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Tenth Circuit Overturns NCLA Client's Wrongful Conviction Under USFS Regulation for Instagram Post

United States v. David A. Lesh

Washington, DC (July 16, 2024) – Today, the U.S. Court of Appeals for the Tenth Circuit overturned New Civil Liberties Alliance client David Lesh's criminal conviction for allegedly violating a regulation promulgated by the U.S. Forest Service (USFS). The Court ruled that the USFS regulation banning unauthorized "work activity or service" on USFS lands is impermissibly vague as applied to his conduct. This means Mr. Lesh could not have known that taking photos on USFS land and posting them to his personal Instagram account would be punishable under the regulation. The Tenth Circuit, under binding Supreme Court precedent, determined that Mr. Lesh was not deprived of his Sixth Amendment right to a jury trial because the so-called petty offense exception applies, but two judges implied that the exception might be inconsistent with the Constitution and should be revisited.

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. Without a jury trial, Mr. Lesh was sentenced to six months' probation, 160 hours of community service, and a $10,000 fine. Only the off-route snowmobiling conviction was upheld today.

In a powerful concurrence, Tenth Circuit Judge Tymkovich, joined by Judge Rossman, urged the Supreme Court to revisit the "petty offense exception" to the jury trial right. Judge Tymkovich explained that this exception appears to be inconsistent with the Sixth Amendment's guarantee of a jury trial in criminal cases and noted that the precedent has been called into question by many constitutional scholars. The concurrence highlights how the Sixth Amendment's jury trial guarantee "[i]n all criminal prosecutions" is currently interpreted by the Supreme Court to exclude petty offenses—those carrying a maximum penalty six months' imprisonment or less. The exception applies even if, as in Mr. Lesh's case, the possible term of imprisonment exceeds six months based on an aggregation of charges. Either way, it contravenes the Constitution's plain language. The concurring judges noted in conclusion that "[u]nder current doctrine, the judicial imperative of interpreting the fundamental-to-liberty jury right has been abdicated to the legislative branch, or in this case even the executive branch. But such discretion 'in regard to criminal causes is abridged by the express injunction of trial by jury in all such cases.'"

NCLA released the following statements:

"We are pleased the Court deemed the regulation's term 'work activity' impermissibly vague as applied to Mr. Lesh. Like many people in modern society, Mr. Lesh is an entrepreneur who engages and promotes himself online via social media. The government's theory would have criminalized this, and the social media activity of

thousands, 'whose crime would be a photo op on public lands.' The decision holds that creating personal content for personal social media pages is not a crime, even if one's online presence is inseparable from his job."
— **Kara Rollins, Litigation Counsel, NCLA**

"Because Mr. Lesh roused the ire of Denver-area law enforcement, the government was dead set on convicting him of *something*. To obtain that conviction, the prosecution stretched the application of the term 'work activity' on federal land beyond reason, to encompass taking a photograph and posting it on a personal social media account. The courts below all too willingly accepted the government's tortured interpretation of the regulation in question. We are thrilled that the Tenth Circuit has vindicated Mr. Lesh's constitutional rights today. In doing so, it upholds the rights of all Americans who might post a photo on social media of themselves on federal land."
— **Jenin Younes, Litigation Counsel, NCLA**

"Kudos to the Tenth Circuit not only for striking down the absurd application of the Forest Service's regulation by prosecutors, but also for recognizing that Mr. Lesh's Sixth Amendment jury-trial right was likely infringed. Although binding Supreme Court precedent prevented the panel from setting Mr. Lesh's conviction aside on that basis, two judges have teed up the petty offense exception nicely for the U.S. Supreme Court's reconsideration."
— **Mark Chenoweth, President, 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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