

No. 25-1100

In the Supreme Court of the United States

THOMAS JOSEPH POWELL, ET AL.,
PETITIONERS,

v.

SECURITIES AND EXCHANGE COMMISSION,
RESPONDENT.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

**BRIEF OF FLOYD ABRAMS
AS AMICUS CURIAE SUPPORTING PETITIONER**

LISA S. BLATT
Counsel of Record
ERIN M. SIELAFF
CHRISTOPHER J. BALDACCI
WILLIAMS & CONNOLLY LLP
*680 Maine Avenue SW
Washington, DC 20024
(202) 434-5000
lblatt@wc.com*

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INTEREST OF AMICUS CURIAE*

Floyd Abrams has been a leading First Amendment lawyer for over five decades, enabling him to offer a unique perspective on the constitutionality of the SEC's Gag Rule.

Mr. Abrams has orally argued in the Supreme Court, as counsel to parties or amici, in thirteen First Amendment cases, including *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979); *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976); *McConnell v. FEC*, 540 U.S. 93 (2003); and *Citizens United v. FEC*, 558 U.S. 310 (2010). He was co-counsel with Alexander Bickel in the Pentagon Papers case, *New York Times Co. v. United States*, 403 U.S. 713 (1971).

He is the author of three books about the First Amendment: *Speaking Freely: Trials of the First Amendment* (2005); *Friend of the Court: On the Front Lines with the First Amendment* (2013); and *The Soul of the First Amendment* (2017). He has taught courses about the First Amendment at Yale Law School, Columbia Law School, the Columbia Graduate School of Journalism, and New York University Law School. Senator Daniel Patrick Moynihan publicly described him as “the most significant First Amendment lawyer of our age.”

Moreover, Mr. Abrams has represented clients subject to the SEC's Gag Rule. In 2022, Mr. Abrams filed a

* Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Counsel of record were provided notice of amicus' intent to file this brief in compliance with Rule 37.2.

petition for a writ of certiorari challenging the Gag Rule’s constitutionality, which this Court denied. *See Romeril v. SEC*, 142 S. Ct. 2836 (2022).

SUMMARY OF ARGUMENT

Every person targeted by an SEC enforcement action must make a painful and extraordinarily consequential decision: deny the SEC’s allegations and litigate, sinking unknown months or years into a drawn-out and expensive fight with the federal government’s experienced enforcement machinery; or, alternatively, reach a settlement. Faced with that Hobson’s choice, it is no surprise that nearly all defendants settle. Gideon Mark, *SEC and CFTC Administrative Proceedings*, 19 U. Pa. J. Const. L. 45, 57 (2016). But Door Number 2 comes with a cost: the SEC does “not ... permit a defendant ... to consent to a judgment or [sanctions] order ... while denying the allegations in the complaint or order for proceedings.” 17 C.F.R. § 202.5(e).

This Gag Rule is blatantly unconstitutional. For several reasons this Court should grant certiorari to make that clear.

First, the SEC conditions the benefit of settlement—which lets enforcement targets avoid protracted and expensive litigation—on the forfeiture of certain First Amendment rights in perpetuity. The Gag Rule is therefore a classic unconstitutional condition. That First Amendment rights can be waived does not change the calculus. An unconstitutional condition is never a valid waiver. And waivers must be knowing and voluntary—an insurmountable hurdle given the crushing settlement pressures burdening SEC defendants. Plus, bread-and-butter contract principles establish that contract clauses

(like the Gag Rule) are unenforceable if they violate public policy—a standard easily met here.

Second, the Gag Rule interferes with defendants’ rights to criticize their enforcement proceedings. As several historical examples show in the criminal context, this free-speech right prevents prosecutorial discretion from bleeding into prosecutorial overreach. For 98% of SEC defendants, however, that check on the government is eliminated.

Third, the harms from the Gag Rule are real and recurring. The SEC enforces the Rule formally and informally, including by filing motions to vacate settlements, sending letters, and using the Rule in litigation to shield SEC conduct from judicial review. The Gag Rule thus wreaks havoc on the First Amendment rights of settling defendants from Fortune 50 companies to Average Joes. And third parties who did not settle with the SEC, like the press, are gagged too, since they cannot publish statements from settling defendants.

