No. 21-1284

IN THE

Supreme Court of the United States

BARRY D. ROMERIL

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF MARK CUBAN, PHILLIP GOLDSTEIN, ELON MUSK, NELSON OBUS, AND INVESTOR CHOICE ADVOCATES NETWORK AS AMICI CURIAE IN SUPPORT OF PETITIONER

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S.E.C. v. Yuen,
No. CV 03-4376 MRP, 2006
WL 1390837 (C.D. Cal. May 8, 2006),
aff'd, 272 F. App'x 615
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S.E.C. v. Yuen,
No. CV 03-4376MRP, 2006 WL
1390828 (C.D. Cal. Mar. 16, 2006) 6

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OTHER AUTHORITIES

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Center. for Capital Martkets,
Examining U.S. SEC Enforcement: Recommendations on Current Processors & Practices (July 2015),
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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici are Mark Cuban, Phillip Goldstein, Elon Musk, Nelson Obus, and Investor Choice Advocates Network ("ICAN"). Each of the individual amici is a sophisticated businessperson and investor who has publicly litigated against the United States Securities and Exchange Commission ("SEC"). ICAN is a nonprofit, public interest law firm working to expand access to markets by underrepresented investors and entrepreneurs. Amici have an interest in the outcome of this case because they believe it is important that the public and the market are able to learn of the merits – or lack thereof – of the SEC's claims against individuals or corporations as well as details about settlement negotiations. In other words, amici appreciate that, absent a compelling reason not present here, enforcement of a "gag order" regarding a settlement agreement between a litigant and the SEC is against public policy. As market participants and adverse parties to litigation with the SEC, amici 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.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amici curiae* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The parties have filed blanket consents to the filing of *amicus curiae* briefs. *See* Sup. Ct. R. 37.3.

SUMMARY OF THE ARGUMENT

The SEC's prohibition against settling defendants criticizing the SEC's unproven allegations raises important First Amendment and Due Process Clause issues, as noted by the Petitioner. *Amici* raise a complementary consideration warranting review: there is no compelling public policy reason to enforce SEC "gag orders" against defendants who settle with the SEC. In fact, the opposite is true. In the statutes and regulations the SEC is responsible for enforcing (and by its own actions, public statements, and admissions), the SEC requires full transparency and disclosure for the benefit of participants in securities markets. There is no compelling justification for the SEC to break from this responsibility and single out for concealment and opacity information from defendants who settle with the SEC. To the contrary, preventing these settling defendants from speaking freely deprives the securities markets of potentially material information and so may harm the very market participants for whose benefit the SEC pursues transparency and disclosure. These important additional considerations weigh in favor of granting the petition.

ARGUMENT

I. The SEC's Gag Orders Conceal Information from the Market

The First Amendment fosters a "marketplace of ideas." *See* Holmes, J., dissenting and joined by Brandeis, J., in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (". . . the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .") This "marketplace of ideas" is

particularly important when it involves criticism of government officials and perceived governmental overreaches. *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

The SEC plays an important role in the "marketplace of ideas," and holds itself out as striving "to promote a market environment that is . . . characterized by transparency."[2] In pursuit of transparency, the SEC regularly insists that market participants provide "full disclosure" and not remain silent when to do so would "make the statements made, in light of the circumstances under which they were made, not misleading[.]" *Lorenzo v. SEC*, 139 S. Ct. 1094, 1105 (2019).

In a recent speech, SEC Chair Gary Gensler tied the need for transparency to "lowering costs of intermediation for those who use capital – issuers – and those who own capital – investors. . . . If we can use our authorities to bring greater transparency and competition into that market, that helps . . . issuers and investors."[3]

However, the SEC's requirement of transparency and full disclosure for the benefit of market participants has one glaring exception highlighted by Petitioner's case. The SEC insists on concealing

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[2] SEC, *Agency & Mission Information*, https://www.sec.gov/about/reports/sec-fy2014-agency-mission-information.pdf.

[3] Gary Gensler, Chair, SEC, Prepared Remarks at the Exchequer Club of Washington, D.C., *Dynamic Regulation for a Dynamic Society* (Jan. 19, 2022), https://www.sec.gov/news/speech/gensler-dynamic-regulation-20220119.

truthful information from the market when that information casts the SEC's own unproven allegations or its prosecutorial misconduct in a negative light. 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.

