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Sixteen Amici Submit Powerful Briefs Defending First Amendment Rights Against SEC’s Illegal Gag Rule

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

Washington, DC (June 27, 2024) – Research organizations, advocacy groups and law firms have filed 11 *amici curiae* briefs in support the New Civil Liberties Alliance’s *Powell, et al. v. SEC* lawsuit in the U.S. Court of Appeals for the Ninth Circuit, challenging SEC’s refusal to amend its “Gag Rule.” This 50-year-old 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. Representing Petitioners Thomas Powell, Cassandra Toroian, Gary Pryor, Joseph Collins, Michelle Silverstein, Rex Scates, Ray Lucia, Barry Romeril, Christopher Novinger, the Reason Foundation, and the *Cape Gazette*, NCLA thanks *amici* for demanding the Gag Rule’s downfall in defense of core civil liberties.

Excerpts of the briefs filed by *amici curiae* in support of Petitioners follow:

“[A]llowing ‘an agency of the federal government to shield itself from public view’ ... is the same motivation that underlay *de scandalis magnutum* laws in the Middle Ages, and later sedition laws, ... used to silence criticism and promote only a favorable public perception [of government] regardless of truth. ... Compelling or silencing speech to burnish agency reputation is not a legitimate function of government.”

— [Americans for Prosperity Foundation, Foundation for Individual Rights and Expression, and Freedom of the Press Foundation](#)

“This vague gag on the accused’s speech ... prevents the public from being ‘their own governors’ ... SEC keeps as much of its enforcement activity out of the public eye as possible. The SEC has power and perverse incentives, and it largely operates in secrecy—the perfect trifecta for a threat to civil liberty. ... The SEC believes it has the right to prevent anyone from examining how it goes about using the people’s power and the public purse. ... Law enforcement in secret is a gateway to fascism. Our federal government must be better than that.”

— [The Atlantic Legal Foundation](#)

“The [Gag] rule violated the Constitution the day it was promulgated, and no less today. ... [Constitutional rights and protections] are lost both to Americans currently gagged and to future SEC enforcement targets who lack the nearly boundless resources and stamina needed to go toe-to-toe with the SEC. Any additional delay will give rise to new irreparable First Amendment injury.”

— [The Buckeye Institute](#)

“For over fifty years ... the SEC’s complaint stands as the last word on the matter, and defendants—even those who have done nothing unlawful—must remain silent for life. The SEC’s Gag Rule means that the government’s side of the story will be the only side of the story the public ever knows. ... The governmental interest, apparently, is the power of the government to protect its reputation by silencing potential critics. No court has held that that is a cognizable government interest in the First Amendment context.”

— [Cato Institute](#)

“The pressure to settle with the SEC is immense, and settling parties have no opportunities to negotiate [the Gag]. SEC’s policy of silencing settling defendants is an extortionate exaction of constitutional rights—not a voluntary waiver. Settlement ... affords regulators ‘extraordinary discretion’ to press ‘novel legal theories’ that ‘no judge will ever scrutinize’—since those regulators can simply ‘threaten the industries with the risk of such large penalties that they’ll agree to a deal[.]’”

— [Chamber of Commerce of the United States of America](#)

“There is some precedent in the law for the concern that someone could undermine confidence in the government or create the impression that the government did not have a basis for what it did, but that precedent does not help the SEC. That precedent is pre-Constitutional: it derives from the royal prerogative that the king of England could do no wrong. ... This royal prerogative, however, cannot be exercised by the Securities and Exchange Commission. The First Amendment was intended to abolish such features of English law.”

— [Competitive Enterprise Institute and Investor Choice Advocates Network](#)

“[Press] Petitioners ... suffer a First Amendment violation because of their inability to receive this information from the gagged defendants. No one could claim they consented to the waiver of their right to receive information. ... What results is a government commission forcing all but the wealthiest defendants into silence. ... [P]rivate settlements typically put the defendants’ denial of the veracity of the claim directly into the agreement’s recitals ... yet the sky has not fallen. [T]he SEC’s Gag Rule is an aberration.”

— [Hamilton Lincoln Law Institute and the Manhattan Institute](#)

“The SEC’s no-denial policy is remarkably similar to ... the most famous violation of freedom of petition in American history: ... gag resolutions against abolitionism. [John Quincy Adams] insisted that the resolutions ‘interfere[d] with the sacred right of petition.’ ... SEC’s Gag operates much like these pro-slavery gag resolutions. It singles out a particular topic—the past SEC settlement—as off limits to government petitions. It prevents defendants from providing true information ... or calling into question the SEC’s enforcement regime.”

— [Institute for Free Speech](#)

“The SEC asserts an entitlement to extort via pressure something that no court could ever impose: a perpetual prior restraint against criticism of the agency. ... The prohibition on prior restraints is not simply at the core of our First Amendment jurisprudence—it was the motivation for the First Amendment in the first place. ... The government has no interest—and can have no interest, consistent with the First Amendment—in censoring criticism of the government.”

— [Liberty Justice Center](#)

“The SEC’s approach has been to sue industry participants and extract a settlement that muzzles the Defendant. With the Defendant silenced, the SEC then tells only its story of the case. ... These SEC-imposed blind spots do great harm—detering potential participants from entering emergent industries and increasing compliance costs for those who do. This undermines the SEC’s self-described mission to foster capital formation. ... Ironically, the SEC regularly requires transparency from the entities it regulates.”

— [Texas Blockchain Council and AI Innovation Association](#)

“While at odds with America’s traditional First Amendment principles, the SEC’s Gag Rule is perfectly consistent with the unfortunate tendency of government bureaucracies to use secrecy as a means to increase their own powers at the expense of the public. ‘Information is power, and it is no mystery to government officials that power can be increased through controls on the flow of information.’ ... [C]ourts must exercise their authority to protect the public’s access to crucial information about its government rather than permit a powerful federal agency to regulate in the shadows away from public scrutiny.”

— [Thomas More Society](#)

NCLA released the following statements:

“The depth of scholarship, historical understanding and legal reasoning in each of these *amicus curiae* briefs is breathtaking—and devastating to the SEC’s unconstitutional and unlawful Gag Rule. The Court must ensure it expires in well-deserved infamy.”

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

“The silver lining to the five-plus years it took the SEC to rule against NCLA’s Gag Rule Petition is that we have built up our strategic alliances over that time. The wealth of truly fantastic *amicus curiae* briefs filed in this case in support of our client Petitioners astounds. I would like to thank the SEC for taking so long to rule that it allowed the coalition against the Gag Rule to grow. Even more, I would like to thank all of these organizations for caring deeply enough about the First Amendment rights being trampled by the SEC to contribute these *amicus* briefs.”

— **Mark Chenoweth, President, 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.