ARGUMENT

I. The SEC’s Gag Rule Is an Unconstitutional Condition

The First Amendment prohibits the government from both forcing a person to be a mouthpiece for the government’s views and gagging a person’s speech based on its content. But the SEC threatens defendants with prosecution and punishment unless they agree to never contest the allegations against them. That runs afoul of the longstanding prohibition on unconstitutional conditions.

A. The SEC Cannot Constitutionally Condition Settlement on Waiving First Amendment Rights

1. The government may not “condition[.]” the “conferral of a benefit ... on the surrender of a constitutional right.” *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484,

513 (1996). This is true even if the government has no obligation to provide the benefit. *Id.* For example, the government can't condition legal-aid funding on not raising certain arguments. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 546-49 (2001). Nor can it condition the renewal of an employment contract on refraining from criticizing the government. *Perry v. Sindermann*, 408 U.S. 593, 598 (1972). The “greater” power to withhold the benefit does not include the “lesser” power to offer it only on unconstitutional terms.

The unconstitutional-conditions doctrine flows from the principle that the government cannot do indirectly what it cannot do directly. *See Rumsfeld v. F. for Acad. & Inst. Rts., Inc.*, 547 U.S. 47, 59 (2006). “[I]t is ... axiomatic that a state may not induce ... private persons to accomplish what it is constitutionally forbidden to accomplish.” *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) (cleaned up). “If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution ... may thus be manipulated out of existence.” *Frost v. R.R. Comm’n of State of Cal.*, 271 U.S. 583, 594 (1926). Therefore, the government cannot condition the avoidance of punishment on a person’s accession to an unconstitutional restriction.

There is no dispute that the First Amendment forbids the government from “compel[ling] a person to speak its own preferred messages.” *303 Creative LLC v. Elenis*, 600 U.S. 570, 586 (2023). Nor may the government “use the power of the State to punish or suppress disfavored expression.” *Nat’l Rifle Ass’n v. Vullo*, 602 U.S. 175, 188 (2024). But the SEC’s Gag Rule does both—it requires defendants to either “admit the allegations” against them

or “state[] that [they] neither admit[] nor den[y] the allegations,” no matter how fervently they maintain their innocence. 17 C.F.R. § 202.5(e). And the SEC prohibits defendants from ever denying the allegations—or even making statements that give the impression that the allegations were unfounded. *See id.*; Pet. 9.

The SEC achieves those unconstitutional speech restrictions only by making them a condition of a government benefit. That is, to secure a favorable dispute resolution with the government, parties must waive their free-speech rights. That condition puts this case on all fours with the canonical cases where the government holds out a benefit that a person can only obtain by ceding their constitutional rights. *See, e.g., Perry*, 408 U.S. at 597-98 (employment); *Velazquez*, 531 U.S. at 536-37 (funding); *Barron v. Burnside*, 121 U.S. 186, 200 (1887) (permission to do business within a state).

But the Gag Rule is even more pernicious because it acts as both a carrot and a stick. A person must relinquish his First Amendment rights to resolve the SEC’s prosecution on more favorable terms. But if he cherishes his First Amendment rights enough to forego a settlement, the SEC will hale him before a judicial or administrative tribunal and seek severe professional and monetary penalties. If the government cannot condition benefits on unconstitutional requirements, it certainly cannot demand that a person accept the unconstitutional condition with a gun to his head.

It is immaterial that, by settling, the SEC forfeits its right to prosecute further, by pursuing either more charges or higher penalties. This Court has “repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional rights.” *Koontz*

v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 608 (2013). Put differently, the SEC’s greater power to refrain from settlement does not entail the lesser power to offer a settlement on terms that offend the First Amendment.

2. Unsurprisingly then, many courts have acknowledged that “the Constitution prevents courts from enforcing the waiver of First Amendment rights as a condition of settlements.” *SEC v. Moraes*, 2022 WL 15774011, at *4 (S.D.N.Y. Oct. 28, 2022) (collecting cases). For example, the Fourth Circuit in *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 222 (4th Cir. 2019), held that Baltimore could not require plaintiffs settling civil-rights suits to waive their rights to criticize the police—“the First Amendment” made such a waiver “void.” The Second Circuit held that a judgment between two private parties—even one “entered on consent”—violated the First Amendment because it prohibited a defendant from publishing any information about the plaintiff. *Crosby v. Bradstreet Co.*, 312 F.2d 483, 485 (2d Cir. 1963). The court had “no power” to issue a prior restraint “against the publication of facts which the community has a right to know and” the defendant “has the right to publish.” *Id.* And the Sixth Circuit held that a state could not condition a liquor license on an establishment’s agreement not to exercise its “constitutional rights ... to free expression.” *G&V Lounge, Inc. v. Mich. Liquor Control Comm’n*, 23 F.3d 1071, 1077 (6th Cir. 1994). Relatedly, the Ninth Circuit held that a trial court could not restrict a defendant from making public comments about a former county commissioner—even pursuant to a voluntary plea agreement. *United States v. Richards*, 385 F. App’x 691, 692-93 (9th Cir. 2010).

