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In NCLA Amicus Win, Fifth Circuit Rules Against FCC's Unlawful Control of Universal Service Fund

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

Washington, DC (July 24, 2024) – Today, the *en banc* U.S. Court of Appeals for the Fifth Circuit [ruled](#) in *Consumers' Research v. Federal Communications Commission* that Congress unconstitutionally delegated legislative power by allowing FCC to create and control a system for extracting Americans' money to finance the Universal Service Fund (USF). The New Civil Liberties Alliance filed an *amicus curiae* [brief](#) calling for this result, identifying core legal problems with that illegitimate arrangement. NCLA applauds the Fifth Circuit for taking a positive step toward restoring proper constitutional order.

The Telecommunications Act of 1996 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 NCLA advised, the Fifth Circuit held this vague standard does not provide an adequate “intelligible principle” to limit the delegation of legislative power to FCC under the Vesting Clause in Art. I of the Constitution. The Court also held that the Universal Service fee is really a tax.

“Congress delegated its taxing power to the Federal Communications Commission. FCC then subdelegated the taxing power to a private corporation,” Judge Andrew S. Oldham wrote for the Fifth Circuit. “That private corporation, in turn, relied on for-profit telecommunications companies to determine how much American citizens would be forced to pay for the ‘universal service’ tax that appears on cell phone bills across the Nation. We hold this misbegotten tax violates Article I, § 1 of the Constitution.”

Today's *en banc* ruling reverses a Fifth Circuit panel decision that wrongly upheld the statute giving FCC this power. Citing the Fifth Circuit's May 2022 *Jarkesy v. SEC* [ruling](#), the panel had said the “nondelegation doctrine applies where Congress has provided ‘no guidance whatsoever.’” This misinterpretation of the *Jarkesy* decision, another case in which NCLA filed successful [amicus briefs](#) that culminated in a historic U.S. Supreme Court [ruling](#) last month, would have rendered the “intelligible principle” standard effectively meaningless. Here, while Congress provided some level of guidance to FCC, the Fifth Circuit found that it had not provided a “sufficiently intelligible” principle. NCLA commends the *en banc* Court for enforcing the Vesting Clause.

NCLA released the following statements:

“Today's Fifth Circuit *Consumers Research* opinion appropriately rejected Congress's vesting the FCC with the power ‘to exact as much tax revenue for universal service as FCC thinks is good.’ There is no doubt that every agency would love to have that power and no question that the Constitution forbids it.”

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

“The taxing power is a core legislative power. Congress cannot divest such core legislative powers to independent executive branch agencies like FCC. The *en banc* Fifth Circuit is correct to rein in this improper delegation.”

— **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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