



NCLA Celebrates Perfect Six for Six Amicus Record Over Administrative Power at U.S. Supreme Court

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As the U.S. Supreme Court's October 2020 Term comes to a close, the New Civil Liberties Alliance is celebrating an unblemished 6-0 record for the *amicus curiae* briefs we filed in defense of civil liberties. The high court's administrative power cases produced several unlikely majorities, including two NCLA *amicus* wins in the form of unanimous opinions written by Justice Sotomayor and Justice Breyer. Justice Gorsuch even quoted from NCLA's *amicus* brief in his separate opinion in *U.S. v. Arthrex*. These six rulings in favor of NCLA's positions show that our strategy of defending civil liberties against administrative power in the federal courts is working.

NCLA's most recent win was handed down Thursday in *Americans For Prosperity Foundation v. Bonta*, in which NCLA filed three separate *amicus* briefs in support of the petitioners along the way to defend the associational freedom and anonymity principles laid out in *NAACP v. Alabama ex rel. Patterson*. Chief Justice Roberts, writing for a 6-3 Court held that the California Attorney General's donor-disclosure policy for nonprofits is facially unconstitutional because it burdens donors' First Amendment rights and is not narrowly tailored to an important government interest.

U.S. v. Arthrex and *Carr v. Saul* addressed separate constitutional questions surrounding federal administrative adjudicators. In *Arthrex*, a divided Court ruled that administrative patent judges (APJs) have either been exceeding their proper authority or else have been appointed improperly. NCLA argued that APJs are "principal officers" of the United States, thereby according to the Constitution's Appointments Clause, they must be appointed by the President with the advice and consent of the Senate. Notably, Justice Gorsuch quoted NCLA's *amicus* brief in his concurring opinion to demonstrate that Congress likely disapproved of the remedy devised by the majority.

NCLA filed a joint *amicus curiae* brief with the Cato Institute in *Carr*, arguing that imposing issue exhaustion requirements is inappropriate when the issue does not depend on an agency's discretion, expertise, or fact-finding. In Justice Sotomayor's opinion for the Court, the judgments of the Eighth and Tenth Circuit Courts of Appeal were reversed under the reasoning that petitioners could not have developed their Appointments Clause challenges in the Social Security Administration administrative law judge (ALJ) proceedings. NCLA's *amicus* briefs

in *Arthrex* and *Carr* aimed to ensure that agency adjudicators must afford people their constitutionally guaranteed rights.

In other wins against the Administrative State, the rulings in *Collins v. Yellen* and *AMG Capital Management v. FTC* invalidated ill-conceived congressional designs for regulatory agencies. Justice Alito's opinion for the Court in *Collins* held that the structure of the Housing and Economic Recovery Act of 2008 violated the separation of powers by restricting the President's power to remove the Director of the Federal Housing Finance Agency (FHFA). In *AMG Capital Management*, the Federal Trade Commission (FTC) was barred from its unlawful practice of applying the agency's statutory provisions in an unauthorized way to avoid the due process protections for monetary remedies Congress provided in the FTC Act.

NCLA's remaining *amicus* win focused on the free exercise of religion. In *Fulton v. City of Philadelphia*, a unanimous Supreme Court ruled in favor of Catholic Social Services (CSS) and three affiliated foster parents in their lawsuit against the City of Philadelphia after being excluded from a foster-care program based on their religious beliefs. Justice Alito cited NCLA President Philip Hamburger's work eight times in his concurrence.

In each of these cases, the Court vindicated Americans' civil liberties after Congress, administrative agencies, or the lower courts neglected them. NCLA will continue to support structural constitutional challenges to the Administrative State in order to safeguard civil liberties.

NCLA released the following statements:

"NCLA's six Supreme Court *amicus curiae* victories are a testament to good sense by the justices and a good deal of administrative abuse that needed checking. These decisions pushed back against administrative power run amok at the local (*Fulton*), state (*AFPP*) and federal (four others) levels."

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

"NCLA has consistently identified key cases in which to successfully argue for the restoration of constitutional checks and balances and separation of powers so as to protect Americans' civil liberties."

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

"The Supreme Court this term consistently ruled against unchecked power of the administrative state. NCLA is proud of its legal work that contributed to that result."

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