No. 25-1100

In the Supreme Court of the United States

THOMAS J. 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 FORMER SEC TARGETS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

JILL C. JACOBSON
WEIL, GOTSHAL & MANGES LLP
1395 Brickell Avenue
Miami, FL 33131

MARK A. PERRY
Counsel of Record
WEIL, GOTSHAL & MANGES LLP
2001 M STREET NW
Washington, DC 20036
(202) 682-7000
Mark.Perry@weil.com

RYAN P. HOR
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Former SEC targets Michelle Cochran and Rengan Rajaratnam respectfully submit this brief as *amici curiae* in support of the petition for a writ of certiorari.

I. Michelle Cochran[2]

If not for some internal mismanagement at the Securities and Exchange Commission, Michelle Cochran may well have been one of the thousands of individuals subject to the SEC's Gag Rule. In 2007, Ms. Cochran was "[a] single mother of two and a certified public accountant" who began working for "a small company called The Hall Group," with an "owner, David Hall, [who] was not just abrasive but dishonest." *Axon Enter., Inc.* v. *FTC*, 598 U.S. 175, 213 (2023) (Gorsuch, J., concurring in the judgment). After significant mistreatment in the workplace, "Ms. Cochran chose to quit and put the whole ordeal behind her." *Ibid.*

In 2016, however, "the SEC alleged that Ms. Cochran had failed to complete auditing checklists, leaving certain sections of certain forms 'blank.' The agency brought … charges [against her] even though there was 'no evidence' that the incomplete paperwork had resulted in any 'monetary harm to clients or inves-

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[1] Pursuant to Supreme Court Rule 37.2, *amici curiae* timely provided notice of their intent to file this brief to all parties. No counsel for a party authored any part of this brief. No party or counsel for a party, and no person other than *amici curiae*, made a monetary contribution intended to fund its preparation or submission.

[2] Michelle Cochran has since returned to using her maiden name Michelle Goheen. This brief uses her former surname, Cochran, only to be consistent with the legal filings in her case.

tors.'" *Ibid.* (internal citation omitted). "She refused to settle and sought to represent herself in the hearing that followed. It did not go well. Just as her hearing was about to start, her former boss settled his own case and then turned about to testify against Ms. Cochran." *Id.* at 213–14. Ms. Cochran's self-representation was no match for an ALJ who had never ruled against the SEC. "In the end, the ALJ fined Ms. Cochran $22,500 and banned her from practicing before the SEC as an accountant for at least five years." *Id.* at 214.

In 2018, several years after her dealings with the agency began, and after her administrative proceeding was vacated as unconstitutional in light of *Lucia* v. *SEC*, 585 U.S. 237 (2018), the SEC "chose instead to take a mulligan," and again initiated new administrative proceedings against her. *Axon*, 598 U.S. at 214. For Ms. Cochran, enough was enough. She sued the SEC in federal court, arguing that "all of its ALJs are unconstitutionally insulated from presidential supervision." *Ibid.* After a "multi-year odyssey[] through the entire federal judicial system," Ms. Cochran won a unanimous procedural victory in this Court—allowing her to raise structural constitutional arguments in federal court in the first instance. *Ibid.* Nevertheless, the agency's administrative proceedings against her were still pending.

Shortly after this Court's decision, the SEC suddenly dismissed Ms. Cochran's case, along with dozens of others, after discovering that "certain Adjudication memoranda were accessible to all Enforcement staff, including attorneys investigating and prosecuting [Ms. Cochran and the other dismissed defendants]." *Second Commission Statement Relating to Certain Administrative Adjudications*, U.S. Sec. & Exch.

Comm'n (SEC Jun. 2, 2023). But for that improper, intra-agency sharing of information, Ms. Cochran may have faced the illusory choice presented to the individual petitioners in this case, some of whom are discussed further below. Indeed, after her case was dismissed, one of Ms. Cochran's first public statements reads:

> *The fight that started nearly a decade ago has finally come full circle. For years, others have told my story—through court filings, news articles, and legal analysis. But now, I'm ready to tell it myself. More to come soon.*

Accordingly, Ms. Cochran has a strong interest in ensuring those charged by the SEC maintain their First Amendment rights, even when they choose to settle.

