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Second Circuit Decision in SEC Gag Rule Case Fails to Address Unconstitutionality of Lifetime Gags

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

Washington, DC (September 27, 2021) – Today, a three-judge panel of the U.S. Court of Appeals for the Second Circuit incorrectly [denied](#) the motion for relief from judgment in the case of former Xerox Chief Financial Officer Barry Romeril. Mr. Romeril had argued that a lifetime “gag order” imposed on him in 2003 by the U.S. Securities and Exchange Commission (SEC) is unlawful and violated his First Amendment rights.

The New Civil Liberties Alliance believes the court not only erred in its decision, but also failed to address many of Mr. Romeril’s key arguments. For example, the court did not tackle arguments that the gag rule violated the Administrative Procedure Act from its inception, that it ignores the public’s right to hear the verboten speech, that it is a forbidden content-based restriction on speech, an unconstitutional condition that operates in perpetuity, and that it implicates the judiciary in unconstitutional orders. The gag order also denies due process of law by prohibiting those who settle with the SEC from speaking freely about their cases, something that the U.S. Supreme Court and other federal courts have said both convicted murderers and disciplined judges have every right to do. The notion that Mr. Romeril somehow bargained away his right to speak misses the fact that his silence was not something the Government could have won as a penalty in the case. Mr. Romeril raised all these issues in his case; unfortunately, the panel failed to address them.

For nearly 50 years, SEC has created deals like Mr. Romeril’s that violate the First Amendment rights of powerless defendants. It was not until recently that NCLA shined a light on the Gag Rule and its manifold and glaring unconstitutional infirmities. A rule that racks up a list of constitutional and legal violations this lengthy should compel appellate courts to safeguard Americans’ civil liberties. Instead, the Second Circuit narrowly construed circuit precedent on prior restraints of speech, which courts lack power to enter even upon consent.

NCLA released the following statement:

“NCLA commends Mr. Romeril for bravely challenging the Administrative State to right this wrong. SEC’s Gag Rule was unlawful and unconstitutional from the day the agency deceitfully slipped it into the Federal Register as a ‘housekeeping rule’ without notice and comment. The passage of time only multiplies the constitutional injury suffered by defendants who cannot settle with SEC unless they agree to a lifetime gag that a court has no power to enter. Other federal agencies do not require gags, nor do courts enter them in cases brought by other agencies. NCLA is committed to end this anomalous practice that dangerously insulates SEC from criticism by those in the best position to point out flaws in the agency’s enforcement practices.”

— **Peggy Little, Senior 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.

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