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NCLA Asks Ninth Circuit to Overturn SEC's Illegal Gag Rule on Targets of Settled Enforcement Cases

Thomas Joseph Powell, Barry D. Romeril, Christopher A. Novinger, Raymond J. Lucia, Marguerite Cassandra Toroian, Gary Pryor, Joseph Collins, Rex Scates, Michelle Silverstein, Reason Foundation, The Cape Gazette and New Civil Liberties Alliance v. United States Securities and Exchange Commission

Washington, DC (March 29, 2024) – The New Civil Liberties Alliance has filed a [petition](#) with the U.S. Court of Appeals for the Ninth Circuit to review the Securities and Exchange Commission's denial of our long-standing [petition](#) to amend the agency's "Gag Rule." In place for over five decades, this pernicious rule forbids every American who settles a regulatory enforcement case with SEC from even truthfully criticizing their cases in public. SEC ignored NCLA's initial petition challenging the Gag Rule for more than five years, only issuing a denial after NCLA filed a [renewed petition](#) in December 2023. Representing several SEC enforcement targets silenced by the Gag Rule—and media organizations eager to hear the stories they wish to tell—NCLA urges the Ninth Circuit to halt this egregious trampling of First Amendment rights.

SEC enacted the 1972 Gag Rule without notice and comment after falsely framing it as an internal "housekeeping" measure that would not affect third parties. The agency never had statutory authority to implement such a substantive rule, and it bypassed Administrative Procedure Act requirements to publish, provide notice and allow comment before promulgating a rule binding on third parties. Speech bans must be narrowly tailored, serve a compelling government interest, and adopt the least restrictive means to protect that interest. SEC has never provided a legitimate—much less a compelling reason—for silencing all settling enforcement targets for life.

The Gag Rule silences Petitioners Thomas Powell, Cassandra Toroian, Gary Pryor, Joseph Collins, Michelle Silverstein, Rex Scates, and returning NCLA clients [Ray Lucia](#) (who settled his case with SEC in 2020), and Barry D. Romeril (who filed the first challenge to his Gag in 2019). NCLA has also represented Petitioner [Christopher Novinger](#) previously in appealing the gag provisions of his SEC enforcement settlement.

Reason Foundation and The Cape Gazette have signed on as Petitioners as well, recognizing that the Gag Rule infringes on their First Amendment rights to Freedom of the Press to hear and report the views SEC enforcement targets wish to express about their cases. The Gag Rule conceals vital information about SEC enforcement policies. Does SEC strong-arm enforcement targets? Does it over-plead complaints to force settling? Has SEC exceeded its statutory authority? Are SEC's legal theories sound? The public and the press deserve answers.

SEC's Gag Rule has drawn prominent judicial criticism. In their 2022 *Novinger v. SEC* opinion, Fifth Circuit Judges Edith Jones and Kyle Duncan said of the gag policy: "A more effective prior restraint is hard to imagine." In her 2022 *SEC v. Moraes* ruling, District Judge Ronnie Abrams similarly observed that the policy "raises the specter of violating the unconstitutional conditions doctrine[;]" (2) "has all the hallmarks of a prior restraint on speech[;]" and (3) "is a textbook content or viewpoint-based prohibition on speech." SEC's letter denying NCLA's petition failed to squarely address these compelling judicial concerns. SEC Commissioner Hester Peirce issued a stinging [dissent](#) from SEC's denial decision, powerfully arguing that "the American public, not government censors" must be the arbiters of the validity of speech.

NCLA released the following statements:

“Congress itself is forbidden to enact what the SEC unlawfully promulgated by stealth in 1972. Only two agencies, SEC and CFTC—mere agencies!—arrogate to themselves power to silence their settling targets for life. What are they so afraid of? Truthful speech and a press free to hear their enforcement targets’ stories? It is long past time for the courts to end this autocratic and thoroughly un-American SEC reign of error.”

— **Peggy Little, Senior Litigation Counsel, NCLA**

“For too long the SEC has operated with the mistaken view that its Gag Rule is lawful, silencing untold numbers of enforcement targets and keeping important information about how the Commission operates hidden from the public. The Gag Rule violates our clients’ First Amendment rights and harms our democratic processes. We hope this case will end the SEC’s silencing regime once and for all.”

— **Kara Rollins, Litigation Counsel, NCLA**

“Despite a vehement dissent from one SEC Commissioner, the SEC refused to take a harder look at its rule that gags those with whom it settles. NCLA’s petition to the Ninth Circuit should finally enable our clients to obtain the relief they have been seeking for years, even decades—the right to speak the truth publicly.”

— **Kaitlyn Schiraldi, Staff Attorney, 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.