

In The  
Supreme Court of the United States

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BARRY D. ROMERIL,  
*Petitioner,*

v.

SECURITIES AND EXCHANGE COMMISSION,  
*Respondents*

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On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Second Circuit

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**BRIEF OF AMICUS CURIAE THOMAS MORE  
SOCIETY IN SUPPORT OF PETITIONER**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....iii

INTEREST OF THE AMICUS CURIAE ..... 1

SUMMARY OF ARGUMENT..... 1

ARGUMENT ..... 3

    I. THE SEC’S GAG RULE CENSORS  
    SPEECH CRITICAL OF THE  
    GOVERNMENT, UNCONSTITUTIONALLY  
    DEPRIVING MEMBERS OF THE PUBLIC  
    OF VITAL INFORMATION ABOUT THEIR  
    OWN GOVERNMENT’S CONDUCT..... 3

        A. The SEC, through its Own Rules  
        and Practices, Invariably Requires  
        the Loss of First Amendment  
        Liberties as a Condition for  
        Settlement of a Case. .... 3

        B. Our System of Government Depends  
        on Free Speech, Including the Right  
        of the Public to Receive Information. .... 5

        C. The SEC’s Gag Rule Empowers  
        Bureaucracy at the Public’s  
        Expense..... 6

II. THE SEC’S BLANKET GAG RULE RUNS COUNTER TO OUR NATION’S BEST JURIDICAL TRADITIONS AND PERPETUATES THE ILL EFFECTS OF EXCESSIVE GOVERNMENT SECRECY.....	9
A. The SEC Gag Rule Results in Enforceable Court Judgments Against Settling Defendants While Evading the Strong Constitutional Presumption in Favor of Public Trials.....	9
B. Excessive Government Secrecy, Like that Embodied in the SEC Gag Rule, is Injurious to the Public Interest. ....	11
III. THE SEC’S RULE CANNOT BE RESCUED BY RELIANCE ON PRINCIPLES OF WAIVER AND CONSENT. ....	12
A. A Party’s “Consent” to the SEC’s Gag Rule is the Product of a Fundamentally Unconscionable Process. ....	12
B. Reliance on Principles of Waiver and Consent Overlooks the Rights of the Public.....	15
CONCLUSION.....	16

## TABLE OF AUTHORITIES

### CASES

<i>Abrams v. United States</i> , 250 U.S. 616 (1919) .....	5
<i>Ariz. Free Enter. Club's Freedom Club PAC v. Bennett</i> , 564 U.S. 721 (2011) .....	15
<i>Ashcroft v. Free Speech Coalition</i> , 535 U.S. 234 (2002).....	6
<i>Bell v. Jarvis</i> , 236 F.3d 149 (4th Cir. 2000) .....	10
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976) .....	15
<i>Cato Inst. v. SEC</i> , 4 F.4th 91, 95 (D.C. Cir. 2021) .....	4
<i>Citizens United v. FEC</i> , 558 U.S. 310 (2009) .....	4, 15
<i>Cowley v. Pulsifer</i> , 137 Mass. 392 (1884) .....	12
<i>Crosby v. Bradstreet Co.</i> , 312 F.2d 483 (2d Cir. 1963).....	16
<i>G &amp; V Lounge v. Michigan Liquor Control Comm'n</i> , 23 F.3d 1071 (6th Cir. 1994).....	14
<i>Gannett Co., v. DePasquale</i> , 443 U.S. 368 (1979).....	10
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1964).....	12

<i>Janus v. Am. Fed’n of State, Cnty. &amp; Mun. Emps., Council 31</i> , 138 S. Ct. 2448 (2018).....	5
<i>Lamont v. Postmaster General</i> , 381 U.S. 301 (1965).....	6
<i>League of United Latin Am. Citizens, Council No. 4434 v. Clements</i> , 999 F.3d 831 (5th Cir. 1993).....	15
<i>Martin v. Struthers</i> , 319 U.S. 141 (1943).....	6
<i>Meriwether v. Hartop</i> , 992 F.3d 492 (6th Cir. 2021).....	5
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964).....	7, 11
<i>Nino v. Jewelry Exchange, Inc.</i> , 609 F.3d 191 (3d Cir. 2010) .....	13
<i>Pokorny v. Quixtar, Inc.</i> , 601 F.3d 987 (9th Cir. 2010).....	13
<i>Press-Enterprise Co. v. Superior Court of California</i> , 464 U.S. 501 (1984).....	9
<i>Publicker Indus., Inc. v. Cohen</i> , 733 F.2d 1059 (3d Cir. 1984) .....	12
<i>Red Lion Broadcasting Co. v. FCC</i> , 395 U.S. 367 (1969).....	5