B. Settling Parties Cannot Validly Waive Their First Amendment Rights at Gunpoint

Despite all this, the Ninth Circuit blessed the SEC’s Gag Rule based largely on the principle that constitutional rights, including First Amendment rights, “can be waived.” Pet.App.10a. But that truism does nothing to rehabilitate the Gag Rule.

1. First and foremost, if a putative waiver amounts to an unconstitutional condition, it is simply unlawful—full stop. *See Moraes*, 2022 WL 15774011, at *4. The Constitution prohibits the government from withholding benefits or threatening punishment that is “calculated to curtail” constitutional rights, even if the state successfully “exact[s] ... a waiver of the exercise of [a person’s] constitutional right[s].” *Terral v. Burke Constr. Co.*, 257 U.S. 529, 532 (1922). In other words, “regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution’s enumerated rights by coercively withholding benefits from those who exercise them.” *Koontz*, 570 U.S. at 606. Otherwise, the government could consistently sidestep constitutional guarantees; instead of directly stripping people’s liberties, it need only turn the screws tighter and tighter until people “agree” to give them up, including rights totally unconnected to the government’s legitimate purposes.

Indeed, that is what separates unconstitutional conditions like the Gag Rule from permissible waivers. *See* Pet. 20-22. Unlike criminal plea agreements, for example, where a one-time waiver of procedural trial rights is an essential component of a bargained-for exchange with the government, the Gag Rule has no nexus to SEC settle-

ments—it is a lifetime ban on speech that defendants cannot negotiate away and extends well beyond the scope of the proceedings.

2. But even under traditional waiver rules, a waiver of free-speech rights is valid only if it is knowing and voluntary. *See, e.g., Puckett v. United States*, 556 U.S. 129, 136 (2009). And a defendant’s submission to the Gag Rule is not voluntary because there is no meaningful opportunity to refuse the SEC’s offer.

The overwhelming majority of defendants have no choice but to settle with the SEC. “For most individuals, and even for many well-resourced corporate defendants, the time, expense, and difficulty of litigating against the federal government makes settling the only economically viable option to resolve Commission enforcement actions.” Pet.App.53a (Comm’r Peirce, dissenting). No wonder an estimated 98% of enforcement targets settle. Mark, *supra*, at 57.

Moreover, the Gag Rule is a “mandatory, non-negotiable term,” so even defendants with infinite resources and preternatural bargaining power cannot resist the gag once they decide to settle. Pet.App.54a (Comm’r Peirce, dissenting). Indeed, several of the petitioners here tried to negotiate out the Gag Rule clauses in their settlements to no avail. *See, e.g.,* CA9 Dkt. 17.1, ER-130, 146. Put simply, the SEC’s awesome enforcement advantages force almost every enforcement target into settling; and once defendants are in settlement talks, they have no choice but to agree to a lifetime ban on denying or undermining the SEC’s allegations. As Judge Jones (joined by Judge Duncan) put it: the SEC’s Gag Rule says to defendants: “Hold your tongue, and don’t say anything truthful—ever,” or else “get bankrupted by having to continue litigating with the SEC.” *SEC v. Novinger*, 40 F.4th 297,

308 (5th Cir. 2022) (Jones, J., concurring). Those are the only two choices, which is to say, there is no real choice at all.

The Ninth Circuit reassured itself that even though nearly every enforcement target settles with the SEC and agrees to its lifetime gag, SEC defendants “are often sophisticated players who are represented by counsel.” Pet.App.20a. But that cuts strongly *against* the conclusion that SEC settlements are meaningfully voluntary. The SEC regulates some of the most powerful and wealthiest people in the world. If even sophisticated, well-counseled parties are cowed into settling with the SEC 98 times out of 100, what chance does an ordinary person have to meaningfully resist a lifetime ban on speech? That 98% of defendants settle shows all defendants, no matter how sophisticated, face extreme settlement pressures.