II. Rengan Rajaratnam

Like the petitioners in this case, Rajarengan ("Rengan") Rajaratnam has been subject to the Gag Rule since he settled with the SEC in 2014. As described below, Mr. Rajaratnam was accused of insider trading and, for the same conduct, charged criminally by the Department of Justice and civilly by the SEC. Mr. Rajaratnam was acquitted of the criminal charges by a jury of his peers yet remains unable to speak about the very same allegations because he settled his administrative proceeding with the SEC. His brother Raj Rajaratnam, by contrast, refused to settle more severe charges stemming from the same course of events. Mr. Rajaratnam's brother fought to the end—even spending time in prison on companion criminal charges—and now exercises his First Amendment rights fully and frequently by discussing the allegations against him and his critiques of the SEC, including in a book

that he co-authored on the topic and on major news networks. Unlike his brother, Mr. Rajaratnam has been silenced for more than ten years. He has first-hand experience of the two-tiered speech regime created by the SEC's Gag Rule and the second- and third-order harms caused by suppression of speech in this context. Mr. Rajaratnam continues his fight to reenter the investment-advisory space to provide for his family, largely hamstrung by his inability to speak freely to prospective employers (whose sponsorship is required to obtain reentry into the field). Thus, he has a strong interest in advocating for this Court's review of the pivotal question presented.

SUMMARY OF ARGUMENT

This Court should grant the petition for a writ of certiorari and reverse the judgment below because the Securities and Exchange Commission's so-called Gag Rule violates the First Amendment, and in so doing, conceals the toll that suppression of speech exacts on the individuals it silences.

The Gag Rule ensures that the agency's factual framing of enforcement proceedings that end in settlement is first, last, and final. If an individual (or entity) wins or even loses an enforcement action against the SEC, that litigant's ability to speak freely remains intact. If that same litigant settles, however, the Gag Rule requires the "withdraw[al] [of] any papers filed … to the extent that they deny any allegations in the complaint,"[3] and forbids the litigant from making "any public statement denying, directly or indirectly,

[3] This is representative of the language used by the SEC in all of its settlements. See generally *SEC* v. *Moraes*, No. 22-CV-8343, 2022 WL 15774011 (S.D.N.Y. Oct. 28, 2022).

any allegation in the complaint or creating the impression that the complaint is without factual basis." 17 C.F.R. 202.5(e). Nor can that litigant provide a statement to third parties or the press. The Rule even goes so far as to prevent the litigant from "permit[ting]" others to deny the allegations lodged by the agency. *Ibid.* In effect, the SEC's Gag Rule guarantees not only that everyday Americans are unable to contest the allegations lodged against them by their government, but that no one can.

The Gag Rule is particularly pernicious because the allegations involved in SEC enforcement actions necessarily strike at the heart of the accused's professional integrity. Individuals subject to the Gag Rule are left with an illusory choice: contest the charges, expending immense financial resources with a 90% chance of losing, or settle and concede to an unconstitutional suppression of speech and a professional death sentence. See *Axon*, 598 U.S. at 215 ("From 2010 to 2015, the SEC won 90% of its contested in-house proceedings compared to 69% of the cases it brought in federal court." (internal citation omitted)); see *Cochran* v. *SEC*, 20 F.4th 194, 229–30 (5th Cir. 2021) (en banc), aff'd sub nom., *Axon*, 598 U.S. at 175, (Oldham, J., concurring (observing that 98% of those charged ultimately settle (internal citation omitted))).

The SEC's continued use of the Gag Rule presents a clear violation of the First Amendment. That alone justifies review. But as set forth below, the constitutional injury inflicted by the Gag Rule triggers staggering and prolonged real-world harm to litigants who often have no practical choice other than to settle.

ARGUMENT

As illustrated by the experiences of *amici*—Michelle Cochran and Rengan Rajaratnam—as well as petitioners such as Ray Lucia, Thomas Powell, Christopher Novinger, and Cassandra Toroian, the SEC's Gag Rule often causes devastating harm on silenced individuals' professional and personal lives. For many defendants, the choice to settle is illusory at best and is more accurately thought of as a rational reaction to significant financial and procedural imbalances between the settling defendant and the agency. And even for individuals who initially refuse settlement, such as Ray Lucia and Rengan Rajaratnam, among others, most do settle in the end. Under these circumstances, the allegations contained within some SEC settlements are not tried-and-tested recitations of fact and law, but written manifestations of accepting defeat—sometimes, after years-long exchanges with the agency and further appeals in federal court. Even so, those who settle, irrespective of whether they ever admitted any wrongdoing, are bound by the SEC's narrative as presented in public documents.

