

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 *AMICUS CURIAE*
AMERICAN SECURITIES ASSOCIATION
IN SUPPORT OF PETITIONERS**

J. Michael Connolly
Counsel of Record
Paul R. Draper
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
mike@consovoymccarthy.com

April 20, 2026

Attorneys for Amicus Curiae

TABLE OF CONTENTS

Table of Cited Authorities..... ii

Interest of *Amicus Curiae*1

Summary of Argument.....2

Argument.....4

 I. The SEC’s outlier Gag Rule hurts
 defendants and the public.....4

 II. The SEC uses its burdensome
 enforcement process to force defendants
 to settle.15

 III. The Gag Rule is a straightforward First
 Amendment violation.20

Conclusion25

TABLE OF CITED AUTHORITIES

Cases

<i>Agency for Int’l Development v. Alliance for Open Soc’y Int’l</i> , 570 U.S. 205 (2013).....	24
<i>Alexander v. United States</i> , 509 U.S. 544 (1993).....	21
<i>ASA v. SEC</i> , 2026 WL 621432 (M.D. Fla. Mar. 5, 2026).....	19
<i>Associated Press v. Meltwater U.S. Holdings</i> , 931 F. Supp. 2d 537 (S.D.N.Y. 2013).....	13
<i>Axon Enterprises v. FTC</i> , 598 U.S. 175 (2023).....	3, 15, 17
<i>Cassava Sciences v. Quintessential Capital Mgmt.</i> , 2024 WL 554042 (S.D.N.Y. Jan. 23, 2024).....	12
<i>Chiles v. Salazar</i> , 146 S.Ct. 1010 (2026).....	22
<i>Citizens United v. FEC</i> , 558 U.S. 310 (2010).....	3, 10, 21
<i>Davies v. Grossmont Union High Sch. Dist.</i> , 930 F.2d 1390 (9th Cir. 1991).....	24
<i>First Nat’l Bank of Boston v. Bellotti</i> , 435 U.S. 765 (1978).....	10
<i>Hi-Craft Clothing v. NLRB</i> , 660 F.2d 910 (3d Cir. 1981)	6
<i>In re Dan Farr Productions</i> , 874 F.3d 590 (9th Cir. 2017).....	22

<i>Jarkesy v. SEC</i> , 34 F.4th 446 (5th Cir. 2022)	15
<i>Kleindienst v. Mandel</i> , 408 U.S. 753 (1972).....	3, 10
<i>Kokesh v. SEC</i> , 581 U.S. 455 (2017).....	15
<i>Koontz v. St. Johns River Water Mgmt. Dist.</i> , 570 U.S. 595 (2013).....	4, 23
<i>Landmark Communications v. Virginia</i> , 435 U.S. 829 (1978).....	22
<i>Lorenzo v. SEC</i> , 587 U.S. 71 (2019).....	1, 13
<i>Louisiana v. Becerra</i> , 577 F. Supp. 3d 483 (W.D. La. 2022)	4
<i>Maguire Financial v. PowerSecure Int’l</i> , 876 F.3d 541 (4th Cir. 2017).....	7
<i>Miller v. Basic Research, LLC</i> , 750 F.3d 1173 (10th Cir. 2014).....	5
<i>Mills v. Alabama</i> , 384 U.S. 214 (1966).....	11
<i>Nebraska Press Ass’n v. Stewart</i> , 427 U.S. 539 (1976).....	4, 21
<i>NFIB v. Sebelius</i> , 567 U.S. 519 (2012).....	5
<i>NRA v. Vullo</i> , 602 U.S. 175 (2024).....	23
<i>Overbey v. Mayor of Baltimore</i> , 930 F.3d 215 (4th Cir. 2019).....	22

<i>Perry v. Sindermann</i> , 408 U.S. 593 (1972).....	23
<i>Pickering v. BOE of Twp. High Sch. Dist.</i> , 391 U.S. 563 (1968).....	11
<i>Red Lion Broadcasting v. FCC</i> , 395 U.S. 367 (1969).....	11
<i>Reed v. Town of Gilbert</i> , 576 U.S. 155 (2015).....	3, 20-21
<i>Ronnie Van Zant, Inc. v. Cleopatra Records</i> , 906 F.3d 253 (2d Cir. 2018)	22
<i>Rosenberger v. University of Virginia</i> , 515 U.S. 819 (1995).....	21
<i>SEC v. Citigroup Global Mkts.</i> , 827 F. Supp. 2d 328 (S.D.N.Y. 2011).....	14
<i>SEC v. Moraes</i> , 2022 WL 15774011 (S.D.N.Y. Oct. 28, 2022)	2, 5-6, 9, 11, 17, 21, 23-24
<i>SEC v. Novinger</i> , 40 F.4th 297 (5th Cir. 2022)	18, 22
<i>SEC v. Vitesse Semiconductor Corp.</i> , 771 F. Supp. 2d 304 (S.D.N.Y. 2011).....	13
<i>United States v. Jackson</i> , 390 U.S. 570 (1968).....	24
<i>United States v. Scott</i> , 450 F.3d 863 (9th Cir. 2006).....	23
<i>United States v. Spaeth</i> , 69 F.4th 1190 (10th Cir. 2023)	24
<i>Upstate Jobs Party v. Kosinski</i> , 106 F.4th 232 (2d Cir. 2024).....	21

