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 WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE THOMAS MORE SOCIETY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

B. Tyler Brooks
Counsel of Record
Thomas Brejcha
THOMAS MORE SOCIETY
121 West Wacker Dr., Ste. 650
Chicago, Illinois 60601
(336) 707-8855
tbrooks@thomasmoresociety.org
tbrejcha@thomasmoresociety.org

Counsel for Amicus Curiae

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional, Statutory, and Regulatory Provisions

Other Authorities

INTEREST OF THE *AMICUS CURIAE*[1]

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 vigorously for the protection of First Amendment rights.

SUMMARY OF ARGUMENT

The Securities and 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 use of this regulation, the SEC demands that settling defendants agree to terms in a consent judgment effectively preventing the defendant from ever criticizing the SEC's case against it. Such an order is a content- and viewpoint-based prior restraint on the defendant's 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 public interests.

---

[1] Petitioners' and Respondent's counsel were provided timely notice of this brief in accordance with Supreme Court Rule 37.2. No counsel for a party authored this brief in whole or part, and no party, counsel for a party, or person other than this *Amicus Curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

While the SEC's Gag Rule infringes on the First Amendment rights of a settling defendant, it also inflicts grievous injury on the public at large, which is 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, less accountable bureaucracy that is able to operate in secret.

Accordingly, this *Amicus* agrees that 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 not only the rights of settling defendants, but also the rights of the public generally, who have a strong interest in being able to evaluate how one of the federal government's most powerful agencies is behaving. This Court should therefore grant certiorari to consider the constitutionality of the SEC's Gag Rule.

I. THE COURT SHOULD GRANT THE PETITION BECAUSE THE SEC'S GAG RULE CENSORS SPEECH CRITICAL OF THE GOVERNMENT, UNCONSTITUTIONALLY DEPRIVING VITAL INFORMATION TO MEMBERS OF THE PUBLIC ABOUT THEIR OWN 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 and 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 for *the rest of their lives*.

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 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 buyers." *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (citations omitted).

Unfortunately, the Gag Rule stifles the marketplace of ideas by preventing willing listeners from receiving information. Such interference in the free exchange of information would be troubling

enough as a general matter, but it is especially egregious and damaging to civic health when information about the manner in which a government agency is discharging its duties is 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, 245 (2002), the SEC Gag Rule engages in precisely that kind of censorship as a matter of course. As implemented, the Gag Rule purports to claim an interest in the SEC not being contradicted *after a case has been resolved*. *See* 17 C.F.R. § 202.5(e).

It is a rare admission by a governmental entity that it is seeking not only 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 tool to increase their own powers at the expense of the public. Writing nearly thirty 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 April 20, 2026) [hereinafter, "Moynihan"].

This tendency was 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. (quoting Weber's *Wirtschaft und Gesellschaft*).

The secrecy and insulation from criticism a bureaucracy like the SEC naturally seeks cannot be squared with what the First Amendment demands. Therefore, this Court should rein in the SEC Gag Rule from further depriving those whom the SEC has sued from disclosing to the American public how its government has acted.

II. THE COURT SHOULD GRANT THE PETITION BECAUSE 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 Proceedings.

The impropriety of the SEC Gag Rule becomes apparent when contrasted with the constitutional protections on the public's right to know what occurs in both 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, 387 n.15 (1979).

As a result of these principles, courts may close trials to the public only based on 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*, 582 U.S. 286, 296-99 (2017). It is certainly true that the SEC's settlements are not courtroom trials. These settlements, however, 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, including the possibility of criminal contempt.

Moreover, the SEC enjoys an extraordinarily high settlement rate. A necessary component of this

settlement rate is the immense power the SEC possesses as part of the modern administrative state. *See, e.g.,* Philip Hamburger, IS ADMINISTRATIVE LAW UNLAWFUL?, 349-62 (2014) (describing overwhelming power of modern administrative agencies). By utilizing this power, the SEC has cut off the ability of those it has sued to utter a critical word about the SEC's suit by means of a categorical rule that applies to every defendant, without any individualized examination of the specific facts, without any consideration of alternatives, and without any but the flimsiest of justifications.

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

The motivations for our national tradition of public 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 April 20, 2026). With its Gag Rule, the SEC effectively monopolizes the power to tell the story of how it is exercising its authority. 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 "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 powers. "'[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 can and should provide.

CONCLUSION

Therefore, the petition for a writ of certiorari should be granted.

Respectfully submitted,

B. TYLER BROOKS
Counsel of Record
THOMAS BREJCHA
THOMAS MORE SOCIETY
121 West Wacker Dr., Ste. 650
Chicago, Illinois 60601
(336) 707-8855
tbrooks@thomasmoresociety.org
tbrejcha@thomasmoresociety.org

April 20, 2026