United States Court of Appeals

for the

First Circuit

Case No. 24-1754

US SECURITIES & EXCHANGE COMMISSION,

Plaintiff-Appellee,

– v. –

GREGORY LEMELSON, a/k/a Father Emmanuel Lemelson;
LEMELSON CAPITAL MANAGEMENT, LLC,

Defendants-Appellants,

THE AMVONA FUND, LP,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS BOSTON DIVISION, NO. 1:18-CV-11926-PBS

BRIEF OF *AMICI CURIAE* ADVANCING AMERICAN FREEDOM, INC.; AMERICAN ENCORE; AMERICANS FOR LIMITED GOVERNMENT; CATHOLICS COUNT; EAGLE FORUM; EAGLE FORUM OF GEORGIA; FAMILY INSTITUTE OF CONNECTICUT ACTION; CHARLIE GEROW; INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS;

(List of Amici Continued on Inside Cover)

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December 4, 2024

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SUPPORTING APPELLANTS AND REVERSAL

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The amici curiae Advancing American Freedom, Inc.; American Encore; Americans for Limited Government; Catholics Count; Eagle Forum; Eagle Forum of Georgia; Family Institute of Connecticut Action; Charlie Gerow; International Conference of Evangelical Chaplain Endorsers; JCCWatch.org; Tim Jones, Former Speaker, Missouri House, Chairman, Missouri Center-Right Coalition; Men and Women for a Representative Democracy in America, Inc.; New Jersey Family Policy Center; Melissa Ortiz, Principal & Founder, Capability Consulting; Project 21 Black Leadership Network; Pro-Life Wisconsin; Pamela S. Roberts, Immediate Past President- Kentucky Federation of Republican Women; Rick Santorum; Setting Things Right; 60 Plus Association; Stand for Georgia Values Action; Tea Party Express; Tea Party Patriots Action, Inc.; The American Association of Senior Citizens; Women for Democracy in America, Inc.; Yankee Institute; Young Conservatives of Texas; and Young America's Foundation are nonprofit corporations. They do not issue stock and are neither owned by nor are the owners of any other corporate entity, in part or in whole. They have no parent companies, subsidiaries, affiliates, or members that have issued shares or debt securities to the public. The corporations are operated by volunteer boards of directors.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including equal treatment before the law.[1] AAF "will continue to serve as a beacon for conservative ideas, a reminder to all branches of government of their responsibilities to the nation,"[2] and believes that America's system of constitutional government, unique in the world, must be preserved and restored for the sake of American freedom. As the Founders understood, liberty depends on the proper balance of power among the people, their local and state governments, and the federal government. AAF files this brief on behalf of its 1,493 members in Massachusetts and its 2,842 members in the First Circuit.

Amici American Encore; Americans for Limited Government; Catholics Count; Eagle Forum; Eagle Forum of Georgia; Family Institute of Connecticut Action; Charlie Gerow; International Conference of Evangelical Chaplain Endorsers; JCCWatch.org; Tim Jones, Former Speaker, Missouri House, Chairman, Missouri

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[1] Appellee and Defendants-Appellants have consented to the filing of this amicus brief. Counsel for interested party Ligand Pharmaceuticals, Inc. did not respond to an initial or a follow up request for consent. No counsel for a party other than AAF authored this brief in whole or in part, and no counsel or party other than AAF made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus or its counsel made a monetary contribution to its preparation or submission.

[2] Edwin J. Feulner, Jr., *Conservatives Stalk the House: The Story of the Republican Study Committee*, 212 (Green Hill Publishers, Inc. 1983).

Center-Right Coalition; Men and Women for a Representative Democracy in America, Inc.; New Jersey Family Policy Center; Melissa Ortiz, Principal & Founder, Capability Consulting; Project 21 Black Leadership Network; Pro-Life Wisconsin; Pamela S. Roberts, Immediate Past President- Kentucky Federation of Republican Women; Rick Santorum; Setting Things Right; 60 Plus Association; Stand for Georgia Values Action; Tea Party Express; Tea Party Patriots Action, Inc.; The American Association of Senior Citizens; Women for Democracy in America, Inc.; Yankee Institute; Young Conservatives of Texas; and Young America's Foundation believe that freedom depends on government that is properly constrained so that the rights of the people are secure not only against private actors but against government itself.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In this case, an agency that writes its own laws, enforces those laws, judges its own enforcement actions, and has an annual budget of multiple billions of dollars, brought significant and potentially ruinous charges against an individual and his investment group. This action threatened massive financial penalties and lifetime prohibitions from certain First Amendment activities. Yet despite the imbalance of power, funding, and potential consequences, that individual, Father Emmanuel Lemelson, chose to defend himself in court. With all of its resources and expertise, the Securities and Exchange Commission failed to convince a jury of most of its

charges against Father Lemelson, including charges that he had engaged in an intentional scheme to defraud investors. *SEC v. Lemelson*, No. 18-11926, 2024 WL 3507495, at *1 (D. Mass. July 23, 2024). The jury only found that on three instances, he made material misstatements concerning Ligand, the pharmaceutical company the stock value of which he was discussing. *Id.* at *1-2. The jury found he was not engaged in a scheme to defraud and did not violate the Investment Advisers Act. *Id.* at *1.