Statutes & Regulations

15 U.S.C. §80b-3	16
17 C.F.R. §202.5	2, 7-8, 10, 13, 20
17 C.F.R. §229.103	7

Other Authorities

25 Steinberg et al., <i>Securities Practice: Federal and State Enforcement</i> (2025).....	15-16
8 Miller, <i>Business and Commercial Litigation in Federal Courts</i> (5th ed. 2022)	16
<i>A Catalyst: Statement on Qatalyst Partners LP</i> , SEC (Sept. 24, 2024)	19
<i>Agency and Mission Information</i> , SEC (2014)	13
<i>Amendments to Exchange Act Rule 10a-1 and Rules 201 and 200(g) of Regulation SHO</i> , SEC (May 21, 2008)	9
Brummer et al., <i>Regulation By Enforcement</i> , 96 S. Cal. L. Rev. 1297 (2024)	12
<i>Enforcement & Litigation</i> , SEC (archived Apr. 15, 2026)	6
<i>Examining U.S. Securities and Exchange Commission Enforcement</i> , Chamber of Commerce (July 2015).....	16
<i>Fierce Competition Ahead as Less Than 100 Asset Managers Secure Two-Thirds of Industry Asset Flows</i> , Broadridge (Oct. 21, 2022)	8
Johnson, <i>SEC Settlement: Agency Self-Interest or Public Interest</i> , 12 Fordham J. Corp. & Fin. L. 627 (2007)	18

Marvell Technology Group Ltd., Form 10-K (filed 2009)	8
<i>Mission</i> , SEC (archived Apr. 15, 2026).....	13
<i>Rajat Gupta on the Financial Crisis</i> , CNBC, (Mar. 22, 2019)	10
Raymond, <i>U.S. Judge Criticizes SEC Use of In-House Court for Fraud Cases</i> , Reuters (Nov. 5, 2014)	12
Ryan, <i>Get the SEC out of the PR Business</i> , WSJ (Nov. 30, 2014)	6
<i>SEC Announces Enforcement Results for Fiscal Year 2025</i> , SEC (Apr. 7, 2026).....	14
<i>SEC Levies More Than \$3.8 Million in Penalties</i> , SEC (Sept. 25, 2024)	7
Steinway, <i>SEC “Monetary Penalties Speak Very Loudly,” But What Do They Say?</i> , 124 Yale L.J. 209, 228 (2014)	8, 17, 19
Stevenson, <i>Falcone Accused of Using Company Assets in Cash Crunch</i> , N.Y. Times (Mar. 27, 2014)	7
Vollmer, <i>Four Ways to Improve SEC Enforcement</i> , 43 Sec. Regul. L.J. 333 (2015)	16-17

INTEREST OF *AMICUS CURIAE**

The American Securities Association is a non-profit trade association that represents small and regional financial services companies that operate across the United States. ASA's members advise Americans how to create and preserve wealth; provide Main Street businesses with access to capital and advisory services; raise capital for schools, hospitals, cities, and states; and work with institutional investors to increase investment returns. ASA's mission is to promote trust and confidence among investors, facilitate capital formation, and support efficient and competitively balanced capital markets.

This case directly impacts ASA's members and its mission. Federal securities law in America is built on transparency, *Lorenzo v. SEC*, 587 U.S. 71, 81 (2019), and financial markets operate most efficiently when institutions and investors have access to a free exchange of information. The SEC's Gag Rule, which prohibits open discussion about the propriety of the agency's enforcement practices and obscures the truth about whether defendants in SEC enforcement actions have *actually* violated the law, runs contrary to those principles. ASA's members, moreover, are regulated by the SEC and have firsthand experience navigating the hardships imposed by the SEC's Gag Rule.

* Per Rule 37.2, *amicus curiae* gave sufficient notice of its intention to file this brief to counsel for all parties. No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

For the past half-century, the SEC has stifled public criticism of its enforcement practices using what is commonly known as the Gag Rule. The agency requires *every* defendant that settles an enforcement action to agree that they will never deny the truth of the SEC’s allegations against them, give the “impression” that those allegations aren’t true, or even “permit” such statements to be made. 17 C.F.R. §202.5(e); *SEC v. Moraes*, 2022 WL 15774011, at *2 (S.D.N.Y. Oct. 28, 2022). This practice silences the voices of those who are in the best position to comment on the wisdom of the SEC’s enforcement decisions.

