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NCLA’s Supreme Court Opening Brief Defends Ability to Challenge SEC Tribunals in Federal Court

Securities and Exchange Commission, et al. v. Michelle Cochran

Washington, DC (June 30, 2022) - The New Civil Liberties Alliance and Latham & Watkins have authored an [opening brief](#) on behalf of Michelle Cochran in the much-anticipated Supreme Court case, *SEC v. Michelle Cochran*, which will determine whether federal district courts have jurisdiction to hear structural constitutional objections to administrative proceedings. Ms. Cochran, a CPA from Dallas, TX, is challenging the constitutionality of the Securities and Exchange Commission’s (SEC) in-house Administrative Law Judges (ALJs) and requests that her case be heard before a real Article III federal court that is competent to decide the claims at issue.

Ms. Cochran’s specific objection is that ALJs are executive officers insulated from accountability by multiple layers of protection from removal by the President—a regime the Supreme Court has deemed to violate Article II of the Constitution, which vests executive power in the President and charges him with a duty to “take Care that the Laws be faithfully executed.” First charged by SEC in 2016, Cochran has already endured one full trial before an unconstitutional ALJ that has since been voided. SEC employees play judge, jury, and prosecutor in agency proceedings, so unsurprisingly, the agency [wins the vast majority](#) of the cases it brings in house. SEC’s administrative proceedings can take such a crushing personal, financial, and reputational toll that most targets are forced to settle, even if they protest their innocence profusely.

The general jurisdiction that Congress granted district courts is a vital safeguard for individuals seeking to enforce their constitutional rights against the government. But in this case, SEC has tried to block federal court jurisdiction, insisting that Congress, in passing the Securities and Exchange Act of 1934, *implicitly* blocked its administrative proceedings from any judicial scrutiny until the SEC has decided to conclude them—when it is too late to vindicate Ms. Cochran’s right to avoid undergoing an unconstitutional adjudication. In the SEC’s illogical view, those caught up in the agency’s machinery must endure years of proceedings—superintended by the very official they claim is unconstitutionally unaccountable—before they may set foot inside a federal courthouse. This notion makes no sense—no one should have to undergo an unconstitutional adjudication that is predestined to be set aside once challenged in court afterward.

When Ms. Cochran filed suit in January 2019, five federal courts of appeal had permitted SEC’s backward regime. In December 2021, the Fifth Circuit sitting *en banc* [ruled](#) in Ms. Cochran’s favor and correctly rejected SEC’s troubling theory of implicit jurisdiction-stripping, thus creating a circuit split. NCLA and Latham & Watkins argue that the Fifth Circuit’s judgment should be affirmed, and that the Supreme Court’s analysis can begin—and end—with a straightforward reading of the statutory text and structure, which does not say a word about divesting district courts of jurisdiction over structural constitutional challenges to administrative proceedings.

NCLA’s lead counsel on the case, Peggy Little, successfully argued it before the *en banc* Fifth Circuit. Latham & Watkins partner Greg Garre, a former Solicitor General of the United States, is Counsel of Record at the U.S. Supreme Court. He will present oral argument for Ms. Cochran there later this year.

NCLA and Latham & Watkins released the following statements:

“The Fifth Circuit correctly ruled that neither the text nor the structure of the Exchange Act stripped federal courts of their duty to protect individuals from unconstitutional agency action. The Supreme Court should affirm that landmark decision course-correcting at least six errant circuit courts that flouted Supreme Court precedent.”

— **Peggy Little, Senior Litigation Counsel, NCLA**

“As explained in our brief, the SEC’s implicit jurisdiction-stripping theory has no basis in the statutory text, Supreme Court precedent, or common sense. And it unjustly deprives individuals like Michelle Cochran from access to one of the most important bulwarks against unconstitutional governmental action—federal district courts. The Supreme Court has previously recognized the importance of upholding immediate judicial review in this precise context, and it should do so again here.”

— **Gregory G. Garre, Partner, Latham & Watkins**

“For far too long, SEC has wielded its flawed theory of implicit jurisdiction-stripping to close federal district courts and force targets like Ms. Cochran to endure unconstitutional administrative proceedings. Time’s up for SEC and its unlawful ALJs. This case will ensure federal courts are available to vindicate constitutional rights.”

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

For more information visit the case page [here](#) or watch the case video [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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