No. 14-541

In the Supreme Court of the United States

TIMOTHY MCGEE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Securities and Exchange Commission (SEC) Rule 10b5-2(b)(2) validly implements the SEC's authority under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), by defining relationships that give rise to a duty to disclose for purposes of misappropriation insider-trading liability.

2. Whether the evidence was sufficient to satisfy the two-witness rule for petitioner's conviction for perjury.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 763 F.3d 304. The memorandum opinions and orders of the district court (Pet. App. 42a-73a) are reported at 892 F. Supp. 2d 726 and 955 F. Supp. 2d 466.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2014. The petition for a writ of certiorari was filed on November 12, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on one count of securities fraud, in violation of 15 U.S.C. 78j(b), 78ff and 17 C.F.R.

240.10b-5, 240.10b5-2, and one count of perjury, in violation of 18 U.S.C. 1621. Pet. App. 5a-6a, 31a, 74a-83a. He was sentenced to six months of imprisonment, to be followed by two years of supervised release. *Id.* at 33a-34a. The court of appeals affirmed. *Id.* at 1a-30a.

1. Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78a *et seq.*, makes it illegal 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 [Securities and Exchange Commission (SEC)] may prescribe." 15 U.S.C. 78j(b). Rule 10b-5(a), adopted under that authority, prohibits the use of "any device, scheme, or artifice to defraud" in connection with a securities trade. 17 C.F.R. 240.10b-5(a).

Insider trading is one of the deceptive devices prohibited by Section 10(b) and Rule 10b-5. Under the "classical theory" of insider trading, a corporate insider violates Rule 10b-5 by "trad[ing] in the securities of his corporation on the basis of material, nonpublic information." *United States* v. *O'Hagan*, 521 U.S. 642, 651-652 (1997). Such trading is a "deceptive device" because of the "relationship of trust and confidence" between corporate insiders and the corporation's shareholders. *Id.* at 652 (quoting *Chiarella* v. *United States*, 445 U.S. 222, 228 (1980)). That relationship "gives rise to a duty to disclose [inside information] or to abstain from trading because of the necessity of preventing a corporate insider from taking unfair advantage of uninformed stockholders." *Ibid.* (brackets, ellipses, and internal quotation marks omitted) (quoting *Chiarella*, 445 U.S. at 228-229). The duty to

disclose or abstain "applies not only to officers, directors, and other permanent insiders of a corporation, but also to attorneys, accountants, consultants, and others who temporarily become fiduciaries of a corporation." *Ibid.*

Under the "misappropriation theory" of insider trading, a person violates Rule 10b-5 "when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information." *O'Hagan*, 521 U.S. at 652. Whereas the classical theory "premis[es] liability on a fiduciary relationship between company insider and purchaser or seller of the company's stock," the misappropriation theory rests on the trader's "deception of those who entrusted him with access to confidential information." *Ibid.* Such conduct violates Rule 10b-5 because the misappropriator engages in deception by pretending "loyalty to the principal while secretly converting the principal's information for personal gain." *Id.* at 653 (citation omitted). The misappropriation theory thus "outlaws trading on the basis of nonpublic information" by "outsider[s]" to the corporation who act fraudulently. *Id.* at 652-653.

In 2000, invoking its rulemaking authority under Section 10(b), the SEC promulgated Rule 10b5-2 to provide a "non-exclusive definition of circumstances in which a person has a duty of trust or confidence for purposes of the 'misappropriation' theory of insider trading." 64 Fed. Reg. 72,603 (proposed Dec. 28, 1999); see *Selective Disclosure and Insider Trading*, 65 Fed. Reg. 51,716 (Aug. 24, 2000). Rule 10b5-2 provides, in relevant part, that "a 'duty of trust or confidence' exists in the following circumstances, among others":

> (1) Whenever a person agrees to maintain information in confidence; [or]
>
> (2) Whenever the person communicating the material nonpublic information and the person to whom it is communicated have a history, pattern, or practice of sharing confidences, such that the recipient of the information knows or reasonably should know that the person communicating the material nonpublic information expects that the recipient will maintain its confidentiality.