I. Settlement is Often a Last Resort

A. The Initial Pressure to Settle

For many individuals living under the SEC's Gag Rule, settlement was the outcome of last resort. To illustrate, in 2012, petitioner Ray Lucia refused to settle when the SEC charged him with violating the anti-fraud provisions of the Investment Advisers Act of 1940 and SEC rules on the basis that his prospective-client presentations used the word "backtest" to de-

scribe hypothetical returns.[4] Choosing to litigate against the SEC is tantamount to "betting the farm," but that did not deter Mr. Lucia—in no small part because the SEC depicted him as a fraudster in its press release, ruining his reputation and that of his company which employed three of his children, his brother, his nephew, and nearly one hundred long-time staff members. *Tilton* v. *SEC*, 824 F.3d 276, 298 n.5 (2d Cir. 2016) (Droney, J., dissenting) (internal citation omitted); see *SEC Charges Radio Personality for Conducting Misleading Investment Seminars*, 2012 WL 3835937 (SEC Sept. 5, 2012).

Amicus Rengan Rajaratnam also originally refused to settle with the SEC after he was civilly and criminally charged in 2013 for insider trading. By 2014, however, the U.S. Attorney's Office for the Southern District of New York dropped four of the criminal counts against Mr. Rajaratnam; the presiding judge dismissed two counts after the close of evidence at trial; and the jury ultimately returned a verdict of not guilty on the sole remaining count. Unlike his brother, who was convicted on more significant charges and

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[4] The SEC took issue with the investment-strategy presentation Mr. Lucia used at prospective-client seminars (at which no securities were ever offered or sold). Two slides (out of one hundred twenty six) compared clearly labeled "hypothetical illustration[s]" of potential investor outcomes by juxtaposing his approach with standard approaches used by other advisors (so-called "backtests"). Mr. Lucia's presentation was regularly reviewed and approved by FINRA-registered broker-dealers, and the SEC even reviewed a similar version that contained the two slides later objected to by the agency. Perhaps most importantly, not one of the over 50,000 attendees at Mr. Lucia's seminars ever alleged that his presentation was misleading before the SEC announced its charges against him.

served out a prison sentence, Mr. Rajaratnam was acquitted. An acquittal did not translate to the dismissal of the SEC's concurrent civil enforcement proceedings against him, however, and post-acquittal Mr. Rajaratnam was forced to choose between continuing to contest the same allegations in a new arena or settling with the agency.

Michelle Cochran found herself at the same crossroads. Ms. Cochran was working as an auditor at a small accounting firm in Texas when, three years after she left the firm, the SEC initiated an enforcement action against her alleging that she "failed to complete auditing checklists" by "leaving certain sections of certain forms 'blank.'" *Axon*, 598 U.S. at 213 (internal citation omitted). The SEC brought these charges against Ms. Cochran "even though there was 'no evidence' that the incomplete paperwork had resulted in any' monetary harm to clients or investors.'" *Ibid.* (internal citation omitted). "She refused to settle and sought to represent herself in the hearing that followed," principally because she was the mother of two small children and firmly believed that she had done nothing wrong. *Ibid.*

Mr. Lucia, Mr. Rajaratnam, Ms. Cochran, and many others who are charged by the SEC but similarly seek to preserve their reputations, reflexively refuse to settle in the first instance.

B. Agency Adjudication All But Requires Settlement

Litigants who opt to defend themselves against the SEC face an uphill battle: "relaxed rules of procedure and evidence" that the SEC "make[s] for [it]self." *Axon*, 598 U.S. at 215 (Gorsuch, J., concurring in the judgment). "Agencies like the SEC … combine the functions of investigator, prosecutor, and judge under

one roof." *Ibid.* As a result, the SEC nearly always wins. See *ibid.* ("From 2010 to 2015, the SEC won 90% of its contested in-house hearings compared to 69% of the cases it brought in federal court."); see also Neil Gorsuch & Janie Nitze, *Over Ruled: The Human Toll of Too Much Law* 77 (2024) (citing Peggy Little, *Ray Lucia's Mythic Lift*, New Civil Liberties Alliance (June 19, 2020)). Indeed, "most defendants don't make it to federal court … because first they'd have to wade through the SEC's lengthy investigation-and-enforcement amalgam." *Cochran*, 20 F.4th at 228 (Oldham, J., concurring). And once there, the chances on appeal aren't much better—presuming litigants have the resources to seek appellate review—because "judges sometimes defer to the agency's conclusions (especially when it comes to disputed questions of fact)." *Axon*, 598 U.S. at 216.[5] Mr. Lucia and Ms. Cochran—both of whom challenged the agency's actions against them in federal court—illustrate why the mere prospect of agency adjudication puts pressure on individuals to settle.