The pressures inherent in SEC enforcement actions make Gag-Rule orders nothing like the other examples of valid waivers the Ninth Circuit cited. True, government employees can agree to certain First Amendment restrictions as part of government employment, private parties can sign NDAs, and public-sector employees can waive some First Amendment rights by paying dues to a public-sector union that engages in collective bargaining. Pet.App.13a. But those speakers still retain freedom to choose where to work, with whom to contract, and where to spend their money. Targets of SEC enforcement actions, by contrast, already have a glowing red dot on their chest. They face imminent deprivations of liberty and property, even if they decide to litigate and ultimately prevail on the merits.

3. Finally, even if this Court treated Gag-Rule settlements as ordinary and voluntary contracts and gave no special concern to the core First Amendment interests at

stake, the Gag Rule should still be unenforceable. Settlements memorialized in a consent judgment have some features of a contract. See *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 236 n.10 (1975). And a contract—including one that purports to waive statutory or constitutional rights—is “unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement.” *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987) (citing Restatement (Second) of Contracts § 178(1) (1981)).

Here the SEC’s scattershot enforcement interests collapse under scrutiny. The codified reason for the Gag Rule is that it is supposedly “important to avoid creating ... an impression that a decree is being entered or a sanction imposed[] when the conduct alleged did not, in fact, occur.” 17 C.F.R. § 202.5(e). But that is a naked preference that the government’s version of events go unquestioned. It beggars belief that the government has a substantial interest in preventing the public from hearing objections to its claims or criticism of its behavior.

The Ninth Circuit speculated that the Gag Rule merely restores the pre-prosecution world (*i.e.*, pre-charges), and the “civil enforcement action remains subject to reopening at the defendant’s election” if he decides to speak out. Pet.App.21a. But the notion that the Gag Rule restores a neutral status quo ante is a fiction. After settlement, both the SEC’s allegations and the fact of settlement remain public, giving the distinct impression that the settling defendant committed the alleged offenses.

The most a gagged defendant can do is “state[] that he neither admits nor denies the allegations,” but that operates as a deafening silence when the SEC has freely and publicly accused the settling party of illegality. So instead of maintaining some sort of neutral world, the SEC’s Gag

Rule privileges and protects the government's speech while silencing any counter-speech. *Infra* pp. 20-21. That runs contrary to the most basic First Amendment principles.

The Ninth Circuit also gestured at the SEC's interest in "determining how to try its cases," "deciding upon settlement terms," and both parties' interest in having "options" for addressing the SEC's allegations. Pet.App.23a. But the general interest in freedom of contract says nothing about whether the SEC's *specific* interest in including a Gag Rule in every settlement is strong enough to justify a prior restraint on speech. Indeed, the Ninth Circuit had to admit that to the extent the SEC believes "it is necessary to silence defendants in order to promote public confidence in the SEC's work, this rationale would be improper. Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that it was adopted in part to protect the free discussion of governmental affairs." Pet.App.23a (cleaned up).

The SEC's meager interest in controlling the narrative surrounding its prosecutions is easily outweighed by the bedrock public policy favoring free expression and unhindered criticism of the government. The "freedom of speech includes both the right to speak freely and the right to refrain from speaking at all." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 892 (2018) (cleaned up).

Indeed, the Fourth Circuit has already invalidated a comparable waiver of First Amendment rights in a settlement agreement. *Overbey*, 930 F.3d at 222-23. In *Overbey*, Baltimore had a policy of requiring plaintiffs who settled civil-rights lawsuits against the city to "promise not to speak to the media about either their underlying

allegations or the settlement process itself.” *Id.* at 219. Baltimore advanced many of the same interests in favor of the waiver that the SEC advances here: “reduc[ing] the time and money that it devotes to litigation,” protecting the reputation of its officers, and avoiding “harmful publicity.” *Id.* at 225-26. But those interests did not stand a chance against the “citizenry’s First Amendment interest in limiting the government’s ability to target and remove speech critical of the government from the public discourse.” *Id.* at 224-25. “We have never ratified the government’s purchase of a potential critic’s silence merely because it would be unfair to deprive the government of the full value of its hush money.” *Id.* at 226.

The sharp conflict between the decision below and *Overbey* alone warrants review.

