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NCLA Asks Ninth Circuit to End SEC's Illegal Gag Rule Against Targets of Settled Enforcement Cases

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

Washington, DC (June 18, 2024) – Last night, the New Civil Liberties Alliance filed an opening [brief](#) in *Powell, et al. v. SEC*, asking the U.S. Court of Appeals for the Ninth Circuit to vacate SEC's refusal to amend its "Gag Rule." NCLA represents SEC enforcement targets silenced by the Gag Rule and media organizations eager to hear their stories. In place for over five decades, this 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. SEC ignored NCLA's initial petition challenging the Gag Rule for more than five years, only issuing a denial after NCLA filed a [renewed petition](#) in December. NCLA is challenging that denial to halt SEC's trampling of First Amendment rights.

SEC enacted the 1972 Gag Rule without notice and comment after falsely framing it as an internal "housekeeping" measure that would not affect third parties. The agency never had statutory authority to implement such a substantive rule, and it bypassed Administrative Procedure Act requirements to publish, provide notice and allow comment before promulgating a rule binding on third parties. Congress is forbidden to infringe the speech of Americans. It did not and could not give SEC power to gag anyone. To pass constitutional muster, speech bans must be narrowly tailored, serve a compelling government interest, and adopt the least restrictive means to protect that interest. The Gag Rule fails all those tests. The rule is accordingly an impermissible prior restraint, restricting speech based on content and viewpoint, the most blatant First Amendment violations.

SEC has unconstitutionally compelled speech in recent mandatory settlement conditions banning settling parties from publicly stating that they did not admit to its findings "without also stating that the Respondent does not deny" them. The Gag Rule denies legal due process, barring even speech that "indirectly creates the impression" that any allegation of SEC's complaint is factually baseless. Once SEC charges you, the settlement price is a permanent record that you are guilty of all charges. This unconstitutional condition defies Supreme Court and Ninth Circuit precedents, and it gives government sole control of the narrative and the last public word on the cases of all who cannot outlast and outspend the powerful agency and settle—as 98% of its targets do. This tactic incentivizes overreach and enforcement abuses, since most SEC enforcement practices happen in the dark.

The Gag Rule silences NCLA clients Thomas Powell, Cassandra Toroian, Gary Pryor, Joseph Collins, Michelle Silverstein, Rex Scates, and returning clients [Ray Lucia](#) and [Barry Romeril](#). NCLA has also represented Petitioner [Christopher Novinger](#) previously in appealing the gag provisions of his SEC enforcement settlement. The petitioning Reason Foundation and *Cape Gazette* recognize the Gag Rule infringes their First Amendment rights to Freedom of the Press to hear and report the views of SEC enforcement targets who wish to tell their side of the story about SEC's case against them. The rule thus denies the public's First Amendment right to receive ideas and information crucial to self-government and understanding of how agency officials wield power.

SEC Commissioner Hester Peirce dissented from the denial of NCLA’s petition, agreeing it is time to amend or drop SEC’s “unceremoniously” adopted rule. SEC did not offer any rational explanation for refusing to amend the Gag Rule, so the Ninth Circuit should vacate the denial and order rulemaking that conforms SEC to the law.

NCLA released the following statements:

“The SEC’s Gag Rule violates every doctrine of First Amendment law you can think of. The Ninth Circuit should discard this unconstitutional arrogation of power by bureaucrats operating in secrecy. Congress itself could not pass such a law. A mere administrative agency thinking it can do so requires a prompt and forceful smackdown by application of controlling Supreme Court and Ninth Circuit law.”

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

“For over 50 years, the SEC has systematically silenced individuals and businesses, causing its preferred narrative to be the first and final word about its enforcement activities. This rule has no doubt robbed the markets, investors, Congress, and the public of crucial and critical information about how the SEC conducts itself. A half century of half-truths is long enough. It’s time for SEC’s gag to go.”

— **Kara Rollins, 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.