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**Media Inquiries:** [Judy Pino](#), 202-869-5218

## **NCLA Asks Fifth Circuit to End an SEC Lifetime Gag Order that Violates the First Amendment**

*U.S. Securities and Exchange Commission v. Christopher Novinger, et al.*

**Washington, DC (December 16, 2021)** – For decades, the U.S. Securities and Exchange Commission (SEC) has silenced people with lifetime speech bans enforced through threat of reopened prosecutions. The New Civil Liberties Alliance has filed an [opening brief](#) in the U.S. Court of Appeals for the Fifth Circuit in *U.S. Securities and Exchange Commission v. Christopher Novinger, et al.*, challenging a “Gag Order” included in Mr. Novinger’s settlement agreement with SEC, which violates not only his First Amendment rights, but also those of everyone who wants to learn more about his case.

On May 11, 2015, SEC filed a complaint against Mr. Novinger and ICAN Investment Group, where he formerly served as director. As a non-negotiable condition of settlement, SEC required Mr. Novinger and ICAN to sign a consent order that they would not question the merits of the Commission’s action against them. Mr. Novinger and ICAN continue to be bound by the Gag Order provision, yet desire to engage in truthful public statements concerning the SEC enforcement proceeding.

Mr. Novinger does not want to violate a consent order or suffer the consequences, so he has refrained from making truthful statements that might indirectly “creat[e] an impression” that the complaint lacked a factual basis or was otherwise without merit. For those reasons, on June 17, 2021, he and ICAN moved for relief from judgment under Rule 60(b).

The district court denied relief in August, [holding](#) that Appellants “consented willingly” to the mandatory gag, and thus “failed to meet their threshold burden” to establish a due process violation. But the First Amendment of the Constitution provides that “Congress shall make no law ... abridging the freedom of speech,” so the First Amendment applies to this court action.

SEC published its Gag Rule in 1972, and for the next half-century, the agency has coerced the silence of hundreds of individuals, forever damaging reputations and livelihoods while securing settlements as the price of peace. But SEC lacked statutory authority to enact such a substantive rule. Furthermore, it did not follow the provisions of the Administrative Procedure Act, which require prior publication, notice and comment before enacting any rule that binds regulated persons or entities.

SEC’s Gag Rule is a forbidden prior restraint, an unconstitutional content-based restriction on speech, and an unconstitutional condition that violates a hornbook’s worth of First Amendment doctrines. The Gag Order also violates Appellants’ right to due process of law because it was never authorized by Congress, nor was it lawfully promulgated by SEC. It shields and encourages regulation by settlement, allowing SEC to pursue cases not well-founded in established law or rules—and the targets of those actions are forever silenced because the gag operates in perpetuity.

**NCLA released the following statements:**

“It is long past time that courts fulfill their unflagging duty to keep government power within constitutional bounds. The gag rule was invalid from the moment SEC deceitfully slipped it into the Federal Register in violation of law five decades ago. Time has only enlarged the scope and depth of damage to the rule of law and the devastation imposed in perpetuity upon the lives, livelihoods, and reputations of SEC targets.”

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

“SEC’s vision statement declares that the Commission seeks to be ‘worthy of the public’s trust and characterized by transparency[.]’ Ironically preferring its operations to remain in the shadows by demanding its targets’ silence, SEC’s gag rule subverts its vision. The unlawful silencing of individuals and businesses for decades has prevented important and transparent public discourse about how the Commission might better conduct its enforcement efforts. It is time for this punitive practice to stop.”

— **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.

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