No. 18-1471

In the Supreme Court of the United States

CHRISTOPHER HALL, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

ROBERT B. STEBBINS
General Counsel
MICHAEL A. CONLEY
Solicitor
HOPE HALL AUGUSTINI
Senior Litigation Counsel
PAUL G. ALVAREZ
Senior Counsel
Securities and Exchange Commission
Washington, D.C. 20549

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

QUESTION PRESENTED

Petitioner lied about the size and existence of liens on securities he had pledged as collateral for his brokerage margin account. In a civil enforcement action for securities fraud, petitioner filed a pre-verdict motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(a), contending that his misrepresentations were not made in connection with the offer, purchase, or sale of a security, as required to create liability under the antifraud provisions of the securities laws. 15 U.S.C. 77q(a), 78j(b); 17 C.F.R. 240.10b-5. The district court denied the motion; the jury found petitioner liable; and petitioner did not renew his motion for judgment as a matter of law under Rule 50(b). The court of appeals affirmed. The question presented is as follows:

Whether the court of appeals correctly held that petitioner's failure to file a post-verdict motion under Rule 50(b) foreclosed consideration of his contention that the jury's finding of liability should be reversed because his misrepresentations to his broker were not made in connection with the offer, purchase, or sale of a security for purposes of the charged antifraud provisions.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

SEC v. *Hall*, No. 15-cv-23489 (June 29, 2017)

United States Court of Appeals (11th Cir.):

SEC v. *Hall*, No. 17-13897 (Jan. 4, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is not published in the Federal Reporter but is reprinted at 759 Fed. Appx. 877. The order of the district court granting reconsideration and entering an amended final judgment (Pet. App. 18-27) is not published in the Federal Supplement but is available at 2017 WL 1504025.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 2019. On March 28, 2019, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including May 20, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

To induce his broker to extend additional loans and to forestall liquidation of his securities, petitioner lied about

the size and existence of liens on securities he had pledged as collateral for his brokerage margin account. Pet. App. 4-5. The Securities and Exchange Commission (SEC or Commission) brought a civil enforcement action against petitioner, alleging violations of Section 17(a) of the Securities Act of 1933 (Securities Act), 15 U.S.C. 77q(a); Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78j(b); and SEC Rule 10b-5, 17 C.F.R. 240.10b-5. A jury found petitioner liable, and the district court imposed sanctions. Pet. App. 5-6. The court of appeals affirmed. *Id.* at 1-17.

1. Beginning in the early 2000s, petitioner was the controlling shareholder of Call Now, Inc., a company in the sports and entertainment industry. Pet. App. 3; C.A. Supp. App. 148. Petitioner also served for a time as chairman of Call Now's board. Pet. App. 3; C.A. Supp. App. 84. Among other ventures, Call Now developed a horse racetrack near San Antonio, Texas, called Retama Park. Pet. App. 4; C.A. Supp. App. 26, 28.

Petitioner and Call Now both had margin accounts at a brokerage firm, Penson Financial Services, Inc. (Penson). Pet. App. 3. A margin account is a financial vehicle through which a broker "lends [an] investor cash * * * to purchase securities," and then holds the securities "as collateral" against the value of the loan. SEC, *Investor Bulletin: Understanding Margin Accounts* (May 14, 2018), https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib_marginaccount; see *Delaware* v. *New York*, 507 U.S. 490, 495 n.3 (1993). Under Section 7 of the Exchange Act, 15 U.S.C. 78g, and Regulation T promulgated by the Board of Governors of the Federal Reserve System, 12 C.F.R. 220.1-220.12, holders of margin accounts must maintain a minimum percentage of equity relative to the value of the securities in their accounts.

If the equity in an account falls below that percentage, the customer must either deposit additional cash or securities, or else face liquidation of the securities in the account. 12 C.F.R. 220.4(c). In addition, collateral pledged to a margin account must not be encumbered; the broker must be able to liquidate assets in the account in order to prevent losses to the customer and broker. 12 C.F.R. 220.4(d); see C.A. Supp. App. 24-25.

