Free speech scholars – and Elon Musk – urge Supreme Court to review SEC gag orders

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(Reuters) - A onetime Xerox Corp CFO who has asked the U.S. Supreme Court to allow him to abandon a gag order provision from his 2003 settlement with the U.S. Securities and Exchange Commission got some help last week from several renowned 1st Amendment scholars – and from the biggest 1st Amendment celebrity of the moment, new Twitter Inc owner Elon Musk.

Musk, who is seeking to vacate his own 2018 SEC settlement, joined three other well-known former SEC targets — Mark Cuban, Phillip Goldstein and Nelson Obus — in an amicus brief criticizing SEC gag orders as improper restraints on critical information. The commission, as you surely recall, adopted a policy about 50 years ago of requiring settling defendants to agree not to deny the SEC's allegations publicly nor to assert that the government's complaint was unfounded. Musk, Cuban, Goldstein and Obus argued in their April 22 Supreme Court brief in Romeril v. Securities and Exchange Commission that the SEC policy deprives the market of important information.

"The SEC insists on concealing truthful information from the market when that information casts the SEC's own unproven allegations or its prosecutorial misconduct in a negative light," the brief said. "The 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."

First Amendment scholars including Rodney Smolla and Alan Garfield of the Delaware Law School of Widener University, Clay Calvert of the University of Florida, Burt Neuborne of NYU School of Law, Nadine Strossen of New York Law School and Eugene Volokh of UCLA School of Law were even more pointed in their amicus brief's criticism of the longstanding SEC gag order policy. Prohibiting defendants from talking about their cases for the rest of their lives is an unconstitutional prior restraint on speech, the scholars argued, made all the more glaring because the gags are premised on content and viewpoint – and because the whole point of the SEC-imposed gag is to shield the government from criticism.

"As a prior restraint that withholds information and criticism from the public, the SEC gag rule undermines a fundamental and vital animating purpose of the First Amendment, namely the protection of wide-open, uninhibited, and robust discussion of political affairs," the law professors argued.

Other amicus filers included the Hamilton Lincoln Law Institute and the Cato Institute, which brought its own unsuccessful challenge to an SEC gag rule a few years back.

Romeril, represented at the Supreme Court by Floyd Abrams of Cahill Gordon & Reindel and the New Civil Liberties Alliance, moved in 2019, under Rule 60 of the Federal Rules of Civil Procedure, for relief from the gag provision in the final judgment in the SEC's case against him. Romeril argued that the gag order had deprived him of constitutional 1st Amendment and due process rights. Among other points, he contended that he was coerced into agreeing to the provision, which he said was presented as a prerequisite for any settlement, and was hamstrung by its vagueness, which scared him into saying nothing about his case lest he face civil penalties and even criminal contempt accusations for violating the gag order.

The 2nd U.S. Circuit Court of Appeals affirmed the denial of Romeril's motion in September 2021, noting that Romeril had consented to the gag order when he signed the settlement agreement with the SEC in 2003. In essence, the 2nd Circuit said, Romeril had waived his right to assert 1st Amendment or due process defects in the settlement he signed because he agreed to the gag provision. Romeril received the benefits he bargained for in the SEC settlement, saving himself the cost of continuing to litigate and the risk of a worse outcome than the $5 million he agreed to turn over to the SEC, the court said. He willingly accepted the gag order as a cost of those benefits at the time, the 2nd Circuit said, so he "cannot complain now, on post-judgment, collateral review, that the provision violates his right to due process."

Romeril's petition for Supreme Court review argued that the 2nd Circuit didn't give enough weight to the SEC's power to coerce defendants to accept speech restrictions. "Because the SEC gag orders at issue are by their terms non-negotiable, they are unconstitutional conditions in violation of the First Amendment," the petition said. "A private party's supposed 'consent' can hardly give the federal government a power of suppression denied it by the First Amendment."

The petition does not contend that federal appellate courts have split on enforcement of SEC gag orders, but both Romeril and the 1st Amendment scholars highlighted the 4th Circuit's 2019 ruling in Overbey v. Mayor and City Council of Baltimore, in which the appeals court refused to enforce a non-disparagement provision in a settlement resolving allegations of police misconduct.

As I reported at the time, a divided 4th Circuit rejected Baltimore's argument that the plaintiff, Ashley Overbey, basically sold her 1st Amendment rights when she signed a settlement with a non-disparagement clause. The majority ruled instead that the public has a powerful 1st Amendment interest in restricting the government's ability to censor criticism of its own conduct.

That, of course, is exactly what the SEC's critics – Elon Musk perhaps chief among them — claim the commission is doing when it imposes gag orders on settling defendants. As Romeril argued in his petition: "The SEC's scheme ensures the agency not only the first public word — by complaint and press release — about its enforcement targets' culpability, but also gives the government the final and only word in nearly all SEC cases," the filing said. "This asymmetry is profoundly dangerous."

The SEC did not respond to my email query. The commission has until May 23 to respond to Romeril's petition for Supreme Court review.