Press Release

WASHINGTON LEGAL FOUNDATION
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WLF Asks Supreme Court to Clear the Way for Constitutional Challenges to Agency Action

(*Smith v. SEC*)

"*Constitutional rights shouldn't hang on whether a lawyer asks a federal agency to do the impossible.*"

— Zac Morgan, WLF Senior Litigation Counsel

WASHINGTON, DC—Washington Legal Foundation (WLF) today urged the U.S. Supreme Court to grant review of a Sixth Circuit decision that held that a constitutional challenge to agency action must be raised before a federal agency or lost forever—even though the agency has no power to set aside its statutory actions as unconstitutional and would never do so. The NFIB Small Business Legal Center and the National Association of Wholesaler-Dealers joined WLF on the brief.

The case arises from an SEC enforcement challenge against Eric Smith. In that proceeding, Smith was denied the Seventh Amendment right to a jury trial that the Supreme Court firmly established in *SEC v. Jarkesy*. But because Smith failed to raise that claim against the very agency committed to denying him that right, the Sixth Circuit held that Smith's argument was forfeited.

WLF's brief explains why agencies cannot permanently set aside a statute as unconstitutional: only federal courts can. And in this case, the Sixth Circuit even conceded that Smith's argument was sure to lose before the agency. Yet it insisted on the kabuki theater of forcing him to ask anyway. This is unnecessary at best and will keep meritorious constitutional claims from being heard by federal judiciary—the arm of the government designed to safeguard liberty by striking down unconstitutional laws.

Celebrating its 49th year, WLF is America's premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.

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