As for Mr. Lucia, his initial administrative proceeding was assigned to an administrative law judge who had *never* ruled against the SEC in his career—not once. At the time Mr. Lucia was charged, there was no statutory or regulatory definition of the term

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[5] Six years after Mr. Lucia was charged, he had challenged both the merits of the SEC's allegations and the constitutionality of the proceedings against him before the SEC, the D.C. Circuit Court of Appeals, and finally this Court. He ultimately prevailed on constitutional grounds, as memorialized in this Court's 2018 landmark appointments decision, *Lucia* v. *SEC*, but his journey contesting the merits of the charges against him was far from over.

"backtest" or guidance related thereto. Nevertheless, the ALJ held that Mr. Lucia's presentation constituted fraud because it "did not meet[] the definition of 'backtest' that I [the ALJ] have adopted." *In re Raymond J. Lucia Cos.*, 2013 WL 6384274, at *27 (SEC Dec. 6, 2013), modifying *In re Raymond J. Lucia Cos.*, 2013 WL 3379719 (SEC July 8, 2013); see also Daniel Gallagher and Michael Piwowar, Comm'rs, Sec. & Exch. Comm'n, *Dissenting Opinion*, *In re Raymond J. Lucia Cos.*, No. 75837 (SEC Oct. 2, 2015) (categorizing the decision as "needlessly engag[ing] in 'rulemaking by opinion'" and "creat[ing]" the requirement from "whole cloth"). And even though the ALJ recognized that no investor had suffered any losses, he barred Mr. Lucia from the securities industry for life, fined him $300,000, and prohibited him from associating with anyone in the industry (including his own son, who had acquired the business before Mr. Lucia was charged). *In re Raymond J. Lucia Cos.*, 2013 WL 6384274, at *60.

Nor was Michelle Cochran spared from this particular ALJ, who happened to adjudicate her case too. Ms. Cochran was on notice of her odds long before the ALJ presiding over her case was singled out by members of this Court. See *Lucia*, 585 U.S. at 242; *Axon*, 598 U.S. at 214–15 (describing how the ALJ "made a practice of warning defendants during settlement discussions that he had never ruled against the agency's enforcement division" (internal citation omitted)). Indeed, after quickly exhausting her legal budget, her counsel—a former SEC enforcement lawyer—told Ms. Cochran that she "would be better off representing herself" against the agency. The ALJ ultimately "fined Ms. Cochran $22,500 and banned her from practicing be-

fore the SEC as an accountant for at least five years." *Axon*, 598 U.S. at 214.

It is easy to see why the vast majority of those charged by the SEC settle when faced with procedural inequalities otherwise impermissible in federal court. See generally *SEC* v. *Jarkesy*, 603 U.S. 109, 143–45 (2024) (Gorsuch, J., joined by Thomas, J., concurring); see also *Axon*, 598 U.S. at 215 (describing the SEC's rules as comparatively "relaxed"). As a result, settlements—wherein the allegations are taken as true—do not stand in for conclusions that withstood rigorous adversarial testing but are, in truth, a representation of a completely foreseeable cost-benefit analysis on the part of defendants.

