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Full Fifth Circuit Bench to Hear Constitutional Challenge to SEC’s Unlawful Administrative Proceedings

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

Washington, DC (October 30, 2020) – The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, is pleased to announce that the U.S. Court of Appeals for the Fifth Circuit has [granted](#) our [petition](#) for rehearing *en banc* in the case of *Michelle Cochran v. U.S. Securities and Exchange Commission*.

A 2-1 panel decision back in August [erroneously dismissed](#) Ms. Cochran’s case claiming a lack of jurisdiction. The panel decision would have illogically forced her to go through a second unconstitutional SEC tribunal before she could raise her constitutional objections.

The case, which drew strong [amicus support](#), challenges the constitutionality of SEC’s Administrative Law Judges (ALJs) and requests that her case be heard before a real Article III federal court that is competent to decide the validity of her claims. 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 Merit Systems Protection Board members—people whom the president can only remove for cause. Such multi-layer insulation of powerful bureaucrats from presidential control runs contrary to the original design of our Constitution.

The panel decision conflicted with the U.S. Supreme Court’s 2010 decision in [Free Enterprise Fund v. PCAOB](#), which held that such officers may only enjoy one layer of for-cause removal protection. Otherwise, the President’s Article II duty to ensure that federal officers are doing their jobs is unduly restricted.

The panel majority also misapplied a prior Fifth Circuit panel decision in the case of [Bank of Louisiana v. FDIC](#), which was decided under an entirely different statute and neither considered nor ruled on any statute or precedent construing the law to be applied in *this* case.

The panel majority further misconstrued the central jurisdictional holding of the United States Supreme Court in *Free Enterprise Fund*. That decision unanimously held that district courts do have jurisdiction to hear removal-based constitutional challenges.

NCLA is encouraged that the Court of Appeals has agreed to rehear Michelle Cochran’s important case.

NCLA released the following statements:

“The full circuit’s vote to reconsider the earlier 2-1 panel decision suggests that the court recognizes the unjust consequences of denying court jurisdiction for constitutional claims raised by Americans in the same plight as Michelle Cochran. It simply makes no sense to require Ms. Cochran to undergo yet another years-long unconstitutional administrative proceeding before she can challenge its constitutionality. NCLA is hopeful that the full circuit will put an end to this eviscerating merry-go-round and follow the Supreme Court’s unanimous and unambiguous command in *Free Enterprise Fund* to find jurisdiction so that a competent court can rule on her constitutional question.”

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

“The Fifth Circuit's decision to rehear this case *en banc* once again confirms the court's hard-earned reputation for independent thinking. Too many other federal courts have failed to follow the Supreme Court's teaching in *Free Enterprise Fund*. We hope this turn of events bodes well for Michelle Cochran's chances to vindicate her right not to endure a second, unconstitutional administrative hearing.”

— **Mark Chenoweth, Executive Director and General Counsel, NCLA**

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