

## D.C. Circuit considers constitutionality of SEC 'gag orders'

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Judges on a federal appeals panel in Washington, D.C., on Thursday questioned a Libertarian think tank's claim that the U.S. Securities and Exchange Commission violated the First Amendment by banning defendants who settle with the agency from publicly denying its allegations, suggesting a hesitance to rule broadly in the case.

A three-judge panel of the U.S. Circuit Court of Appeals for the D.C. Circuit expressed doubt about whether the court had jurisdiction over the Cato Institute's lawsuit claiming a so-called SEC gag order on an unnamed former defendant prevented the group from publishing the defendant's book. U.S. Circuit Court Judge A. Raymond Randolph also questioned whether the ban really violated free speech rights under the U.S. Constitution.

"Can a contract be a law restricting freedom of speech for First Amendment purposes? The party has a right to speak and contracts it away. That doesn't seem like a First Amendment violation," he said.

Cato's attorney Robert McNamara of the Institute for Justice replied that it can be if the government uses its powers "to coerce people into surrendering" their rights. The case is like one where the 4th U.S. Circuit Court of Appeals ruled last year that non-disparagement clauses in the City of Baltimore's settlements with police misconduct claimants violated their First Amendment rights, he said.

U.S. Circuit Court Judge Robert Wilkins questioned that comparison, saying that while the 4th Circuit clearly had jurisdiction in that case, a D.C. Circuit ruling on SEC gag orders could affect settlements entered as consent judgments in federal courts around the country, which would have jurisdiction over ensuing claims. In response, McNamara suggested the court could limit its ruling to the SEC's out-of-court settlements.

Cato had sued the SEC in January 2019, alleging a gag order prevented a former defendant who settled unspecified allegations with the SEC from allowing Cato to publish his book accusing the SEC of overreach and have him and others like him speak at the group's events. Cato said the order thereby chilled its message of skepticism towards government power.

The SEC moved to dismiss the case, arguing that the harm to Cato was merely speculative, as the defendant had not violated the settlement and the agency had not decided whether to take action. U.S. District Court Judge Amy Berman Jackson dismissed the case in February, saying Cato had failed to allege any "actual impediment" to its ability to publish.

Cato appealed in March. Media organizations including the Reporters Committee for Freedom of the Press filed an amicus brief in support, calling the gag orders an obstacle to transparency.

During oral arguments on Thursday, U.S. Circuit Court Judge Gregory Katsas suggested Cato or the speaker could sue if the SEC acted against the defendant after they spoke out. But Katsas also challenged the SEC's assertion that the harm was speculative because it could forgo action against a defendant.

The 2nd U.S. Circuit Court of Appeals is considering similar issues in former Xerox executive Barry Romeril's lawsuit alleging his court-approved settlement with the SEC in 2003 violated the First Amendment.