II. The Gag Rule Guts a Critical Check on Prosecutorial Overreach

“[T]he Constitution requires robust protection of speech about criminal trials and the government’s effort to deprive a defendant of liberty.” *United States v. Trump*, 88 F.4th 990, 1007 (D.C. Cir. 2023). Thanks to these First Amendment protections, many defendants have criticized their criminal proceedings. Chicago mobster Al Capone famously labeled his federal tax-evasion prosecution as “a lot of bunk.” Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 Colum. L. Rev. 583, 583 (2005) (citation omitted). Defendants’ ability to criticize their criminal proceedings goes further than the mere airing of grievances, however, and serves as an important check on prosecutorial overreach. And although the risk of prosecutorial overreach is just as palpable in the civil-enforcement context, the Gag Rule—

which silences 98% of defendants—neuters any counterbalance to the government’s weighty enforcement authority.

A few historical examples demonstrate the importance of protecting defendants’ First Amendment rights and confirm the harm from the Gag Rule to defendants and democracy alike.

1. Take first the trial of Aaron Burr for treason. President Jefferson—Burr’s political enemy—had proclaimed Burr guilty of treason before charges were even filed. Charles F. Hobson, *The Aaron Burr Treason Trial* 3-4, Fed. Jud. Ctr. (2006), <https://tinyurl.com/2atf2r49>. So, in the lead up to his trial, Burr argued that the government was “acting without lawful authority” and that “no proof existed in support of” either “a commitment for treason, or for a misdemeanor.” Statement of Aaron Burr (Mar. 31, 1807), <https://tinyurl.com/3dws2mpp>.

Burr’s counsel also “attack[ed] the prosecution and its motives,” claiming President Jefferson “let slip the dogs of war, the hell-hounds of persecution, to hunt down my friend.” Hobson, *supra*, at 5. Throughout the trial, Burr and his lawyers “adhered to a strategy of attacking the motives and good faith of the government prosecuting him.” *Id.* at 24. Ultimately, Burr was vindicated when the jury acquitted him on the treason charge. *Id.*

2. In 1873, Susan B. Anthony was indicted for voting in the 1872 presidential election without the legal right to vote. She criticized her indictment in a series of public speeches, contending that she “committed no crime, but, instead, simply exercised [her] citizen’s right, guaranteed to [her] and all United States citizens by the National Constitution, beyond the power of any State to deny.”

Douglas Linder, *The Trial of Susan B. Anthony for Illegal Voting* (2007), <https://tinyurl.com/2pkp88v8>.

After the judge ordered a guilty verdict at the close of trial, Anthony again criticized her criminal proceedings at the sentencing hearing, contending that the court had “trampled under foot every vital principle of our government.” Jessie Kratz, *Susan B. Anthony: Women’s Right to Vote*, Nat’l Archives (Nov. 5, 2019), <https://tinyurl.com/ymzater6>. She also objected to the court directing her verdict, arguing she had been denied a jury of her peers, and promised “never [to] pay a dollar of [the] unjust penalty.” Linder, *supra*. Anthony aimed to “turn her trial and conviction into political gains for the women suffrage movement,” *id.*, which would not have been possible without the First Amendment’s protections.

3. Nearly a century later, in 1969, the Chicago Seven were charged with conspiracy to incite a riot during the 1968 Democratic National Convention. The “federal government sought to make an example of the[] protestors,” selecting defendants who had a history of protesting the Vietnam War. JoJo Galvan, *The Chicago 7 Trial*, Chi. Hist. Museum (Sept. 23, 2022), <https://tinyurl.com/fpvn9t8r>. During the trial, the defendants heavily criticized the proceedings and planned demonstrations against “the American judicial system.” *E.g.*, J. Anthony Lukas, *Judge Hoffman Is Taunted at Trial of the Chicago 7 After Silencing Defense Counsel*, N.Y. Times (Feb. 6, 1970), <https://tinyurl.com/nxev2hs8>. Ultimately, the Seventh Circuit tossed their convictions, citing judicial and prosecutorial bias. *United States v. Dellinger*, 472 F.2d 340, 386-91 (7th Cir. 1972).

