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Media Inquiries: [Joe Martyak](mailto:Joe.Martyak@ncla.org), 703-403-1111

NCLA Asks the Supreme Court to Stop FCC's Use of Legislative Power, Bolster Nondelegation Doctrine

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

Washington, DC (February 18, 2025) – The New Civil Liberties Alliance has filed an *amicus curiae* [brief](#) in *Federal Communications Commission v. Consumers' Research* before the U.S. Supreme Court. NCLA asks the Justices to rule that Congress unconstitutionally empowered the Federal Communications Commission (FCC) to set and then rewrite its own policies for the Universal Service Fund (USF). Worse, the scheme authorizes FCC to determine its own funding for the social benefit program it administers without Congressional involvement, in effect allowing it to 'tax' Americans. NCLA urges the Supreme Court to take this opportunity to reinvigorate the enfeebled "nondelegation" doctrine to once again ensure that all legislative power remains with Congress.

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. In July, the *en banc* U.S. Court of Appeals for the Fifth Circuit ruled in this case that Congress had thereby unconstitutionally delegated legislative power through the Act by allowing FCC to create and control the system for extracting Americans' money to finance the USF. NCLA had requested that outcome in a previous *amicus* brief.

FCC claims its sweeping policy and financial control of the USF is constitutional in light of prior court decisions approving "broad" Congressional grants of authority to Executive Branch agencies. The agency argues that general policy statements like the instruction to act in "the public interest" for a particular program provide sufficient legislative limits on its range of decision-making power. But, as NCLA's *amicus* brief points out, in its decisions from early last century, the Supreme Court appropriately had demanded that Congress set discernible standards to provide an agency with criteria for when and to what extent a law should be applied to interfere with liberty and to allow courts and the public to determine when the agency fulfilled or exceeded Congress's will. Contrary to popular misconception then, the high court has never held that "public interest" or similarly vague directional statements are enough to prevent the Executive Branch from wielding legislative power to impinge Americans' rights—and it should not do so here.

The "nondelegation" doctrine was meant to reserve all legislative power to Congress. Instead, what remains of the doctrine is often cited to legitimize divesting legislative power to the Executive Branch. While the Fifth Circuit ruled correctly in this case, other courts have applied Supreme Court cases to approve a scheme that gives FCC ongoing power to evolve its authority regarding the USF and the conversion of private funds to sustain it. The Justices should establish a proper Vested Powers test that requires judicially discernible standards for laws intended to limit individual rights. Such a test would affirm that FCC's power exerted here is unconstitutional.

NCLA released the following statements:

"The Constitution requires that all of the legislative power of the federal government shall be vested solely in Congress. Today, however, lower courts cite opinions from the Supreme Court in support of statements claiming

that Congress can divest its legislative power in some circumstances. The ‘nondelegation’ doctrine currently fails to serve its purpose. By returning to its earlier precedent, the Court can realign precedent with constitutional first principles and protect liberty from agency encroachment.”

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

“Taxation without representation helped start the American Revolution, as any school-aged child can tell you. Yet the FCC ‘taxes’ Americans for contributions to the USF and Congress purports to authorize this mischief. The Supreme Court must tell Congress it cannot delegate its core taxing power to an unelected federal agency.”

— **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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