<i>SEC v. Farha</i> , No. 8:12-CV-47-T-23MAP, 2018 WL 11354497, 2018 U.S. Dist. LEXIS 244839 (M.D. Fla. May 1, 2018).....	15
<i>Schacht v. United States</i> , 398 U.S. 58 (1970).....	7
<i>Sorrell v. IMS Health Inc.</i> , 564 U.S. 552 (2011).....	5
<i>Stanley v. Georgia</i> , 394 U.S. 557 (1969).....	6
<i>Stovall v. City of Cocoa, Fla.</i> , 117 F.3d 1238 (11th Cir. 1997).....	15
<i>Waller v. Georgia</i> , 467 U.S. 39 (1984) .....	9
<i>Weaver v. Massachusetts</i> , 137 S. Ct. 1899 (2017).....	10
<i>Whitney v. California</i> , 274 U.S. 357 (1927).....	5

#### STATUTES AND RULES

17 C.F.R. § 202.5(e) .....	1, 4, 7, 13
S. Ct. Rule 37.2.....	1
S. Ct. Rule 37.6.....	1

## OTHER AUTHORITIES

- Daniel Patrick Moynihan et al., *Report of the Commission on Protecting and Reducing Government Secrecy*, S. Doc. No. 105-2, app. A at Ch. 3 (“Secrecy: A Brief Account of the American Experience”) (1997) ..... 8, 11
- John Milton, *Areopagitica*, in *Prose Works* (Yale 1959) ..... 11
- John Stuart Mill, *On Liberty* (Oxford: Blackwell 1947)..... 11
- Philip Hamburger, *Is Administrative Law Unlawful?*, 347-55 (2015) ..... 10

## INTEREST OF THE AMICUS CURIAE<sup>1</sup>

Amicus Curiae Thomas More Society is a non-profit, national public-interest law firm dedicated to restoring respect in law for life, family, and religious liberty. The Thomas More Society provides legal services to clients free of charge and often represents individuals who cannot afford a legal defense with their own resources. Throughout its history, the Thomas More Society has advocated for the protection of First Amendment rights.

### SUMMARY OF ARGUMENT

The Security & Exchange Commission exercises great power over the economy and those it regulates. One of the most dramatic ways the SEC discharges its powers is by enforcement of 17 C.F.R. § 202.5(e). Through its use of this regulation, the SEC demands that defendants it has sued (such as petitioner Barry Romeril) agree to a consent judgment that effectively bars the defendant from ever criticizing the SEC's case against them. Such an order is a content and viewpoint based prior restraint on the defendant's

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<sup>1</sup> Petitioner consents to the filing of this brief, and Respondent has filed a blanket consent to the filing of *amicus curiae* briefs regarding the petition for a writ of certiorari. Pursuant to S. Ct. Rule 37.2, the Thomas More Society states that the parties' counsel received timely notice of its intent to file this brief. Pursuant to S. Ct. Rule 37.6, the Thomas More Society further states that no counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than this *amicus* or its counsel, has made a monetary contribution to this brief's preparation or submission.



speech. And to make matters worse, this gag order language is included in the SEC's "consent" judgments as a matter of course without any individualized assessment of the purported need or countervailing interests.

While the SEC's gag rule infringes on the First Amendment rights of the defendant, it also inflicts grievous injury on the public at large, which is being denied information about the manner in which its government is functioning. Our system of government depends on the ability of citizens to obtain information about how our leaders are exercising the trust reposed in them. This necessarily includes information critical of those leaders. The SEC's gag rule stifles public access to such information, leading to a more powerful and less accountable bureaucracy that is able to operate in secret.

