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U.S. Supreme Court Will Not Hear Case Challenging Removal Protections for SEC's In-House Judges

Christopher M. Gibson v. U.S. Securities and Exchange Commission

Washington, DC (January 11, 2021) – The U.S. Supreme Court today [denied](#) a petition for *writ of certiorari* in the case of NCLA client Christopher Gibson. He was challenging the decision of an Eleventh Circuit panel which concluded the district court lacked jurisdiction to hear his objections to the unlawful protection from removal by the President that Securities and Exchange Commission (SEC) administrative law judges (ALJs) enjoy. Former U.S. Solicitor General Greg Garre of Latham & Watkins authored the cert. petition.

In 2014 the SEC entered a formal order of investigation of Gibson's trading activities. Gibson's first ALJ, who ruled on his case in 2017, was deemed unlawfully appointed according to the U.S. Supreme Court's 2018 decision in *Lucia v. SEC*. Rather than try Gibson in federal court, the SEC subjected him to a second hearing before another constitutionally-defective ALJ. NCLA argues that SEC ALJs enjoy multiple layers of protection from removal by the President of the United States. Currently, ALJs can only be removed for cause, *and* the only people who can remove them are SEC Commissioners and Merit Systems Protection Board members—also people whom the President can only remove for cause.

SEC's scheme fails to follow two controlling Supreme Court decisions: *Free Enterprise Fund v. PCAOB* and *Thunder Basin v. Reich*. In the Supreme Court unequivocally held that officers of the United States—like SEC ALJs—may enjoy only one layer of for-cause removal protection. Otherwise, the President's Article II duty to ensure that federal officers are doing their jobs is unduly restricted. *Free Enterprise Fund* also unanimously held that district courts have jurisdiction to hear constitutional challenges to structural defects in agency tribunals under the very statutory provision at issue in Mr. Gibson's case. Thus, the Eleventh Circuit's ruling—and that of several other circuits—conflicts with the Supreme Court's precedent in *Free Enterprise Fund*. *Thunder Basin* instructs that courts must hear claims that cannot be meaningfully reviewed later, are wholly collateral, and are outside agency competence and expertise—all of which are true in this case.

The SEC's pattern of ignoring such precedents must be corrected. NCLA has another case in the works that may reach the Supreme Court on this same issue. NCLA has oral argument in front of an *en banc* Fifth Circuit on Jan. 20 in a similar case representing single-mom [Michelle Cochran](#) of Dallas, TX. If the Fifth Circuit rules against the SEC, that would set up a split in the law among the circuits, which might persuade the Supreme Court to address the issue.

NCLA released the following statements:

“Christopher Gibson will have endured two constitutionally flawed administrative trials, multiple appeals and surrendered six figures in government penalties before a competent court can decide the threshold question of whether his ALJ had the right to try him in the first place. And, he will face a third retrial if he is able to vindicate his rights in a circuit court at the end of his administrative appeal. This is senseless, costly to both the

government and its targets, and illogical. NCLA intends to continue to fight to protect similarly situated Americans' constitutional rights and restore rationality to our system of justice.”

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

“NCLA is disappointed that the Supreme Court chose not to resolve this jurisdictional issue that is preventing lower courts from even addressing the important constitutional question at issue, but we are not giving up. Christopher Gibson and others like him should not have to pony up six-figure fines to the SEC before an Article III federal court ever even hears the merits of their valid constitutional claims.”

—**Mark Chenoweth, Executive Director and General Counsel, NCLA**

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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