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NCLA Amicus Brief Tells D.C. Circuit It Must Avoid Remanding Regulations Without Vacating Them

Cigar Association of America, et al. v. Food & Drug Administration, et al.

Washington, DC (April 22, 2024) – Today, the New Civil Liberties Alliance filed an *amicus curiae* [brief](#) in *Cigar Association of America v. FDA*, urging the U.S. Court of Appeals for the District of Columbia Circuit to reject the “remand without vacatur” legal doctrine. This dubious practice allows administrative agencies to continue enforcing rules the court has just declared unlawful. The doctrine creates a legal category unknown to the law: Unlawful but enforceable rules. Instead of sending them back, courts must set aside unlawful rules.

The U.S. District Court for the District of Columbia concluded FDA’s Final Deeming Rule regulating tobacco products was “arbitrary and capricious” with respect to premium cigars because FDA failed to account for evidence regarding the potentially differential health effects between premium cigars and other tobacco products. This defect, the district court decided, meant the agency acted “arbitrarily and capriciously” when it included premium cigars in the Final Deeming Rule, so the court set the rule aside to the extent it addresses those products. The FDA now asks the D.C. Circuit to either reverse the district court’s ruling, or at least allow it to continue enforcing the remaining unlawful rule under the “remand without vacatur” doctrine while it considers its options.

Without taking a position on whether the FDA’s conduct was arbitrary and capricious, NCLA argues that the Administrative Procedure Act requires courts to set aside unlawfully promulgated rules completely. This duty necessarily follows from basic principles underlying both the rule of law and our constitution. Our government, as the Declaration of Independence says, has only those powers it obtains with the “consent of the governed.”

“We the People” have not consented to the creation of arbitrary and capricious rules, so courts have no authority to grant that consent on our behalf—even temporarily—via the “remand without vacatur” doctrine. When a court concludes an administrative agency improperly promulgated a rule, its only option is to set it aside. NCLA encourages the D.C. Circuit to avoid the unjust “remand without vacatur” doctrine and instead uphold the rule of law by reinforcing the foundational principle that it should never permit the enforcement of an unlawful rule.

NCLA released the following statements:

“The ‘remand without vacatur’ doctrine licenses administrative agencies to act contrary to law with the court’s (unintentional) blessing. The judiciary is where we go to vindicate the rule of law, not where unlawfulness goes to receive the court’s imprimatur. We are confident the D.C. Circuit will recognize the terrible error at the heart of this doctrine and will act accordingly.”

— **Daniel Kelly, Senior Litigation Counsel, NCLA**

“A regulation is either lawful or unlawful. It cannot be, like Schrodinger’s cat, both dead and alive at the same time. Vacatur is required whenever unlawfulness is found.”

— **John Vecchione, Senior Litigation Counsel, NCLA**

“Congress has spoken in the Administrative Procedure Act as to what courts must do with rules that have been promulgated unlawfully. Like a fallen soufflé, they have failed, and the agency must start over. There is no provision for sending the rule back to the agency to simply add a missing ingredient and re-bake it. Nor does the half-baked ‘remand without vacatur’ doctrine properly incentivize agencies to follow the law in the first instance.”
— **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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