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NCLA's 100th Case Challenges Agency's Illegal Criminalization of BASE Jumping in National Parks

BASE Access, Jedd Cowser, Lisa DeMusis, Catherine Hansen, Ryan Kempf, Charley Kurlinkus, and Marshall Miller v. National Park Service, et al.

Washington, DC (February 24, 2025) – Today, the New Civil Liberties Alliance filed a Complaint challenging Congress's unconstitutional delegation of criminal lawmaking power to the National Park Service (NPS), allowing the agency to decide what constitutes a criminal offense within the 85 million acres of public land it oversees. For decades, NPS has unconstitutionally wielded this legislative power, criminalizing a vast range of activities in the national parks, including some as innocuous as roller skating or using a metal detector. As relevant to this case, NPS effectively criminalized an entire sport—BASE jumping—without clear direction from Congress, the only branch authorized to make criminal law. As a result, NCLA's clients—a group of law-abiding working professionals and dedicated athletes—face arrest and criminal penalties, including a $5,000 fine, a permanent criminal record, and even imprisonment, simply for engaging in a legitimate, internationally recognized sport in our national parks. NCLA asks the U.S. District Court for the Southern District of Texas to invalidate this unconstitutional delegation of legislative power to NPS and enjoin the agency from criminally prosecuting BASE jumpers simply for engaging in environmentally friendly recreation.

Congress enacted the NPS Organic Act in 1916, broadly granting the Department of the Interior (DOI) and NPS (an agency within DOI) the unlimited authority to create any regulations that the agencies might deem "necessary or proper" for the "use and management" of the national parks. Congress mandated in a subsequent statute that the violation of ***any*** of the regulations deemed "necessary or proper" by DOI or NPS under the Organic Act would constitute a federal criminal offense. In conferring this criminal lawmaking authority on the agencies, Congress provided no intelligible principle limiting DOI's power to create criminal law, offering only a vague affirmative mandate to "conserve" and "provide for the enjoyment" of national parks. NPS has seized the opportunity to criminalize, at its unfettered discretion, a vast array of activities that Congress never outlawed, including BASE jumping. Further, NPS arbitrarily applies its regulations, criminally prosecuting individuals who engage in recreation that the agency disfavors (***i.e.***, BASE jumping), while permitting parkgoers to freely engage in substantially similar activities (***i.e.***, hang gliding) of which it approves.

Since BASE jumping was invented, NPS has unlawfully wielded its "Aerial Delivery Rule"—a decades-old regulation that predates the sport's existence, and, by its plain terms, regulates unauthorized cargo drops and aerial deliveries from aircraft, as opposed to any form of recreational activity—against BASE jumpers. The agency has transformed this inapplicable regulation into an outright ban on BASE jumping. NCLA's clients seek only a means of lawfully BASE jumping in the national parks, which hold many of the safest and most naturally stunning places in the country for the sport. Yet, until NPS's unchecked lawmaking authority is abolished, Plaintiffs and others across the country will be unable to do so without risking a federal misdemeanor, thousands of dollars in fines, and imprisonment.

Congress's surrender of such broad criminal lawmaking authority to DOI and NPS, ***Executive*** Branch agencies, violates the Vesting Clause of the Constitution, which requires that all legislative powers remain within the

Legislative Branch. NPS's criminalization of BASE jumping also defies fundamental principles of due process. Neither the NPS Organic Act nor the Aerial Delivery Rule clearly describes the conduct being prohibited, failing to provide fair notice that BASE jumping qualifies as a criminal offense. In addition, by selectively enforcing its aerial regulations against BASE jumpers while freely granting park use for similar activities like hang gliding, NPS has abandoned reasoned decision-making in favor of arbitrary rule by decree. NPS should not be permitted to impose an indefinite ban on otherwise legal recreational activities like BASE jumping without providing reasoned explanation or meaningful analysis of the activity. This ban, enforced under the inapplicable Aerial Delivery Rule, is textbook arbitrary and capricious agency action that violates the Administrative Procedure Act. Further, even if the NPS Organic Act's broad and amorphous mandate to "conserve" and "provide for the enjoyment of" the national parks qualified as an "intelligible principle" from Congress (it does not), NPS's interpretation of the Aerial Delivery Rule exceeds the scope of the statute. Indeed, rather than provide for enjoyment, NPS has outlawed a form of recreational enjoyment (BASE jumping) that the agency has not shown to impede the conservation of the national parks.

Ultimately, NCLA asks that the court reaffirm the fundamental principle that criminal laws must be written by Congress, not agencies, and that Americans are entitled to fair notice of what the law prohibits before they may be branded as criminals. The Constitution demands nothing less.

The ***BASE Access*** case is NCLA's 100th original litigation matter since filing our first case in the fall of 2018. In less than seven years, NCLA has achieved historic progress in safeguarding Americans' rights against the unlawful Administrative State, including three major victories at the U.S. Supreme Court. The new civil liberties movement is off to a fantastic start.

NCLA released the following statements:
"No American should face criminal prosecution and imprisonment for engaging in recreation that unelected agency bureaucrats—not Congress—decided to brand as a criminal offense. NCLA looks forward to bringing the National Park Service's unconstitutional stint at criminal lawmaking to an end."
— Casey Norman, Litigation Counsel, NCLA

"Criminal laws shouldn't come from park rangers with pens. Congress defines federal crimes—not NPS—and it must do so in terms that ordinary Americans can understand. Defining a crime as whatever NPS deems improper doesn't cut it."
— Sheng Li, Litigation Counsel, NCLA

"NCLA is thrilled to represent our BASE-jumping clients in an exciting case to mark our 100th original litigation matter. NCLA has always opposed Congress's delegating the power to write criminal laws to bureaucrats. We won a big case at the Supreme Court last summer on that subject, and we believe this case will be a winner, too."
— 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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