The SEC’s rule is an outlier—only one other federal agency silences defendants as a matter of course—which is reason enough to doubt its utility. More importantly, the Gag Rule inflicts tremendous harm on the individuals and businesses it silences. The SEC touts settled cases as victories, suggesting with not-so-subtle language that defendants are guilty of wrongdoing even if they never admitted liability. But under the terms of the Gag Rule, defendants are not allowed to present their side of the story, even if their version of events is *true*. That makes it harder for those defendants to do business in the future: With their reputation tarred, wary clients and investors may choose to withdraw funds, vendors may terminate contracts, insurance providers may raise premiums, and so on.

The Gag Rule hurts the public too. The First Amendment protects the right to speak *and* the right to receive information. *Kleindienst v. Mandel*, 408

U.S. 753, 762 (1972). But because the SEC silences those who are in the best position to comment on and possibly criticize its enforcement practices, the public is deprived of a valuable perspective. The Gag Rule thus undermines the democratic accountability at the core of the First Amendment. *See Citizens United v. FEC*, 558 U.S. 310, 339 (2010).

The SEC says this is all okay because defendants “agree” to the gag provisions when they settle. SEC Br. (CA9.Dkt.61.1) at 7. But for most, the choice to settle is far from voluntary. Indeed, defending against an SEC enforcement action is a losing proposition for all but the most well-resourced and well-regarded companies. Litigation is prohibitively expensive and invites bad publicity. And the majority of defendants who litigate to final judgment lose their case. *Axon Enterprises v. FTC*, 598 U.S. 175, 215-16 (2023) (Gorsuch, J., concurring). Thus, the very process of enforcement is itself a punishment. The only realistic option for most defendants is to settle.

And the SEC knows this. “Aware” that “few” defendants will be able to “outlast or outspend” it, the SEC uses its sweeping powers as “leverage to extract settlement terms [it] could not lawfully obtain any other way.” *Id.* at 216. Then it deploys its non-negotiable Gag Rule to stop defendants from criticizing the process.

This sweeping speech ban is unconstitutional. The First Amendment does not allow the government to prohibit speech based on its content. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Nor does it allow prior restraints on speech. *Nebraska Press Ass’n v.*

Stewart, 427 U.S. 539, 559 (1976). But the Gag Rule does both, proactively barring speech that denies or questions the truth of the SEC’s allegations against a defendant. That restriction—which serves no interest other than protecting the SEC’s reputation—cannot survive strict scrutiny. And it makes no difference that defendants purportedly “agree” to surrender their speech rights in exchange for settlement; the government cannot condition public benefits on the forfeiture of constitutional rights. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013).

ARGUMENT

I. The SEC’s outlier Gag Rule hurts defendants and the public.

The SEC is one of only two federal agencies with a rule that bars everyone who settles from ever questioning the agency’s decision to charge them. Its Gag Rule, though an outlier, inflicts real harm on the individuals and companies whose speech it curtails. It tars their reputation and makes it harder (and more expensive) to do business. It also hurts the public, which is deprived of hearing the valuable insight into the SEC enforcement process that gagged defendants could provide if they were allowed to exercise their speech rights.

A. “There are hundreds of federal agencies.” *Louisiana v. Becerra*, 577 F. Supp. 3d 483, 495 (W.D. La. 2022). But of those hundreds of agencies, the SEC is one of only *two* that—as a matter of course—require defendants who settle enforcement actions to surrender their First Amendment right to question the basis of the agency’s allegations against them. In other

words, “[a]mong federal agencies, the SEC virtually stands alone ... in its compulsory use of such a provision.” *Moraes*, 2022 WL 15774011, at *2.

The Gag Rule’s outlier status is reason enough to doubt its legality. *See NFIB v. Sebelius*, 567 U.S. 519, 549 (2012) (“[S]ometimes the most telling indication of a severe constitutional problem is the lack of historical precedent.” (cleaned up)). If nothing else, the fact that the SEC is one of only two agencies with such a rule certainly disproves the agency’s claim that gagging defendants is necessary to avoid “undermin[ing] confidence in the Commission’s enforcement program.” Pet.App.37a-38a. Indeed, other federal agencies regularly settle, or win, civil and criminal actions without asking courts to silence their opponents. Even other agencies that regulate financial markets—like the Department of Justice, which prosecutes criminal securities-law violations, and the Federal Trade Commission, which enforces antitrust and consumer-protection laws—do not impose gag rules as a non-negotiable condition of settlement. And of course, “parties regularly settle disputes without stipulating liability” at all. *Miller v. Basic Research, LLC*, 750 F.3d 1173, 1178 (10th Cir. 2014).

Yet no one doubts that the many federal agencies without blanket gag rules have extended their regulatory power over American life. In any event, even if the SEC’s contention were true as a factual matter, “undermining confidence in the government is an inevitable result of our robust First Amendment protections for speech critical of the government.” Pet.App.24a.

If the Ninth Circuit’s decision in this case is allowed to stand, however, the consensus in favor of preserving regulated parties’ First Amendment rights may change. Emboldened by the panel’s opinion blessing the SEC’s practice, other federal agencies may follow suit and adopt their own gag rules to thwart criticism of their enforcement practices. *See Hi-Craft Clothing v. NLRB*, 660 F.2d 910, 916 (3d Cir. 1981) (“[G]overnment agencies have a tendency to swell, not to shrink, and are likely to have an expansive view of their mission.”).