17 C.F.R. 240.10b5-2(b)(1) and (2).

2. a. Petitioner purchased and sold shares in the Philadelphia Consolidated Holding Corporation (PHLY), a publicly traded company, on the basis of material nonpublic information about the company's impending sale. Pet. App. 3a. Petitioner learned about the sale of PHLY from Christopher Maguire, an executive insider at the company. *Ibid.*

Petitioner and Maguire had become confidants at some point between 1999 and 2001 through their membership in Alcoholics Anonymous (AA). AA is a fellowship of recovering alcoholics where a "newcomer can turn . . . with the assurance that no newfound friends will violate confidences relating to his or her drinking problem." Pet. App. 3a-4a (quoting Alcoholics Anonymous World Serv., Inc., *44 Questions* 11 (2008)). Petitioner informally mentored Maguire for over a decade toward the goal of achieving and maintaining sobriety, and they "shared intimate details about their lives to alleviate stress and prevent relapses." *Ibid.* Petitioner assured Maguire that their conversations would remain private, and Maguire never repeated information that petitioner entrusted to him. *Id.* at 4a.

In 2008, Maguire was closely involved in negotiations to sell PHLY. During that time, he "experienced sporadic alcohol relapses, culminating in a drinking episode * * * at a weekend golf event" in June. Pet. App. 4a. Petitioner saw Maguire at an AA meeting shortly after the golf event and, following the meeting, asked Maguire about his recent absences from AA meetings. *Ibid.* Maguire then "'blurted out' the inside information about PHLY's imminent sale," at a time when it "had not been publicly announced," and told petitioner that the company would be sold "'for three times book [value].'" *Ibid.* (citation omitted). Maguire "expected [petitioner] to keep this information confidential" and "believed he could trust [petitioner] with the information given their long history of sharing confidences related to sobriety." *Ibid.*

Between July 15 and July 22, 2008, however, petitioner purchased 10,750 shares of PHLY stock at prices ranging from $33 to $35 per share. To partially finance those purchases, he borrowed approximately $226,000 at 6.875% interest. The PHLY stock grew from less than 10% of petitioner's stock portfolio to 60%. On July 23, 2008, shortly after the public announcement of PHLY's sale, petitioner sold the stock for a profit of $292,128. See Pet. App. 3a, 5a.

b. The SEC began an investigation of petitioner. Pet. App. 5a. During sworn testimony before the agency, petitioner was asked, among other things, if he had "any information prior to making [his] purchases in Philadelphia Consolidated in July of '08 that there might be something afoot at the company, that there might be something happening with the stock." *Id.* at 22a-23a n.12. Petitioner responded, "No." *Id.*

at 23a n.12 (emphasis omitted). With respect to interactions he had with Maguire about sobriety, petitioner was asked if he "ever sense[d] or pick[ed] up any type of information or [cue] that would suggest that the company was going to be purchased." *Ibid.* Petitioner responded, "I did not." *Ibid.* (emphasis omitted). Petitioner was also asked if there were "any rumors going on that [he] heard about the company being bought that led [him] to purchase the stock in July." *Ibid.* Petitioner responded, "No. I knew nothing. I mean there was not a factor." *Ibid.* (emphasis omitted).

3. Petitioner was indicted in the United States District Court for the Eastern District of Pennsylvania on one count of insider trading, in violation of 15 U.S.C. 78j(b), 78ff and 17 C.F.R. 240.10b-5, 240.10b5-2(b), and one count of perjury, in violation of 18 U.S.C. 1621. Pet. App. 74a-83a.

a. The district court denied petitioner's pretrial motion to dismiss the insider-trading charge. Pet. App. 55a-73a. Petitioner had contended that Subsections (b)(1) and (b)(2) of Rule 10b5-2 were invalid exercises of the SEC's rulemaking authority, because "although [Section 10(b)] left a gap for the SEC to fill," this Court's decision in *O'Hagan* required "a recognized, fiduciary or fiduciary-like relationship" to establish liability for insider trading under a misappropriation theory. Pet. App. 62a. The district court, however, "agree[d] with the courts of appeal who have rejected this argument, holding that the predicate relationship is not always a recognized, fiduciary relationship." *Id.* at 62a-63a (citing decisions from the Second and Eleventh Circuits). The court then held that Subsections (b)(1) and (b)(2) are reasonable exer-