Given the SEC's expansive powers and the manner in which it extracts "consent" from settling defendants, it cannot be said that the gag language is the product of a process that is fair, either substantively or procedurally. Even if the defendant's consent were valid, however, courts must exercise their authority to protect the public's access to crucial information about the government rather than permitting a powerful federal agency to regulate in the shadows away from public scrutiny. For these reasons, the petition for a writ of certiorari should be granted.

## ARGUMENT

Americans like receiving news and information. Americans especially like receiving news and information about what the United States government is doing in their name. The SEC, however, prefers to ensure that, when it comes to its enforcement actions, only one side of the story ever gets told—its own. The First Amendment demands more to protect the rights not only of settling defendants, but also of the public generally, which has a strong interest in being able to evaluate how one of the federal government's most potent agencies is discharging its powers. Accordingly, the petition for a writ of certiorari should be granted so that this Court can review the constitutionality of the SEC's restrictions on the speech of settling defendants.

### **I. THE SEC'S GAG RULE CENSORS SPEECH CRITICAL OF THE GOVERNMENT, UNCONSTITUTIONALLY DEPRIVING MEMBERS OF THE PUBLIC OF VITAL INFORMATION CONCERNING THEIR GOVERNMENT'S CONDUCT.**

#### **A. The SEC, through its Own Rules and Practices, Invariably Requires the Loss of First Amendment Liberties as a Condition for Settlement of a Case.**

The Securities & Exchange Commission's Gag Rule seeks to ensure Americans receive only the SEC's side of the story regarding enforcement actions in which it is involved. In 1972, the SEC

adopted 17 C.F.R. § 202.5(e) (*i.e.*, the “SEC Gag Rule”), which states in relevant part:

[I]t is important to avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur. Accordingly, [the SEC] hereby announces its policy not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings.

Furthermore, the SEC regularly includes language in the consent judgments entered by the court that effectively prohibits those whom it has sued from ever contradicting the SEC’s position on the matter *the rest of their lives*. *See, e.g.*, Pet. 10-11.

Therefore, any settling defendant who appears to later suggest that the SEC was incorrect about the case risks both breaching the settlement agreement and being held in contempt of court. *See, e.g., Cato Inst. v. SEC*, 4 F.4th 91, 95 (D.C. Cir. 2021) (“[A] court may institute criminal contempt proceedings against an SEC defendant who violates a no-deny provision . . . So regardless of whether the SEC is enjoined from seeking to enforce the no-deny provisions in its consent decrees, the courts that issued the consent decrees would still be able to enforce the no-deny provisions[.]”) (internal citations omitted).

**B. Our System of Government Depends on Free Speech, Including the Right of the Public to Receive Information.**

Contrary to the position embodied in the SEC's Gag Rule, "it is our law and our tradition that more speech, not less, is the governing rule." *Citizens United v. FEC*, 558 U.S. 310, 361 (2009). The constitutional protection of free speech is not merely intended to encourage self-expression. "[F]ree speech is 'essential to our democratic form of government.' Without genuine freedom of speech, the search for truth is stymied, and the ideas and debates necessary for the continuous improvement of our republic cannot flourish." *Meriwether v. Hartop*, 992 F.3d 492, 503 (6th Cir. 2021) (Thapar, J.) (quoting and citing *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018)).

The First Amendment creates a marketplace of ideas because our Founders were confident in their belief "that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth[.]" *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). The Constitution accordingly seeks to "maintain a free marketplace of ideas, a marketplace that provides access to 'social, political, esthetic, moral, and other ideas and experiences.'" *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 583 (2011) (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390, (1969) and citing *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

For the existence of a marketplace of ideas sufficient to sustain a healthy civic society, the rights of both speakers and listeners must be respected. Thus, the Constitution generally prevents the government from interfering with “the right to receive information and ideas.” *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *see, e.g., Martin v. Struthers*, 319 U.S. 141, 143 (1943). “The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyer.” *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (citations omitted). Unfortunately, the SEC Gag Rule stifles the marketplace of ideas by preventing willing listeners from receiving information. Such interference in the free exchange of information is harmful as a general matter, and it is especially egregious and damaging to civic health for information about the manner in which a government agency is discharging its duties to be suppressed.

