

# The Burger Court Opinion Writing Database

*Aaron v. SEC*

446 U.S. 680 (1980)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

March 3, 1980

Re: 79-66 - Aaron v. S.E.C.

Dear Potter:

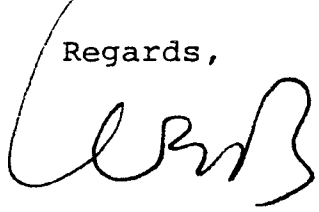
I find here, as with a half dozen of this week's cases, that there are wide disparities in the basis of a majority even when five or more agree on the result.

In this case you may recall my view that the Court of Appeals decided the issue of scienter when it was not necessary to do so. (a) The District Court found scienter but gratuitously went on to say "negligence of one may suffice . . ."; (b) the Court of Appeals did not disturb the finding and indeed relied on it in part. (See page 21a, App. to Pet. For Cert.)

As I stated at Conference, the Court of Appeals opinion goes beyond the need for a holding that negligence alone is enough. For me, the issue I thought we had is not here. I therefore conclude to take that position, in which I am joined by no one as of now. In these circumstances, I would remand to require the Court of Appeals to reconsider its holding in light of there being no need to pass on the scienter issue on this record.

Bill Brennan would affirm across the board; five votes (without mine) were to vacate and remand but not on the same basis as I think we should do so. In light of this, I would prefer to have you assign and my narrower ground for remanding can be stated in concurrence.

Regards,



Mr. Justice Stewart

Copies to the Conference

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

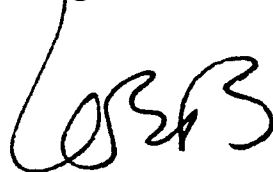
May 21, 1980

Re: 79-66 - Aaron v. Securities and Exchange Commission

MEMORANDUM TO THE CONFERENCE:

My "solo" position set out in my memo of March 3 remains essentially intact. I will have a short concurrence out within a week expressing my view.

Regards,

A handwritten signature in dark ink, appearing to be "LFB", written in a cursive style.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

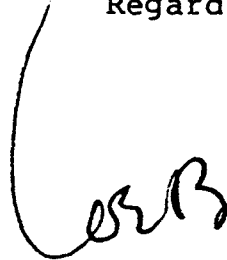
MEMORANDUM TO THE CONFERENCE:

May 28, 1980

AARON v. S.E.C., 79-66

Attached is my opinion concurring in the opinion of the Court. I think everyone is now "in" and this case can come down next week.

Regards,

A handwritten signature in dark ink, appearing to be "LFB" or "LFB.", written below the word "Regards,".

To: Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Justice Rehnquist  
Mr. Justice Stevens

From: The Chief Justice

Circulated: MAY 28 1980

Recirculated: \_\_\_\_\_

RE: 79-66 - Aaron v. S.E.C.

I join the opinion of the Court and write separately to make three points:

(1) No matter what mental state § 10b and § 17(a) were to require, it is clear that the District Court was correct here in entering an injunction against petitioner. Petitioner was informed by an attorney representing Lawn-A-Mat that two representatives of petitioner's firm were making grossly fraudulent statements to promote Lawn-A-Mat stock. Yet he took no steps to prevent such conduct from recurring. He neither discharged the salesmen, or rebuked them; he did nothing whatever to indicate that such salesmanship was unethical, illegal and should stop. Hence, the District Court's findings (a) that petitioner "intentionally failed" to terminate the

To: Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

1st DRAFT

From: The Chief Justice  
Circulated: MAY 28 1986

**SUPREME COURT OF THE UNITED STATES**

No. 79-66

Recirculated: \_\_\_\_\_

Peter E. Aaron, Petitioner,  
v.  
Securities and Exchange  
Commission. } On Writ of Certiorari to the  
United States Court of Appeals  
for the Second Circuit.

[June —, 1980]

MR. CHIEF JUSTICE BURGER, concurring.

