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## **NCLA Amicus Brief Asks Supreme Court to End SEC Gags on Targets of Settled Enforcement Cases**

*Elon Musk v. U.S. Securities and Exchange Commission*

**Washington, DC (January 19, 2024)** – Today, the New Civil Liberties Alliance filed an *amicus curiae* [brief](#) in *Elon Musk v. Securities and Exchange Commission* urging the Supreme Court to grant Musk’s cert petition and strike down SEC’s “Gag Rule” censoring every American with whom it settles a regulatory enforcement case. For over 50 years, SEC has forbidden all enforcement targets from even truthfully criticizing their cases in public.

SEC is limiting Mr. Musk’s future speech and ability to speak publicly without preclearance or criticize the agency as a condition of settlement. This is a quintessential instance of prior restraint, which the Supreme Court has called “the most serious and the least tolerable infringement on First Amendment rights.” But SEC has no power to regulate the future speech of those with whom it settles! Musk’s case is emblematic of a much larger problem: imposing this restriction on all Americans who settle enforcement cases with SEC under its Gag Rule forces them to abandon their constitutional rights, an action that is itself blatantly unconstitutional. Supreme Court precedent forbids the government from conditioning anyone’s ability to receive a benefit on surrendering their constitutional rights. NCLA is confident that the Court will recognize this fatal flaw—among others—in SEC’s gag orders.

In December, NCLA, its client Christopher Novinger, and former clients Barry Romeril and Ray Lucia filed a [renewed petition](#) asking SEC to eliminate the Gag Rule. SEC has ignored NCLA’s original 2018 petition for more than five years, effectively nullifying the constitutional right to petition, which has no meaning if government can simply fail to respond. The longer SEC ignores NCLA’s petition, the more it infringes the rights of Musk and other Americans bound by its gag orders, some of whom are currently in their 70s and 80s and hope to finally speak out about the enforcement proceedings they endured and as to which they have been silenced for decades.

The U.S. Court of Appeals for the Second Circuit decided to uphold the SEC gag order imposed on Musk, concluding that he voluntarily waived his First Amendment rights, or should have negotiated a different agreement. That decision conflicts with First Amendment precedents set by at least four other circuit courts and the Second Circuit itself. SEC consistently admits that its gag orders are non-negotiable. Musk and the thousands of others censored under the Gag Rule had no choice.

The Gag Rule also far exceeds the scope of SEC’s powers; no agency has any inherent power to make law. Article I of the Constitution vests all legislative power in Congress, barring agencies from acting without Congressional authorization. Securities laws simply do not permit SEC to seek this type of relief in federal court, nor authorize courts to order it.

Thanks to NCLA’s unrelenting work, several federal judges have openly questioned the constitutionality of SEC’s gag orders in recent years. The Supreme Court should take this opportunity to get rid of them once and for all.

**NCLA released the following statements:**

“Congress itself could not pass a law requiring that Americans who settle their cases with the government agree to be gagged for life. The Supreme Court has long recognized that even murderers retain their First Amendment rights to speak and publish about their prosecutions. SEC’s self-arrogated power to concoct such tyrannous penalties infringes the First Amendment and the public’s right to hear what SEC’s targets have to say.”

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

“SEC’s practice of gagging settling parties is not only antithetical to the First Amendment, but it also deprives investors and the public from receiving critical information about SEC’s enforcement actions. It is telling that only two federal agencies, SEC and CFTC, employ this unconstitutional tactic. The Court should grant certiorari and put an end to SEC’s systematic silencing.”

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

**For more information visit the *amicus* 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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