In the years before the 2008 financial crisis, petitioner and Call Now "borrowed millions of dollars in margin loans" from Penson to "purchase bonds and to fund operating expenses at Retama Park." Pet. App. 3-4. During the financial crisis, the market value of the Retama Park bonds dropped, while the interest on the margin loans extended by Penson increased significantly. C.A. Supp. App. 29, 86. In 2009, Penson "required [petitioner] and Call Now to deposit additional collateral" in their margin accounts or face liquidation of their securities. Pet. App. 4. Petitioner responded by pledging Call Now stock, but he told Penson that "he needed loans to unencumber the shares because they were pledged to other lenders." *Ibid.* Penson agreed to the proposal and loaned petitioner $3.68 million. *Ibid.* "In fact," however, petitioner's Call Now "shares were unencumbered." *Ibid.* Petitioner "had lied so that [Penson] would loan him more money." *Ibid.*

By 2010, petitioner and Call Now "again had shortfalls in their margin accounts with Penson." Pet. App. 4. "To avoid liquidation," petitioner "agreed to a restructuring that required him to sell some of his Call Now shares back to Call Now, which would then pledge the shares as additional collateral" for Penson. *Ibid.* Petitioner again "claimed that the shares were encumbered and that he could not sell the shares back to Call Now

until he paid off a $1.8 million lien." *Ibid.* Penson again agreed to extend a loan—this time, for $1.8 million—and Call Now pledged the shares as collateral. *Ibid.* Petitioner, however, had "reached a deal with the lienholder to satisfy the lien for only $850,000." *Ibid.* After petitioner "satisfied the lien, he kept the rest of the money that [Penson] had loaned him." *Ibid.* "All told, as a result of these lies about the liens, [petitioner] obtained millions in loans (about $5.5 million) from [Penson], but paid only $850,000 to a single lender who had a valid lien on [his] Call Now Stock." *Id.* at 4-5.

In another transaction, petitioner "pledged his interest in a real-estate limited partnership as additional collateral for his margin loans." Pet. App. 5. Petitioner "claimed that his interest in the limited partnership was subject to an existing lien," but he "failed to disclose that *he* was the holder of that lien, through an entity created for his benefit to hide his assets." *Ibid.*

2. In 2015, the SEC brought a civil enforcement action against petitioner in federal district court. Pet. App. 5. The Commission alleged that petitioner's lies to his broker about the size and existence of liens on the securities he had pledged as collateral for his margin account violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5. 15 U.S.C. 77q(a), 78j(b); 17 C.F.R. 240.10b-5. Petitioner denied liability and proceeded to a jury trial. At the trial, petitioner "admitted he lied to [Penson] numerous times to receive millions of dollars in loans," but he contended that he was not subject to liability because he had not told those lies "in connection with" the offer, purchase,

or sale of a security, as required for liability under the charged antifraud provisions. Pet. App. 5.[1]

Before the case went to the jury, petitioner filed a motion under Federal Rule of Civil Procedure 50(a), which allows a court to grant judgment as a matter of law if "a reasonable jury would not have a legally sufficient evidentiary basis to find for" a party on a given issue. Fed. R. Civ. P. 50(a); see Pet. App. 5. Petitioner's Rule 50(a) motion contended "that the SEC failed to show that his lies were material or made in connection with a securities transaction." Pet. App. 5; see C.A. Supp. App. 144-147. The district court denied the motion, and a "unanimous jury found that [petitioner] committed multiple violations of the antifraud provisions of the federal securities laws." Pet. App. 5. Petitioner did not "file[] a renewed motion for judgment as a matter of law" under Rule 50(b), which allows such a motion to be filed within 28 days after the entry of judgment. *Id.* at 5-6; see Fed. R. Civ. P. 50(b).

The district court subsequently imposed on petitioner multiple sanctions, including a permanent injunction barring further violations of the securities laws, a ten-year bar on serving as an officer or director of a publicly traded company, a $225,000 civil penalty, and disgorgement of more than $3.7 million and nearly $1 million in prejudment interest. Pet. App. 6-7, 26-27.