B. Though the SEC’s Gag Rule is (for now) an outlier, it has disastrous consequences for individuals and businesses who settle cases. The SEC is allowed to—and frequently does—encourage the perception that those individuals and businesses are guilty of wrongdoing, but they are not allowed to defend themselves, which hurts their reputation, their bottom line, and their ability to engage in policy debates. And because the SEC imposes “lifetime gag orders,” defendants who agree to settle must suffer these consequences forever. *Moraes*, 2022 WL 15774011, at *1.

To start, being forced to remain silent severely hampers defendants’ ability to conduct business. The SEC issues public “announce[ments]” when it settles cases. *Enforcement & Litigation*, SEC (archived Apr. 15, 2026), perma.cc/EJ4M-TLY3; Ryan, *Get the SEC out of the PR Business*, WSJ (Nov. 30, 2014), bit.ly/4teNRbN. And it often frames those settlements as victories, noting that defendants were hit with “charges” and “penalties,” even if they never “ad-

mit[ed]” wrongdoing. *SEC Levies More Than \$3.8 Million in Penalties*, SEC (Sept. 25, 2024), perma.cc/ZW4T-XX4B. In some circumstances, corporations who settle with the SEC may even be required to affirmatively disclose that fact to investors through public filings. See *Maguire Financial v. PowerSecure Int’l*, 876 F.3d 541, 545 (4th Cir. 2017); 17 C.F.R. §229.103(a).

And news of a settlement can scare business away. Clients and investors are naturally wary of entering or maintaining relationships with individuals and firms who have been accused of wrongdoing and hit with heavy fines by the SEC. *E.g.*, Stevenson, *Falcone Accused of Using Company Assets in Cash Crunch*, N.Y. Times (Mar. 27, 2014) (“In the weeks after [an] S.E.C. settlement,” one fund “was confronted with a flurry of requests from investors to return their money.”). A firm that chooses to settle not because it was guilty but for prudential reasons—*e.g.*, to avoid the cost of litigation—would want to reassure clients that their investments are safe and reiterate the firm’s belief that it has not committed any wrongdoing. But the Gag Rule prohibits such speech; defendants who settle cannot insist upon their innocence to clients or otherwise explain their conduct and decision to settle in a way that gives the “impression” that the SEC’s allegations are not true. 17 C.F.R. §202.5(e).

And competitors to these businesses are aware of the disadvantage that the Gag Rule places on those who choose to settle. Competition for clients and customers in the securities and financial services industries can be “fierce.” *Fierce Competition Ahead as Less*

Than 100 Asset Managers Secure Two-Thirds of Industry Asset Flows, Broadridge (Oct. 21, 2022), perma.cc/MC34-WS7K. Other firms have a strong incentive to peel away clients and business opportunities from gagged firms, knowing they can't fight back. The Gag Rule, in other words, forces those subject to its speech prohibitions to compete with one hand tied behind their back, after they have *already* paid hefty fines in their settlement.

There are collateral consequences too. Regulated parties who settle with the SEC have to communicate that fact to vendors, insurance providers, lenders, and others. But the Gag Rule, again, prohibits them from publicly explaining the circumstances behind that settlement in a manner that “refus[es] to admit the” truth of the SEC’s “allegations.” 17 C.F.R. §202.5(e). Left with only the SEC’s version of events—which insists upon the settling party’s guilt—vendors may choose to withdraw contracts, insurers may hike premiums, lenders may raise interest rates, and banks may shut down accounts, increasing the cost of doing business (or making business altogether impossible) across the board. Steinway, *SEC “Monetary Penalties Speak Very Loudly,” But What Do They Say?*, 124 Yale L.J. 209, 228 (2014). Indeed, many companies report that their “settlement with the SEC” negatively impacts their “relationships” with “suppliers and business partners” and their “ability to obtain director and officer insurance coverage” and “access debt and equity markets.” Marvell Technology Group Ltd., Form 10-K (filed 2009), perma.cc/4PKA-4TKH. Unable to tell their side of the story, companies have no way to mitigate the damage that has been done.

Being subject to a gag provision also frustrates a settling party's ability to advocate for policy change. There are few people better positioned to opine on the value of our securities regulations than those who have been subjected to them. But to the extent advocating for changes to regulations could be perceived as disputing the propriety of the SEC's charges *based* on those regulations, such speech is arguably prohibited by the Gag Rule. Indeed, settlement provisions implementing the Gag Rule typically bar settling parties from making "any public statement" that even "*indirectly*" undermines the basis of the SEC's allegations in their case. *Moraes*, 2022 WL 15774011, at *2. In an abundance of caution, parties subject to such a provision may choose to refrain from participating in the public discourse rather than risk invoking the SEC's ire.

