



**FOR IMMEDIATE RELEASE**

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## **NCLA Asks Supreme Court to Force U.S. Patent Office Back to Using Notice-and-Comment Rulemaking**

*Chestek PLLC v. Kathi Vidal, Director, United States Patent and Trademark Office*

**Washington, DC (June 17, 2024)** – The New Civil Liberties Alliance has filed an *amicus curiae* [brief](#) urging the Supreme Court to hear *Chestek PLLC v. Vidal* and stop the U.S. Patent and Trademark Office from eschewing notice-and-comment rulemaking. PTO should not be issuing rules that profoundly affect the economy without public input or considering all relevant information. The U.S. Court of Appeals for the Federal Circuit issued a mistaken decision below effectively erasing a statute that requires PTO to follow a notice-and-comment process before promulgating its rules. NCLA is asking the Supreme Court to reverse the Federal Circuit’s error and restore PTO’s Congressionally required accountability to the public.

Although PTO is only permitted to promulgate “procedural” rules, the agency’s decisions carry major economic impact. Congress deliberately enacted 35 U.S.C. § 2(b)(2)(B) to require PTO to engage in a notice-and-comment process prior to rulemaking. Neglecting well-established statutory interpretation methods, the Federal Circuit failed to give effect to the Congressional enactment, essentially reading § 2(b)(2)(B) out of the Patent Act and freeing the PTO to make rules without any democratic accountability.

The decision below misreads both the Patent Act and the Administrative Procedure Act. The ruling also ignores Congress’s deliberate policy in favor of public participation in PTO rulemaking. Such public input is designed to ensure “openness, explanation, and participatory democracy.” With its *In re Chestek* ruling, the Federal Circuit transformed the Patent Office into perhaps the only federal agency that can completely avoid the public’s routine participation in agency rulemaking. The Supreme Court must end this threat to democratic self-governance.

### **NCLA released the following statements:**

“As our Declaration of Independence says, governments derive ‘their just powers from the consent of the governed.’ Congress has ordered administrative agencies like the Patent Office to utilize the notice-and-comment process for rulemaking. The Federal Circuit eviscerated this requirement, so the Supreme Court should step in to correct the error and to restore the regulatory procedures Congress created.”

— **Greg Dolin, Senior Litigation Counsel, NCLA**

“The Federal Circuit made a grave error when it told PTO that it does not have to use notice-and-comment rulemaking. Unfortunately, it once again falls to the U.S. Supreme Court to clean up the Federal Circuit’s mess.”

— **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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