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NCLA Commends the U.S. Court of Appeals for the Ninth Circuit for Not Deferring to FDA’s Attempt to Circumvent FOIA

Amicus Brief in Support of Appellants in Goldwater Institute v. U.S. Dep’t of Health and Human Services

Washington, DC (March 25, 2020) – The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights organization commends today’s [decision](#) of the Ninth Circuit in *Goldwater Institute v. U.S. Department of Health and Human Services*. In a victory for NCLA, the Ninth Circuit concluded that the district court erred in allowing the Food and Drug Administration (FDA) to rely on its own regulations in withholding disclosure of the process it used in speedily approving the drug ZMapp for treatment of Ebola-infected patients in 2014. Instead, the Court concluded that the agency should be required to meet its burden of showing that a particular FOIA exemption applies to the records it withheld.

NCLA filed an [amicus brief](#) in support of the plaintiff-appellant in this case calling out the district court for extending judicial “*Auer* deference” to legal interpretations that federal agencies provide in affidavits to the court as one of the litigating parties. In its ruling the Court states, “FDA’s blanket refusal to produce any records from the IND file does not warrant summary judgment in its favor” and that the agency has “failed to meet its burden of establishing that the documents it withheld are exempt from disclosure under [FOIA] Exemption 4.”

Deferring to the interpretations of federal agencies requires judges to abandon their duty of independent judgment and violates the Fifth Amendment of the U.S. Constitution by commanding that the judiciary display systematic bias in favor of agencies whenever they appear as litigants.

The Supreme Court created a new “Step Zero” to *Auer* deference last summer in [Kisor v. Wilkie](#), which requires courts first to use traditional tools of statutory construction and evaluate other factors to determine whether there is a need to resort to *Auer* deference. Under *Kisor*, there should be no need to defer to agencies’ legal interpretations in most cases going forward—very much including this one.

The FDA had refused to release records of the process it used to approve ZMapp—at the time, an experimental drug—within days of hearing about the Ebola outbreak in Africa. The FDA drug-approval process usually takes years. The Goldwater Institute had asked FDA to disclose what process it used for emergency approval; knowing the fast-track process could help others seek emergency approval during future pandemics (like the one currently plaguing the world).

NCLA released the following statement:

“While the court does not mention ‘deference,’ its instruction to the district court to look to the FOIA and not the agency’s self-serving regulations is clear and welcome. NCLA will continue pushing the courts to acknowledge their duty to provide independent judgment, to protect the due process of law for all litigants, and to bolster the confidence of the people in the courts.” —Adi Dynar, Litigation Counsel, NCLA

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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