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NCLA Petitions Supreme Court to End Decades-Long Suppression of Free Speech by SEC Gag Order

Barry D. Romeril v. U.S. Securities and Exchange Commission

Washington, DC (March 21, 2022) – Settling defendants whom the Securities and Exchange Commission (SEC) has muzzled for decades might get a chance at finally having their voices heard. Today, the New Civil Liberties Alliance filed a [petition](#) for a *writ of certiorari* with the U.S. Supreme Court in *Romeril v. SEC*, seeking a review of the constitutionality of SEC’s “gag orders,” which the Commission requires in virtually all settled cases.

As a result of SEC’s gag policy, Petitioner Barry Romeril, who reached a no-admit-no-deny settlement with the Commission in 2003, has since been unable to discuss his case publicly. Mr. Romeril, who formerly served as Chief Financial Officer at Xerox, desires to speak truthfully about SEC’s case and offer his opinions about the proceedings against him. However, because he does not want to violate an SEC Order that was transformed into a binding federal court order—nor even risk doing so—he has refrained from making statements that might be deemed to “create an impression” that the Complaint in his case lacked a factual basis or was without legal merit.

In the decades since it issued the Gag Rule in 1972, SEC has commenced and settled thousands of cases with judgments containing a lifetime restraint on speech barring the settling defendant from ever even “indirectly” leaving the “impression” that “any allegation” in the agency’s original complaint is “without factual basis.” No act of Congress authorizes, or ever could authorize, such a sweeping speech restriction. This unlawful mechanism allows SEC to obtain something as the price of settlement that it could never win at trial—the coerced silence of the thousands of defendants with whom it settles.

The limitation on Mr. Romeril’s ability to criticize the SEC abridges his freedom of speech. It is a quintessential prior restraint, described by the Supreme Court as “the most serious and the least tolerable infringement on First Amendment rights.” Moreover, the lifetime nature of the ban, its application to wholly truthful speech, and its content-and viewpoint-discrimination (permitting praise but not criticism of SEC) also violates First Amendment precedent. It is hard to conceive of a better mechanism to systematically silence a powerful agency’s critics.

Additionally, the Gag Rule violates the due process of law by requiring defendants to waive their constitutional rights if they settle with the agency, including rights to be heard on the Consent agreement, rights to notice of what speech would violate the Gag Order, and the right to freely share their views of the administrative process they endured at the end of the government’s proceedings.

SEC has no lawful—much less compelling—interest in suppressing speech critical of its settled enforcement actions. Orders such as the one imposed on Mr. Romeril stifle public debate and deprive the public of useful information. They require defendants to make the difficult choice to surrender their rights to speak out or to forgo consent settlements with the Commission and face the potentially ruinous costs and risks of litigating to the bitter end. SEC’s speech ban has already silenced Mr. Romeril for 18 years. Unless the Supreme Court grants cert. and determines the Gag Rule is unconstitutional, that ban will continue to silence him for the rest of his life.

NCLA released the following statements:

“The Constitution forbids Congress itself from enacting prior restraints, the most serious and least tolerable First Amendment violations. SEC’s successful effort to self-confer such power by an unlawful rule must end. The agency’s profoundly dangerous ‘gag rule’ scheme systematically silences criticism of the SEC by those who know its shortcomings best. The Supreme Court should grant cert. and fulfill its duty to ensure that administrative agencies—and the courts—abide by the Constitution.”

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

“SEC has often described its mission and vision as seeking to increase public trust and promote transparency in the markets and its regulation thereof. But the unlawful and coerced silencing of individuals and businesses has hampered public discourse for decades now about how the Commission might better conduct its enforcement efforts. It is past time for this unconstitutional practice to stop.”

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

For more information visit the case page [here](#). Watch the case video [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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