4. Criminal defendants who plead guilty also retain their free-speech rights, unlike SEC defendants who settle. *Cf. Simon & Schuster, Inc. v. Members of N.Y. State*

Crime Victims Bd., 502 U.S. 105, 121-22 (1991). For instance, the West Memphis Three were unjustly convicted of murder at trial. John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 Cornell L. Rev. 157, 159-60 (2014). After the defendants challenged their convictions with newly found evidence, the prosecution offered a new, “highly coercive” deal: plead guilty in exchange for a sentence of time served. *Id.* at 161. The defendants ultimately did plead guilty “to a murder they adamantly maintained they did not commit” to secure their release. *Id.* at 160. The case drew widespread attention and, after entering the plea, one defendant opined that “[t]his was not justice.” *Id.* at 161. That defendants who plead guilty may still criticize their convictions is essential to the just operation of the criminal-justice system, because “factually innocent defendants do plead guilty.” *Id.* at 157 (abstract); *accord When the Innocent Plead Guilty*, Innocence Project (Jan. 26, 2009), <https://tinyurl.com/3cwb8t2n>. The First Amendment enables criminal defendants who plead guilty to draw attention to their cases and rally support—something all but 2% of SEC defendants cannot do. The upshot? The SEC is freed from a critical restraint ordinarily faced by prosecutors in the criminal context.

III. The First Amendment Harms Are Real and Recurring Because the SEC Enforces the Gag Rule

The decision below emphasized the lack of evidence “that the SEC regularly returns to court to reopen judgments for claimed violations of” the Gag Rule. Pet.App.7a. To the contrary, the SEC has both formally and informally enforced the Gag Rule, trampling the First Amendment rights of settling defendants and third parties alike.

A. The Gag Rule Is Not an Empty Threat

The SEC has enforced the Gag Rule both by filing motions to vacate settlements and by less formal means. Indeed, the SEC itself has agreed it enforces the Rule; the then-Director of the Division of Enforcement assured Congress that the SEC “has demanded a retraction or correction on those occasions when a defendant’s post-settlement statements are tantamount to a denial.” *Examining the Settlement Practices of U.S. Financial Regulators: Hearing Before H. Comm. on Fin. Servs.*, 112th Cong. (2012) (statement of Robert Khuzami, Dir., Div. of Enforcement, SEC), <https://tinyurl.com/2jhw7uwb>. The Gag Rule’s First Amendment effects are therefore tangible, as a few emblematic examples show.

1. In the mid-1990s, the SEC “construed” “[s]tatements made on behalf of” settling defendant Michael Angelos “as denials of the allegations in the Complaint.” SEC, Litigation Release No. 14886 (Apr. 22, 1996), <https://tinyurl.com/mrx4wmxv> (referencing *SEC v. Angelos*, No. B96-834 (D. Md.)). The SEC thus filed a motion to vacate the judgment on March 27, 1996. *Id.* But the SEC gave Angelos a way out—when Angelos made the following statement, the SEC “agreed to withdraw its motion to vacate”:

I settled this case without admitting or denying the allegations of the complaint. To comply with my settlement with the Securities and Exchange Commission, I withdraw any statement made on my behalf that may have been inconsistent therewith. I am pleased that this settlement resolves the SEC’s lawsuit against me. I will have no

further comment other than any sworn testimony I may give in this or any other matter.

Michael P. Angelos

Id.

Angelos demonstrates two aspects of the stunning overbreadth of the Gag Rule. For one, the SEC took issue with statements made on Angelos’s behalf—not Angelos’s own speech. The Gag Rule thus apparently requires settling defendants to police the speech of third parties who are not bound by the settlement agreement and who never even arguably waived their free-speech rights. *But see supra* § I. For another, the method of remedying a supposed Gag-Rule violation is through compelled pro-government speech. As *Angelos* shows, the SEC uses the Gag Rule to both restrict and compel speech, sounding First Amendment alarm bells.

2. In 2003, the SEC demonstrated an informal enforcement method. After Morgan Stanley settled with the SEC, the company’s CEO told investors: “I don’t see anything in the settlement that will concern the retail investor about Morgan Stanley. Not one thing.” Floyd Norris, *Morgan Stanley Draws S.E.C.’s Ire*, N.Y. Times (May 2, 2003), <https://tinyurl.com/3hnj4s5x>. The SEC took umbrage with that statement and “released a blistering letter” warning that “Morgan Stanley could face further legal action if it continued to deny having acted badly.” *Id.* The letter opined that the “allegations in the commission’s complaint against Morgan Stanley are extremely serious,” emphasized the company’s obligation not to deny those allegations, and cautioned that “the commission would regard a violation of that obligation as seriously as a failure to comply with any other term of the settlement.”

