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Prominent Organizations Join Call for en Banc Rehearing in NCLA Suit Against SEC's Illegal Gag Rule

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

Washington, DC (October 6, 2025) – Research and advocacy groups have submitted four compelling *amici curiae* briefs in favor of *en banc* rehearing at the U.S. Court of Appeals for the Ninth Circuit in the New Civil Liberties Alliance's *Powell, et al. v. Securities and Exchange Commission* case challenging SEC's "Gag Rule." The Gag 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, yet the Ninth Circuit panel in this case wrongly upheld it. NCLA and its clients—Thomas Powell, Cassandra Toroian, Gary Pryor, Joseph Collins, Michelle Silverstein, Rex Scates, Ray Lucia, Barry Romeril, Christopher Novinger, The Cape Gazette and Reason Foundation—thank *amici* for supporting their effort to defeat the Gag Rule and restore fundamental First Amendment civil liberties.

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

"[T]he First Amendment prohibits the SEC from railroading settling parties into forever abandoning the right to publicly doubt the Commission's allegations against them. … '[C]ourts must "look through forms to the substance" of government conduct' … '[P]ublic scrutiny and discussion of governmental affairs' is precisely what 'the First Amendment was adopted to protect.' … The policy is facially unconstitutional [because] in all its applications it operates on a fundamentally mistaken premise: that the Commission may stifle criticism to protect its reputation. … The SEC's policy… gags the settlor *for life*. … [and] rests on extortionate demands, not voluntary waivers."
— Foundation for Individual Rights and Expression

"The First Amendment, after all, protects not only the right to speak but also the right of the public to receive … ideas and experiences. … [S]ince the panel's approval of this practice conflicts with a decision of [the Ninth Circuit] … and 'with a decision of the United States Supreme Court,' rehearing is warranted. Worse still, … the panel overlooked entirely the claims of media Petitioners The Cape Gazette and Reason Foundation, which were supported by declarations. … The panel's refusal to consider … media Petitioners [argument] regarding their own First-Amendment rights 'conflicts with … authoritative decision[s] of []other … court[s] of appeals,' … another consideration favoring *en banc* rehearing. This violates not only the settling defendants' rights, but also the public's First-Amendment right to receive uninhibited discourse about government activity."
— Freedom of the Press Foundation

"Had the SEC followed [controlling precedent] it could not have sustained its blanket gag policy, [n]or could the panel have ratified that decision. … A consent decree … may amount to '"an out-and-out plan of extortion"' … [whereby] an agency could shoehorn unbounded authority into its consent decree power. Courts customarily reject any 'conceit of unlimited agency power.' … There is no legitimate public interest in suppressing otherwise protected speech simply because it criticizes or embarrasses the government. [As Justice Robert Jackson has said], [o]pen discussion of criminal enforcement, prosecution and settlement practices by government agencies is of the utmost public interest and cannot be fairly conducted with one side silenced. … Because the SEC has no power

to impose speech restrictions directly, it has smuggled them in through the backdoor of its enforcement action settlement authority."
— Hamilton Lincoln Law Institute

"[When reviewing] [t]his remarkable assertion of agency power … [a court] must consider whether the agency had authority to promulgate the Rule in the first place. [A]pplying the avoidance canon … protect[s] the First Amendment right to free speech, a cornerstone of democracy … [and] a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. … The clear statement requirement follows logically from the avoidance canon … and presumes Congress will 'speak clearly when authorizing an agency to exercise powers [that]'… 'implicate[] historically or constitutionally grounded norms.' … The Securities Exchange Act contains no clear authorization to restrict speech' … If Congress wished for the SEC to issue speech restrictions, it would have done so clearly."
— Cato Institute

NCLA released the following statements:

"The panel decision checks every box that supports rehearing. It conflicts with the settled law of the Ninth Circuit and fails to follow controlling Supreme Court precedent. It conflicts with the law of several circuits regarding unconstitutional conditions and the independent First Amendment rights of the Press. Finally, SEC lacks any authority whatsoever to regulate speech, and gags are not among the penalties Congress allows it to impose."
— Peggy Little, Senior Litigation Counsel, NCLA

"These friend of the court briefs bring home a point the panel missed. The gags at issue in this case are not really the product of voluntary negotiations. Rather, SEC imposes gags as a condition of settlement to protect the agency's reputation. There is no place in a government of the people, by the people, and for the people for an agency to impose a gag on speech in violation of the First Amendment just to save face."
— 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.

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