# NCLA's Constitutional Claim at en banc Fifth Circuit Against SEC ALJs Draws Strong Amicus Support

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

December 09, 2020

This week liberty-minded organizations **Americans for Prosperity**, **the Cato Institute and Competitive Enterprise Institute,** as well as American investors and entrepreneurs **Phillip Goldstein, Mark Cuban, and Nelson Obus**, filed *amicus* briefs in support of NCLA's position that the *en banc* Fifth Circuit Court of Appeals should find federal jurisdiction for NCLA client Michelle Cochran's constitutional claim in the case of *Michelle Cochran v. U.S. Securities and Exchange Commission*. The briefs *amici curiae* urge the full court to protect the rights of citizens, like Ms. Cochran, to access federal courts when personal liberty is threatened by executive-branch action that violates essential separation-of-powers principles.

NCLA argues that the Securities and Exchange Commission's administrative law judges (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—appointees themselves whom the president can only remove for cause. This objection needs to be heard by a real Article III federal court *before* Ms. Cochran is subjected to an unlawful hearing.

**NCLA released the following statement:**

"For four years, Michelle Cochran has endured one unconstitutional proceeding after another at the SEC. Even if she ultimately prevails in a federal court, her reward would be a third successive administrative proceeding. This process is death by a thousand administrative cuts. Federal courts have long been the front-line protector of rights safeguarded by the Constitution. As these superb *amicus* briefs convincingly show, the *en banc* Fifth Circuit Court of Appeals should find federal jurisdiction for her constitutional claim."

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

**Excerpts from the three briefs *amici curiae* submitted in support of NCLA:**

"Unlike defendants in federal court proceedings, respondents in SEC administrative proceedings are not afforded the right to a jury trial or the benefits and protections of the federal rules of evidence and procedure … No defendant's constitutional right[s] … should be trumped by the whim of a government plaintiff attempting to tip the scales in its favor by [the government's] unilateral choice of forum."

**— Brief *amicus curiae,* Phillip Goldstein, Mark Cuban, and Nelson Obus**

"This case presents a recurring, exceptionally important issue: the rights of citizens to access federal courts when personal liberty is threatened by executive-branch action that violates essential separation-of-powers principles. It also highlights the intolerable predicament faced by aggrieved citizens when structural constitutional violations are allowed to persist until any meaningful remedy evaporates … [The SEC] requires private citizens and businesses to endure the entire, multi-year gauntlet of the SEC's administrative enforcement process before they are afforded an opportunity to convince a court that the process itself is unconstitutional."

**— Brief *amicus curiae,* The Cato Institute and The Competitive Enterprise Institute**

"[J]udicially created barriers to timely and meaningful [federal court] review of agency actions are inconsistent with the separation of powers and the text, structure, and history of the U.S. Constitution. Such barriers wrongly place a thumb on the scale in favor of the nation's most powerful litigant: the federal government. Due process and fairness demand that those facing *ultra vires* or unconstitutional agency enforcement actions should not have to face years of potentially ruinous costs just to have their day in an Article III court."

**— Brief *amicus curiae,* Americans for Prosperity Foundation**

**For more information visit the case page here.**