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NCLA Amicus Brief Supporting Cert Petition Criticizes CFTC’s Enforcement Power Grab

Brief Amicus Curiae at U.S. Supreme Court in Monex Deposit Company, et al. v. CFTC

Washington, DC (February 20, 2020) – The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights organization, has filed an [amicus brief](#) in support of the petitioners’ request for a Writ of Certiorari from the U.S. Supreme Court in *Monex Deposit Company, et al. v. Commodity Futures Trading Commission*. In this case, CFTC is testing the furthest reaches of judicial deference to agency interpretations in order to exert its regulatory power.

Oddly, the agency has studiously avoided specifying which brand of judicial deference its legal interpretation relies upon, which has denied petitioners their due process right to know the legal basis of the charges against them. Regardless, NCLA contends that any judicial deference to an agency interpretation abandons the judicial duty under Article III to exercise independent judgment and exhibits systematic bias violating the due process of law under the Fifth Amendment.

CFTC’s \$290 million enforcement action against *Monex*, a retail precious metals dealer based in Newport Beach, California, alleges violations of the Commodities Exchange Act. NCLA’s amicus argues that CFTC lacks authority over the alleged violations because defendants make “actual delivery” of precious metals to customers within 28 days. CFTC and Congress have previously endorsed the actual-delivery-within-28-days business model for at least three decades. CFTC should not be able to unfairly surprise *Monex* with an enforcement action based on a litigating position CFTC first took in an unrelated case. It should instead have to pass a statute or formal regulation to enforce a prohibition against a previously approved trading practice. CFTC is retroactively outlawing *Monex*’s long-established business practice and seeking a gigantic penalty for conduct that the company had no way to anticipate would be disallowed.

NCLA also asks the Court to take this case to clarify that the rule of lenity is constitutionally required when agencies pursue punitive enforcement actions of the magnitude at issue here.

NCLA released the following statements:

“If an agency such as CFTC can redefine the scope of its own regulatory authority in order to bring proceedings that are criminal in nature, for conduct that both the statute and the agency’s own rules had previously permitted, it shows that the Administrative State is willing to embrace the grossest of denials of due process.”—**Adi Dynar, Litigation Counsel, NCLA**

“Judicial deference is running amok in the federal judiciary. Lower federal courts in this case did not even force CFTC to declare which kind of judicial deference it is demanding. The U.S. Supreme Court should grant cert in this case, if only to ensure that the most basic principles of due process are adhered to before depriving a defendant of \$290 million.”—**Mark Chenoweth, Executive Director and General 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.