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In Hawaii, Ninth Circuit Hears Oral Argument in NCLA Case Against SEC's Illegal Gag Rule

Thomas Joseph Powell, et al. v. United States Securities and Exchange Commission

Honolulu (February 13, 2025) – Today, New Civil Liberties Alliance Senior Litigation Counsel Peggy Little presented oral argument in [Powell, et al. v. Securities and Exchange Commission](#), urging a panel of the U.S. Court of Appeals for the Ninth Circuit to vacate SEC's refusal to amend its "Gag Rule." In place for over five decades, this rule forbids every American who settles a regulatory enforcement case with SEC from even truthfully criticizing their cases in public for the rest of their lives. NCLA's clients, enforcement targets silenced by the Gag Rule and media organizations eager to hear their stories, made their case in a Honolulu, Hawaii courtroom today, calling for an end to this trampling of First Amendment rights.

NCLA pointed out that SEC's Gag Rule was quietly introduced in 1972 with immediate effect, yet it has never been judicially reviewed—until now. 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. Congress is forbidden to infringe Americans' speech. It did not and could not give SEC power to gag anyone. In addition, SEC's Gag Rule has been called out by a growing chorus of federal judges as a plain prior restraint on speech, which, to pass constitutional muster, must be narrowly tailored, serve a compelling government interest, and adopt the least restrictive means to protect that interest. The Gag Rule fails all those tests. It also restricts speech based on content and viewpoint, among the most blatant First Amendment violations.

The Gag Rule silences NCLA clients Thomas Powell, Cassandra Toroian, Gary Pryor, Joseph Collins, Michelle Silverstein, Rex Scates, Ray Lucia, Barry Romeril, and Christopher Novinger. NCLA also represents the Reason Foundation and Cape Gazette. These media organizations recognize the Gag Rule infringes their First Amendment rights to Freedom of the Press to hear and report the views of SEC enforcement targets who wish to tell their side of the story about the agency's case against them. The rule thus denies the public's First Amendment right to receive ideas and information crucial to self-government and understanding of how agency officials wield power—the core interest protected by the First Amendment.

NCLA showed how SEC has unconstitutionally compelled speech in mandatory settlement conditions banning settling parties from publicly stating that they did not admit to its findings "without also stating that the Respondent does not deny" them. The Gag Rule denies legal due process, barring even speech that "indirectly creates the impression" that any allegation of SEC's complaint is factually baseless and which mandates that settling parties give up their right to a hearing on these unconstitutional conditions of their settlement. Once SEC charges you, the price of settlement is that SEC's charges are the last and only permanent record that the public is allowed to hear—namely that you are guilty of all charges. This unconstitutional condition defies Supreme Court and Ninth Circuit precedents, and gives SEC sole control of the public narrative, inflicting devastating life-time reputational damage on all who cannot outlast and outspend the powerful agency and settle—as 98% of its targets do. This incentivizes regulatory overreach and enforcement abuse, since most SEC enforcement practices happen in secrecy and the full story of the outcome has long been concealed by the gag.

Judges on the panel examined whether accepting a gag as a condition of settlement with SEC is voluntary. The agency imposes gags on everyone who settles their enforcement cases, making the policy neither voluntary nor consensual. Moreover, the First Amendment interests of the public and the press cannot be waived by any individual. The gag policy is unique to SEC and the Commodity Futures Trading Commission, which adopted a copycat rule. Every other agency manages to regulate Americans without extorting a lifetime gag as the cost of settlement. Indeed, for its first 40 years, SEC managed to regulate the securities market without stripping Americans of the exercise of their First Amendment and due process rights.

NCLA released the following statements:

“For far too long, SEC has mandated surrender of its targets’ due process and First Amendment rights as the devastating price of getting this powerful agency off their back. Today the panel expressed serious concern with the agency’s refusal to amend its rule to eliminate this brazen and longstanding injustice by which SEC leverages its power to strip its targets of their civil liberties—something it could never win at trial.”

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

“The SEC has now adopted a ‘we-know-it-when-we-see-it’ approach to potential violations of the gags it insists on. But that provides no clarity for those bound by a gag and does not end the chilling effect on their speech imposed by the SEC.”

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

“The First Amendment enshrines Americans inherent rights of speech. I am confident the Court will see the wisdom of our argument.”

— **Thomas Powell, NCLA Client**

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.