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NCLA Seeks *En Banc* Review of First Amendment SEC Gag Rule Case in Second Circuit

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

Washington, DC (November 15, 2021) – The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, is seeking *en banc* review in *U.S. Securities and Exchange Commission v. Barry D. Romeril*. NCLA filed a [petition](#) with the U.S. Court of Appeals for the Second Circuit Friday to address whether courts have the power to uphold prior restraints on speech as a non-negotiable condition of settlement of U.S. Securities and Exchange Commission (SEC) allegations.

In September, a Second Circuit panel [denied](#) former Xerox Chief Financial Officer Barry Romeril’s motion for relief from a “gag order” SEC imposed on him in 2003. In doing so, the Court became complicit in an ongoing First Amendment violation. Mr. Romeril reached a settlement with SEC in 2003 after the agency filed a complaint alleging violations of federal securities law. The SEC requires as a condition of settlement that all defendants agree that they will neither deny nor “create an impression” that they deny any allegations SEC has made against them—even ones that SEC knows at the time of settlement it could not prove. Mr. Romeril faces the threat of renewed prosecution if he speaks up because the court-approved final judgment incorporated the terms of this “consent” to a gag with SEC.

The Second Circuit’s ruling was untroubled by such “consents,” reasoning that courts routinely enforce individuals’ agreements to waive their constitutional rights. But the panel failed to recognize that whereas waiver of rights to a jury trial or an appeal are intrinsically part of settling cases, the right to engage in truthful free speech is not at issue in any SEC enforcement action, win or lose. NCLA contends that the gag order is a content-based restriction of speech, a forbidden prior restraint, and that it gives the SEC unbridled enforcement discretion by silencing Mr. Romeril in perpetuity.

The panel decision in this case should have been simple because a prior decision of the Second Circuit in *Crosby v. Bradstreet Co.* had forbidden courts to enter such unconstitutional prior restraints even between private parties. This same principle applies with far greater force when, as in Mr. Romeril’s case, the government demands silence as a non-negotiable condition of settlement of allegations in a civil SEC complaint. The panel’s contrary ruling created an intra-circuit split which the full Court must decide, under the Court’s own rules, sitting *en banc*.

The question raised in this appeal has an enormous individual and collective impact on Americans’ civil liberties because SEC settles 98% of its cases. In Mr. Romeril’s settlement, the First Amendment violation occurred 18 years ago and is repeated each day since then. Mr. Romeril desires to engage in truthful public statements concerning SEC’s case against him but is prevented from doing so. As briefed to the Court by several First Amendment scholars and public interest groups, the practice of demanding gags is a content-based prior restraint on speech, an unconstitutional condition, and a denial of due process that operates against the public’s interest in knowing how its government operates, which is core protected speech.

NCLA released the following statement:

“SEC’s requirement that anyone who wishes to settle charges against them may never even *question* any allegations SEC made *in perpetuity* is the sort of thing you might expect in a totalitarian regime, not a country with a proud heritage of free speech. It is long past time for the SEC’s outlier, unlawful, and unconstitutional fifty-year reign of imposing silence on Americans to end.”

— **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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