C. Succumbing to Settlement Pressure

Few litigants can bear the financial strain of agency adjudication. A formal investigation by the SEC results in, on average, $4 million in external legal counsel costs alone. See U.S. Chamber of Commerce Center for Capital Markets Competitiveness, *Examining U.S. Securities and Exchange Commission Enforcement: Recommendations on Current Process and Practices*, 39–40 (2015). And that says nothing of the steep costs incurred beforehand at the informal investigation stage, nor during subsequent enforcement proceedings or challenges to such proceedings on appeal. Indeed, the SEC is hyper-aware that "few can outlast or outspend the federal government." *Axon*, 598 U.S. at 216. The agency can therefore use this leverage "to extract settlement terms they could not lawfully obtain any other way," like the Gag Rule. *Ibid.*; *id.* at n.4. ("Consent decrees create potential for an enforcement agency to extract from parties under investigation commitments well beyond what the agency could obtain in lit-

igation" (quoting D. Ginsburg & J. Wright, Antitrust Settlement: *The Culture of Consent*, in 1 W. Kovacic: *An Antitrust Tribute* 177 (N. Charbit et al. eds. 2013)). For many defendants, the options are either to "'[h]old your tongue, and don't say anything truthful—ever'—or get bankrupted by having to continue litigating with the SEC." *SEC* v. *Novinger*, 40 F.4th 297, 308 (5th Cir. 2022) (Jones, J., joined by Duncan, J., concurring).

Such was the case for Mr. Lucia. After ten years of litigation at the highest levels, during which he was hemorrhaging money financing his own defense, the SEC decided to retry him. Unable to work in his chosen profession, Mr. Lucia and his wife sold their dream home to pay legal bills and liquidated their grandchildren's college fund. The prospect of restarting the litigation cycle proved too daunting for Mr. Lucia at nearly 70 years old, especially after he suffered a heart attack during the course of the litigation. He ultimately settled in 2020, even though that meant he—and his family, many of whom still operated his former business—were permanently barred from contesting the allegations against him, lest the SEC revive his case once more. *In re Raymond J. Lucia Cos.*, 2020 WL 3264213, at *3 (SEC June 16, 2020).

In Mr. Rajaratnam's case, financing both the SEC's complex initial investigation demands and a full federal criminal trial resulting in acquittal left him unable to fund yet another round of white-collar defense. At the time, and still today, his wife's modest income supports the family, including Mr. Rajaratnam's legal fees. Financial strain coupled with Mr. Rajaratnam's health concerns pushed him to settle with the SEC conditioned upon the right to apply for reentry to work in

the securities industry after five years and a nearly one million dollar sanction. See *In re Rajarengan Rajaratnam*, 2014 WL 5513904 (SEC Nov. 14, 2014). For Mr. Rajaratnam, like many charged by the SEC, the prospect of even more litigation—in his case, *after an acquittal*—was financially and personally untenable.

Mr. Lucia and Mr. Rajaratnam are not isolated examples. Mr. Novinger, also a petitioner in this case, was forced to declare bankruptcy in 2016 after defending himself and asserting his innocence for over a year. Similarly, petitioner Thomas Powell amassed over $4 million in legal expenses responding to inquiries from the SEC over a four-year period. By the time he was ultimately offered a settlement in 2021, Mr. Powell was unwilling to further sacrifice the productivity of his company or throw any more of his time and resources into a process stacked against him by continuing in an adversarial posture. He ultimately settled.

"Settlement is a form of contract. ... The defendant saves the anxiety and cost of litigation, and the prosecutor frees up resources[.]" Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. of Legal Stud. 289, 297 (1983). Here, "'[t]he divergence of the parties' marginal propensity towards settlement, [however], creates uneven bargaining power, with the Commission holding the upper hand.'" Hester Peirce, *Unsettling Silence*: Dissent from Denial of Request for Rulemaking to Amend 17 C.F.R. 202.5(e), n.30 (SEC Jan. 30, 2024) (quoting *Report on the Task Force on SEC Settlements*, 41 Bus. Law 1083, 1093–94 (1991) (modification added)). Yet despite the significant financial and procedural dynamics that make settlement all but guaranteed, the SEC's Gag Rule requires the agency's presented facts to be blindly taken as true

and goes as far as to penalize those who do anything but nod their head yes. "Quite simply, a settlement negotiated by someone desperate to end an investigation that is disrupting or destroying her life should not form the basis on which the law applicable to others is based." Hester M. Peirce, Comm'r, Sec. & Exch. Comm'n, *The Why Behind the No*: Remarks at the 50th Annual Rocky Mountain Securities Conference (May 11, 2018).

II. Life Under the SEC's Gag Rule

A. Professional and Financial Impacts

Allegations of professional misconduct have significant professional and financial impacts long before a conviction is secured. More often than not, those in the securities industry are thrust into professional purgatory as soon as the agency issues its first press release. The Gag Rule ensures many settling defendants stay there.

