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NCLA Amicus Brief Criticizes Removal Protections and Lack of Jury Trials in SEC ALJ Proceedings

George R. Jarkesy, Jr., et al. v. U.S. Securities and Exchange Commission

Washington, DC (March 19, 2021) – The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, has filed an [amicus brief](#) on behalf of petitioners in *George R. Jarkesy, Jr., et al. v. U.S. Securities and Exchange Commission*. NCLA is asking the U.S. Court of Appeals for the Fifth Circuit to review whether Mr. Jarkesy was adjudicated by an Administrative Law Judge (ALJ) who was improperly insulated from removal. Mr. Jarkesy was also denied his jury trial rights and equal protection of the law, among other problems. The U.S. Securities and Exchange Commission (SEC) Final Order being appealed here was issued seven years after his administrative proceeding ended, which puts the lie to the notion that ALJ proceedings save time.

George R. Jarkesy, Jr. was an investment professional and host of a nationally syndicated talk-radio program at the time when SEC conducted its administrative proceeding against him. He raised a constitutional claim against the SEC’s ALJs, who enjoy multiple layers of protection from removal by the President. In 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 multiple layers of 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.”

In addition to dismissing Mr. Jarkesy’s constitutional removal claim, SEC violated his Seventh Amendment jury-trial rights as well as the equal protection component of the Fifth Amendment’s Due Process Clause. NCLA’s brief specifically spotlights the federal securities laws’ unequal allocation of the right to demand a jury in a proceeding seeking imposition of civil penalties. If SEC desires a jury trial, it can obtain one or avoid it by initiating an administrative proceeding. In contrast, the targets of those proceedings, like Mr. Jarkesy, do not have a similar option. Thus, federal securities laws unfairly deprive enforcement targets of the same right to demand a jury trial that SEC gets—a blatantly discriminatory practice.

The Seventh Amendment protects a litigant’s right to demand a jury trial whenever the federal government initiates proceedings to impose a civil penalty. The SEC’s attempt to deny Mr. Jarkesy his jury-trial rights on a faulty premise that the civil-penalty proceeding against him constitutes an exception to the Seventh Amendment is indefensible. SEC seeks a money judgment against Jarkesy for his alleged fraud. Such claims and remedies were not “unknown to the common law”—a prerequisite to any assertion by the federal government that its administrative proceedings are exempt from the Seventh Amendment.

NCLA is asking the court to vacate the SEC’s Final Order against Mr. Jarkesy.

NCLA released the following statements:

“SEC administrative proceedings deny many constitutional rights to Americans—particularly the right to be tried only *once* before an adjudicator competent to rule on their case. The Supreme Court decided in 2010 that executive branch officers may not constitutionally have multiple layers of job protection that insulate them from Presidential control. In 2018, it held that the tenure-protected SEC ALJs are such officers. Seven years ago, Mr. Jarkey tried to have a competent federal court protect his rights—and was senselessly told he would have to undergo the ALJ proceeding first before a court will decide whether that proceeding is constitutional. This is a senseless, years-long deprivation of rights, inflicting grave injury to Mr. Jarkey’s ability to work in his chosen profession and to his reputation. At long last, the Fifth Circuit Court of Appeals has a golden opportunity to right these wrongs—and free Americans from this cruel administrative maze.”

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

“By seeking penalties in an administrative forum rather than a federal court, SEC is seeking to eliminate Mr. Jarkey’s jury-trial right. But that right is protected by the Seventh Amendment, particularly when, as here, SEC reserves to itself the right to seek a jury trial when doing so suits SEC’s interests.”

— **Rich Samp, Senior Litigation Counsel, NCLA**

For more information about this case visit [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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