In fact, the SEC compels silence even after the law *has* changed. Because the SEC imposes "lifetime gag order[s]," *id.* at *1, defendants who settle cases can *never* question the SEC's charges against them. That remains true even if subsequent amendments to securities laws and regulations mean that the SEC could not bring those same charges against the defendant today. And to be sure, the SEC has reversed course on many of its regulations. *E.g.*, *Amendments to Exchange Act Rule 10a-1 and Rules 201 and 200(g) of Regulation SHO*, SEC (May 21, 2008), perma.cc/QSY4-NSAG (SEC largely eliminated its ban on short selling securities during a downtick). Put simply, many defendants are forever barred from publicly criticizing the SEC's enforcement decisions, even

if everyone agrees that their alleged conduct is perfectly legal now.

If these consequences weren't bad enough, the SEC's Gag Rule adds insult to injury by treating defendants who settle worse than defendants who litigate their case to final judgment. Parties that settle civil cases with the SEC are strong-armed into abandoning their speech rights, *see* 17 C.F.R. §202.5(e) (the SEC does "not ... permit" settlements without a gag), but those who lose at trial—and even those who are convicted of *criminal* securities violations—are allowed to publicly deny wrongdoing and criticize the SEC's handling of their case, *see, e.g., Rajat Gupta on the Financial Crisis*, CNBC (Mar. 22, 2019), [bit.ly/487Pa42](https://www.cnbc.com/2019/03/22/rajat-gupta-interview.html) (former McKinsey CEO gave interviews and wrote a book "shar[ing] his side of the story" after serving 19 months in prison for insider trading conviction). In other words, the SEC treats settlement not as a compromise but as a punishment.

C. The SEC's Gag Rule doesn't just hurt the people it silences. It also undermines the public interest by stifling important conversations about the wisdom of the agency's enforcement practices.

"The First Amendment ... serves significant social interests." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). It protects not only the right to speak, but also "the right to *receive* information and ideas." *Kleindienst*, 408 U.S. at 762 (emphasis added). That right—to "hear" and to "use information to reach consensus"—is an "essential mechanism for democracy." *Citizens United*, 558 U.S. at 339. And it is "the means to hold officials accountable to the people." *Id.*

This “right may not constitutionally be abridged.” *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390 (1969).

But that is precisely what the Gag Rule does. It silences a whole category of speakers and prevents the public from hearing their insight into the SEC’s enforcement decisions and procedures. Worse, it silences those who are “most likely to have informed and definite opinions as to” whether and how the SEC’s enforcement practices ought to be reformed. *Pickering v. BOE of Twp. High Sch. Dist.*, 391 U.S. 563, 572 (1968). It is “essential that” those who have faced the full weight of the SEC’s enforcement powers “be able to speak out freely on such questions without fear of” reprisal, *id.*, but thanks to the Gag Rule, the public only ever hears one side of the story: the SEC’s.

The First Amendment framework, in other words, is flipped on its head. Instead of “protect[ing] the free discussion of governmental affairs” so that “abuses of power by governmental officials” can be exposed, *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966), the SEC’s Rule ensures that *only* the government is able to speak on this issue of public importance.

Compounding the problem, the Gag Rule’s prohibitions aren’t limited to false claims. On the contrary, the Rule punishes defendants even if they make accurate and true statements. Pet.9; *Moraes*, 2022 WL 15774011, at *1 (“Truth is no defense.”). The public is thus deprived of even concededly true information about how its government is enforcing securities law and doling out punishments to alleged violators.

The public’s interest in hearing information about SEC enforcement practices, and the harm to the public caused by being deprived of such information, is especially strong because the SEC appears to be pursuing a strategy of regulation by enforcement. Hoping to avoid the procedural hassle (and democratic accountability) of “legislative or administrative rulemaking,” the agency instead uses “litigation to introduce or test out novel legal theories.” Brummer et al., *Regulation By Enforcement*, 96 S. Cal. L. Rev. 1297, 1298 (2024). And because almost all enforcement actions settle before trial, the SEC can avoid scrutiny from the courts as well.

The playbook is clear: Use the weight of the enforcement process to “extract negotiated settlements” without “ever having to go to court,” then “publiciz[e] the terms of the settlement” to “shape the public perception as to what the law ‘is.’” *Id.* at 1319. And deploy the Gag Rule to stop the defendants from speaking out against the process. This framework, as at least one federal judge has pointed out, empowers the “SEC to become, in effect, a law unto itself.” Raymond, *U.S. Judge Criticizes SEC Use of In-House Court for Fraud Cases*, Reuters (Nov. 5, 2014), [bit.ly/4cnv3A4](https://www.reuters.com/legal/4cnv3A4).

This forced silence has consequences for the marketplace too. “Public markets operate most efficiently when there is a free exchange of information.” *Cassava Sciences v. Quintessential Capital Mgmt.*, 2024 WL 554042, at *8 (S.D.N.Y. Jan. 23, 2024). Transparency builds trust and promotes fair dealing. That’s one reason why courts have recognized “a strong pub-

lic interest in preserving ... efficient access to information.” *Associated Press v. Meltwater U.S. Holdings*, 931 F. Supp. 2d 537, 553 (S.D.N.Y. 2013). The Gag Rule, however, undermines transparency and distorts public markets by locking information behind the terms of a settlement agreement. What we get instead is a “stew of confusion” in which “the public will never know whether the S.E.C.’s charges are true.” *SEC v. Vitesse Semiconductor Corp.*, 771 F. Supp. 2d 304, 309 (S.D.N.Y. 2011).