II. The SEC's "Hobson's Choice" Settlements Are No Substitute for Market Transparency

The SEC may contend that all relevant information about settled enforcement matters is available from the SEC's complaint, judgment, and press release. However, the manner in which most SEC actions reach settlement suggests that the SEC's unproven charging document rarely, if ever, contains all information material to investors and the public. The "Hobson's Choice" nature of most SEC settlements stifles the "marketplace of ideas" and denies the financial markets and the general public potentially useful information from the SEC's litigation opponents.

According to one 2015 study, the average cost for companies to respond to an SEC formal investigation – prior to the filing of any litigation – was more than $4 million.[4] Following investigation, the SEC may elect to pursue targets through its administrative hearing process, in federal court, or both, which

[4] Center. for Capital Martkets, *Examining U.S. SEC Enforcement: Recommendations on Current Processors & Practices* (July 2015), https://www.centerforcapitalmarkets.com/wp-content/uploads/2015/07/021882_SEC_Reform_FIN1.pdf

results in formidable costs and may take years to resolve. 15 U.S.C. §§ 78d-1(a), 78u(d), and 78y(a)(1).

Under these circumstances, most defendants have no choice but to settle – not necessarily because they concede the accuracy of the SEC's allegations, but rather because the legal cost to resist an opponent having virtually unlimited resources would be financially ruinous and would inflict enormous reputational damage. The direct and indirect cost of litigating against the SEC has motivated even defendants with substantial resources to settle rather than go to trial for an adjudication of the SEC's allegations.[5] As a result, settlements do not represent findings of fact at the end of an adversarial process. Instead, settlements often represent a begrudging alternative to a battle of attrition described by one settling defendant as "totally abusive."[6]

If for no other reason than market transparency, it is against public policy for the SEC to prohibit frank discussion by litigation opponents who settle in the face of a process few can afford to endure.

III. The SEC Demands Transparency Regarding Settlements Between Private Parties

While the SEC prevents those who settle with it from publicly speaking negatively about their settlements, it simultaneously chastises other

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[5] *See* Jeff Cox, *Leon Cooperman: SEC insider trading case was 'extraordinarily abusive,'* CNBC (May 30, 2017, 12:18 PM EDT) (estimating trial costs of $20 million in addition to other indirect costs), https://www.cnbc.com/2017/05/30/leon-cooperman-tells-cnbc-sec-case-was-extraordinarily-abusive.html.

[6] *Id.*

litigants for failing to disclose enough information about their litigation and settlements.

Take, for example, the case of *S.E.C. v. Yuen*, No. CV 03-4376MRP (PLAX), 2006 WL 1390828 (C.D. Cal. Mar. 16, 2006). There, the SEC charged Henry Yuen, the CEO of a public company, with securities fraud and other violations of the federal securities laws. *Id.*, at *1. The SEC alleged that Yuen acted wrongfully in failing to disclose sufficient detail about his company's settlement negotiations and settlement agreement with an opponent in litigation, thus misleading the investing public. *Id.*, at *30. As a result of these actions, Yuen received a permanent officer and director bar and was required to disgorge more than $10 million and pay a civil penalty of more than $10 million. *S.E.C. v. Yuen*, No. CV 03-4376 MRP (PLAX), 2006 WL 1390837, at *2 (C.D. Cal. May 8, 2006), aff'd, 272 F. App'x 615 (9th Cir. 2008).

But consider the circumstances if Yuen had, instead of settling with a private party, entered into a settlement with the SEC. In that case, he would have been barred from providing <u>**any**</u> information to the investing public regarding the settlement critical of the SEC's allegations, even if that information was truthful and material to investors.

And *Yuen* is not unique. The SEC regularly brings enforcement actions against individuals and companies based, at least in part, on their failure to provide the investing public with sufficient information about their settlements or litigation. *See, e.g.*, *S.E.C. v. RPM Int'l, Inc.*, 282 F. Supp. 3d 1, 28 (D.D.C. 2017) (failing to disclose submission of settlement offer); *S.E.C. v. Kirkland*, 521 F. Supp. 2d

1281, 1303 (M.D. Fla. 2007) (failing to disclose litigation history); *S.E.C. v. Falstaff Brewing Corp.*, 629 F.2d 62, 73 (D.C. Cir. 1980) (failing to provide sufficient detail regarding litigation). The SEC would prohibit each of these disclosures if it reflected negatively on the SEC's allegations in a settled enforcement action.

