

Lemelson's petition presents the Court with an overdue opportunity to decide the extent, if any, to which SEC regulation and enforcement is subject to First Amendment scrutiny. Review is especially warranted now, given SEC's continuing disregard of free speech rights both in its regulatory agenda, *see, e.g.*, *NAM v. SEC*, 800 F.3d 518 (D.C. Cir. 2015) (setting aside SEC "conflict mineral" disclosure rule on First Amendment grounds), and in its enforcement program, *see, e.g., SEC v. Novinger*, 40 F.4th 297, 308 (5th Cir. 2022) (Jones, J., concurring) (noting, with respect to SEC's non-negotiable demand that its enforcement targets agree to a gag order as a condition of any settlement, that "[a] more effective prior restraint is hard to imagine"); *SEC v. Moraes*, No. 22-cv-8343, 2022 WL 15774011 at *1 (S.D.N.Y. Oct. 28, 2022) (SEC "stands nearly alone" among all federal agencies in demanding gag orders as a condition of settlement).

III. EXCHANGE ACT SECTION 10(b) AND SEC RULE 10b-5 DO NOT REACH NON-FRAUDULENT FALSE STATEMENTS

The decision below upheld liability under Exchange Act § 10(b) and SEC Rule 10b-5 based on speech that the jury found untrue but not fraudulent. This unprecedented expansion of liability under these

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curiam) (6-3 decision dismissing certiorari petition as improvidently granted in false advertising case that, in Justice Breyer's dissenting view, "directly concern[ed] the freedom of Americans to speak about public matters in public debate," where waiting to decide the issue "extracts a heavy First Amendment price" in the form of self-censorship and a "chilling effect").

oft-litigated provisions of federal securities law warrants the Court's review.

Exchange Act § 10(b) prohibits—indeed criminalizes—"use or employ[ment]," in connection with the purchase or sale of any security, of any "manipulative or deceptive device or contrivance" in contravention of such rules and regulations that SEC may prescribe. 15 U.S.C. § 78j(b). Enabled by that statute, SEC hastily promulgated Rule 10b-5 in 1942. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 767 (1975) (quoting Remarks of Milton Freeman, *Conference on Codification of the Federal Securities Laws*, 22 BUS. LAW. 793, 922 (1967) (SEC staff, with little discussion, drafted the rule by "put[ting] ... together" § 10(b) with § 17(a) of the Securities Act of 1933 and obtaining the SEC commissioners' approval the same day with oral input from only one commissioner, whose sole comment before signing off was, "Well, …, we are against fraud, aren't we?")). Notwithstanding its hasty and impulsive provenance (and perhaps because of it), Rule 10b-5 has since spawned decades of prolific federal court litigation, including SEC's case against Lemelson.

This Court has repeatedly held that liability under SEC Rule 10b-5 is coextensive with liability under Exchange Act § 10(b)—that is, the rule cannot create or expand liability for conduct that is not prohibited by its enabling statute. *See, e.g., Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 262 (2010); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008); *SEC v. Zandford*, 535 U.S. 813, 816 n.1 (2002); *United States v. O'Hagan*, 521 U.S. 642, 651-54 (1997); *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 172-73, 177 (1994);

Aaron v. SEC, 446 U.S. 680, 689-90 (1980); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212-214 (1976). In this case, an overly literal reading of Rule 10b-5 resulted in liability for speech that is not prohibited by the rule's enabling statute, and thus the rule was invalidly applied.

On its face, Exchange Act § 10(b) does not abridge speech—not even intentionally fraudulent speech. Nor does the statute mention the word "fraud" at all. The statute prohibits "manipulative or deceptive device[s] or contrivance[s]." 15 U.S.C. § 78j(b). And Congress presumably intended this statute to prohibit manipulative or deceptive *conduct*, rather than speech, because just a year earlier it had enacted § 17(a) of the Securities Act of 1933. Subparagraph (2) of that section expressly prohibits "obtain[ing] money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading," 15 U.S.C. § 77q(a)(2)—language conspicuously absent from Exchange Act § 10(b). Yet, even under this potentially speech-abridging provision of the Securities Act § 17(a)(2), liability attaches only if the speaker "obtain[ed] money or property" by means of misleading speech. By contrast, subparagraph (b) of SEC Rule 10b-5 purports to prohibit and criminalize "untrue" speech and nothing more, something Congress obviously never intended when it enacted Exchange Act § 10(b).