cises of the SEC's rulemaking authority because they "are consistent with [Section 10(b)'s] requirement that the defendant used a 'deceptive device.'" *Id.* at 66a. "The deception occurs," the court explained, "when the misappropriator betrays the insider's trust that the material nonpublic information will be safeguarded, based on either an agreement to maintain confidences, 10b5-2(b)(1), or a history of sharing and maintaining confidences[,] 10b5-2(b)(2)." *Ibid.*

b. Petitioner proceeded to a jury trial. Although petitioner had been indicted under both Subsection (b)(1) and Subsection (b)(2) of Rule 10b5-2, the jury was instructed only on Subsection (b)(2) for the insider-trading count. Pet. App. 6a n.2. The jury found petitioner guilty on both that count and the perjury count. *Id.* at 6a.

c. The district court denied petitioner's motion for judgment of acquittal under Federal Rule of Criminal Procedure 29. Pet. App. 42a-54a. As relevant here, the court rejected petitioner's argument that his conviction on the perjury charge violated the so-called "two-witness rule," which holds that a perjury conviction "cannot rest on the uncorroborated testimony of a single witness," but may rest on "a single witness and corroborating non-testimonial evidence." *Id.* at 49a. Based on its review of the trial record, the district court found that Maguire's testimony, in combination with "[t]he records of [petitioner's] stock trades," satisfied that rule. *Id.* at 49a-50a. "The unusual timing and the large number of the shares purchased within a three-week period of time when compared to his previous holdings in PHLY stock, and the significant loan he took to purchase the stock," the court explained, "is corroborative evidence that [petitioner]

had been tipped about the pending merger." *Id.* at 50a. The court added that the records "contradicted [petitioner's] * * * explanation" for his trading strategy. *Ibid.*

4. The court of appeals affirmed. Pet. App. 1a-30a.

a. Applying the two-step framework of *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), the court of appeals held that Rule 10b5-2(b)(2) represents "a valid exercise of the SEC's rulemaking authority." Pet. App. 19a; see *id.* at 7a-19a. At the first step, the court concluded that Section 10(b) "is ambiguous because Congress declined to define the amorphous term 'deceptive device,'" *id.* at 12a (quoting Section 10(b)), and "did not speak to the 'precise question at issue' because § 10(b) does not mention insider trading at all, much less misappropriation or relationships required for liability," *ibid.* (quoting *Chevron*, 467 U.S. at 843). The court rejected petitioner's argument that this Court's "insider trading jurisprudence * * * expressly requires a fiduciary relationship between a misappropriator and the source of inside information for liability." *Id.* at 13a-15a. This Court's decisions, the court of appeals determined, do "not unambiguously define recognized duties or cabin such duties to fiduciary relationships." *Id.* at 14a. The court accordingly "join[ed] [its] sister circuits in recognizing that [this] Court '[has] not set the contours of a relationship of "trust and confidence" giving rise to the duty to disclose or abstain and misappropriation liability.'" *Id.* at 14a-15a (quoting *SEC* v. *Cuban*, 620 F.3d 551, 555 (5th Cir. 2010), and citing *SEC* v. *Yun*, 327 F.3d 1263, 1271 (11th Cir. 2003)).

The court of appeals accordingly continued to the second step of *Chevron* by asking "whether the

[SEC's] interpretation is reasonable in light of the language, policies, and legislative history of § 10(b) and the Exchange Act." Pet. App. 16a (citation and internal quotation marks omitted; first set of brackets in original). The court found that the SEC's "approach was reasonable and 'buttressed by a thorough and careful consideration . . . of the ends of § 10(b), the state of the current insider trading case law' and 'the need to protect investors and the market.'" *Id.* at 17a (quoting *United States* v. *Corbin*, 729 F. Supp. 2d 607, 619 (S.D.N.Y. 2010)). Rule 10b5-2(b)(2), the court explained, "'trains on conduct involving manipulation or deception' and proscribes 'feigning fidelity to the source of the information.'" *Ibid.* (quoting *O'Hagan*, 521 U.S. at 655). "A trader's undisclosed, self-serving use of confidential information notwithstanding the parties' history of sharing confidences," the court continued, "chills market participation because it stems from contrivance, not luck, and the informational disadvantage to other investors cannot be overcome with research or skill." *Id.* at 17a-18a (citations and internal quotation marks omitted). The court therefore determined that Rule 10b5-2(b)(2) was "well tuned to an animating purpose of the Exchange Act: to insure honest securities markets and thereby promote investor confidence." *Id.* at 18a (quoting *O'Hagan*, 521 U.S. at 658).