Id. In response, Morgan Stanley’s CEO wrote a letter retracting his statements and praising the SEC’s reforms. *Excerpts from Exchange of Letters*, N.Y. Times (May 2, 2003), <https://tinyurl.com/3wybrcuy>.

As *Morgan Stanley* highlights, even the SEC’s informal mechanisms for enforcing the Gag Rule trip First Amendment wires. The SEC distorted a general statement of opinion about investor takeaways from the settlement agreement into a denial of the factual allegations in the complaint. And the way to remediate that apparent Gag-Rule violation was, once again, through compelled pro-SEC speech.

3. The SEC has also wielded the Gag Rule as a sword in litigation. Consider *Black v. SEC*, 462 F. App’x 6 (D.C. Cir. 2012). There, John Gardner Black settled with the SEC after the agency took issue with how he valued the collateral backing an investment agreement. *Id.* at 7. Black consented to, among other things, “a follow-on SEC order barring him from ‘association with any broker, dealer, municipal securities dealer, investment adviser[,] or investment company.’” *Id.* (citation omitted).

Over a decade later, Black petitioned the SEC to vacate the follow-on bar order. Black argued his valuation method “would [now] be legal under a recent revision of asset valuation standards,” but the agency nonetheless denied relief. *Id.* The SEC’s “primary response to Black’s argument was to treat it as a ‘collateral attack’ on the consent injunction and the allegations in the injunctive complaint” and to argue that the Gag Rule forbade such an attack. *Id.* at 7-8. Although the D.C. Circuit did not resolve the case on that basis, *Black* evinces how the SEC tries leveraging the Gag Rule to insulate itself from judicial review.

4. The SEC followed a similar playbook in *SEC v. Rogers*, 221 F.3d 1349, 2000 WL 642467, at *1 (9th Cir. 2000) (unpublished table op.). There, defendants Robert Reed Rogers and Gregory Armijo settled with the SEC, but their settlement agreements left open the amount of disgorgement. *Id.*; Appellants’ Br., *Rogers*, 221 F.3d 1349, 1998 WL 34099213, at *1-2.

The defendants appealed the district court’s disgorgement order, arguing that their business “was not engaged in substantial business activities.” *Rogers*, 2000 WL 642467, at *1. In response, the SEC objected that the duo was “estopped from denying in this action the fact that they now seek to establish.” Appellee’s Br., *Rogers*, 221 F.3d 1349, 1998 WL 34099212, at *17-18. The court agreed with the SEC, holding that the Gag Rule barred the defendants’ argument. *Rogers*, 2000 WL 642467, at *1; accord *SEC v. O’Brien*, 2024 WL 2813722, at *1 (2d Cir. June 3, 2024) (noting part of appeal of disgorgement order “violate[d] [defendant’s] agreement with the SEC”). Here as well, the SEC invoked the Gag Rule to nip judicial review in the bud.

5. On top of these overt enforcement examples, the Gag Rule has also been overextended in more subtly pernicious ways. When testifying before the House Committee on Financial Services, Professor Paul Eckert explained that “at times the SEC staff has taken the position that the failure to use a preferred term ... or that ordinary references to litigation costs or delays amount to ‘denials’ under Rule 202.5(e).” *SEC Enforcement: Balancing Deterrence with Due Process: Hearing Before H. Comm. on Fin. Servs., Subcommittee on Cap. Mkts.*, 118th Cong. 8 (2024) (statement of Paul R. Eckert), <https://tinyurl.com/43ccp3u9>. Professor Eckert went so far as to label it “commonplace for a settling firm on the day of a

settlement announcement to receive a call from the SEC staff taking issue with some aspect of the settling firm's description of the settlement in a press release, a Form 8-K filing, or a registration amendment." *Id.*

In other words, the Gag Rule is ripe for abuse. Settling defendants must not only avoid denying allegations (like Morgan Stanley) and police the language and statements of others (like Angelos), but also use the SEC's preferred terminology to describe their cases. That result is downright Orwellian.

6. One wrinkle further complicates the enforcement picture. Courts often enter SEC settlements containing the Gag Rule as consent decrees. As a result, "a court may institute criminal contempt proceedings against an SEC defendant who violates a no-deny provision contained in a consent decree issued by that court even absent the SEC's consent." *Cato Inst. v. SEC*, 4 F.4th 91, 95 (D.C. Cir. 2021). That a court may sua sponte decide to enforce the Gag Rule only increases the chances of harm to core First Amendment rights.