In essence, the SEC requires the withholding of information from the investing public when the SEC is involved in a case, but condemns such withholding in many other circumstances. The same reasons the SEC cites in support of its cases compelling private parties to disclose aspects of private litigation and settlements weigh in favor of permitting those who settle with the SEC to provide information to the investing public about their settlements with the SEC.

IV. The SEC Is Not Infallible and Should Welcome Exposure of Its Unproven Allegations to Scrutiny

"Sunlight is said to be the best of disinfectants."[7] Like any organization, the SEC is capable of error. But unlike many organizations over which the SEC has considerable authority, the SEC is a federal government agency "whose interest . . . is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). The 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.

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[7] Louis Brandeis, *Other People's Money* (1914).

An extreme example of injustice demonstrates the point. In a now infamous case involving allegations of options backdating at a public technology company, the SEC secured settlements against the company and several of its employees. In one such settlement in March 2008, the SEC obtained a judgment requiring payment of $1.4 million in penalties and disgorgement from the company's vice president of human resources. J., *SEC v. Tullos*, No. SACV 08-242-AG (MLGx) (C.D. Cal. Mar. 10, 2008), ECF No. 6.

The March 2008 settlement was subject to the SEC's gag order, and so the settling defendant was not free to speak about the reasons she settled, the weaknesses in the SEC's case, or the ambiguous nature of the legal theory at issue.

In the meantime, a parallel criminal case proceeded to trial against other defendants. But before that trial concluded, the district court judge presiding over both the civil SEC and criminal cases made a stunning announcement from the bench. Based on findings of egregious prosecutorial conduct, the judge dismissed the criminal cases. The judge cited, among other things, that the defendant who settled with the SEC met with the government "on 26 separate occasions and [the government] subjected her to grueling interrogation during which the government interjected its views of the evidence and, at least on one occasion, told her that she would not receive the benefits of cooperation unless she testified differently than she had initially in an earlier session." (Tr. of Proceedings at 5196-97, *United States v. Ruehle,* No. SACR 08-00139-CJC (C.D. Cal. Dec. 15, 2009).

Based on these and other findings of prosecutorial misconduct, the judge dismissed the criminal cases and "discourage[d] the SEC from proceeding further with the case. . . . The accounting standards and guidelines were not clear, and there was considerable debate in the high-tech industry as to the proper accounting treatment for stock option grants." *Id.* at 5201.

Nearly a year after the judge's actions, the SEC revised its settlement with the defendant, eliminating the $1.4 million in penalties and disgorgement. Am. Final J., *SEC v. Tullos*, No. SACV 08-242-CJC (MLGx) (C.D. Cal. Nov. 10, 2010), ECF No. 11.

From the time of the initial settlement and imposition of a gag order in March 2008 to the December 2009 hearing at which the judge revealed the prosecutorial misconduct, the settling defendants kept mum as the SEC demanded. They did not talk about the formidable amount of time, energy, and expense necessary to litigate against the SEC, or the unclear accounting standards at issue, or the pressure exerted by government attorneys to testify in a certain way, or defenses and exculpatory facts they would have asserted had they not settled. Moreover, if the judge presiding over the parallel proceedings had not uncovered the prosecutorial misconduct, the public never would have learned of the troublesome issues with the SEC's case.

All of this is of course immensely important to settling defendants such as the Petitioner in this case. But full and frank discussion about SEC enforcement actions is also important to the general public and particularly to those with a connection to the

securities markets. As then-SEC Chair Arthur Levitt said in a 1999 speech to the Economic Club of New York, "Quality information is the lifeblood of strong, vibrant markets. Without it, investor confidence erodes. Liquidity dries up. Fair and efficient markets simply cease to exist."[8] Rather than impeding the flow of information about its unproven allegations as it does with settlement gag orders, the SEC should be barred from discouraging full, frank, public discussion.

CONCLUSION

The petition for a writ of certiorari should be granted.

April 22, 2022

Respectfully Submitted,'

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[8] Arthur Levitt, Chairman, SEC, Prepared Remarks Before the Economic Club of New York City, *Quality Information: The Lifeblood of Our Markets* (Oct. 18, 1999), https://www.sec.gov/news/speech/speecharchive/1999/spch304.htm

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