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NCLA Asks Supreme Court to Vindicate Right to Sue in Federal District Court over SEC ALJ Defect

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

Washington, DC (August 31, 2020) –The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, filed a [petition for a writ of certiorari](#) with the U.S. Supreme Court today in the case of *Christopher M. Gibson v. U.S. Securities and Exchange Commission*. Former U.S. Solicitor General Greg Garre of Latham & Watkins is counsel of record on the petition and led NCLA’s *pro bono* effort seeking certiorari.

The petition asks the highest court in the land to review a decision of the United States Court of Appeals for the Eleventh Circuit. At issue is whether individuals like Mr. Gibson may gain access to a federal court to vindicate structural constitutional claims that directly impact individual liberty *before* they must run the entire gauntlet of agency administrative proceedings. NCLA believes the Eleventh Circuit panel erred in concluding the district court lacked jurisdiction to hear Mr. Gibson’s objections to the unlawful protection from removal by the President that SEC administrative law judges (ALJs) enjoy.

Mr. Gibson’s case is one of many trapped on a treadmill of administrative proceedings that are going nowhere, before unconstitutional ALJs. 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. This time, the problem is that the ALJ enjoys multiple layers of for-cause removal protection. In [Free Enterprise Fund v. Public Co. Accounting Oversight Board](#), the Supreme Court made clear in 2010 that “officers of the U.S.” may not be insulated from removal by more than one layer of for-cause protection. Further protection runs afoul of Article II of the Constitution, which requires the President to “take Care that the Laws be faithfully executed.”

Free Enterprise Fund also squarely 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*. Although the Supreme Court ordinarily awaits a circuit split before granting certiorari, the fact that so many circuits have followed one another in committing the same error is a compelling reason for granting review in this case.

NCLA also represents single mom [Michelle Cochran](#) in her similar case against the SEC.

NCLA released the following statements:

“SEC charges put Americans’ personal, financial, professional and reputational futures in immediate and often permanent jeopardy. Such life-altering power should only be exerted before a constitutional ALJ. If the Supreme Court does not step in to course-correct the law, Christopher Gibson will have endured two trials, multiple appeals, and surrendered six figures to the government before any 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 even if he wins. This is senseless, costly, and illogical. NCLA is determined to secure justice for Gibson and all other similarly situated Americans.”

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

“The courts of appeals—including the Eleventh Circuit—have gone off the rails when it comes to defendants challenging constitutional defects with agency decisionmakers. People like Christopher Gibson should not have to endure repeated pointless proceedings before ever having a chance to present their constitutional arguments to a real federal judge. The Supreme Court should grant cert in this case and let a federal district judge decide whether ALJs who enjoy multiple layers of protection from removal violate the U.S. Constitution.”

—**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.