b. The court of appeals also held that the evidence was sufficient to support petitioner's perjury conviction. Pet. App. 22a-28a. The court recognized that a conviction under 18 U.S.C. 1621 "must be based on 'the testimony of two independent witnesses or by one witness and corroborating evidence.'" *Id.* at 24a (quoting *United States* v. *Neff*, 212 F.2d 297, 306 (3d

Cir. 1954)). In light of its examination of the trial record, the court found the evidence sufficient to meet that standard here. Petitioner's record of trading, the court explained, was sufficient corroborative evidence because his high-volume trades of PHLY stock immediately before and after the company's sale were not consistent with the legitimate trading strategy that he claimed to have undertaken. See *id.* at 25a-26a.

The court of appeals further determined that its analysis and holding comported with the Second Circuit's decision in *United States* v. *Chestman*, 903 F.2d 75 (1990), partially vacated on other grounds, 947 F.2d 551 (1991) (en banc), cert. denied, 503 U.S. 1004 (1992), another perjury case involving insider trading. The court explained that although *Chestman* had held that the two-witness rule was not satisfied by the evidence in the case, that was because, unlike here, the defendant's trading had been fully consistent with a strategy that did not depend on inside information. See Pet. App. 25a.

ARGUMENT

Petitioner contends (Pet. 12-20) that Rule 10b5-2(b)(2) is invalid because this Court's decisions have unambiguously required a fiduciary relationship between an alleged missappropriator and the source of inside information to support liability under the misappropriation theory of insider trading. That contention lacks merit and does not warrant further review. This Court has never held that a traditional fiduciary relationship is required to establish liability, and petitioner does not contend that the decision below conflicts with any decision of another circuit. Petitioner also contends (Pet. 20-26) that the government presented insufficient corroborative evidence of

Maguire's testimony to support petitioner's perjury conviction. The court of appeals correctly rejected that contention in light of the evidence presented at trial, and its factbound application of settled legal principles does not conflict with any decision of this Court or another court of appeals. Further review therefore is not warranted.

1. The SEC validly exercised its rulemaking authority in promulgating Rule 10b5-2(b)(2).

a. i. Section 10(b) makes it unlawful to use a "deceptive device * * * in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. 78j(b). As this Court has held, under the misappropriation theory of insider-trading liability, the phrase "deceptive device" includes the purchase or sale of a security on the basis of material nonpublic information in breach of a duty of trust or confidence that is owed to the person who is the source of the material nonpublic information, even if the trader owes no such duty to another trading party. See *United States* v. *O'Hagan*, 521 U.S. 642, 652-653 (1997); 17 C.F.R. 240.10b5-1(a). Rule 10b5-2(b)(2) defines one set of circumstances in which a duty of trust or confidence exists: "[w]henever the person communicating the material nonpublic information and the person to whom it is communicated have a history, pattern, or practice of sharing confidences, such that the recipient of the information knows or reasonably should know that the person communicating the material nonpublic information expects that the recipient will maintain its confidentiality." 17 C.F.R. 240.10b5-2(b)(2).

That rule reflects a reasonable interpretation of Section 10(b). As in other circumstances in which Congress has authorized the SEC to "prescribe legislative rules" implementing a statutory provision, the validity of Rule 10b5-2(b)(2) must be evaluated under the two-step framework of *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 844 (1984). *O'Hagan*, 521 U.S. at 673; see *SEC* v. *Zandford*, 535 U.S. 813, 819-820 (2002). Under that framework, a court must first "apply[] the ordinary tools of statutory construction" to "determine 'whether Congress has directly spoken to the precise question at issue.'" *City of Arlington, Tex.* v. *Federal Commc'ns Comm'n*, 133 S. Ct. 1863, 1868 (2013) (quoting *Chevron*, 467 U.S. at 842). If so, that meaning controls. "But 'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.'" *Ibid.* (quoting *Chevron*, 467 U.S. at 843). In that circumstance, the SEC's determination is entitled to "controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *O'Hagan*, 521 U.S. at 673 (brackets in original) (quoting *Chevron*, 467 U.S. at 844).

