



**FOR IMMEDIATE RELEASE**

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## **U.S. Forest Service Illegitimately Created Crimes, Prosecuted Skier over Instagram Post, NCLA Says**

*United States v. David A. Lesh*

**Washington, DC (June 9, 2023)** – The New Civil Liberties Alliance, a nonpartisan, nonprofit civil liberties organization, filed an [opening brief](#) with the U.S. Court of Appeals for the Tenth Circuit last night, appealing its client David Lesh’s contested criminal convictions for violating two regulations promulgated by the U.S. Forest Service (USFS). NCLA argues that the government failed to prove essential elements of its allegations, and it punished Mr. Lesh in violation of his First Amendment free speech rights. In addition, because these regulatory violations are classified as so-called petty offenses, the courts below denied Mr. Lesh his Sixth Amendment right to a trial by jury. Finally, Lesh’s convictions must be overturned because the regulations USFS promulgated specify criminal violations, a legislative function that is solely Congress’s prerogative.

An accomplished skier and founder of the outdoor gear company Virtika, Mr. Lesh posted two photographs on his *personal* Instagram account in April 2020 that depicted a snowmobiler performing a jump at Colorado’s Keystone Ski Resort. The resort rests on USFS-administered land and was closed at the time due to Covid-19. Mr. Lesh’s Instagram post did not mention Virtika, nor did it promote the company’s products. Nevertheless, a federal magistrate judge convicted him of violating one regulation prohibiting operating a snowmobile outside of a designated route and another banning unauthorized “work activity or service” on USFS lands. Mr. Lesh was sentenced to six months’ probation, 160 hours of community service, and a \$10,000 fine. In March, the U.S. District Court for the District of Colorado [affirmed](#) Mr. Lesh’s earlier convictions. NCLA is now asking the Tenth Circuit to overturn them.

Mr. Lesh’s first conviction should not have happened when the USFS apparently had not published a legally required route map ahead of time. Mr. Lesh’s second conviction, for unauthorized work, directly violates his First Amendment right to free speech. That conviction was upheld on the tortured theory that posting the photos meant he was performing commercial activity without proper authorization. In effect, he was punished for posting photos on his personal Instagram, which is protected speech.

The [two regulations](#) Mr. Lesh was convicted of violating were promulgated under a statute that purports to grant the Secretary of Agriculture practically unfettered legislative authority, in violation of the Vesting Clause of Article I of the Constitution. That provision places “All legislative Powers” in Congress, so agencies like USFS can only act if Congress provides an “intelligible principle” to guide their application of the law. But the [statute](#) authorizing the Secretary of Agriculture’s criminal rulemaking provides none.

Because each of the regulations carries a prison term of six months or less, Mr. Lesh never received a jury trial, depriving him of his Sixth Amendment rights as well. The petty offense exception is an ahistorical divergence from the right to trial by jury, and it stands in direct conflict with the Constitution’s guarantees to criminal defendants—particularly when the two convictions had the potential to send Mr. Lesh to prison for a year.

**NCLA released the following statements:**

“Every American should be concerned that agencies, like the U.S. Forest Service, believe that they can criminalize activity based on an open-ended delegation, with no input from Congress and in violation of the Constitution’s design. This case also tees up the deeply problematic petty offense exception, which categorically denies some criminal defendants their Sixth Amendment right to a trial by jury. Under the Constitution, the ‘all’ in ‘all criminal prosecutions’ means just that, and it is time the absolute right to trial by jury is restored.”

— **Kara Rollins, Litigation Counsel, NCLA**

“Mr. Lesh is being prosecuted for his speech—that is, for his decision to post photos on the internet. The Government is restricting his speech based on its content—the Government does not want people publicizing their activities on Forest Service land. The First Amendment prohibits such content-based speech restrictions.”

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

**For more information visit the case page [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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