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[1] Section 10(b) of the Exchange Act and Rule 10b-5 prohibit fraud "in connection with" the offer, purchase, or sale of a security, 15 U.S.C. 78j(b); 17 C.F.R. 240.10b-5, while Section 17(a) of the Securities Act prohibits fraud "in the offer or sale of" a security, 15 U.S.C. 77q(a). "Both Congress and this Court have on occasion" referred to those requirements "interchangeably," *United States* v. *Naftalin*, 441 U.S. 768, 773 n.4 (1979) (citations omitted), and the parties in this case have done so as well.

3. Petitioner appealed on various grounds, and the court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1-17. As relevant here, petitioner challenged "the jury's finding that he was liable," on the theory that "there was insufficient evidence to establish that the misrepresentations he made to" Penson had "occurred 'in connection with the purchase and sale' of securities." *Id.* at 8 n.6. The court held that it could not consider that challenge. The court explained that, "to challenge on appeal the sufficiency of the evidence supporting a verdict, a party must file a Rule 50(b) motion" after the jury renders its verdict. *Id.* at 9 n.6 (citing *Unitherm Food Sys., Inc.* v. *Swift-Eckrich, Inc.*, 546 U.S. 394, 400 (2006)). Because petitioner had "made a Rule 50(a) motion, arguing that the SEC failed to show that his lies were * * * made in connection with a securities transaction," but had "failed to file a post-verdict motion" under Rule 50(b) renewing that argument, the court held that it had "no authority to review [his] challenges to the sufficiency of the SEC's evidence at trial." *Ibid.*

ARGUMENT

The court of appeals correctly applied this Court's decision in *Unitherm Food Systems, Inc.* v. *Swift-Eckrich, Inc.*, 546 U.S. 394 (2006), in holding that it lacked authority to consider petitioner's challenge to the jury's finding that his misrepresentations were made "in connection with" the offer, purchase, or sale of a security. As the court of appeals correctly recognized, petitioner's challenge called into question the sufficiency of the evidence, and it therefore could not be considered on appeal given petitioner's failure to file a post-verdict motion under Federal Rule of Civil Procedure 50(b). Contrary to petitioner's suggestion, the courts of appeals

agree that a failure to make a Rule 50(b) motion forecloses appellate consideration of a challenge to the sufficiency of the evidence.

To the extent petitioner contends that the particular argument he asserts here is not properly characterized as a sufficiency challenge, he is mistaken. In any event, that case-specific issue would not warrant this Court's review. Finally, even if petitioner's challenge to the sufficiency of the evidence had been properly raised in the court of appeals, it would lack merit under this Court's precedents, which have broadly interpreted the "in connection with" requirement of the antifraud provisions. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly held that it lacked authority to consider petitioner's contention that his lies to his broker were not made "in connection with" the offer, purchase, or sale of a security, as required for the jury to find liability under the antifraud provisions of the securities laws. Pet. App. 8 n.6; see 15 U.S.C. 77q(a); 15 U.S.C. 78j(b); 17 C.F.R. 240.10b-5.

In *Unitherm*, this Court held that a party's "failure to comply with Rule 50(b) forecloses its challenge to the sufficiency of the evidence" on appeal. 546 U.S. at 404. The Court grounded that conclusion in the text of the rule, longstanding precedent, considerations of judicial administration, and "principles of fairness." *Id.* at 401 (quoting *Johnson* v. *New York, New Haven & Hartford R.R.*, 344 U.S. 48, 53 (1952)); see *ibid.* ("Determination of whether * * * judgment [should be] entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart.") (quoting *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216 (1947)) (brackets omitted).

Petitioner acknowledges (Pet. 27) this Court's holding in *Unitherm* "that in order for an appellate court to have authority to consider *sufficiency of the evidence* arguments on appeal, a party must file a *post*-verdict Fed. R. Civ. P. 50(b) motion in the trial court." Petitioner also acknowledges (Pet. 7) that he "did not file a Fed. R. Civ. P. 50(b)" motion. Petitioner's contention that the court of appeals had authority to consider his "in connection with" argument therefore turns on whether that argument is properly characterized as a challenge to the sufficiency of the evidence.