In the early 2000s, Mr. Lucia's career was on fire. During that time, he ran a San Diego-based financial advisory business that he built from the ground up. While managing his successful business, Mr. Lucia also hosted his own radio and television show alongside several other financial professionals and routinely appeared as a guest on other programs to educate everyday Americans about retirement planning. He did all of this for twenty years without a single customer complaint or allegation of professional misconduct. Now, Mr. Lucia is, in his own words, "forcibly retired" and has been for some time. He and his wife are financially supported by Social Security and the generosity of their children.

Professionally, the Gag Rule operates as a functional death sentence because it muzzles Mr. Lucia from

articulating in his own words what was made clear by the agency's decision in his own case: that "the[re] [was a total] absence of injury to [his] clients or prospective clients." *In re Raymond J. Lucia Cos.*, 2015 WL 5172953, at *37 (SEC Sept. 3, 2015). Surely no prospective employer or business partner would hire Mr. Lucia after reading the SEC's press releases in his case—particularly in the financial services industry where trust is at a premium.

In addition to the SEC's prohibition on speech that "directly or indirectly" denies "any allegation in the complaint," the agency also requires as a pre-condition to settlement that the individual "withdraw any papers filed" that "deny any allegations in the complaint." 17 C.F.R. 202.5(e). What remains for public consumption—including prospective employers and potential business partners—is not the administrative record as it stood at the time of settlement, but a version of the proceedings as curated by the agency.

Mr. Rajaratnam accepted a settlement in no small part because it promised the opportunity to reenter the investment-advisory field and provide for his family after a five-year period. Twelve years later, Mr. Rajaratnam is still fighting to reenter the industry. See *In re Rajarengan Rajaratnam*, Respondent's Request for a Status Update, No. 3-16245 (SEC Jan. 5, 2026). Indeed, one of the requirements for reentry is that he find an advisory firm that is willing to employ and "sponsor" him to have the bar lifted. See 17 C.F.R. 201.193. Yet the Gag Rule hamstrings Mr. Rajaratnam from denying—or even discussing—the allegations with potential advisors in a way that would undermine the agency's framing. In Mr. Rajaratnam's own words, "no American investment adviser is willing

to engage [with him], likely due to the accessibility of information regarding [Mr. Rajaratnam's] history with the Commission and possibly due to the association of his distinctive last name and the similarity between his first name, 'Rajarengan,' and that of his [criminally charged and convicted] brother, 'Rajakumaran.'" *In re Rajarengan Rajaratnam*, Respondent's Motion for Relief, No. 3-16245 (SEC Jan. 27, 2025). Still today, he remains unable to support his family and struggles to reckon with the seemingly permanent bar to reentering his chosen profession.

B. Social Impacts

The Gag Rule's irreparable damage goes far beyond the professional sphere. Of course, the SEC had its own reputational motivations for adopting the Gag Rule, reasoning that "it is important to avoid creating, or *permitting to be created*, an impression" that the agency was bringing baseless charges. 17 C.F.R. 202.5(e) (emphasis added). The agency's regard for reputation, however, ends with its own. See *Moraes*, 2022 WL 15774011, at *1 ("No matter how weak, or strong, the allegations in the complaint may be—indeed, even if the testimony of key witnesses proves to be false—if defendants ever consider publicly defending themselves, the [Gag Rule] prevents them from doing so.").[6] While individuals subject to the Gag

[6] For instance, State Street settled with the SEC and is therefore gagged and unable to contest the agency's allegation that the company made misleading statements related to its Fund's exposure to subprime investments in the wake of the 2008 market collapse, see *In re State St. Bank & Tr. Co.*, 2010 WL 421154 (SEC Feb. 4, 2010), only for the First Circuit to conclude when one of State Street's employees refused to settle that "the Commission's findings are not supported by substantial evidence" and the examined

Rule are free to praise the SEC or to confess culpability, what they cannot do is "deny[] the allegations in the complaint." 17 C.F.R. 202.5(e); see *Reed* v. *Town of Gilbert*, 576 U.S. 155, 163 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional ….").

In Mr. Lucia's case, the narrative set by the SEC follows him and his family. His son, Ray Lucia Jr. ("Junior") still runs the family business, but is gagged by extension, and thus unable to speak of the allegations against his father to prospective business partners or current clients—unless, of course, the speech amounts to nothing more than an affirmation of the agency's views.