### **C. The SEC’s Gag Rule Empowers Bureaucracy at the Public’s Expense.**

Even though, “[a]s a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear,” *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002), the SEC Gag Rule engages in precisely that kind of censorship as a matter of course. With a rule that discriminates on the basis of both content and viewpoint, the SEC boldly claims that it has an

interest in not being contradicted *after a case has been resolved*. See 17 C.F.R. § 202.5(e); see also App.-37 (containing terms of *Romeril* consent order: “In compliance with this policy, Defendant [*Romeril*] agrees not to take any action or to make or permit to be made any public statement denying, directly or indirectly, any allegation in the complaint or creating the impression that the complaint is without factual basis.”).

It is a rare admission by a governmental entity that it is seeking not just to censor a certain perspective, but that it is specifically seeking to censor that perspective because it would be critical of the government. It beggars the imagination how a government agency can claim a legitimate, let alone compelling, interest in insulating itself from criticism. “The right of free public discussion of the stewardship of public officials . . . [is] a fundamental principle of the American form of government.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964); see *Schacht v. United States*, 398 U.S. 58, 63 (1970) (commenting that all persons “in our country, enjoy[] a constitutional right to freedom of speech, including the right openly to criticize the Government”).

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. Writing over twenty years ago, the bipartisan Commission on Protecting and Reducing Government Secrecy chaired by then-U.S. Senator Daniel Patrick Moynihan condemned the federal

government's covetous treatment of public information, which resulted in an excessive amount of government secrecy. Daniel Patrick Moynihan et al., *Report of the Commission on Protecting and Reducing Government Secrecy*, S. Doc. No. 105-2, app. A at Ch. 3 ("Secrecy: A Brief Account of the American Experience") (1997), available at <https://sgp.fas.org/library/moynihan/appa3.html> (last visited Apr. 21, 2022) [hereinafter, "Moynihan"]. This tendency is nothing new to government and nothing unique to the U.S. government, the Commission explained. Instead, the Commission attributed it to the natural inclination of bureaucracies as described by the German sociologist Max Weber:

Every bureaucracy seeks to increase the superiority of the professionally informed by keeping their knowledge and intentions secret. Bureaucratic administration always tends to be an administration of "secret sessions" [and] in so far as it can, it hides its knowledge and action from criticism . . . The concept of the "official secret" is the specific invention of bureaucracy, and nothing is so fanatically defended by the bureaucracy as this attitude[.]

*Id.*

The secrecy and insulation from criticism a bureaucracy like the SEC naturally seeks cannot be squared with what the First Amendment demands. Therefore, the Court should grant the petition for certiorari in this case to rein in the SEC Gag Rule

from further depriving those whom the SEC has sued from disclosing to the American public how their government has acted.

**II. THE SEC'S BLANKET GAG RULE RUNS COUNTER TO OUR NATION'S BEST JURIDICAL TRADITIONS AND PERPETUATES THE ILL EFFECTS OF EXCESSIVE GOVERNMENT SECRECY.**

**A. The SEC Gag Rule Results in Enforceable Court Judgments Against Settling Defendants While Evading the Strong Constitutional Presumption in Favor of Public Trials.**

The impropriety of the SEC Gag Rule becomes apparent when contrasted with the constitutional protections on the public's right to know what transpires in criminal and civil trials. Decisions of this Court make clear that there is a public right to access the records and proceedings of both criminal and civil cases. *See Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 510, (1984) (describing the public's First Amendment right to access judicial proceedings and records); *see also Waller v. Georgia*, 467 U.S. 39, 44-45 (1984) (describing a criminal defendant's Sixth Amendment right to a public trial). "For many centuries, both civil and criminal trials have traditionally been open to the public. As early as 1685, Sir John Hawles commented that open proceedings were necessary so 'that truth may be discovered in civil *as well as* criminal matters' (emphasis added). Remarks upon Mr. Cornish's Trial, 11 How. St. Tr. 455, 460."



*Gannett Co., v. DePasquale*, 443 U.S. 368, 386 n.15 (1979).

