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NCLA Amicus Brief Encourages Supreme Court to Hear Case Against FCC’s Universal Service Fund

Consumers’ Research, et al. v. Federal Communications Commission, et al.

Washington, DC (November 30, 2023) – Every year the Federal Communications Commission (FCC) collects billions of dollars from telecommunications customers—anyone with a telephone—to fund “universal service.” The program subsidizes high-cost areas and certain educational and healthcare providers. However, Congress wrote an evolving and open-ended statute, leaving FCC to set and then rewrite its own policies for the Universal Service Fund (USF) and to fund the program without limit through fees that escape Congressional oversight. Today, the New Civil Liberties Alliance filed an *amicus curiae* [brief](#) urging the U.S. Supreme Court to hear the case of *Consumers’ Research v. FCC*, overturn this unconstitutional arrangement, and correct the enfeebled “nondelegation” doctrine that has enabled it.

Through the Telecommunications Act of 1996, Congress authorized FCC to define and fund “universal” telecommunications and information services on an “evolving” basis “consistent with the public interest, convenience, and necessity” and in line with policies FCC itself could adopt. As a result, FCC has the power to determine and redetermine the relevant statute’s purpose and policy in perpetuity, violating the Constitution’s requirement that legislative power remain vested in Congress. In short, FCC is free to define its own objectives and priorities, with no standards to constrain them or hold them accountable. The statute’s self-funding mechanism also evades Congress’s power of the purse, a core constitutional duty of the legislature.

The U.S. Court of Appeals for the Sixth Circuit wrongly upheld the statute, untroubled by Congress’s divestment of legislative power to FCC. The Court saw the alleged inability of Congress to do its job without giving away power as the “rationale” for the nondelegation doctrine, demonstrating how far that doctrine has deviated from its constitutional purpose. As NCLA co-founder Philip Hamburger has argued, the nondelegation doctrine developed to prevent Congress from divesting legislative power to outside parties, but its modern application does the opposite, wrongly legitimizing statutes that effectively grant power to the Executive Branch. This misnamed doctrine rests on multiple false assumptions and must be recast to ensure that the Constitution serves its purpose.

Consumers’ Research v. FCC presents an opportunity to rein in the unlawful use of administrative power, a central part of NCLA’s mission. The Supreme Court should grant certiorari in this case and once again restrict legislative power to Congress—where it belongs.

NCLA released the following statements:

“The Supreme Court once recognized that Congress does not complete its job of legislating when it merely frees the executive branch to create legislative codes, a practice that has become the mainstay of the Administrative State. Pursuant to our Constitution, Congress must take on the hard task not only of setting policy, but of establishing standards that meaningfully constrain agency implementation of policy objectives. Agencies cannot be left as wardens of their own authority.”

— **Zhonette Brown, Senior Litigation Counsel, NCLA**

“Congress seems to forget that it is *the only* body with the power to tax and spend. Such a weighty power cannot simply be passed off to an agency—in this case, the FCC. By relinquishing its power of the purse, FCC has gone rogue and has unconstitutionally taxed the American people to the tune of \$10 billion dollars annually to fund its Universal Service Fund. It’s time Americans wake up to the mischief of the Administrative State and rightfully draw boundaries around the enumerated powers.”

— **Kaitlyn Schiraldi, Staff Attorney, NCLA**

“It is shocking that the Universal Service Fund has grown to 25x the annual budget of FCC. This isn’t the tail wagging the dog, it’s the tail wagging the elephant. Just because Congress wants to fund something a certain way does not make it constitutional. Whether it’s the odd way Congress funds the Consumer Financial Protection Bureau or this USF fiasco, the courts must ensure that Congress controls agency spending via appropriations.”

— **Mark Chenoweth, President, NCLA**

For more information visit the *amicus* 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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