The social impact is equally pronounced. Mr. Lucia was a three-time author and a nationally recognized media personality and now, in his own words, he has "dropped out of sight." He and his wife have retreated from their community, of which they were once central figures particularly through their charity work and church participation. The Gag Rule creates a paradoxical and unconstitutional reality in which Mr. Lucia and his family may contest the allegations against him for nearly ten years while litigating his case through every level of the court system, yet only when Mr. Lucia's coffers have run dry and he accepts defeat, can they no longer speak freely.

Mr. Rajaratnam has also suffered socially, particularly in contrast to his brother, who—despite playing a far larger role in the underlying conduct and serving time in prison related thereto—can and does speak

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communication "was not misleading." *Flannery* v. *SEC*, 810 F.3d 1, 4 (1st Cir. 2015).

freely about his experience with the SEC. Mr. Rajaratnam cannot openly discuss his agency proceedings, yet his brother has since authored a book, *Uneven Justice: The Plot to Sink Galleon*, and does long-form interviews on national programs such as CNBC. This comparison underscores a cruel irony: only if a defendant is *convicted* by the SEC, does he retain the right to share his point of view such that he may rehabilitate his reputation in the eyes of his peers and the public. See Andrew Ross Sorkin, CNBC, Interview with Raj Rajaratnam, at 18:43–19:10 (Dec. 8, 2021) ("How lucky I am to live in this country … because you can speak out without being penalized.").[7]

C. Impacts on Democracy and the Public

The toll of the SEC's Gag Rule is most acute for those it silences. But to be sure, as with all violations of the Constitution, the negative effects are felt by society more broadly. The agency claims that the Gag Rule is necessary "to avoid the perception that the SEC had entered into a settlement when there was not in fact a violation" of securities laws. 17 C.F.R. 202.5(e). It is difficult to see why the agency cannot accomplish that goal by simply ensuring that it only brings unassailable charges. When the SEC silences defendants with whom it settles—a penalty not even assessed against those who are *criminally convicted* on identical, or worse, allegations—the SEC encroaches on defendants' right to speak about their own government and the public's right to remain informed on the same.

The trickle-down effect of silencing those who settle is concrete and immediate. Indeed, the First Amendment not only protects defendants' right to criticize the

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[7] Available at https://www.youtube.com/watch?v=bqrrOyQh38A.

government, but also the public's right to hear such criticism. For example, petitioner Cape Gazette, a local Delaware newspaper, has twice reported on co-petitioner Cassandra Toroian's SEC enforcement case. The first time, when the complaint was initially filed, the Cape Gazette interviewed both sides to arrive at a neutral and accurate account. See Melissa Steele, *Rehoboth financial advisor faces fraud claims*, CAPE GAZETTE (Mar. 4, 2022). Once Ms. Toroian settled, however, not only was her ability to speak to the Cape Gazette stifled, but so too was the Gazette's ability to provide the public with the most comprehensive and accurate information. See *Va. State Bd. of Pharm.* v. *Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) ("Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both." (footnote omitted)).

This Court has previously recognized those with first-hand knowledge of government processes may be best suited to keep the public informed. See *Waters* v. *Churchill*, 511 U.S. 661, 674 (1994) ("Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions." (citation omitted)). The Gag Rule ensures those who are most informed about the agency's prosecutorial practices are effectively unable to share such information with the public—or anyone else for that matter. The SEC's regime likewise ensures that the public is shielded from information that contradicts the SEC's public statements or filings. For these reasons, while the Gag Rule unequivocally exacts immediate personal harm to

defendants, the ripple effects of suppressing speech that bears on government conduct extend far beyond any one individual.

CONCLUSION

Under circumstances where many individuals have no practical choice whether to litigate, the SEC should not be permitted to use its leverage and resources to demand silence—and the lifelong punitive effects that come along with it—as the price for peace.

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

JILL C. JACOBSON
WEIL, GOTSHAL & MANGES LLP
1395 Brickell Avenue
Miami, FL 33131

MARK A. PERRY
Counsel of Record
WEIL, GOTSHAL & MANGES LLP
2001 M STREET NW
WASHINGTON, DC 20036
(202) 682-7000
MARK.PERRY@WEIL.COM

RYAN P. HOR
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153

Counsel for Amici Curiae

April 20, 2026