As a result of these principles, courts may close trials to the public only upon there being a record of certain showings, including that there is an “overriding interest” in closing the proceedings, that the proceedings are not closed any more than necessary to protect that overriding interest, and that the court has considered alternatives to closing the public out of the proceedings. *See, e.g., Bell v. Jarvis*, 236 F.3d 149, 166 (4th Cir. 2000); *see also Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908-10 (2017). It is certainly true that the SEC’s settlements, like the one at issue in this case, are not courtroom trials. These settlements, though, are also not merely contracts between the SEC and the settling defendant. They become federal court judgments enforceable with the full contempt powers of the federal judiciary, which subjects the defendant to the threat of criminal contempt.

Moreover, the SEC settles approximately 98% of the cases it brings. *See* Pet. 18-19 (citing sources). A necessary component of this high settlement rate is the immense power it possesses as part of the modern administrative state. *See generally* Philip Hamburger, *IS ADMINISTRATIVE LAW UNLAWFUL?*, 347-55 (2015) (describing overwhelming power of modern administrative agencies). By utilizing this power, the SEC has cut off the ability of those it has sued from *forever* uttering a critical word about the SEC’s suit by means of a categorical rule that applies in every case, without any individualized examination of the specific facts, without any

consideration of alternatives, and without any but the flimsiest of identified interests (*viz.*, protecting the SEC from criticism).

**B. Excessive Government Secrecy, Like that Embodied in the SEC Gag Rule, is Injurious to the Public Interest.**

Justifications that support our national tradition of open trials apply with equal force to the SEC's "consent" judgments. "Information is power, and it is no mystery to government officials that power can be increased through controls on the flow of information." Moynihan, *supra*, at Ch. I ("Overview: Protecting Secrets and Reducing Secrecy"), available at <https://sgp.fas.org/library/moynihan/chap1.html> (last visited Apr. 21, 2022). With its Gag Rule, the SEC effectively monopolizes the power to tell the story of how it is exerting its powers. Yet, the free exchange of conflicting information and views is the cornerstone of discovering truth. Even a speaker whose criticisms are misguided or inaccurate is nonetheless protected by the First Amendment because it has long been recognized that "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" *New York Times*, 376 U.S. at 279 n.19 (1964) (quoting John Stuart Mill, *On Liberty* (Oxford: Blackwell 1947), at 15, and citing John Milton, *Areopagitica*, in *Prose Works* (Yale 1959), Vol. II, at 561).

The public likewise has an interest in knowing how its officials are discharging their duties. "[I]t is

of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.” *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1069 (3d Cir. 1984) (quoting *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884)). Yet, the SEC interferes with this ability in the most extreme of ways—a total, complete, lifetime gag rule against any criticism from settling defendants at any point in the future. The result is less public information and a greater danger for public mistrust and cynicism.

The SEC Gag Rule is long overdue for a constitutional reckoning, which this Court should provide by granting Mr. Romeril’s petition for certiorari.

### **III. THE SEC’S RULE CANNOT BE RESCUED BY RELIANCE ON PRINCIPLES OF WAIVER AND CONSENT.**

#### **A. A Party’s “Consent” to the SEC’s Gag Rule is the Product of a Fundamentally Unconscionable Process.**

Given the substantive and procedural unfairness of the means by which the SEC obtains the settling defendant’s purported waiver of its First Amendment rights, it is no answer that the SEC’s gag language is the product of consent between the parties. *Cf. Gideon v. Wainwright*, 372 U.S. 335, 344 (1964) (“From the very beginning, our state and national constitutions and laws have laid great

emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.”).

First, the process by which the gag language comes to be included is procedurally unconscionable. The language prohibiting future speech is not a negotiated term of the settlement agreement that is included due to any specific and articulable needs of the particular case. To the contrary, the gag language—drafted by the SEC—must be included per 17 C.F.R. § 202.5(e), which is intended to justify the SEC’s position as to all of its enforcement actions in perpetuity. The settling defendant is given Hobson’s choice of either acceding to the Gag Rule or going through a complex and expensive trial where its exposure is enormous. *See, e.g., Nino v. Jewelry Exchange, Inc.*, 609 F.3d 191, 201 (3d Cir. 2010) (“We have consistently found that adhesion contracts—that is, contracts prepared by the party with greater bargaining power and presented to the other party ‘for signature on a take-it-or-leave-it basis’—satisfy the procedural element of the unconscionability analysis.”) (citations omitted); *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 996 (9th Cir. 2010) (“An agreement or any portion thereof is procedurally unconscionable if the weaker party is presented the clause and told to ‘take it or leave it’ without the opportunity for meaningful negotiation.”) (internal quotation marks and citation omitted). The fact that only a tiny fraction of SEC suits fails to settle before trial evidences the strong disincentive that defendants have to risk taking a case to verdict once

they have been targeted by the SEC. *See, e.g.*, Pet. 4-5,18-19.