Rule 10b5-2(b)(2) readily satisfies the *Chevron* framework. The statute expressly contemplates that the SEC will promulgate rules to effectuate Section 10(b)'s regulatory framework. And, as the court of appeals explained, Section 10(b) does "not speak to the 'precise question at issue' because [it] does not mention insider trading at all, much less misappropriation or relationships required for liability." Pet. App. 12a (citation omitted). The SEC therefore has latitude to define those relationships.

Under the second step of *Chevron*, Rule 10b5-2(b)(2) is not "arbitrary, capricious, or manifestly contrary" to the Exchange Act, because it "trains on conduct involving manipulation or deception" (*O'Hagan*, 521 U.S. at 655): deceptively exploiting for personal use nonpublic information that was acquired through a relationship of trust and confidentiality. As this Court explained in *O'Hagan*, the "undisclosed, self-serving use of a principal's information to purchase or sell securities, in breach of a duty of loyalty and confidentiality, defrauds the principal of the exclusive use of that information." *Id.* at 652. The same form of deception occurs in the circumstances encompassed by Rule 10b5-2(b)(2), in which informal relationships of trust and confidence arise out of the parties' "history, pattern, or practice of sharing confidences." When a person trades on information acquired in the course of such relationships, as petitioner did, he deceives "those who entrusted him with access to confidential information." *Ibid.*. Accordingly, not only fiduciary relationships, but other relationships of trust and confidence can give rise to the deception that the misappropriation theory targets.

Similarly, as with misappropriation involving traditional fiduciaries, when a trader misappropriates information acquired in the course of informal relationships of trust and confidence with insiders, the trader's informational advantage relative to other investors "stems from contrivance, not luck" and "cannot be overcome with research or skill." *O'Hagan*, 521 U.S. at 658-659. And as with traditional fiduciaries, such conduct, if widespread, could prompt "investors [to] refrain from dealing altogether" or to "incur costs to avoid dealing with such transactors or corruptly to

overcome their unerodable informational advantages." *Id.* at 659 (quoting Victor Brudney, *Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws*, 93 Harv. L. Rev. 322, 356 (1979)). Rule 10b5-2(b)(2) thus is "well tuned to an animating purpose of the Exchange Act: to insure honest securities markets and thereby promote investor confidence." *Id.* at 658.

ii. Petitioner does not contend in his petition that the text of Section 10(b) forecloses the interpretation of that provision reflected in Rule 10b5-2(b)(2), that Rule 10b5-2(b)(2) conflicts with the purposes of the Exchange Act, or that the SEC's interpretation of Section 10(b) is arbitrary and capricious. Petitioner's only contention here (Pet. 12-20) is that this Court's precedents conclusively establish that the existence of a traditional fiduciary relationship is necessary for insider-trading liability under the misappropriation theory, such that "there is no longer any different construction that is consistent with [this Court's precedents] and available for adoption by the agency," *United States* v. *Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1843 (2012).

That contention is incorrect. This Court's only decision addressing the misappropriation theory is *O'Hagan*, which held that liability requires the breach of a "recognized duty." 521 U.S. at 666. The Court, however, did not further define that concept, because the Court's resolution of that case did not require an exhaustive description of the sorts of duties that suffice for liability. Although the Court referred at various points in its opinion to fiduciary duties, it also described the requisite duty as "a duty owed * * * to the source of the information," *id.* at 653, a "fiduci-

ary duty or other duty," *ibid.* (citation omitted), a "duty of trust and confidence," *ibid.*, "a duty of loyalty and confidentiality," *id.* at 665 n.7, "a duty of confidentiality," *id.* at 661, and "a relationship of trust and confidence," *id.* at 662 (quoting *Chiarella* v. *United States*, 445 U.S. 222, 230 (1980)). And *O'Hagan* quoted a law-review article stating that the misappropriation theory bars "trading on the basis of information that the wrongdoer converted to his own use in violation of some fiduciary, contractual, or *similar obligation* to the owner or rightful possessor of the information." *Id.* at 663 (quoting Barbara Bader Aldave, *Misappropriation: A General Theory of Liability for Trading on Nonpublic Information*, 13 Hofstra L. Rev. 101, 122 (1984)) (emphasis added).

