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NCLA Asks Eleventh Circuit to Rehear Case that Consigns SEC Defendants to Repeated Proceedings Before Unconstitutional ALJs

Christopher M. Gibson v. SEC

Washington, DC (February 14, 2020) – The New Civil Liberties Alliance, a nonpartisan, nonprofit public-interest litigation group, filed a [petition for rehearing en banc](#) in the U.S. Court of Appeals for the Eleventh Circuit in the case of *Christopher M. Gibson v. SEC*. Mr. Gibson’s case against the U.S. Securities and Exchange Commission is disturbingly similar to scores of cases where that agency insists on putting people through pointless administrative proceedings before unconstitutional administrative law judges (ALJs) that are destined to be vacated.

NCLA believes the Eleventh Circuit panel erred in concluding the district court lacked jurisdiction to hear Mr. Gibson’s objections to the SEC’s second unconstitutional hearing in his case. As NCLA’s petition shows, the U.S. Supreme Court’s 2018 decision in [Lucia v. SEC](#) held that the SEC’s ALJs are “officers” of the United States. As such, NCLA argues, the ALJs may not enjoy more than one layer of for-cause tenure protection. *Lucia* clarified that defendants have a right not to be tried in front of constitutionally defective ALJs. Hence, federal district courts must have jurisdiction to decide *before an administrative hearing takes place* whether an ALJ has the proper constitutional authority to hear the case.

Mr. Gibson’s case is one of more than one-hundred invalid SEC hearings nullified following the *Lucia v. SEC* decision. In 2014 the SEC entered a formal order of investigation of Gibson that focused on trading activities. An ALJ found him in violation of securities laws in a 2017 hearing. Gibson filed a petition for review of that decision which sat undecided before the Commission for over two years. In June 2018, the Supreme Court’s decision in *Lucia v. SEC* vacated the ALJ’s initial decision. Rather than retry Gibson before the Commission itself, the SEC subjected him to a second hearing before another constitutionally defective ALJ. This time, the problem is that the ALJ enjoys multiple layers of removal protection.

Under an earlier precedent called [Free Enterprise Fund v. Public Co. Accounting Oversight Board](#), the Supreme Court made clear that officers of the U.S. may not be insulated from removal by more than one layer of tenure protection without running afoul of the clause in Article II of the Constitution that requires the President to “take Care that the Laws be faithfully executed.” *Free Enterprise Fund* also squarely held that district court jurisdiction exists under the very statutory provision at issue in Mr. Gibson’s case.

NCLA also represents [Michelle Cochran](#) in her Fifth Circuit case against the SEC for trying to force her to appear before another invalid ALJ.

NCLA released the following statements:

“The SEC has defied the Supreme Court’s instruction to give Mr. Gibson a new hearing before a properly appointed official. This circuit should rehear the case en banc and rein in a lawless and defiant agency and course correct the law of this circuit.” —**Peggy Little, Senior Litigation Counsel, NCLA**

“NCLA will not rest until the courts recognize the injustice of the SEC’s administrative law judges and the costly, life-altering, business and reputation destroying proceedings before these ALJs who preside in violation of the Constitution—as the Government itself admits.” —**Jessica Thompson, Litigation Counsel, NCLA**

ABOUT NCLA

NCLA is a nonpartisan, nonprofit civil rights organization 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.