Rather than the seven-figure sum the SEC sought, the court awarded only a $160,000 penalty against Father Lemelson, still a large fine though significantly less than the SEC was seeking. *See id.* at *1-3. Father Lemelson later sought attorney's fees from the SEC to cover the more than $1,500,000 cost of legal representation amassed over the decade-plus battle with the administrative behemoth. *See id.* at *1. The SEC rejected his claim.

Father Lemelson and those like him face a choice when presented with an SEC enforcement action: defend their rights against claims that are often meritorious but may just as well be abusive, or take any settlement offer made by the SEC. If the SEC does not cover Father Lemelson's legal expenses, innocent targets of SEC investigation may well look at his case and conclude that legal fees potentially comparable to what the SEC is seeking in damages and a yearslong legal fight are

not worth the risk and hassle. Better to just take the SEC's "offer he can't refuse"[3] than face the fight.

The Constitution distributes the three powers of government among three separate, coequal branches as one precaution against the kind of abuse a ruling for the SEC in this case would facilitate. The SEC, like many other administrative agencies, exercises all three powers of government without meaningful limits. The SEC can create regulations which have the force of law, enforce those regulations without constitutionally sufficient presidential control, and can often bring those enforcement actions before its own kangaroo courts. *See SEC v. Jarkesy*, 144 S. Ct. 2117, 2139 (2024) (holding that defendants facing fraud suits have a right to trial by jury before a neutral adjudicator).

According to then-SEC Commissioner Edward Fleischman, "the true life force of a fourth branch agency is expressed in a commandment that failed, presumably only through secretarial haste, to survive the cut for the original decalogue: Thou shalt expand thy jurisdiction with all thy heart, with all thy soul and with all thy might."[4] In that regard the SEC has been something of a religious zealot, especially in recent years. The SEC's commitment to the eleventh commandment

[3] The Godfather (Paramount Pictures 1972).
[4] Edward H. Fleischman, Commissioner, SEC, Address to the Women in Housing and Finance, *The Fourth Branch at Work*, (November 29, 1990) https://www.sec.gov/news/speech/1990/112990fleischman.pdf.

justifies judicial skepticism of its claims here, especially given the fact that those claims would degrade the rights of SEC targets.

Finally, the SEC's refusal to cover Father Lemelson's attorney's fees will further chill First Amendment activity because it will put on notice anyone interested in speaking about the stock market that even an unintentional misstatement of fact that is not shown to have caused any harm could nonetheless have devastating personal consequences. Further, the SEC's refusal to cover Father Lemelson's attorney's fees will be particularly likely to remove risk-averse voices from the public square.

For all of these reasons and because, as the Plaintiff shows, the SEC's interpretation of the Equal Access to Justice Act is both impractical and wrong-headed, this Court should rule for the Plaintiff and award attorney's fees.

ARGUMENT

I. The Constitution Separates the Powers of Government to Ensure the Rule of Law and Thereby Protect the Rights of the People.

The founding generation understood the purpose of government to be the protection of individual rights. Because government can violate individual rights, the Framers understood that government itself had to be restrained. The constitutional separation of powers was implemented as just such a protection.

The rights of individuals pre-exist government and come from man's Creator. The Declaration of Independence, which imbues meaning into the Constitution,

expresses the fundamental philosophy of American government: "Governments are instituted among Men" to secure "certain unalienable rights," which come from man's Creator and among which "are Life, Liberty, and the pursuit of Happiness." The Declaration of Independence para. 2 (U.S. 1776).[5] These provisions of the Declaration of Independence "refer[] to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth." *Obergefell v. Hodges*, 576 U.S. 644, 735 (2015) (Thomas, J., dissenting).

The Constitution, "like the Declaration of Independence before it—was predicated on a simple truth: One's liberty, not to mention one's dignity, was something to be shielded from—not provided by—the State."[6] *Obergefell*, 576 U.S.

