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NCLA Amicus Brief Decries SEC's Administrative Denial of Jury Trial Rights, ALJ Removal Protections

Securities and Exchange Commission v. George R. Jarkesy, Jr. and Patriot28, L.L.C.

Washington, DC (October 19, 2023) – The Securities and Exchange Commission prosecuted investment professional and syndicated talk-radio host George R. Jarkesy, Jr. in a years-long administrative proceeding rife with constitutional defects. He raised these problems in federal court ahead of time but the U.S. Court of Appeals for the District of Columbia Circuit told him (in a pre-*Axon/Cochran* setting) that federal courts lacked jurisdiction over his case. So, he was forced to endure the flawed administrative proceeding for years on end, which SEC adjudicated by an Administrative Law Judge (ALJ) who had no constitutional authority to exercise judicial power and who was improperly insulated from removal. Worse yet, the proceeding denied his Seventh Amendment right to a jury trial. The New Civil Liberties Alliance has filed an *amicus curiae* [brief](#) in *SEC v. Jarkesy*, urging the U.S. Supreme Court to uphold the Fifth Circuit Appeals Court's ruling overturning this unconstitutional regime.

In 2010, the Dodd-Frank Act unconstitutionally transferred judicial power to SEC by empowering the agency's ALJs to adjudicate SEC enforcement cases against Americans like Mr. Jarkesy for alleged securities law violations. The Constitution's text places judicial power only in federal *courts*. So, SEC's in-house adjudication scheme violates constitutional separation of powers. SEC's ALJs also enjoy multiple layers of protection from removal by the President. The Supreme Court clarified in its 2010 [Free Enterprise Fund v. Public Co. Accounting Oversight Board](#) decision that multiple layers of removal protection for officers of the U.S. run afoul of the clause in Article II of the Constitution that requires the President to "take Care that the Laws be faithfully executed."

SEC adjudication further violated Mr. Jarkesy's Seventh Amendment jury-trial rights as well as the Fifth Amendment's Due Process Clause, which requires courts of law to adjudicate SEC's claims. Dodd-Frank empowers SEC to obtain a jury trial by suing in federal court or avoid a jury trial by initiating an administrative proceeding. Enforcement targets, like Jarkesy, do not have a similar option. Hence, the law unfairly deprives them of the same right to demand a jury trial that SEC has—a blatantly discriminatory rule. The U.S. Court of Appeals for the Fifth Circuit correctly recognized all of these claims as blatant constitutional violations in May 2022.

The Jarkesy (Case) Stands Alone

In April, the Supreme Court upheld NCLA client Michelle Cochran's right to challenge the constitutionality of her ALJ's removal protections in federal court *before* undergoing an administrative adjudication. Mr. Jarkesy's ordeal proves why [SEC v. Cochran](#) was correct. Shockingly, SEC has since tried to avoid judicial review of the constitutionality of its proceedings by dismissing dozens of pending administrative proceedings, including Ms. Cochran's. SEC's manipulation of federal court dockets leaves Mr. Jarkesy standing alone in seeking a court ruling on these structural constitutional defects affecting hundreds of Americans. It is essential that the U.S. Supreme Court reach all of Mr. Jarkesy's claims on review and require the SEC to pursue only constitutional *judicial* court proceedings—with their due process and jury trial protections—in its enforcement actions.

NCLA released the following statements:

“SEC’s in-house adjudication regime has tipped the scales of justice in the agency’s favor through multiple constitutional violations that shift judicial power from courts to agencies. Congress cannot relocate judicial power that is constitutionally vested in courts alone because only courts preserve and protect jury trial rights, due process, unbiased fact-finding, and appellate review in an independent judicial branch of government. The Framers vested judicial power in courts alone—to prevent the Executive Branch from acting as prosecutor, judge and jury.”

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

“The Sixth and Seventh Amendments guarantee everyone the right to a jury trial. The SEC should not be permitted to do away with juries in its enforcement proceedings simply because it doesn’t like the verdicts that juries sometimes reach.”

— **Richard Samp, Senior Litigation Counsel, NCLA**

For more information visit the *amicus* page [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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