The court of appeals correctly treated petitioner's contention as a sufficiency challenge. Pet. App. 8 n.6. At its core, a sufficiency challenge is a claim that a party's conduct cannot lawfully be found to fall within the terms of a particular legal provision. See, *e.g.*, *Musacchio* v. *United States*, 136 S. Ct. 709, 715 (2016). That is what petitioner argues here—that his lies to his broker cannot lawfully be found to be "in connection with" the offer, purchase, or sale of a security. See Pet. 30-32. Petitioner acknowledges that he made precisely that argument in a Rule 50(a) motion. See Pet. 7 (stating that petitioner "moved for judgment as a matter of law, pursuant to Fed. R. Civ. P. 50(a), arguing the Commission failed to demonstrate that [his] misrepresentations were * * * made 'in connection with' a securities transaction"). As noted above, the premise of a Rule 50(a) motion is that "a reasonable jury would not have *a legally sufficient evidentiary basis* to find for the party on that issue." Fed. R. Civ. P. 50(a) (emphasis added). By making a Rule 50(a) motion asserting the "in connection with" claim, petitioner thus necessarily recognized that the claim was a sufficiency challenge.

Petitioner attempts (Pet. 28) to draw a distinction between a sufficiency challenge, which he says requires analysis of "whether the evidence at trial was sufficient to support findings of violations of the securities laws," and a different kind of challenge that "requires an analysis of law." That distinction, however, does not withstand scrutiny. Contrary to petitioner's suggestion, a sufficiency challenge necessarily "requires an analysis of law." *Ibid.* After all, the result of a successful sufficiency challenge is a grant of "judgment as a matter of law." Fed. R. Civ. P. 50(a) and (b). And a court cannot decide whether the evidence is sufficient to satisfy the governing legal standard without determining what that standard is. A court reviewing a sufficiency challenge thus "considers only the '*legal*' question 'whether, after viewing the evidence in the light most favorable to [one party], *any* rational trier of fact could have found the essential elements of the'" statute to be satisfied. *Musacchio*, 136 S. Ct. at 715 (quoting *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979) (first emphasis added).

To be sure, some sufficiency challenges require "evaluating evidence or assessing the credibility of witnesses." Pet. 28. But other sufficiency challenges involve only the legal question whether undisputed evidence satisfies an element of a statute. See, *e.g.*, *Taylor* v. *United States*, 136 S. Ct. 2074, 2078 (2016) (holding that robbing a drug dealer of drugs and money "was sufficient to satisfy the * * * commerce element" of the Hobbs Act, 18 U.S.C. 1951). Petitioner's assertion that his conduct did not satisfy the "in connection with" requirement of the antifraud provisions is such a sufficiency challenge.

Throughout this case, petitioner has argued that his misrepresentations lacked the requisite connection to a

securities transaction because they were not material to Penson's decision to buy or sell a security. See Pet. 30-31. But this Court long has recognized that the issue of materiality is "a mixed question of law and fact, involving as it does the application of a legal standard to a particular set of facts," requiring assessments that "are peculiarly * * * for the trier of fact." *TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438, 450 (1976). Indeed, petitioner conceded in the court of appeals that his contention that his conduct did not satisfy the materiality element of securities fraud *was* a sufficiency challenge that he had forfeited by failing to raise it in a Rule 50(b) motion. Oral Argument at 10:30-10:50, *SEC* v. *Hall*, No. 17-13897 (11th Cir. Oct. 5, 2018), https://go.usa.gov/xyhCw. The same is true of his contention with respect to the "in connection with" element.

