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NCLA Challenges Use of Unconstitutional Administrative Law Judges at the USDA

Joe Fleming et al. v. USDA

WASHINGTON, DC, March 5, 2020 – The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights organization, today filed an amicus brief with the U.S. Court of Appeals for the District of Columbia Circuit in support of Joe Fleming's case against the U.S. Department of Agriculture (USDA). The *Fleming* case contests USDA's use of unconstitutional administrative law judges (ALJs) in a way that violates Article II of the U.S. Constitution.

As NCLA's brief shows, the U.S. Supreme Court's 2018 decision in ***Lucia v. SEC*** held that ALJs at the U.S. Securities & Exchange Commission (SEC) are "officers" of the United States. As such, ALJs must be appointed consistent with the Appointments Clause. NCLA's brief explains that USDA ALJs are executive "officers" too, and it argues that ALJs must also be *removable* in a way consistent with the Appointments Clause. *Lucia* clarified that defendants have a right not to be tried in front of constitutionally defective ALJs. Hence, federal courts must have jurisdiction to decide *before an administrative hearing takes place* whether an ALJ has the proper constitutional authority to hear the case. Fleming was sanctioned by a USDA ALJ who is not constitutionally removable.

Under an earlier precedent called ***Free Enterprise Fund v. Public Co. Accounting Oversight Board***, the Supreme Court made clear that officers of the U.S. may not be insulated from removal by more than one layer of tenure protection without running afoul of the clause in Article II of the Constitution that requires the President to "take Care that the Laws be faithfully executed." *Free Enterprise Fund* also squarely held that Article III jurisdiction exists to hear cases like this.

NCLA represents clients before the Fifth (*Cochran*), Ninth (*Lucia*), and Eleventh Circuits (*Gibson*) who are currently challenging the multiple layers of for-cause removal protection enjoyed by ALJs at the SEC as unconstitutional. Those cases enable NCLA to speak authoritatively about issues relating to administrative exhaustion and forfeiture, agency attempts to nullify Article III court jurisdiction, as well as what remedy may be appropriate when an agency's ALJs are held unconstitutional.

NCLA released the following statements:
"When Congress nests protections in Matryoshka-doll-like fashion—it effectively immunizes executive officers of the President from removal, defeating the design of Article II. NCLA is determined to get appellate courts to recognize the injustice of the costly, life-altering and business-destroying practice of administrative agencies trying Americans before their own in-house ALJs who are not constitutional. This is not exhaustion of remedies—it's exhaustion of Americans." —**Peggy Little, NCLA Senior Litigation Counsel**

"Following *Lucia*, courts considering the constitutionality of "quasi-judicial" officers must confront how the structural idiosyncrasies of each agency's adjudicatory scheme raise distinct constitutional issues. What's become clear—if it wasn't already—is that only Congress can fix the unconstitutionality of agency adjudications. Each time a court tries to sever one unconstitutional provision, the legality and legitimacy of another provision inevitably raises its ugly head." —**Jared McClain, NCLA Staff Attorney**

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.

For more information visit us online at: **NCLAlegal.org**.