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[5] The Declaration, though perhaps revolutionary in its clarity and universality, was not espousing entirely new ideas. Rather, it echoes the reasoning of William Blackstone and John Locke, among others. According to Blackstone, absolute rights are those "which are such as appertain and belong to particular men, merely as individuals or single persons." 1 W. Blackstone, Commentaries on the Laws of England 119 (1765). The Declaration shows its indebtedness to the ideas of Locke, who wrote, "no one ought to harm another in his life, health, liberty, or possessions: for men being all the workmanship of one omnipotent, and infinitely wise maker; all the servants of one sovereign master, sent into the world by his order, and about his business" are "made to last during his, not one another's pleasure." John Locke, *Second Treatise on Government*, § 6 at 9 (C.B. Macpherson ed. 1980). *See, generally*, Jeffery Rosen, *The Pursuit of Happiness: How Classical Writers on Virtue Inspired the Lives of the Founders and Defined America* (Simon & Schuster 2024).

[6] "The American Founders understood that there was nothing distinctly American then about the idea of a rule of law, or the principles that barred ex post facto laws, or established the wrongness of bills of attainder. They understood that these principles would not be brought into being by the Constitution they were framing. Those principles had to be in place as we were guided in the framing of a legal

at 736 (Thomas, J., dissenting). The Ninth Amendment reinforces the idea that rights pre-exist government. U.S. Const. amend IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."). In other words, the people were to retain their *pre-existing* rights, both enumerated and unenumerated, under the new government.

The Founder's view of government "was rooted in a general skepticism regarding the fallibility of human nature." *See INS v. Chadha*, 462 U.S. 919, 949 (1983). In a state of anarchy,[7] the rights of individuals are real, but are subject to violation by the strong. Under a government, the rights of individuals are real but are subject to the whims of those exercising governmental power. According to Montesquieu, "constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go."[8] In thousands of years of recorded human history, that nature has not changed.[9]

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structure. The Founders knew they could draw then on what Blackstone called the 'laws of Nature and reason.' In that vein, Jefferson famously remarked that everything was changeable in human affairs, except the unalienable rights of mankind. Those were not subject to change, because they were rooted in something enduring either in the nature of man or in the principles of right themselves." Hadley Arkes, *A Natural Law Manifesto or an Appeal from the Old Jurisprudence to the New*, 87 Notre Dame L. Rev. 1245, 1248 (2013).

[7] *Cf.*, Thomas Hobbes, *Leviathan*.

[8] Montesquieu, *Spirit of the Laws*, § 11.4 (Thomas Nugent trans. 1752) (1748).

[9] *See* Jefferson, *supra* note 3, at 130 ("Human nature is the same on every side of the Atlantic, and will be alike influenced by the same causes. The time to guard against corruption and tyranny is before they shall have gotten hold on us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons

The Founders were familiar with the abuse of government power. The "government [is] the greatest of all reflections on human nature[.]"[10] As Madison explained:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.[11]

Under proper government, the *law*—not the whims of the one, the few, or the many—must rule. The Supreme Court in *Yick Wo v. Hopkins*, wrote that the idea of a person's rights held "at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." 118 U.S. 356, 370 (1886). If Father Lemelson in this case is not awarded attorney's fees under the Equal Access to Justice Act, it will send a clear message to future potential plaintiffs facing the SEC that there is no escaping the whims of the SEC bureaucrats. One cannot outlast or outspend the bureaucrats who have nothing personal at stake in the case. One might as well take the settlement offer.

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after he shall have entered.").

[10] The Federalist No. 51 at 349 (James Madison) (Jacob E. Cooke ed., 1961).

[11] *Id.*

II. The SEC's Refusal to Comply with the Equal Access to Justice Act is Consistent with its Recent Pattern of Seeking to Unconstitutionally Expand its Power.

The SEC's refusal to comply with the Equal Access to Justice Act is just the latest in a "long train of abuses and usurpations." The Declaration of Independence para. 2. Since its inception, the SEC has been gradually siphoning more and more legislative power from Congress while simultaneously limiting the ability of the Judiciary to check infringements on Americans' constitutional rights. This Court should secure the rights of speakers against the taxpayer-funded juggernaut of the administrative state. The SEC's abuses are myriad and wide ranging. This case is just another instance of that abusive pattern. Illustrative examples include the SEC's creation of the Consolidated Audit Trail (CAT), its promulgation of rules intended to advance an environmental agenda at the expense of its role as a securities regulator, and its employment of kangaroo courts for its own prosecutorial action.