The SEC’s preference for silence over speech doesn’t just run contrary to general principles of free speech and democratically accountable government. It contradicts the agency’s *own* stated principles. The SEC claims, for example, that it “strives to promote a market environment that is worthy of the public’s trust and characterized by transparency and integrity.” *Agency and Mission Information*, SEC, at 9 (2014), perma.cc/E5QR-54CS. It agrees that “everyone should have access to certain facts about investments and those who sell them,” and that participants in the securities market “must tell the truth about their business.” *Mission*, SEC (archived Apr. 15, 2026), perma.cc/7PKA-FAMV. Securities law, after all, is founded on “a philosophy of full disclosure.” *Lorenzo*, 587 U.S. at 81. But the Gag Rule denies the very transparency that the SEC claims to promote.

It seems that the *only* interest served by the Gag Rule is to protect the SEC’s reputation. In fact, that’s the exact justification offered by the agency itself. *See* Pet.App.37a-38a (claiming the Rule preserves “confidence” in the agency); 17 C.F.R. §202.5(e) (claiming

the Rule “avoid[s]” giving the wrong “impression” about the agency’s enforcement practices). But there is no exception to the First Amendment for preserving the SEC’s good name.

The cause for concern over the Gag Rule’s effect on public discourse is especially great given the scope of the problem. The SEC brings hundreds of enforcement actions every year and collects billions of dollars in monetary relief. *E.g.*, *SEC Announces Enforcement Results for Fiscal Year 2025*, SEC (Apr. 7, 2026), perma.cc/HW58-QE2C (“During fiscal year 2025, the Commission filed 456 enforcement actions, including 303 standalone actions and 69 ‘follow-on’ administrative proceedings” and “obtain[ed] orders for monetary relief totaling \$17.9 billion.”). And most of those end in settlements that permanently gag the SEC’s targets. “Between 2017 and 2023,” for example, “the SEC settled with—and gagged—an estimated 2,700 individuals and businesses.” Pet.30.

“[T]here is an overriding public interest in knowing the truth.” *SEC v. Citigroup Global Mkts.*, 827 F. Supp. 2d 328, 335 (S.D.N.Y. 2011), *vacated and remanded on other grounds*, 752 F.3d 285 (2d Cir. 2014). And “the S.E.C., of all agencies, has a duty, inherent in its statutory mission, to see that the truth emerges.” *Id.* The Gag Rule betrays that mission and obscures important information about the securities industry and the agency that regulates it. This Court should not sanction such a scheme.

II. The SEC uses its burdensome enforcement process to force defendants to settle.

The SEC doesn't—nor could it—dispute the devastating consequences that its Gag Rule has on the businesses and professionals who settle cases. Instead, the SEC says those consequences are irrelevant because defendants “voluntarily agree” to the terms of their settlements. SEC Br. (CA9.Dkt.61.1) at 7. But the experiences of those who have been targeted by the agency's enforcement arm—including ASA's members—prove otherwise. For most, the financial cost and reputational harm associated with litigating against the SEC, and the slim chance of victory, make settlement the only realistic option.

“As the agency charged with enforcing the federal securities laws, the SEC is vested with sweeping investigatory and prosecutorial powers.” 25 Steinberg et al., *Securities Practice: Federal and State Enforcement* §9:16 (2025). It “wields tremendous power over those it seeks to investigate,” *id.*, and “its decisions have broad consequences for personal liberty and property,” *Jarkesy v. SEC*, 34 F.4th 446, 449 (5th Cir. 2022). “Aware, too, that few” have the resources to “outlast or outspend” it, the SEC uses its sweeping powers “as leverage to extract settlement terms [it] could not lawfully obtain any other way.” *Axon Enterprises*, 598 U.S. at 216 (Gorsuch, J., concurring).

Of course, the SEC has “an arsenal of punishing weapons” at its disposal to penalize those who the agency believes have violated securities regulations. Pet.2; see *Kokesh v. SEC*, 581 U.S. 455, 459 (2017) (The SEC has “a full panoply of enforcement tools: It

may promulgate rules, investigate violations of those rules and the securities laws generally, and seek monetary penalties and injunctive relief for those violations.”); 15 U.S.C. §80b-3(f) (the SEC can bar people from working in the securities industry).

