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Influencer Appeals Conviction for Posting Instagram Pic of Allegedly Illicit Snowmobiler on USFS Land

United States v. David Lesh

Washington, DC (August 23, 2022) – Colorado influencer and entrepreneur David Lesh was charged and convicted in federal court for driving a snowmobile off a designated route and selling merchandise or conducting work activity on U.S. Forest Service (USFS) land. Mr. Lesh, who owns Virtika, an outdoor apparel company, posted a photo on his *personal* Instagram account (not Virtika’s account) depicting an individual snowmobiling at the Keystone Ski Resort near Denver, along with the comment, “solid ski sesh, no lift ticket needed.” Prosecutors argued that the post proves Mr. Lesh was in an off-limits section of the resort on a particular date when the park was closed. Following a bench trial by a federal magistrate, he was sentenced to six months’ probation, 160 hours of community service, and a total fine of \$10,000.

Today, the New Civil Liberties Alliance filed an [opening brief](#) appealing Lesh’s conviction in the U.S. District Court for the District of Colorado, arguing that prosecutors failed to prove his guilt of both counts beyond a reasonable doubt, that the bench trial denied his right to a trial by jury on criminal charges, that the court erred by allowing inadmissible material into evidence, and that the USFS’s interpretation of the statute was wrong, would violate the First Amendment, and would raise serious nondelegation questions.

The prosecution’s proof is fatally flawed. The person snowmobiling in the photograph cannot be identified in any way, since the face is not visible and no part of the body is exposed. No brand name can be seen on the clothing, nor was Virtika mentioned or tagged in the post on Lesh’s personal Instagram account. The photograph could have been taken on a date when the area was open to the public. NCLA argues there was insufficient evidence to prove Lesh was at Keystone on April 24, and no evidence at all that he sold merchandise or conducted work activity *on federal land*. Moreover, Congress did not delegate to USFS authority to prosecute someone for posting a photograph on social media, so interpreting the law to cover Mr. Lesh’s conduct is unconstitutional.

Prosecutors originally charged Mr. Lesh with various trespassing-related offenses based on photographs appearing to show his unlawful entry into Hanging Lake, a protected land. Those charges were dropped when the government realized Lesh had faked those photos. The determination to hold Mr. Lesh criminally liable for *something* anyway—regardless of whether he had, in fact, committed a crime—explains why USFS contorted the regulations far beyond reason. But animus does not justify the agency’s wild and warped legal interpretations.

Furthermore, the trial court committed reversible error by permitting the prosecutor to enter into evidence a 15-page *New Yorker* profile of Mr. Lesh. The article contained several layers of hearsay as the journalist who wrote it was not called to testify. The piece was replete with irrelevant, personal, and prejudicial information, as well as the author’s observations and impressions of Mr. Lesh, making it inadmissible under Federal Rules of Evidence. Both the *New Yorker* article and other bad acts evidence that the court admitted served as grounds for the guilty verdict, as explicitly stated in the magistrate’s written order. These serious evidentiary errors, along with the myriad statutory and constitutional issues with this case, require reversal and vacatur of Mr. Lesh’s convictions.

NCLA released the following statements:

“The U.S. Forest Service has reached a new low by pursuing a case against Mr. Lesh for posting photos on his Instagram account. To secure a conviction in this case, both the prosecutor and the court twisted the law far beyond any reasonable interpretation. In the process, they violated Mr. Lesh’s constitutional rights. We are confident that on appeal, Mr. Lesh will prevail.”

— **Jenin Younes, Litigation Counsel, NCLA**

“The right to trial by jury ‘in all criminal prosecutions,’ is protected by the Sixth Amendment and must be held sacrosanct. By instead allowing Mr. Lesh’s criminal case to be decided—over his objection—by a magistrate who is not even an Article III judge appointed by the President and confirmed by the Senate, this prosecution fell far short of the Sixth Amendment’s guarantee. NCLA is determined to ultimately restore Mr. Lesh’s jury trial rights.”

— **Mark Chenoweth, President, NCLA**

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