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NCLA Takes Former Xerox CFO's Case Against SEC 'Gag Rule' to Second Circuit Court of Appeals

Barry D. Romeril v. U.S. Securities and Exchange Commission

Washington, DC (April 13, 2020) – The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, filed its [opening brief](#) Friday in the U.S. Court of Appeals for the Second Circuit on behalf of client Barry Romeril, the former Chief Financial Officer of Xerox. The appeal seeks reversal of the district court's [decision](#) to deny his [motion for relief from judgment](#). Mr. Romeril is challenging the constitutionality of a gag order the U.S. Securities and Exchange Commission (SEC) imposed in a 2003 settlement and consent order. He is asking the Court of Appeals to remove the lifetime gag so that he may tell his side of the story publicly.

NCLA argues that the U.S. District Court for the Southern District of New York erred in its decision when it failed to follow circuit precedent in two areas. First, the judge's decision held that 16 years was too long for Mr. Romeril to wait to challenge his gag. But circuit precedent dictates that motions under Rule 60(b)(4) of the Federal Rules of Civil Procedure may be made "at any time" if the underlying order is void. In [Crosby v. Bradstreet](#), the Second Circuit reversed a court order as an unconstitutional prior restraint on speech—like Mr. Romeril's—even when the order had been entered 30 years earlier.

Second, the district court decision misconstrued the law applicable to challenges for "voidness" under Rule 60(b)(4). The court denied relief because Romeril supposedly failed to identify a jurisdictional defect or violation of due process that would render the 2003 consent order void. But orders can also be void, as the [Crosby](#) precedent shows, for including unconstitutional requirements. So, if Romeril is right that the gag order violates the First Amendment, that alone provides enough reason for the court to void it.

NCLA's brief details several different ways in which SEC gag orders like this one violate the First Amendment. Government-imposed gag orders are primarily a problem because they are "prior restraints" on speech, that is they prohibit future speech (even if truthful). The gag order against Romeril also unlawfully restricts his speech based on its content; it allows him to say positive things about SEC in praise of its investigation and charges against him, but it does not allow him to say anything critical about SEC's complaint against him. Gag orders also interfere with the general public's right to receive full information about the case, and they prevent Mr. Romeril from exercising his right to petition.

The district court also mistakenly disregarded Romeril's due process claims. The gag order violates the Fifth Amendment guarantee of due process of law because it is unconstitutionally vague and leaves too much up to SEC's discretion. Finally, and perhaps most egregiously, SEC only issued the gag rule as a 'housekeeping' rule back in 1972. Such rules are never supposed to be binding on anyone outside the government, but SEC has been ignoring that inconvenient fact for five decades. NCLA anticipates that several *amici curiae* will file briefs in support of Mr. Romeril's appeal at the end of this week.

NCLA released the following statements:

“Constitutional rights are not subject to a statute of limitations. This case involves important questions of First Amendment and due process arising from the SEC’s suppression of speech for nearly 50 years in the 98% of cases that powerful agency settles. Congress itself could not require someone to surrender their First Amendment rights in order to settle a case; a mere administrative agency perform lacks such authority.”

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

“The SEC’s gag rule not only quashes Mr. Romeril’s fundamental rights to speak and petition the government, but also the public’s fundamental right to receive his speech and learn what their government is up to. The disregard of clear and controlling circuit precedent by the court below would leave federal courts complicit in the SEC’s unconstitutional practices. This issue is too important for the Second Circuit not to correct course.”

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

“The SEC has a big problem on its hands. Almost 50 years ago, the agency took a dubious regulatory shortcut and issued its ‘gag rule’ without bothering to go through notice and comment rulemaking. The resulting ‘rule’ should never be binding on anyone outside the government. But the SEC has enforced its gag rule against Barry Romeril for 17 years and against scores, if not hundreds, of other defendants. Now that Romeril has made the court aware of this deficiency, as a matter of due process, courts must not abet the agency’s sharp practice.”

—**Mark Chenoweth, Executive Director and General Counsel, NCLA**

For more background on this case visit: <https://nclalegal.org/romeril-sec/>

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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