Those passages make clear that *O'Hagan* did not comprehensively describe the types of trust relationships that would give rise to duties to disclose or abstain from trading and did not purport to foreclose the SEC from reasonably defining such relationships through rulemaking. For that reason, the courts of appeals to consider the question have explained that "*O'Hagan* did not set the contours of a relationship of 'trust and confidence' giving rise to the duty to disclose or abstain and misappropriation liability." *SEC* v. *Cuban*, 620 F.3d 551, 555 (5th Cir. 2010); see Pet. App. 13a-15a; *SEC* v. *Yun*, 327 F.3d 1263, 1271-1273 (11th Cir. 2003).

Petitioner also lists quotations referring to fiduciary duties from this Court's insider-trading decisions other than *O'Hagan*. See Pet. 13-15. None of those cases addressed the scope of the misappropriation theory, and none established what sort of relationship is necessary to give rise to the requisite duty of trust

and confidence. Petitioner also omits key passages. In *Dirks* v. *SEC*, 463 U.S. 646 (1983), and *Chiarella*, *supra*, this Court, in describing the classical theory of insider trading, explained that "there can be no duty to disclose where the person who has traded on inside information 'was not [the corporation's] agent, . . . was not a fiduciary, [*or*] was not a person in whom the sellers [of the securities] had *placed their trust and confidence*.'" *Dirks*, 463 U.S. at 654 (emphases added; brackets in original) (quoting *Chiarella*, 445 U.S. at 232). The Court then classified any one of those sorts of relationships as a "fiduciary relationship." *Ibid.* The cited decisions therefore make clear that this Court has not confined the scope of liability for insider trading to traditional fiduciary relationships.

Petitioner accordingly errs in relying (Pet. 18-19) on *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005) (*Brand X*). *Brand X* teaches that a judicial decision construing a statute does not foreclose an agency from adopting a different interpretation of the statute unless the judicial decision holds that its interpretation unambiguously follows from the statutory text. See *id.* at 982-983. For the reasons explained above, none of this Court's decisions holds that a traditional fiduciary relationship is required for liability under Section 10(b) under a misappropriation theory. But even if one could conceivably interpret some decision of this Court to have so held, it is not possible to read those decisions to hold that such a requirement follows unambiguously from the statutory text. See Pet. App. 12a-14a.

b. Petitioner acknowledges (Pet. 10) that no conflict of authority exists over whether Rule 10b5-2 is a

valid exercise of the SEC's regulatory authority. Indeed, no other court of appeals has considered that question. And his argument that the decision below conflicts with this Court's decisions is incorrect. See pp. 14-16, *supra*. Petitioner has not identified any other compelling reason for this Court to rule on the validity of Rule 10b5-2(b)(2) at this time.[1]

2. The court of appeals correctly held that the government had presented sufficient evidence at trial to satisfy the two-witness rule for petitioner's perjury conviction.

a. As the court of appeals held, a conviction for perjury under 18 U.S.C. 1621 requires more than the testimony of one witness. See Pet. App. 24a; see, *e.g.*,

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[1] Petitioner briefly adverts (Pet. 1) to Justice Scalia's recent statement respecting the denial of certiorari in *Whitman* v. *United States*, No. 14-29, 2014 WL 5799568 (Nov. 10, 2014), which was joined by Justice Thomas. In that statement, Justice Scalia said that he would be "receptive to granting" a petition for certiorari that properly raises the question whether a "court owe[s] deference to an executive agency's interpretation of a law that contemplates both criminal and administrative enforcement," but he explained that that the petitioner there had not sought review on that issue and the case's procedural posture made it a poor vehicle. *Id.* at *1-*2. Similarly here, the petition does not seek this Court's review of the question whether an agency's interpretation of a law with both criminal and administrative enforcement can receive deference. Petitioner, moreover, did not dispute below that *Chevron* was the appropriate framework to consider the validity of Rule 10b5-2(b)(2), and the court of appeals accordingly did not address the issue whether the rule's criminal enforcement precluded the application of the *Chevron* framework. See Pet. C.A. Br. 24-25 ("Although *Chevron* requires courts to defer to an agency's interpretation of an ambiguous statute that Congress has entrusted that agency to administer, Section 10(b) is not ambiguous."). Petitioner has thus forfeited any such argument, and this case would therefore be an inappropriate vehicle for considering it.

