# Supreme Court Case Challenging SEC's Unlawful Admin. Proceedings Draws Strong Amicus Support

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**Washington, DC (July 8, 2022)** – Liberty-minded organizations, distinguished civil liberties activists, and prominent leaders in the business community, including Phillip Goldstein, Mark Cuban, and Nelson Obus, are among the sixteen *amici curiae* who have filed briefs in support of the arguments presented by the New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, in the Supreme Court case, *SEC v. Michelle Cochran*.

NCLA filed an **opening brief** last week on behalf of Michelle Cochran, a CPA from Dallas, TX, who is challenging the constitutionality of the Securities and Exchange Commission's (SEC) in-house Administrative Law Judges. Ms. Cochran requests that her case be heard before a real Article III federal court that is competent to decide the claims at issue. SEC employees play judge, jury, and prosecutor, and unsurprisingly, the agency **wins the vast majority** of the cases it brings through administrative proceedings.

Ten briefs were filed in support of Ms. Cochran and against SEC's deeply flawed administrative proceedings. **Phillip Goldstein, Mark Cuban, Nelson Obus, and Investor Choice Advocates Network** filed jointly, as well as **Raymond J. Lucia, Sr., George R. Jarkesy, Jr., and Christopher M. Gibson**. Separate *amicus* briefs were presented by **Americans for Prosperity Foundation**, **Atlantic Legal Foundation**, **The Cato Institute**, **Citizens United**, **The Institute for Justice**, **Pacific Legal Foundation**, **The U.S. Chamber of Commerce**, and **Washington Legal Foundation**.

NCLA's lead counsel on the case, Senior Litigator Peggy Little, successfully argued it before the *en banc* Fifth Circuit. Latham & Watkins partner Greg Garre, a former Solicitor General of the United States, is Counsel of Record at the U.S. Supreme Court. He will present oral argument in the case later this year.

**Excerpts from the ten *amici curiae* briefs submitted in support of NCLA follow:**
"The SEC inhouse prosecution scheme is indeed a Potemkin jurisdiction …—in which it acts as investigator, prosecutor, and judge of its own cause— [and is thus] rigged against respondents….

If the SEC wants to prosecute Ms. Cochran and seek substantial civil penalties, it should be required to prove up its case in federal court, subject to the protections of the Federal Rules of Civil Procedure and the Federal Rules of Evidence, not to mention Article III, due process, and the Seventh Amendment. The Constitution requires no less."
— **Americans for Prosperity Foundation**

"Because the SEC does not possess the authority, competence, or expertise to address this issue, there is no reason to delay judicial review of Cochran's structural constitutional claim while she is forced either to participate in the charade of defending herself in a likely unconstitutional (as well as biased) administrative forum, or to indelibly stain her own reputation by signing an SEC-devised consent decree."
**— Atlantic Legal Foundation**

"Eventual review, at some point in the remote future, is not meaningful review. The respondent … can default …[o]r she can contest her guilt, in which case she can count on spending years more before the SEC's interminable adjudicative regime. … The respondent is thus caught in a Catch-22 … That is a choice worthy of Camus or Kafka, not America."
— **The Cato Institute**

"When it comes to adjudicating before administrative agencies, the process often is the punishment. The mere whiff of an investigation may cause lasting reputational harms. The adjudication process is long, it is expensive, the procedural deck is stacked against respondents, and the reward for a successful challenge is often getting to start at square one and begin the whole process over again. That is what has happened in this case, where it is Groundhog Day at the SEC."
**— Citizens United and Citizens United Foundation**

"The SEC's ability to selectively forum shop violates the Seventh Amendment and leads to bizarre and unequal results for similarly situated defendants in SEC enforcement actions. A defendant's constitutional rights should not be held hostage to the whim of a government plaintiff seeking home court advantage. …The SEC can use its home field advantage to pressure defendants like Ms. Cochran to settle, inflicting grievous constitutional injuries without producing an appealable final order. Id. This is not a just, or constitutional, result."
— **Phillip Goldstein, Mark Cuban, Nelson Obus, and Investor Choice Advocates Network**

"[T]he agency's choice to burrow its enforcement actions inside its own agency proceedings … divest[s] the district courts of their jurisdiction to consider constitutional claims, … violat[ing] the separation of powers [and] delegat[ing] to the SEC the legislative power to choose which subjects of its enforcement actions enjoy their full set of constitutional rights—including the right to seek redress of constitutional violations in federal court and the right to a jury trial."
— **The Institute for Justice**

"[F]or years…lower courts refused to decide whether Amici were being forced to defend themselves before an unconstitutional tribunal. …This Court therefore should ensure that nobody has to wait for nearly a decade before a court can adjudicate her structural-constitutional dispute

with the government."
— **Raymond J. Lucia, Sr., George R. Jarkesy, Jr., and Christopher M. Gibson**

"[U]sing administrative agencies as 'judicial' fora to deprive parties of their private rights creates a problem—one of constitutional magnitude… Congress does not intend to do what it cannot do under the Constitution. Thus, this Court should clarify that [] every case raising jurisdiction stripping … must be read alongside key constitutional protections to fully guard against potential infringement of separation of powers and due process."
— **Pacific Legal Foundation**

"The SEC's structure and proceedings are riddled with constitutional problems. … Forcing private parties to suffer through unconstitutional agency proceedings just to challenge those proceedings later inflicts irreparable constitutional harm. … Delayed judicial review also perversely rewards the worst constitutional offenders. The SEC's particular constitutional flaws—which overlap with and may even exceed the FTC's flaws—underscore the imperative of pre-enforcement review…. to guard against arbitrary, unchecked agency power."
— **The United States Chamber of Commerce**

"Litigation is not cheap. … The Securities and Exchange Commission relishes the ability to use its unlimited resources against individuals who must count their pennies. That is why it seeks review of the en banc Fifth Circuit's correct decision here. At bottom, the SEC wants to exercise both executive and legislative power without meaningful review by a federal court. This lack of judicial review violates core separation-of-powers principles. … Thunder Basin was wrong when it was decided and is still wrong today. The Court should thus explicitly overrule it."
— **Washington Legal Foundation**