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## **NCLA Asks Supreme Court to Hear Securities Law Appeal with Major First Amendment Implications**

*Rev. Father Emmanuel Lemelson and Lemelson Capital Mgmt., LLC v. Securities and Exchange Commission*

**Washington, DC (August 1, 2023)** – The New Civil Liberties Alliance has filed a [petition](#) for a *writ of certiorari* in *Lemelson, et al. v. SEC*, asking the U.S. Supreme Court to hear a case that poses an important First Amendment dilemma. May the SEC punish commentary about publicly traded corporations that contains a few purported misstatements or omissions when a jury has cleared the accused of all fraud and deception charges? Surprisingly perhaps, the Supreme Court has never answered this question. So, for now, the SEC punishes such speech freely.

Rev. Fr. Emmanuel Lemelson, a Greek Orthodox priest and activist investor, issued five lengthy reports and several online interviews about Ligand Pharmaceuticals in 2014. Under pressure from Ligand, SEC investigated Fr. Lemelson for years and eventually charged him with fraud in 2018. Although a jury rejected all fraud allegations, it did find that one sentence and one sentence fragment (about a company he didn't trade in) embedded in some 56 pages of written reports, and one two-second online interview comment, were misleading. The U.S. District Court for the District of Massachusetts then held Fr. Lemelson liable for violating the Securities Exchange Act of 1934 and SEC Rule 10b-5. It fined him \$160,000 and barred his making similar statements for five years.

The U.S. Court of Appeals for the First Circuit declined to overturn that ruling, claiming Fr. Lemelson's three isolated statements were assertions of fact, not opinion, and thus unprotected by the First Amendment. That decision contradicts well-established Supreme Court precedent demanding "clear and convincing evidence" proving intentional deception before speech loses First Amendment protection. The jury specifically found Fr. Lemelson 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." The jury also determined he did not defraud his own investors, even under a lower negligence standard, nor did it find his harshest statements about the company's insolvency untrue.

The First Amendment protects the expression of inaccurate or misleading speech, in part to avoid chilling other, more useful speech. For example, it even protects false speech about having a military medal. So, the SEC cannot punish someone for uttering speech just because a jury finds it misleading. The government instead must prove that such speech was uttered in conjunction with a scheme to defraud and that someone was harmed by that fraud. Here the government fined and enjoined an activist investor's speech, even though a jury cleared him of all fraud charges. Indeed, Fr. Lemelson's criticism proved prescient as Ligand's stock price fell significantly. And the district court said SEC failed to provide evidence it could identify any victims of the alleged fraud in this scenario.

The Supreme Court should take advantage of this ideal vehicle to further its valiant historical defense of First Amendment rights. In the absence of a deceptive or fraudulent scheme, the Court should forbid SEC from punishing activist investors like Fr. Lemelson—who publicly disclosed his short position in Ligand—for their isolated, cherry-picked snippets of speech against public corporations that a jury later deems untrue or misleading.

### **NCLA released the following statements:**

"The lower courts have profoundly abridged our client's free speech rights under the First Amendment. The federal government punished him for his past speech and enjoined him from engaging in similar future speech. Unlike many First Amendment threats that are clad, so to speak, in sheep's clothing, where the hand of

government is more remote or subtle, here the enormous power of government was on full display. This free speech threat, to quote the late Justice Scalia, ‘comes as a wolf.’”

— **Russ Ryan, Senior Litigation Counsel, NCLA**

“The First Amendment applies to the SEC just the same as it applies to every other federal agency. Contrary to current practice, 100 F St. NE is not a First Amendment-free zone. If SEC could punish untrue or misleading speech, while proving nothing else, that would chill far too much valuable speech—by activist investors and other critics.”

— **Mark Chenoweth, President and General Counsel, NCLA**

**For more information visit the case page [here](#).**

## **ABOUT NCLA**

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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