United States v. *Stewart*, 433 F.3d 273, 315 (2d Cir. 2006); *United States* v. *Chaplin*, 25 F.3d 1373, 1377-1378 (7th Cir. 1994). The so-called "two-witness rule" requires "*either* the testimony of a second witness *or* other evidence of independent probative value." *Stewart*, 433 F.3d at 315 (citation omitted).[2] For non-testimonial corroborative evidence to be sufficient, it must be established "(1) that the evidence, if true, substantiates the testimony of a single witness who has sworn to the falsity of the alleged perjurious statement; [and] (2) that the corroborative evidence is trustworthy." *Weiler* v. *United States*, 323 U.S. 606, 610 (1945). The latter question is resolved by "determin[ing] the credibility of the corroborative testimony," a decision that "belongs exclusively to the jury." *Ibid.*

The court of appeals correctly upheld the district court's conclusion that evidence of petitioner's trading was sufficient to corroborate Maguire's testimony that he told petitioner about the impending sale of PHLY. Petitioner borrowed $226,000 at a 6.875% interest rate to purchase a large number of PHLY shares during the week preceding the public announcement of the sale. The proportion of petitioner's portfolio represented by PHLY stock ballooned from 10% to 60% during that short period of time. And petitioner then sold the stock shortly after the public announcement. Pet. App. 3a, 5a. Those circumstances powerfully corroborate Maguire's testimony, particularly because, as the court of appeals explained, they were

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[2] The two-witness rule is not a constitutional requirement. It has been abolished for other statutes proscribing false statements. See *United States* v. *Diggs*, 560 F.2d 266, 269 (7th Cir.), cert. denied, 434 U.S. 925 (1977).

inconsistent with the legitimate trading strategy that petitioner claimed to have undertaken. See *id.* at 25a-26a; see also *id.* at 49a-50a (district court's opinion) ("The records of [petitioner's] stock trades corroborated the insider's testimony and contradicted [petitioner's] * * * explanation."). Accordingly, sufficient evidence supported petitioner's perjury conviction.

b. Petitioner contends (Pet. 24-26) that the court of appeals' decision conflicts with *United States* v. *Chestman*, 903 F.2d 75, 82 (2d Cir. 1990), partially vacated on other grounds, 947 F.2d 441 (2d Cir. 1991) (en banc), cert. denied, 503 U.S. 1004 (1992), and *Chaplin*, *supra*. In those decisions, the courts applied the same two-witness rule applied by the court of appeals here, but concluded that the trial evidence was insufficient to support convictions for perjury under Section 1621. The different outcomes represent merely different applications of the same legal rule to different evidentiary records.

In *Chestman*, the Second Circuit did not hold, as petitioner suggests (Pet. 24), that a defendant's trading strategy can never supply the corroborating evidence necessary to sustain a perjury conviction. To the contrary, the court observed that "circumstances surrounding an alleged perjurious statement may constitute better corroborative evidence than oral testimony." 903 F.2d at 82. It concluded only that the defendant's trading strategy was equally consistent with his version of events, so it was not corroborating. See *id.* at 77-78, 82 ("The fact that Chestman bought * * * stock prior to the announcement of the tender offer is consistent with Chestman's position that he researched the company, assumed it was a takeo-

ver target, and invested accordingly."); see also Pet. App. 25a. Similarly, in the cited passage from *Chaplin* (a case that did not involve insider trading) the court found that the purportedly corroborating evidence did not confirm the government's "suggested chronology of events"; it was merely consistent with that chronology. See 25 F.3d at 1380. Here, by contrast, the court of appeals concluded, based on the trial evidence, that petitioner's trading strategy was consistent only with Maguire's having informed him about the impending sale of PHLY. See Pet. App. 25a-26a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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