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NCLA Seeks Declaratory Relief to End Christopher Novinger’s SEC-Imposed Lifetime Speech Ban

U.S. Securities and Exchange Commission v. Christopher Novinger, et al.

Washington, DC (August 23, 2022) – Today, the New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, filed for [declaratory relief](#) in the U.S. District Court for the Northern District of Texas in the lawsuit aiming to restore Christopher Novinger’s First Amendment rights. For decades, the U.S. Securities and Exchange Commission (SEC) has silenced people with lifetime speech bans enforced through threat of reopened prosecutions. SEC self-conferred this unlawful power outside the normal administrative process and beyond any authority granted by Congress, suppressing speech critical of the agency and undermining the Constitution.

SEC’s “Gag Rule” is set out in a regulation that the agency published in 1972 without notice and comment under the false premise that it was an internal “housekeeping” rule. SEC lacked statutory authority to enact such a substantive rule and did not comply with the Administrative Procedure Act, which requires prior publication, notice, and comment before promulgating a rule that binds (or, in this case, gags) third parties. Moreover, the same instrument that imposes the gag on settling defendants requires SEC enforcement targets to surrender their access to the courts, thus immunizing the agency’s unlawful conduct from judicial review.

Mr. Novinger’s Gag Orders permanently forbid him and his company, ICAN Investment Group, LLC, from contesting allegations in SEC’s complaint, however inaccurate, and regardless of the truth of the forbidden speech, on pain of reopened and renewed prosecution. This is a textbook example of a prior restraint. Indeed, in the appeal in this case, two Fifth Circuit judges concurred that “[a] more effective prior restraint is hard to imagine.”

To pass constitutional muster, speech bans must be narrowly tailored, serve a compelling government interest, and regulate speech by the least restrictive means to protect that interest. SEC has provided no legitimate, let alone compelling, justification for extracting silence from all SEC targets. Other regulatory agencies and the Department of Justice routinely settle matters without demanding a defendant’s silence as a non-negotiable condition of settlement. By *systematically* demanding gag orders as a condition of settlements, SEC prevents the public, Congress, courts, and policymakers from overseeing how SEC conducts its enforcement actions. Shielding such an important exercise of government power from scrutiny is profoundly dangerous, because it prevents lawmakers from knowing when to rein in—or unleash—SEC authority and engage in course correction.

NCLA maintains that elevated judicial scrutiny is warranted in this case because speech gags place a content-and viewpoint-based burden on protected expression. If murderers are free to publish books about their crimes and their prosecutions—as they must be in a free society—SEC cannot silence SEC targets from speaking about their enforcement proceedings.

NCLA released the following statement:

“The Constitution forbids the government from passing laws and regulations that abridge Americans’ freedom of expression—especially when the speech the SEC attempts to suppress concerns criticism of the agency itself.

NCLA is pleased that two judges of the Fifth Circuit recognized that the gag rule constitutes a prior restraint, ‘the most serious and the least tolerable infringement on First Amendment rights’ per the Supreme Court. It is high time for courts to put an end to this unlawful, unconstitutional, secretive, and anomalous agency practice.”

— **Peggy Little, Senior Litigation Counsel, 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.

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