I join the opinion of the Court and write separately to make three points:

(1) No matter what mental state § 10b and § 17 (a) were to require, it is clear that the District Court was correct here in entering an injunction against petitioner. Petitioner was informed by an attorney representing Lawn-A-Mat that two representatives of petitioner's firm were making grossly fraudulent statements to promote Lawn-A-Mat stock. Yet he took no steps to prevent such conduct from recurring. He neither discharged the salesmen, or rebuked them; he did nothing whatever to indicate that such salesmanship was unethical, illegal and should stop. Hence, the District Court's findings (a) that petitioner "intentionally failed" to terminate the fraud and (b) that his conduct was reasonably likely to repeat itself find abundant support in the record. In my view, the Court of Appeals could well have affirmed on that ground alone.

(2) I agree that § 10b and § 17 (a)(1) require scienter but that § 17 (a)(2) and § 17 (a)(3) do not. I recognize, of course, that this holding "drives a wedge between [sellers and buyers] and says that henceforth only the seller's negligent misrepresentations may be enjoined." *Ante*, at 12 (BLACKMUN, J., dissenting). But it is not this Court that "drives a wedge"; Congress has done that. The Court's holding is compelled in large measure by *Ernst & Ernst v. Hochfelder*, 425 U. S. 185.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

March 4, 1980

RE: No. 79-66 Aaron v. Securities and Exchange Commission

Dear Harry:

Thurgood, you and I are in dissent in the above. Would you be willing to undertake the dissent?

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill".

Mr. Justice Blackmun

cc: Mr. Justice Marshall

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

April 17, 1980

RE: No. 79-66 Aaron v. Securities & Exchange Comm.

Dear Potter:

I will await the dissent in the above.

Sincerely,

*Bill*

Mr. Justice Stewart

cc: The Conference



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

May 20, 1980

RE: No. 79-66 Aaron v. Securities & Exchange  
Commission

Dear Harry:

Please join me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill".

Mr. Justice Blackmun

cc: The Conference

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: 16 APR 1980

Recirculated: \_\_\_\_\_

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-66

Peter E. Aaron, Petitioner,  
v.  
Securities and Exchange  
Commission. } On Writ of Certiorari to the  
United States Court of Appeals  
for the Second Circuit.

[April —, 1980]

MR. JUSTICE STEWART delivered the opinion of the Court.

The issue in this case is whether the Securities and Exchange Commission (Commission) is required to establish scienter as an element of a civil enforcement action to enjoin violations of § 17 (a) of the Securities Act of 1933 (1933 Act), § 10 (b) of the Securities Exchange Act of 1934 (1934 Act), and Commission Rule 10b-5 promulgated under that section of the 1934 Act.

I

When the events giving rise to this enforcement proceeding occurred, the petitioner was a managerial employee at E. L. Aaron & Co. (the firm), a registered broker-dealer with its principal office in New York City. Among other responsibilities at the firm, the petitioner was charged with supervising the sales made by its registered representatives and maintaining the so-called "due diligence" files for those securities in which the firm served as a market maker. One such security was the common stock of Lawn-A-Mat Chemical & Equipment Corp. (Lawn-A-Mat), a company engaged in the business of selling lawn care franchises and supplying its franchisees with products and equipment.

Between November 1974 and September 1975, two registered representatives of the firm, Norman Schreiber and Don-

6,7,8

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice White  
Mr. Justice Rehnquist  
Mr. Justice Stevens  
Mr. Justice Marshall  
Mr. Justice Black  
Mr. Justice Powell

From: Mr. Justice Stewart

2nd DRAFT

Circulated: \_\_\_\_\_

**SUPREME COURT OF THE UNITED STATES**

Filed: 23 MAY 1980

No. 79-66

Peter E. Aaron, Petitioner,  
v.  
Securities and Exchange  
Commission. } On Writ of Certiorari to the  
United States Court of Appeals  
for the Second Circuit.

[April —, 1980]

MR. JUSTICE STEWART delivered the opinion of the Court.

The issue in this case is whether the Securities and Exchange Commission (Commission) is required to establish scienter as an element of a civil enforcement action to enjoin violations of § 17 (a) of the Securities Act of 1933 (1933 Act), § 10 (b) of the Securities Exchange Act of 1934 (1934 Act), and Commission Rule 10b-5 promulgated under that section of the 1934 Act.