As applied here against Petitioner Lemelson, SEC Rule 10b-5 was stretched well beyond anything prohibited by its enabling statute (or even by Securities Act § 17(a)(2), which SEC did not charge

Lemelson with violating). SEC did allege fraudulent conduct *in addition to* the making of "untrue" statements or omissions of material fact, but the jury rejected *all* of SEC's fraudulent conduct charges. More specifically, and as previously noted, the jury found that SEC did *not* prove that Lemelson violated either subparagraph (a) of Rule 10b-5 (by "intentionally or recklessly engaging in a scheme to defraud"), 17 C.F.R. § 240.10b-5(a), or subparagraph (c) of the rule (by engaging in any "act, practice, or course of business which operates or would operate as a fraud or deceit"), *id.* § 240.10b-5(c). *See* App. 55a. The jury found *only* that Lemelson intentionally or recklessly made three untrue statements or omissions of material fact in violation of subparagraph (b) of the rule, 17 C.F.R. § 240.10b-5(b). *See* App. 56a.

In a sense, then, this case is the flip side of *Lorenzo v. SEC*, 139 S. Ct. 1094 (2019), which is instructive here. In *Lorenzo*, this Court held that even where an accused wrongdoer was not the "maker" of an untrue statement under subparagraph (b) of SEC Rule 10b-5, and thus could not be penalized for violating that subparagraph of the rule, he could still be penalized for disseminating the untrue statement if doing so was *also* part of a fraudulent scheme, act, practice, or course of business that violated subparagraph (a) or (c) of the rule. *Id.* at 1099. Here we have the opposite scenario to what was presented in *Lorenzo*: As found by the jury, SEC proved *only* the making of an untrue statement that was *not* also part of any fraudulent scheme, act, practice, or course of business that would have violated subparagraph (a) or (c) of the rule. Importantly, the jury also did not make any finding that Lemelson used or employed any "manipulative or

deceptive device or contrivance," as required for liability under Exchange Act § 10(b) or derivatively under SEC Rule 10b-5.

IV. THIS CASE PROVIDES AN IDEAL VEHICLE TO DECIDE THE FIRST AMENDMENT QUESTION AND THE SECURITIES LAW QUESTION

This case presents the Court with an ideal vehicle to address whether and to what extent SEC may lawfully penalize and silence speech that analyzes and challenges the disclosures, financial health, and financial prospects of publicly traded corporations. Such speech—even when it includes isolated errors (as is inevitable)—plays a critical role in the robust give-and-take that ensures fair and transparent markets. Punishing, silencing, chilling, or otherwise abridging such speech violates not only the First Amendment rights of the speakers, but also those of the investing public to hear dissenting views about the companies they might consider investing in. *Cf. Bd. of Educ. v. Pico*, 457 U.S. 853 (1982) ("the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom"); *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (law directing postmaster general to detain incoming mail deemed communist political propaganda violated recipient's First Amendment rights and "is at war with the 'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment" (quoting *Sullivan*, 376 U.S. at 270)).

The decision below, if allowed to stand, would embolden SEC to punish and silence other critics of public companies whenever the agency, as here,

deems the criticism to be even slightly ill-informed or misguided. It would undoubtedly chill commentators and analysts from speaking out for fear of facing Lemelson-like consequences. It would also embolden other publicly traded corporations to enlist federal law enforcement in efforts to silence and punish their critics—especially when, as here, they lack the clear and convincing evidence of actual malice needed to prove defamation or other tort claims. *See generally* Couture, 65 ALA. L. REV. at 906 (arguing for full application of actual malice standard to securities law claims that are based on allegedly false statements by corporate outsiders). The Court should seize this opportunity to ensure that robust commentary and debate about our publicly traded companies remains free, unpunished, and un-chilled.

It is also critically important for this Court to clarify the reach of Exchange Act § 10(b) and SEC Rule 10b-5 when untrue speech about publicly traded corporations is not fraudulent. Does the mere utterance of untrue statements—even if done intentionally or recklessly—amount to a "manipulative or deceptive device or contrivance" punishable under Exchange Act § 10(b) and SEC Rule 10b-5, absent proof that the statements were *also* part of a fraudulent scheme, act, practice, or course of business? Given the unusual clarity of the jury verdict here, this case offers a rare and ideal vehicle for deciding that question.

CONCLUSION

The petition for a writ of certiorari should be granted.

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July 31, 2023