But the enforcement process is *itself* a form of punishment. For one thing, the SEC is a powerful agency with a massive budget and the patience to litigate for years if need be. See 8 Miller, *Business and Commercial Litigation in Federal Courts* §92:2 (5th ed. 2022) (“The primary disincentive to litigating against the SEC is the enormous resources that the SEC has at its disposal.”). For private entities, by contrast, the cost of defending an SEC enforcement action can be crushing. “[T]he [average] cost of responding to a formal investigation” runs into the millions, and many companies defending against SEC enforcement pay tens of millions of dollars in legal fees alone. *Examining U.S. Securities and Exchange Commission Enforcement*, Chamber of Commerce, at 40 (July 2015), perma.cc/HDK4-RZQE. These hefty fees make “the pressure to settle ... overpowering even when the SEC case lacks merit.” Vollmer, *Four Ways to Improve SEC Enforcement*, 43 Sec. Regul. L.J. 333, 336 (2015).

Being targeted by the SEC brings reputational harm as well. “Investigations, even if merely inquisitory, are not innocuous. They are inherently accusatory and can have injurious effects on both personal and business reputations.” Steinberg et al., *supra*, at § 9:16. For those who fear “adverse publicity” and do not wish to have their reputation tarnished, continued litigation is not a serious option. Vollmer, *supra*, at

336. And these reputational harms can themselves have financial consequences. “[T]he pendency of an investigation places a cloud over the corporation that may inhibit its access to capital markets, chill relationships with vendors and customers, and distract and demoralize management.” Steinway, *supra*, at 228. In other words, the very fact of “pending litigation can be disastrous” for accused parties. *Id.*

If the accused *does* choose to put up a fight, the odds of victory are daunting. The SEC wins the vast majority (69%, by one count) of contested actions that it brings in federal court and an even greater majority of cases that it litigates through its in-house administrative proceedings. *Axon Enterprises*, 598 U.S. at 215-16 (Gorsuch, J., concurring). No surprise, then, that “nearly every one of the hundreds of cases brought by the SEC each year is settled.” *Moraes*, 2022 WL 15774011, at *1; *see Axon Enterprises*, 598 U.S. at 216 (Gorsuch, J., concurring) (the “‘vast majority’ of SEC cases settle”). Between crushing litigation costs, reputational harm, long odds of victory, and “the threat of significant monetary fines,” settlement often seems the only sensible choice. *Axon Enterprises*, 598 U.S. at 204 (Thomas, J., concurring).

And just as they lack the resources to litigate in the first place, accused parties often lack the relative bargaining power to meaningfully negotiate the terms of settlement. “Unlike settlements between private parties who may be in equal positions of strength, during an SEC settlement the SEC has more bargaining power than most of its opposition. The parties are not

equals.” Johnson, *SEC Settlement: Agency Self-Interest or Public Interest*, 12 Fordham J. Corp. & Fin. L. 627, 660 (2007). The SEC has a “take all’ approach to settlement.” *Id.* Its punitive drive and its disproportionate bargaining power mean that it often “receives as much in terms of sanctions as it does” when it wins “a contested proceeding, without as many work hours.” *Id.* at 661.

As one former SEC enforcement attorney explained, defendants “cannot realistically walk away from the settlement.” *Id.* “SEC settlements,” in other words, “are not the result of a good faith negotiation between two equal parties” but a Hobson’s choice imposed on parties with no real options. *Id.* Especially so when the defendant is an “individua[l]” or a “small to mid-sized enterprise.” *Id.* The only viable path forward for these defendants is to accept the settlement as crafted by the SEC—Gag Rule and all.

In the words of one court of appeals panel, the SEC puts defendants between a rock and a hard place: Either “continue litigating with the SEC” and “get bankrupted,” or settle the case, be gagged, “[h]old your tongue, and don’t say anything truthful—ever.” *SEC v. Novinger*, 40 F.4th 297, 308 (5th Cir. 2022) (Jones and Duncan, JJ., concurring).

To make matters worse, the SEC appears to decide who to target based in part on how much money they have to spare or how much publicity a case against them would generate. Because “[t]he SEC has considerable latitude to prioritize its enforcement agenda,” there is a “possibility that the SEC will select targets not because they are the worst violators, but

for improper reasons [like] self-aggrandizement.” Steinway, *supra*, at 224. And “empirical evidence suggests that the SEC targets ‘deep pockets’ for whom large-dollar fines will not induce insolvency, as well as” unlikeable “violators whose cases will engender positive press” for the agency. *Id.*

Recent enforcement sweeps underscore the concern. In the SEC’s “off-channel” communications cases, for example, the agency investigated a series of large financial institutions for supposed record-keeping failures. The conduct was allegedly “prevalent across the securities industry,” but—as two sitting SEC Commissioners with “deep reservations” about the agency’s priorities explained—the enforcement initiative focused on well-capitalized firms capable of absorbing extraordinary fines and generating “headline-making” settlements. *A Catalyst: Statement on Qatalyst Partners LP*, SEC (Sept. 24, 2024), perma.cc/H7BW-M66H. The result was a series of high-dollar resolutions, which reinforced the perception that the SEC’s enforcement priorities are shaped by visibility and ability to pay rather than relative culpability. And, with little regard for the obvious double standard, the SEC later refused to disclose records on how it calculated penalties for the targeted firms, until a federal court ordered it to disclose the information. *See ASA v. SEC*, 2026 WL 621432 (M.D. Fla. Mar. 5, 2026).

