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NCLA Asks Fifth Circuit to Approve Pathway to Challenge Unlawful SEC-Imposed Lifetime Speech Ban

U.S. Securities and Exchange Commission v. Christopher Novinger; ICAN Investment Group, LLC

Washington, DC (August 16, 2023) – Today, the New Civil Liberties Alliance filed a [brief](#) calling on the U.S. Court of Appeals for the Fifth Circuit to strike down SEC’s lifetime speech ban against its client, Christopher Novinger, in *SEC v. Novinger and ICAN Investment Group, LLC*. For over five decades, SEC has issued similar bans to silence every person with whom it settles an enforcement case, gravely violating their First Amendment rights by barring them from speaking truthfully about their cases after settling. SEC unilaterally assumed this unlawful power outside the normal administrative process and without Congressional authorization.

SEC and Novinger reached a settlement in 2016 after the agency accused him and his company ICAN Investment Group, LLC of violating securities laws. As a settlement condition, SEC imposed gag orders permanently forbidding Novinger and his company from even truthfully contesting allegations in the agency’s original complaint against them, however inaccurate, or else face renewed prosecution. A district court declined to remove the gag orders previously, but two Fifth Circuit judges who heard a subsequent appeal agreed that “[a] more effective prior restraint is hard to imagine.” This second appeal seeks to remedy that constitutional violation.

SEC issued these gag orders under its 1972 “Gag Rule,” which it enacted without notice and falsely framed as an internal “housekeeping” measure. The agency never had statutory authority to implement such a substantive rule, and it disobeyed Administrative Procedure Act requirements to publish, provide notice and allow comment before promulgating a binding rule for third parties. SEC’s gag on enforcement targets like Novinger also forces them to surrender their due process access to courts, permanently shielding any unlawful agency conduct from judicial review. Securities laws confer no power on SEC to suppress truthful speech, let alone as a condition of settlement.

The Constitution requires any speech bans to be narrowly tailored, to serve a compelling government interest, and to regulate speech by the least restrictive means to protect that interest. SEC has not provided a single legitimate or compelling reason for silencing all its targets. Hundreds of other government entities and regulatory agencies routinely settle matters without demanding a defendant’s silence as a non-negotiable settlement condition. By systematically demanding gag orders as a condition of settlements, SEC blocks the public, courts, and policymakers from overseeing how the agency conducts its enforcement actions. Shielding such an important exercise of government power from scrutiny is profoundly dangerous, preventing Congress from knowing when to rein in—or unleash—SEC authority and correct course.

NCLA released the following statements:

“The Constitution provides that ‘Congress shall make no law ... abridging the freedom of speech.’ Congress itself could not pass a law requiring citizens who settle with the government to be gagged in this fashion. That a mere agency has for 50 years arrogated a power the Constitution has explicitly denied to Congress beggars belief. Courts have an unflagging duty to put an end to this dangerous and unconstitutional practice.”

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

“NCLA has tried several times with multiple clients to persuade a federal court to reach the merits of the First Amendment question in speech gag cases. So far, courts have thwarted NCLA’s efforts, deciding that various forms of post-settlement relief are not available, despite the illegality surrounding SEC’s speech bans. As this appeal cogently explains, some form of post-settlement relief must be available to rectify the terrible injustice underlying speech gags.”

— **Mark Chenoweth, President and General 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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