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## **NCLA En Banc Fifth Circuit Reply Brief Refutes SEC's Objections to Hearing Constitutional Challenge**

*Michelle Cochran v. Securities and Exchange Commission*

**Washington, DC (January 14, 2021)** – The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, has filed a [reply brief](#) in the case of *Michelle Cochran v. Securities and Exchange Commission* (SEC) which the Fifth Circuit U.S. Court of Appeals will hear *en banc* on Jan. 20. Ms. Cochran, a single mom from Dallas, TX, was administratively charged with paperwork violations by the SEC. The brief seeks reversal of a federal district court decision that [erroneously dismissed](#) Ms. Cochran's claims for lack of jurisdiction. NCLA argues that the district court must exercise jurisdiction over this case under controlling Supreme Court authority.

The case ultimately challenges the constitutionality of SEC's in-house Administrative Law Judges (ALJs) and requests that the case be heard before a real Article III federal court that is competent to decide the claims at issue. 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.

The U.S. Supreme Court's 2010 decision in [Free Enterprise Fund v. PCAOB](#) held that officers of the United States (which includes SEC ALJs after the Court's 2018 decision in *Lucia*) may enjoy only 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. That same decision unanimously held that district courts do have jurisdiction to hear this kind of constitutional challenge. Furthermore, another Supreme Court case, *Thunder Basin*, instructs that jurisdiction exists where a claim cannot be meaningfully reviewed otherwise, is collateral, and is outside agency competence and expertise—as in Ms. Cochran's case.

Ms. Cochran instituted this challenge in the district court so that she would not have to endure a second—and ultimately a third—administrative enforcement proceeding when the second, like the first—is inevitably deemed constitutionally invalid and void. It's bad enough that administrative agencies are permitted to force individuals like her to defend themselves before ALJs—who aren't even real judges. But that injustice is compounded when an agency can try someone repeatedly in a process it knows is constitutionally flawed.

NCLA expects the *en banc* Fifth Circuit to rule for Ms. Cochran, find jurisdiction in the district court for her case, and return it there for a decision on the merits.

### **NCLA released the following statement:**

“Michelle Cochran has already endured a ruinous, years-long journey through a byzantine administrative process that ultimately was vacated. SEC insists that she go through that same process again with a still-unconstitutional ALJ before her claim can ever be heard by a competent court. Both logically and legally, this question about removal protections for ALJs must be decided beforehand.”

— **Peggy Little, Senior Litigation 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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