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NCLA Asks Full Fifth Circuit to Rehear Case Concerning Unlawful SEC Administrative Proceedings

Michelle Cochran v. U.S. Securities and Exchange Commission

Washington, DC (September 24, 2020) – The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, today filed a [petition](#) for rehearing *en banc* in the U.S. Court of Appeals for the Fifth Circuit in the case of *Michelle Cochran v. U.S. Securities and Exchange Commission*. NCLA’s client, Michelle Cochran, is contesting last month’s 2-1 panel decision that erroneously dismissed her case based on a purported lack of subject-matter jurisdiction. Ms. Cochran wants to challenge the unconstitutional protections from removal by the President enjoyed by Administrative Law Judges (ALJs) at the Securities and Exchange Commission (SEC).

Instead, the panel decision would deny her the immediate opportunity to have her constitutional claim heard by a real Article III federal judge. The ALJ would not be able to rule on her constitutional claim, so it makes no sense to deny her access to a judge competent to decide the validity of her claims. Forcing her to go through a second unconstitutional SEC hearing before she can raise her constitutional objections is illogical.

Ms. Cochran argues that these 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 the Merit Systems Protection Board—people whom the President can only remove for cause. Such double insulation of powerful bureaucrats from presidential control violates the Constitution.

NCLA seeks full court review on behalf of Ms. Cochran because the panel decision conflicts with a 2010 U.S. Supreme Court decision in [Free Enterprise Fund v. PCAOB](#), which held that federal officers may only enjoy one layer of for-cause removal protection. Two layers of protection (or double insulation) unduly interferes with the President’s Article II constitutional duty to ensure that officers are doing their jobs. The *PCAOB* case also held *unanimously* that federal district courts have jurisdiction to hear removal-based constitutional challenges.

The panel majority also misapplies a recent Fifth Circuit panel decision in the case of [Bank of Louisiana v. FDIC](#). That case was decided under an entirely different statute (that explicitly stripped jurisdiction), and the judges there neither considered nor ruled on any statute or issue that bears on the law to be applied in *this* case.

First charged by the SEC in 2016, Ms. Cochran has already endured one full trial before an unconstitutional ALJ. In 2018, the U.S. Supreme Court ruled in [Lucia v. SEC](#) that the ALJ who presided over Ms. Cochran’s first proceeding over four years ago was unconstitutionally appointed in violation of Article II, vacating all proceedings she had gone through in 2016-17. Now, eight years after the events she was charged for, the SEC insists on retrying her before a still unconstitutional ALJ.

If left to stand, the panel’s flawed decision will condemn single mother Michelle Cochran and other Americans like her to another cycle of futile administrative proceedings that violate the Constitution and due process rights.

Read full case summary [here](#). Watch case video [here](#).

NCLA released the following statement:

“Michelle Cochran should not have to go through a *second* unconstitutional hearing before she is allowed to challenge whether the ALJ—who can impose life-ruining penalties and industry bars on her—is constitutional. This deeply flawed panel majority decision admits that Ms. Cochran might prevail someday on her claims, perhaps at the Supreme Court. NCLA is confident that a consensus of circuit judges will agree with Judge Catharina Haynes’s dissent that forcing Ms. Cochran through a second administrative trial that could later be vacated by a court makes no sense—and deprives her of due process of law and her civil liberties.”

— **Peggy Little, Senior Litigation 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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