In 2012, the SEC began planning the CAT, a data collection and surveillance system that will aggregate every securities trade in the United States and match it to personally identifiable information on both sides of the interaction.[12] To create this massive collection for the prying eyes of federal and quasi-regulatory agents, the

[12] *See generally* Brief of Amici Curiae Advancing American Freedom, et al., *Davidson v. Gensler*, No. 6:24-cv-00197 (W.D. Tex.) available at https://advancingamericanfreedom.com/davidson-v-gensler/.

SEC—an agency purportedly of the Executive Branch—usurped for itself the powers of the other two branches of government.

CAT depends on a usurpation of Congress's power of the purse. "[T]he power to tax involves the power to destroy." *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819). If the executive had unilateral authority to tax, fund, and enact laws, there would be no sufficient check on an "excess of law making" and the accompanying infringements on liberty. *Id.* (citing The Federalist No. 48, at 309–12 (J. Madison)). As Madison wrote, "[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates."[13]

The SEC subverts the purpose of this constitutional design by allowing the CAT operating committee—a group chosen by participant self-regulatory organizations, not Congress—to determine and issue fees to other participant organizations and industry members. This funding structure allows the SEC to fund and administer the CAT indefinitely without meaningful oversight either from the constitutional branches of government or the people.

In addition to the legislative power concerns, CAT presents issues for judicial power because its disclosure requirements constitute warrantless and suspicionless

[13] The Federalist No. 47, at 251 (James Madison) (paraphrasing from Montesquieu's Spirit of Laws) (George W. Carey and James McClellan, eds., The Liberty Fund 2001). With respect to "excess of lawmaking," see generally, Neil Gorsuch & Janie Nitze, *Over Ruled: The Human Toll of Too Much Law* (2024).

searches and seizures in violation of the Fourth Amendment. The CAT entails initial unreasonable mass seizures that allow the SEC and self-regulatory organizations to perform suspicionless searches of people's personal information included in their securities records, without any judicial or legislative authorization. 17 C.F.R. § 242.613 (c)(2)-(8), (e)(2).

In another case of misaligned priorities, the SEC has recently turned its attention not to fraud but to climate issues.[14] On March 6, 2024, the SEC issued a final rule that gives "climate issues . . . special treatment and disproportionate space in Commission disclosures and managers' and directors' brain space."[15] The rule requires many publicly traded corporations to report their climate-related risks and greenhouse gas emissions as part of their financial disclosures. Petition for Review at 26-30, *Iowa v. United States Securities and Exchange Commission*, No. 24-1522 (8th Cir. 2024). Vesting such significant authority in an agency runs counter to constitutional limits. This climate disclosure rule's purpose is not the facilitation of

[14] *See generally*, Brief of Amici Curiae Advancing American Freedom et al., *Diamond Alternative Energy v. Environmental Protection Agency*, No. 24-7, available at https://advancingamericanfreedom.com/diamond-alternative-energy-v-environmental-protection-agency/.

[15] Hester M. Pierce, *Green Regs and Spam: Statement on the Enhancement and Standardization of Climate-Related Disclosures for Investors* (Mar. 6, 2024) available at https://www.sec.gov/newsroom/speeches-statements/peirce-statement-mandatory-climate-risk-disclosures-030624.

financial disclosure; it is environmental regulation designed to manipulate the behavior of corporations.

Beyond CAT and the climate disclosure rule, the SEC's administrative law judges (ALJs) usurped the proper role of judges under Article III of the Constitution and continue to violate the separation of powers among the three branches.[16] In *SEC v. Jarkesy*, 144 S. Ct. 2117, 2124–25 (2024), the SEC brought an action against respondents George Jarkesy and Patriot28, LLC, for alleged fraud. The matter was adjudicated through the SEC's in-house administrative process before one of their ALJs, circumventing the federal courts that would have allowed Jarkesy to have a jury trial. *Id.* In ruling that Jarkesy had a right to a jury trial in an Article III court, the Supreme Court affirmed the importance neutral adjudication. *Id.* at 2139. The separation of powers set forth in the Constitution does not "permit Congress to concentrate the roles of prosecutor, judge, and jury in the hands of the Executive Branch." *Id.*

In this case, Father Lemelson amassed over $1,500,000 in legal fees defending himself against the SEC. With such heavy costs, future victims of such agency action will think twice about invoking their right to challenge administrative proceedings

[16] *See generally*, Brief of Amici Curiae Advancing American Freedom et al., *SEC v. Jarkesy*, No. 22-859 (Jun 27, 2024) available at https://advancingstg.wpenginepowered.com/wp-content/uploads/2023/10/2023-10-18-22-859-Jarkesy-AAF-Final.pdf.