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Between November 1974 and September 1975, two registered representatives of the firm, Norman Schreiber and Don-

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

April 17, 1980

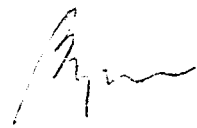
Re: No. 79-66 - Peter E. Aaron v. SEC

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Dear Potter,

Please join me.

Sincerely yours,



Mr. Justice Stewart

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

April 16, 1980

Re: No. 79-66 - Peter E. Aaron v. Securities  
and Exchange Commission

Dear Potter:

I await the dissent.

Sincerely,

*Jm.*  
T.M.

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 20, 1980

Re: No. 79-66 - Aaron v. Securities and  
Exchange Commission

Dear Harry:

Please join me in your opinion in this one.

Sincerely,

*J.M.*

T.M.

Mr. Justice Blackmun

cc: The Conference

HA  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

March 4, 1980

Re: No. 79-66 - Aaron v. SEC

Dear Bill:

I shall be glad to attempt a dissent in this case.

Sincerely,

*Harry*  
\_\_\_\_\_

Mr. Justice Brennan

cc: Mr. Justice Marshall

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN


April 16, 1980

Re: No. 79-66 - Aaron v. S.E.C.

Dear Potter:

In due course, I shall try my hand at a dissent in  
this case.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", with a long horizontal flourish extending to the right.

Mr. Justice Stewart

cc: The Conference



HAB  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 12, 1980

Re: No. 79-66 - Aaron v. SEC

Dear Potter:

My dissent in this case has gone to the Printer this afternoon. I suppose there is some delay at the Printer, so I enclose, for your advance information, a xerox copy of what I have put together.

Sincerely,



Mr. Justice Stewart

Mr. Justice Blackmun  
Mr. Justice Brennan  
Mr. Justice Burger  
Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens  
Mr. Justice Souter

Rev. Mr. Justice Blackmun

Circulation: MAY 15 1980

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2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

**No. 79-66**

Peter E. Aaron, Petitioner,  
v.  
Securities and Exchange  
Commission. } On Writ of Certiorari to the  
United States Court of Appeals  
for the Second Circuit.

[May —, 1980]

MR. JUSTICE BLACKMUN, concurring in part and dissenting  
in part.

I concur in the Court's judgment that §§ 17 (a)(2) and (3) of the Securities Act of 1933, 15 U. S. C. §§ 77q (a)(2) and (3), do not require a showing of scienter for purposes of an action for injunctive relief brought by the Securities and Exchange Commission. I dissent from the remainder of the Court's reasoning and judgment. I am of the view that neither § 17 (a)(1) of the 1933 Act, 15 U. S. C. § 77q (a)(1), nor § 10 (b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j (b), as elaborated by SEC Rule 10b-5, 17 CFR § 240.10b-5 (1979), requires the Commission to prove scienter before it can obtain equitable protection against deceptive practices in securities trading. Accordingly, I would affirm the judgment of the Court of Appeals in its entirety.

The issues before the Court in this case are important and critical. Sections 17 (a) and 10 (b) are the primary anti-fraud provisions of the federal securities laws. They are the chief means through which the Commission, by exercise of its authority to bring actions for injunctive relief, can seek protection against deception in the marketplace. See § 20 (b) of the 1933 Act, 15 U. S. C. § 77t (b); § 21 (d) of the 1934 Act, 15 U. S. C. § 78p (d). As a result, they are key weapons in the statutory arsenal for securing market integrity and investor confidence. See Douglas & Bates, The Federal Securities Act of 1933, 43 Yale L. J. 171, 182 (1933); Note, 57

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CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

April 17, 1980

79-66 Aaron v. SEC

Dear Potter:

Please join me.

Sincerely,



Mr. Justice Stewart

lfp/ss

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

April 17, 1980

Re: No. 79-66 - Aaron v. SEC

Dear Potter:

Please join me.

Sincerely,



Mr. Justice Stewart

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

April 29, 1980

Re: 79-66 - Aaron v. SEC

Dear Potter:

Please join me.

Respectfully,



Mr. Justice Stewart

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