Finally, petitioner's arguments on the merits (Pet. 30-32) underscore that his "in connection with" argument constitutes a sufficiency challenge. For example, petitioner contends (Pet. 31) that the "purported misstatements—the reasons articulated *why* [p]etitioner needed the loans (to pay down liens)—did not have an impact on Penson's decision to accept the Call Now shares as collateral (the securities transaction at issue)." The question of whether and how certain statements "ha[d] an impact on" (*ibid.*) a particular decision is a quintessential fact question to be resolved by the jury. The court of appeals thus correctly held that petitioner's "in connection with" argument presented a "challenge[] to the sufficiency of the SEC's evidence at trial," and that petitioner's failure to file a Rule 50(b)

motion therefore precluded him from raising that challenge on appeal. Pet. App. 9 n.6; see *Unitherm*, 546 U.S. at 407.[2]

2. Petitioner asserts (Pet. 9) that "the courts of appeals conflict" over whether they "have authority to hear challenges to issues of law raised in the trial court in a *pre*-verdict Fed. R. Civ. P. 50(a) motion for directed verdict where the issue of law is not subsequently renewed in a *post*-verdict Rule 50(b) motion." No such conflict exists. As petitioner observes, numerous courts of appeals have explained that, under *Unitherm*, a litigant must file a Rule 50(b) motion in order to preserve a challenge "to the *sufficiency of the evidence*." Pet. 10 (collecting cases). The Eleventh Circuit's holding in this case is fully consistent with those decisions. The Eleventh Circuit explained that, under *Unitherm*, it lacked authority to consider petitioner's "challenges to the sufficiency of the SEC's evidence" because he had failed to assert those challenges in a Rule 50(b) motion. Pet. App. 9 n.6. Like the other courts of appeals whose decisions petitioner cites (Pet. 15-17), the court below thus applied *Unitherm* only to a challenge to "the sufficiency of the * * * evidence." Pet. App. 9 n.6.

To be sure, petitioner contends that the argument he advanced below is not properly viewed as a sufficiency challenge. But whatever the merits of that contention, the Eleventh Circuit held only that *Unitherm* governs

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[2] Without filing a post-verdict Rule 50(b) motion, petitioner could have reasserted on appeal an objection to the jury instruction regarding the "in connection with" requirement, thereby raising a challenge distinct from his attack on the sufficiency of the evidence. But petitioner did not do so, and he now acknowledges (Pet. 30) that the relevant jury instruction was "technically true in language."

challenges to the sufficiency of the evidence, thus applying the same rule that petitioner attributes to the other courts of appeals that have addressed the issue. See Pet. 10, 15-17. Petitioner does not suggest that courts of appeals have disagreed on the much narrower question whether an argument that certain statements were not made "in connection with" a securities transaction should be characterized as a challenge to the sufficiency of the evidence.

Petitioner also asserts (Pet. 10) a conflict between the Eleventh Circuit's earlier decision in *Hi Limited Partnership* v. *Winghouse of Florida, Inc.*, 451 F.3d 1300 (2006), and decisions of other courts of appeals applying *Unitherm*. But petitioner again fails to demonstrate that any conflict exists. In *Hi Limited Partnership*, the Eleventh Circuit held that, under *Unitherm*, a party's failure to file a Rule 50(b) motion asserting that its counterparty "did not fully perform" a contract precluded the court from considering that argument on appeal. *Id.* at 1301. Whether a party fully performed a contract is a factual question properly decided by a jury, and the assertion that "the district court erred in submitting the matter to the jury" is a textbook sufficiency challenge. *Ibid.*

Nothing in *Hi Limited Partnership* suggests that the Eleventh Circuit would apply *Unitherm* outside the context of sufficiency challenges. Indeed, petitioner (Pet. 28-29) contends only that *Hi Limited Partnership* leaves the question "unclear." Even if that characterization were correct, it would not create a circuit conflict warranting this Court's review. But in any event, other courts of appeals have not found the Eleventh Circuit's decision in *Hi Limited Partnership* to be ambiguous. In *Linden* v. *CNH America, LLC*, 673 F.3d 829 (2012)—

petitioner's lead example of the prevailing court of appeals position (see Pet. 15-17)—the Eighth Circuit cited *Hi Limited Partnership* to support its statement that "appeals courts have uniformly limited [*Unitherm*] to sufficiency of the evidence challenges where parties fail to file a postverdict motion under Rule 50(b) after the denial of a Rule 50(a) preverdict motion." 673 F.3d at 832-833 (emphasis omitted).