The gag language is also substantively unconscionable. Besides being collateral to the actual merits of the case and the substance of the settlement (*i.e.*, monetary relief and any changes in party conduct going forward), it is staggeringly broad. It is not limited to a set time period (*e.g.*, 5 years) or limited by the happening of a future event, such as the conclusion of related investigations and proceedings. Rather, the defendant is *forever* restrained from exercising his constitutional right to free speech on the subject matter being settled. This is particularly disturbing in light of the fact that the gag language is imposed without any inquiry into a need for secrecy or confidentiality by the SEC or the court that enters the consent judgment. Such actions would be troubling enough between private parties. But here the case concerns a *government* actor, and courts have accordingly refused to enforce such language. *See, e.g., G & V Lounge v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1077 (6th Cir. 1994) (“[A] state actor cannot constitutionally condition the receipt of a benefit . . . on an agreement to refrain from exercising one’s constitutional rights, *especially one’s right to free expression.*”) (emphasis added).

Thus, the SEC’s Gag Rule cannot be supported by a party’s purported “consent” to be bound by the gag language.

## **B. Reliance on Principles of Waiver and Consent Overlooks the Rights of the Public.**

Waiver and consent further fail as talismans for the SEC because an unconstitutional injunction cannot stand, even if the parties agree to it. “[J]ust as two parties cannot stipulate to subject-matter jurisdiction, two parties cannot stipulate to an injunction violative of substantive and procedural law.” *See, e.g., SEC v. Farha*, No. 8:12-CV-47-T-23MAP, 2018 WL 11354497, 2018 U.S. Dist. LEXIS 244839, at \*7 (M.D. Fla. May 1, 2018) (citing *Stovall v. City of Cocoa, Fla.*, 117 F.3d 1238 (11th Cir. 1997) (explaining that a district court must refuse to adopt an unlawful consent decree) and *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.3d 831, 845–46 (5th Cir. 1993) (Higginbotham, J.) (“Even if all the litigants were in accord, it does not follow that the federal court must do their bidding.”).

This Court has repeatedly recognized that “[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.” *Citizens United*, 558 U.S. at 339; *see Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 754 (2011) (“[T]here is practically universal agreement that a major purpose of the First Amendment ‘was to protect the free discussion of governmental affairs[.]’”) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)). The SEC’s Procrustean Gag Rule runs directly contrary to these rights and interests of the public.

Similar defects to those in the SEC Gag Rule led to the Second Circuit's rejection of such language in *Crosby v. Bradstreet Co.*, 312 F.2d 483 (2d Cir. 1963). Much as in the present case, *Crosby* concerned language that broadly "restrained the defendant from publishing any report, past, present or future, about certain named persons." 312 F.2d at 484. Despite the defendant having once agreed to the provision, the Second Circuit had little trouble finding it unconstitutional under the First Amendment. *Id.* at 485. "Such an injunction, enforceable through the contempt power, constitutes a prior restraint by the United States against the publication of facts which the community has a right to know and which [the defendant] had and has the right to publish." *Id.* The injunction was not merely void. "The court was without power to make such an order; *that the parties may have agreed to it is immaterial.*" *Id.* (emphasis added).

The Second Circuit's recent turn, however, in denying Mr. Romeril relief cannot be reconciled with its more constitutionally sound decision in *Crosby*. This Court should therefore grant the petition for certiorari to make clear that party consent alone cannot support enforcement of injunctions restricting free speech.

## CONCLUSION

For the above-stated reasons, this *amicus* respectfully submits that the petition for writ of certiorari should be granted.

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