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NCLA Asks High Court to Grant Cert Now, Not Hold Case Questioning SEC’s Unconstitutional ALJs

Securities and Exchange Commission, et al. v. Michelle Cochran

Washington, DC (March 29, 2022) – The New Civil Liberties Alliance today filed an early [response](#) to the U.S. Securities and Exchange Commission’s March 11 [petition](#) for a *writ of certiorari* in *SEC v. Michelle Cochran*. NCLA argues that the U.S. Supreme Court should reject the government’s request to hold the *Cochran* case pending a decision in *Axon Enterprise, Inc. v. FTC*; instead, it should grant plenary review in *Cochran* and consolidate the case with *Axon* for argument next fall.

NCLA’s [December 2021 victory](#) in *Cochran* at the *en banc* U.S. Court of Appeals for the Fifth Circuit created a circuit split as to whether the scheme of administrative and judicial review in the Securities Exchange Act of 1934 implicitly strips federal district courts of jurisdiction to hear structural constitutional claims challenging SEC administrative proceedings. The Fifth Circuit correctly held that Congress did not “implicitly strip[] district courts of jurisdiction to hear structural constitutional claims.”

Three weeks after the Fifth Circuit’s momentous decision—the Supreme Court granted certiorari in *Axon*, which presents the same jurisdiction-stripping question in the context of the Federal Trade Commission (FTC) Act. The Court’s resolution of that question, however, would not necessarily resolve the circuit split, which has arisen in the context of SEC’s distinct statutory scheme. Aside from granting a summary affirmance in *Cochran*, granting plenary review and hearing the case alongside *Axon* is the only way to ensure that the Court can fully resolve the circuit split that has closed federal courthouse doors to the constitutional claims of SEC defendants for far too long. Plenary review will also forestall otherwise inevitable spin-off litigation that would accompany an FTC-specific decision in *Axon*. Such ancillary litigation would add insult to injury for a litigant like Michelle Cochran, who already has been fighting for *years* for her day in court to present her structural constitutional claims.

By filing a petition for certiorari in this case, the government conceded that this question merits Supreme Court review. The fact that so many circuits—including those hearing the lion’s share of securities enforcement actions—have already weighed in on this issue underscores its national significance. The issue will not subside until the Court addresses the SEC statutory scheme directly. After Dodd-Frank expanded the SEC’s ability to try cases before its in-house administrative tribunals, SEC has brought the vast majority of its enforcement actions before its own administrative law judges (ALJs), where it enjoys a distinct home-court advantage. As a result, individuals are currently forced to litigate for years at great expense in a hostile forum where the ALJ is employed by their prosecutor, before they may ever challenge that ALJ’s constitutional legitimacy.

As the Court has done in some prior instances where the government has asked for a hold, the Supreme Court should instead grant the government’s petition in this case and set it for plenary review alongside *Axon*.

NCLA released the following statement:

“Michelle Cochran has already endured six years in the interminable waiting room of a federal district court. In 2010, the Supreme Court unanimously held that the same SEC statute does not strip federal district courts of jurisdiction to hear the precise structural constitutional claim she raises here. Five circuit courts ignored that holding, depriving hundreds of SEC respondents of their day in court. SEC’s request for a ‘hold’ petition pending the Supreme Court’s ruling under a different statute would, if granted, unjustly prolong her time in the SEC administrative holding cell. It is long past time to fling open the courthouse doors.”

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

For more information visit the case page [here](#) or watch the 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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