



Free-spoken billionaires Musk, Cuban ask SCOTUS to rein in SEC gag orders

Constitutional law professors call the gag orders on defendants a prior restraint on "steroids" and "gun to the head" to protect the government from criticism. Victims of agency overreach can't even petition Congress.

Greg Piper

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Long before free-spoken billionaires Elon Musk and Mark Cuban clashed with the Securities and Exchange Commission, the chief financial officer of Xerox gave up his First Amendment rights to get the agency off his back.

Now they're backing Barry Romeril in a Supreme Court challenge to the SEC's five decades of imposing gag orders in settlements, which threaten fines and jail time for defendants who subsequently contest the factuality of agency claims about them.

The Tesla CEO and ebullient Dallas Mavericks owner joined one of several friend-of-the-court briefs by investors, constitutional scholars and public interest legal groups filed in support of Romeril. The SEC's response was initially due April 22, but it got an extension until May 23.

It's the second constitutional challenge to the SEC filed by the New Civil Liberties Alliance (NCLA), which also alleges its system of in-house judges violates the constitutional separation of powers.

Before it represented Romeril, NCLA asked the agency in 2018 to junk its 1972 gag-order rule, which was approved without a rulemaking. The SEC has variously argued it's intended to prevent the "perception" that its targets are innocent or that it was "acting collusively with wrongdoers" to lessen their punishments.

"The government is institutionally highly unlikely to admit to either practice," the legal group wrote. "Silencing the only other parties to the arrangements with a government enforced muzzle allows the government to act with impunity."

Last fall, the 2nd U.S. Circuit Court of Appeals upheld a trial ruling against Romeril's 2019 challenge, which came 16 years after he accepted the "no-deny provision" in his consent agreement. "The First Amendment is no exception" to the rule that parties can waive constitutional rights such as a right to trial, the three-judge panel said.

This is a red herring, NCLA said in [asking for SCOTUS review](#). The SEC said in 2012 that it settles about 98% of cases it brings, and "it could never win" a gag order at trial if it tried. This "quintessential" and "lifetime" prior restraint on "wholly truthful speech" cannot even be imposed by statute on defendants convicted of treason, the brief said.

Cuban won one of those few trials in 2013, spending more on insider-trading defense than he would have paid in fines, [Cuban told media at the time](#). He called out then-SEC chair Mary Jo White for not setting "bright line rules" for investors to follow: "They regulate through litigation."

Musk's tweets about Tesla were the target of his 2018 SEC settlement, which he's now challenging in court on First Amendment grounds by [invoking rapper Eminem's beef with the FCC](#).

These "sophisticated" businessmen "have a particular interest in fostering the ability of settling defendants to comment on the SEC's unproven claims and the circumstances that such defendants assert caused them to settle," according to their [brief with the Investor Choice Advocates Network](#).

The SEC is not only hypocritical in demanding one-way "full transparency and disclosure," but the gag orders also withhold "potentially material information" from participants in securities markets, the intended beneficiaries of the agency's transparency rules, the brief said.

Settlements are inevitable for most targets because "the legal cost to resist an opponent having virtually unlimited resources would be financially ruinous and would inflict enormous reputational damage." The SEC knows they do not reveal the truth as a trial would, Musk and Cuban said.

The U.S. District Court of Appeals for the D.C. Circuit rejected an appeal last summer by the Cato Institute in its First Amendment challenge to the gag orders, which prevented the libertarian think tank from publishing a firsthand account of "perceived overreach" by the SEC.

Cato joined a [brief by the Competitive Enterprise Institute](#), Institute for Free Speech and Institute for Justice, which had represented Cato in court. The four want to publicize stories of those victimized by SEC overreach in their "scholarship, commentary, and congressional testimony," their brief explains.

The SEC knows that threatening to send Romeril to jail and have him "socked with nearly \$2 million in additional fines" for criticizing the agency is unconstitutional, they claim. The gag order doesn't even protect investors, they argue, because it lets Romeril tell them in "private" conversations the agency lied about him.

"Aside from the Commodity Futures Trading Commission, the SEC is the *only* agency in the entire federal bureaucracy that sees the need to suppress the speech of every settling defendant," the brief says.

The groups denounced the 2nd Circuit for "effectively insulat[ing] the Commission from all accountability," even in court. Only SCOTUS can solve the problem because the gag orders also prevent defendants from petitioning Congress, withholding crucial information from lawmakers who oversee "the administrative state," they said.

Six constitutional law professors, including UCLA's Eugene Volokh and former ACLU President Nadine Strossen, told SCOTUS it needed to provide guidance on First Amendment "issues that long have vexed and confused lower courts."

The 2nd Circuit created a split with other federal appeals courts but also state courts "at a time when the principles governing the enforceability of non-disclosure, non-disparagement, and similar silence-imposing arrangements are in dramatic flux," the scholars wrote.

The gag orders are a "prior restraint on 'steroids,' fatally infected by content and viewpoint discrimination" and "animated by the government's self-serving desire to shield itself from criticism," the brief says. The "unconstitutional conditions doctrine ... means at the very least that the government receives no free pass from what otherwise would be an open-and-shut" First Amendment violation, a figurative "gun to the head" to compel settlement.

The Thomas More Society was the only explicitly religious group to file. The public interest law firm noted the 6th Circuit upheld a Christian professor's right to refrain from calling a transgender student by different pronouns, on the grounds that "[w]ithout genuine freedom of speech, the search for truth is stymied."