3. Even if petitioner were correct in arguing that the court of appeals should have considered his challenge to the jury's liability finding, that challenge lacks merit. Petitioner's core argument is that, even though he lied about the size and existence of liens on the securities he had pledged as collateral to his broker, those lies were not "in connection with" a securities transaction because his broker received "exactly [the securities] it had bargained for." Pet. 30; see Pet. 31 ("[T]he value of the securities that Penson received as collateral was consistent with what Penson had bargained for."). That contention is flawed on multiple grounds.

As an initial matter, this Court has long held "that a pledge of stock is equivalent to a sale for the purposes of the antifraud provisions of the federal securities laws." *Marine Bank* v. *Weaver*, 455 U.S. 551, 554 n.2 (1982); see *Rubin* v. *United States*, 449 U.S. 424, 429 (1981). Lying to a broker about a security while pledging that security as collateral—as petitioner has conceded he did here, see Pet. App. 3-5—therefore has the requisite connection to a securities transaction to create liability under the antifraud provisions of the securities laws.

This Court has also rejected petitioner's argument that misrepresentations must affect the "value of the securities" (Pet. 31) at issue in order to create liability under the antifraud provisions. In *SEC* v. *Zandford*,

535 U.S. 813 (2002) (see Pet. 20-23), this Court explained that "neither the SEC nor this Court has ever held that there must be a misrepresentation about the value of a particular security in order to run afoul of the [Exchange] Act." 535 U.S. at 820. To the contrary, the Court concluded that the term "in connection with" in the antifraud provisions "should be 'construed not technically and restrictively, but flexibly to effectuate its remedial purposes.'" *Id.* at 819 (quoting *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 151 (1972)); see *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 85 (2006) ("[W]hen this Court has sought to give meaning to the phrase in the context of §10(b) and Rule 10b-5, it has espoused a broad interpretation.") (emphasis omitted). Accordingly, a fraud is "in connection with" a securities transaction if the fraud "coincide[s]" with that transaction. *Zandford*, 535 U.S. at 820. Here, petitioner lied to his broker about securities pledged to his margin account, which he used to conduct securities transactions, and he did so to prevent his broker from selling off his securities. See Pet. App. 4-5; C.A. Supp. App. 30-33, 77-84. At a minimum, those lies "coincided" with securities transactions and thereby triggered liability under the antifraud provisions. *Zandford*, 535 U.S. at 820.

In attempting to avoid that conclusion, petitioner relies (Pet. 23-24) on this Court's decision in *Chadbourne & Parke LLP* v. *Troice*, 571 U.S. 377 (2014). But the Court in *Troice* reiterated *Zandford*'s directive that courts should flexibly construe the "in connection with" requirement, as well as *Zandford*'s holding that the requirement is satisfied where the fraud and securities transaction "simply 'coincide.'" *Id.* at 392-393 (citation omitted). The Court concluded that the "in connection

with" requirement was not satisfied in *Troice* because the alleged misrepresentations did not coincide with the purchase or sale of a "covered security," which in that private action was limited to a security authorized for listing on a national exchange. *Id.* at 380-381 (quoting 15 U.S.C. 78bb(f)(5)(E)). The Court observed, however, that no such limitation exists in an enforcement action, like this one, that is brought by the government. See *id.* at 394 ("Frauds like the one here * * * will continue to be within the reach of federal regulation because the authority of the SEC and Department of Justice extends to all 'securities,' not just to those traded on national exchanges.") (citation omitted). *Troice* thus underscores that petitioner was correctly found liable for his securities fraud.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

ROBERT B. STEBBINS
General Counsel
MICHAEL A. CONLEY
Solicitor
HOPE HALL AUGUSTINI
Senior Litigation Counsel
PAUL G. ALVAREZ
Senior Counsel
Securities and Exchange Commission

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