7. Worse still, while the SEC's enforcement targets face real sanctions (or the ever-present threat of sanctions) for speaking out against their prosecution, the government's speech is unhindered. Through press releases, court statements, and even third parties, the SEC's allegations are amplified and treated as cold hard facts, tarnishing reputations and leading to severe personal and professional consequences.

For instance, petitioner Tom Powell settled with the SEC in 2021. Although he neither admitted nor denied the allegations, the SEC later told the public that it unequivocally "*found*" that Powell committed securities violations. *Compare* SEC, Press Release (Sept. 24, 2021),

<https://tinyurl.com/4ad43rk3>, *with* SEC, In the Matter of Resolute Capital Partners LTD, LLC (Oct. 13, 2022), <https://tinyurl.com/mrx4yk2a> (emphasis added). Such faux findings redound in trade publications, which republish the SEC’s allegations. *See, e.g., SEC Issues Order Involving Resolute Capital Partners, Homebound Resources, Thomas J. Powell and Stefan T. Toth*, Credit Risk Monitor, <https://tinyurl.com/4aep58r5> (last visited Apr. 17, 2026).

In court filings too, the SEC will paint its allegations in settled cases as facts without adding qualifying language. *E.g.*, Mem. in Opp. 5-6, *SEC v. Allaire*, No. 3-cv-4087 (S.D.N.Y. June 18, 2019), Dkt. 31; Reply 2 n.5, *Allaire* (S.D.N.Y. July 5, 2019), Dkt. 32 (identifying issue). This dramatic asymmetry in speaking power recurs with each settlement. And privileging government speech while silencing citizens’ dissent is precisely the sort of viewpoint discrimination that the First Amendment prohibits. *Cf. Chiles v. Salazar*, 146 S. Ct. 1010, 1020-22 (2026).

B. The Gag Rule Infringes the First Amendment Rights of All Types of Defendants and of Third Parties

A whopping 98% of defendants settle with the SEC, and the SEC forces the Gag Rule into each and every settlement. *Supra* p. 8. Defendants of all types—from financial institutions to individuals—must therefore agree to speech suppression to avoid potentially ruinous litigation. *See, e.g.*, Consent of Def. Goldman, Sachs & Co. ¶ 15, *SEC v. Goldman Sachs & Co.*, No. 10-cv-3229 (S.D.N.Y. July 20, 2010), Dkt. 25 (incorporating Gag Rule); Consent of Def. Gregory Altieri ¶ 12, *SEC v. Altieri*, No. 20-cv-6343 (E.D.N.Y. Apr. 20, 2021), Dkt. 15 (same).

Not only does the Gag Rule curtail these defendants' free-speech rights, but it also infringes the First Amendment rights of third parties, who are not even bound by the settlement. For instance, the Cato Institute challenged the Gag Rule after "contract[ing] to publish a certain manuscript" written by a settling defendant. *Cato Inst.*, 4 F.4th at 93. But Cato could neither publish that manuscript nor find settling defendants to participate in panel discussions about "the SEC's prosecutorial overreach" because of the looming specter of Gag-Rule enforcement. *Id.* As *Cato* shows, the Gag Rule silences the press alongside defendants by interfering with publications that would critique the SEC's enforcement activities. The essential safeguard of liberty that comes from the press's government-criticizing function, *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713-17 (1931), is thus hamstrung.

The Gag Rule also stymies the press's ability to report on SEC settlements. *See* Reporters' Amicus Br., *Cato Inst.*, 4 F.4th 91, 2020 WL 3542773, at *5-6. Ordinarily, reporters gather information from both sides of the "v." in a lawsuit to ensure the public has a complete picture of a case. *See id.* The Gag Rule grinds that process to a halt by forbidding defendants from speaking openly about their cases. At bottom, the press cannot fulfill its critical function of keeping the public informed of SEC enforcement proceedings when a defendant settles—"and an informed public is the essence of working democracy." *See Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983).

This Court should review the Gag Rule now. The Ninth Circuit's suggestion to wait for a future case cloaks the rule from challenge, indefinitely barring the speech of countless defendants.

CONCLUSION

The petition should be granted.

Respectfully submitted,

LISA S. BLATT

Counsel of Record

ERIN M. SIELAFF

CHRISTOPHER J. BALDACCI

WILLIAMS & CONNOLLY LLP

680 Maine Avenue SW

Washington, DC 20024

(202) 434-5000

lblatt@wc.com

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