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NCLA Asks High Court to Uphold Federal Court Jurisdiction over Unconstitutional Agency Proceedings

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

Washington, DC (November 7, 2022) - Texas accountant Michelle Cochran's case seeking to have her challenge to the Securities and Exchange Commission's (SEC) in-house adjudication scheme heard by an Article III federal judge was argued today at the U.S. Supreme Court. In *Securities and Exchange Commission v. Michelle Cochran*, the Court is reviewing a Fifth Circuit *en banc* [ruling](#) that district courts have jurisdiction to hear structural constitutional challenges to SEC's administrative proceedings—*before* those proceedings take place. Former Solicitor General Greg Garre of Latham & Watkins, advocating for Ms. Cochran, asked the Justices to uphold district court jurisdiction, an important bulwark for individual liberty and a vital check on administrative power.

The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, also represents Ms. Cochran, who originally [filed suit](#) against SEC in January 2019 to challenge the Commission's system of adjudicating enforcement actions with tenure-protected Administrative Law Judges (ALJs) employed by the prosecuting agency. SEC ALJs are insulated by multiple layers of protection from removal by the President, which prevents accountability and violates his constitutional duty to "take Care" that laws are faithfully executed.

The Securities Exchange Act of 1934 vested SEC with regulatory powers that have grown in the decades since the agency's inception. Originally, the Exchange Act allowed SEC to impose only a limited range of minor administrative sanctions without going to court. Over time, however, this authority has swollen such that nearly half of major enforcement cases are now brought administratively before ALJs who are employed by the same agency that prosecutes the case. SEC-initiated proceedings frequently drag on for several years and take such an enormous personal, financial, and reputational toll that nearly all targets (98%)—even those vigorously asserting their innocence—are forced to capitulate and settle.

The availability of federal district courts to hear structural constitutional claims is an important safeguard for individuals seeking to assert their constitutional rights. Agencies like SEC lack the competence and expertise to resolve such constitutional challenges, but they also have an institutional bias evident from a statistically embarrassing 90+% agency win rate before them. SEC's home-court advantage can—and does—tie individuals up in yearslong administrative proceedings, exhausting their fortitude and financial wherewithal to fight.

The Fifth Circuit properly held that Congress did not intend this unjust and illogical result. SEC's position does not rest on the text of any congressionally enacted statute expressly stripping district courts of jurisdiction to hear Constitutional disputes. The Supreme Court should reject SEC's unfounded theory that the Exchange Act implicitly strips federal district courts of jurisdiction to protect individuals from unconstitutional agency action.

NCLA and Latham & Watkins released the following statements:

"The government's implicit jurisdiction-stripping theory has no basis in the statutory text, Supreme Court precedent, or common sense. And it unjustly deprives everyday Americans 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 we hope it will do so again here.”

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

“Six years ago, Michelle Cochran endured one adjudication later held to be unconstitutional—and was facing a second unconstitutional SEC proceeding when NCLA stepped in. NCLA has fought in multiple cases through three federal circuits to vindicate the right of Americans to have a federal district court decide whether SEC’s scheme of institutionally biased, unaccountable, tenure-protected ALJ adjudications withstand constitutional scrutiny. The Supreme Court should tell federal courts to exercise their unflagging duty to enforce the Constitution and protect Americans from Kafkaesque proceedings that exact great human cost and destroy individual liberties.”

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

“Unless and until the U.S. Supreme Court allows federal district courts to police the unconstitutional aspects of ALJ adjudications, the SEC and other agencies will continue to abuse these lopsided proceedings to turn the process into the punishment for agency enforcement targets. Fortunately, it appears the Court is poised to use Michelle Cochran’s case to restore jurisdiction over structural constitutional challenges.”

— **Mark Chenoweth, President, 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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