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Prominent 1st Amendment Scholars, Investors and Think Tanks Support NCLA's SCOTUS Cert Petition

Barry D. Romeril v. Securities and Exchange Commission

Washington, DC (April 25, 2022) – Prominent Constitutional Law and First Amendment scholars, including former ACLU president Nadine Strossen, American investors and entrepreneurs Elon Musk, Mark Cuban, Philip Goldstein, and Nelson Obus, and ten liberty-minded organizations, have filed *amici curiae* briefs in support of the arguments presented by the New Civil Liberties Alliance in *Barry D. Romeril v. Securities and Exchange Commission*. NCLA, a nonpartisan nonprofit organization, filed a [petition](#) for a *writ of certiorari* in March asking the Supreme Court to review SEC's rule that any settlement with it must include a lifetime restraint on speech.

The lawsuit challenges the constitutionality of the U.S. Securities and Exchange Commission's "gag orders" that have silenced thousands including the petitioner in this case, former Xerox Chief Financial Officer Barry Romeril. As a result of SEC's gag policy, Mr. Romeril has been unable fully to discuss his case publicly for over 18 years. The decree embodying SEC's demands is an unconstitutional prior restraint, a sort of order the Supreme Court has described as "the most serious and the least tolerable infringement on First Amendment rights."

Twenty *amici curiae* have filed seven total *amicus* briefs in support of Mr. Romeril and against SEC's gag rule.

NCLA released the following statement:

"For 50 years, SEC has leveraged its enormous power to impose crushing defense costs to silence for life any target's criticism of the agency. These eloquent amici lay out shocking examples of the Gag's role in permitting SEC to prosecute innocent parties and hide other agency misconduct. They expose that SEC's Gag creates a misbegotten scheme by which the government, despite the First Amendment, silences speech even private parties would not dare to attempt. Finally, amici peel back the procedural and substantive contortions of the decision below that effectively overruled its own precedents and jettisoned binding Supreme Court doctrine."

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

Excerpts from the seven briefs *amici curiae* submitted in support of NCLA:

"SEC wields enormous influence and power by using consent orders ... [in] approximately 98% of its enforcement cases ... [Its] Gag Rule is not just any prior restraint, but a prior restraint on "steroids," fatally infected by content and viewpoint discrimination ... exacerbated by its practical operation as an *in terrorem* 'gun to the head,' forcing submission by any who attempt resolution of disputes with the Commission."

— [Constitutional Law and First Amendment Scholars Rodney A. Smolla, Clay Calvert, Alan E. Garfield, Burt Neuborne, Nadine Strossen and Eugene Volokh filed by the Atlantic Legal Foundation](#)

"SEC should welcome scrutiny of its allegations, particularly unproven allegations in settled cases, to ensure that justice is done and any shortcomings in its cases are publicly aired ... SEC's insistence on secrecy in connection with its settlements serves no compelling purpose, runs contrary to the SEC's mission, and harms the very markets the SEC is charged with protecting."

— [Mark Cuban, Philip Goldstein, Elon Musk, Nelson Obus and Investor Choice Advocates Network](#)

“A more obvious attempt to suppress public criticism of government officials could scarcely be imagined. ... The gag orders eviscerate one of the last checks on the Commission’s power: speech capable of generating public outrage and calls for reform. ... This extreme, unprecedented level of insulation from ‘political accountability’ poses a serious threat to ‘individual liberty,’ warranting this Court’s immediate attention.”

— [Competitive Enterprise Institute, Cato Institute, Institute for Justice and Institute for Free Speech](#)

“There is no legitimate public interest in suppressing otherwise protected speech simply because it criticizes or embarrasses the government. ... “The right to ‘examin[e] public characters and measures through free communication may be no less than the ‘guardian of every other right.’ (quoting Madison’s Report on the Virginia Resolutions (1800)). Open discussion of criminal enforcement, prosecution, and settlement practices undertaken by government agencies is of the utmost public importance and cannot be fairly conducted with one side silenced.”

— [Hamilton Lincoln Law Institute](#)

“While at odds with America’s traditional First Amendment principles, the SEC’s Gag Rule is perfectly consistent with the unfortunate tendency of government bureaucracies to use secrecy as a means to increase their own power at the public’s expense. With its Gag Rule, the SEC effectively monopolizes the power to tell the story of how it is exerting its powers.”

— [The Thomas More Law Society](#)

“Anyone who has experienced a swarm of federal agents investigating their workplace for suspected securities law violations could tell how inherently intimidating and one-sided an SEC investigation can feel. Now imagine a foreman of that posse essentially proposes that their investigators will end their work in exchange for a financial settlement and execution of a promise never to speak of the circumstances or raise concerns ... to a federal judge.”

— [The Due Process Institute](#)

“If the panel had grappled with the First Amendment issues present in this case instead of distinguishing *Crosby* on dubious grounds, it would have concluded that the No-Deny Provision is unconstitutional ... [and] a prior restraint. ... This Court has never upheld (1) a lifelong, content-based waiver of First Amendment rights (2) secured by the government (3) that lacks a compelling government interest. ... The Court should grant certiorari.”

— [The Pelican Institute for Law and Public Policy](#)

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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