In other words, the SEC picks a mark with “deep pockets” or an unsympathetic story, *id.*, accuses them of violating securities laws, forces them into a crush-

ingly expensive and reputationally harmful investigation and enforcement process, uses that process to pressure them to settle, extracts massive payments in the settlement, and then imposes a gag that prevents the accused party from *ever* questioning the SEC's allegations, to *anyone*, even if their criticisms are *true* and they never actually violated the law. That is the antithesis of responsible regulation.

III. The Gag Rule is a straightforward First Amendment violation.

The Gag Rule compels regulated entities to promise to never question the SEC's decision to prosecute them. That is an impermissible content-based speech restriction and a prior restraint. The SEC cannot circumvent that straightforward conclusion with an argument that defendants "agree" to abandon their First Amendment rights. The agency cannot achieve an unconstitutional end (gagging criticism) through indirect means (requiring a gag as a condition of settlement).

A. The Gag Rule runs afoul of the First Amendment in at least two ways. First, it is a content-based restriction on speech. Governments have "no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed*, 576 U.S. at 163. But the Gag Rule does exactly that. It prohibits defendants from expressing two kinds of messages: (1) statements that "den[y]" or give the "impression" of denying the truth of SEC allegations, and (2) statements that "refus[e] to admit the allegations." 17 C.F.R. §202.5(e). Because this prohibition restricts

speech based on “the topic discussed” and the “message expressed,” it “is content based.” *Reed*, 576 U.S. at 163.

Worse yet, the Gag Rule prohibits speech based not only on its subject matter, but on its viewpoint. A defendant is not allowed to criticize the SEC for investigating and suing him, but “he is perfectly free to praise the SEC for its enforcement tactics” or “confess his culpability in violating the securities laws.” *Moraes*, 2022 WL 15774011, at *5. This viewpoint-based restriction is an especially “egregious form of content discrimination.” *Rosenberger v. University of Virginia*, 515 U.S. 819, 829 (1995).

Although the Gag Rule silences defendants, it lets the SEC say whatever it wants. Nothing in the SEC’s typical settlement agreements restrict the agency’s ability to vigorously insist upon a defendant’s guilt, even if the settlement contained no admission of liability by the defendant. “The First Amendment prohibits such distinctions, as ‘speech restrictions based on the identity of the speaker are all too often simply a means to control content.’” *Upstate Jobs Party v. Kosinski*, 106 F.4th 232, 258 (2d Cir. 2024) (quoting *Citizens United*, 558 U.S. at 340).

Second, the Gag Rule is a quintessential prior restraint on speech. “[P]rior restraints on speech ... are the most serious and the least tolerable infringement on First Amendment rights.” *Nebraska Press Ass’n*, 427 U.S. at 559. The Gag Rule, which “actually forbid[s] speech activities” under threat of renewed litigation, is a “classic exampl[e] of” such a provision. *Alexander v. United States*, 509 U.S. 544, 550 (1993). A

“more effective prior restraint is hard to imagine.” *Novinger*, 40 F.4th at 308 (Jones and Duncan, JJ., concurring) (discussing the Gag Rule).

Content-based speech restrictions and prior restraints are both presumptively unconstitutional and must satisfy strict scrutiny to survive. *Chiles v. Salazar*, 146 S.Ct. 1010, 1021 (2026); *In re Dan Farr Productions*, 874 F.3d 590, 593 n.2 (9th Cir. 2017). But the SEC doesn’t even try to argue that its rule passes that test. *See* SEC Br. (CA9.Dkt.61.1) at 23-48. Nor could it. Even assuming the SEC “has an interest in protecting the good repute” of the agency’s enforcement practices, it is “firmly established” that protecting the government’s “institutional representation” is “an insufficient reason ‘for repressing speech that would otherwise be free.’” *Landmark Communications v. Virginia*, 435 U.S. 829, 841-42 (1978).

That’s why courts regularly deem gag clauses unconstitutional, even in contracts between private parties. *E.g.*, *Ronnie Van Zant, Inc. v. Cleopatra Records*, 906 F.3d 253, 257 (2d Cir. 2018) (“[C]ourts should always be hesitant to approve” injunctions prohibiting speech even if the injunction is “imposed as a result of private contract rather than government censorship.”); *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 224 (4th Cir. 2019) (declining to enforce a non-disparagement clause that was essentially “a government-defined and government-enforced restriction on government-critical speech”).

B. Refusing to engage the required strict scrutiny analysis, the SEC (along with the Ninth Circuit below) tries to do an end run around the Constitution

altogether by arguing that its gag provisions are permissible because defendants voluntarily agree to waive their First Amendment rights as a condition of settlement. *See* Pet.App.2a.

As explained above, it is wrong to say that defendants in enforcement actions “voluntarily” agree to the SEC’s non-negotiable settlement conditions. *See supra* II. But either way, the SEC cannot do indirectly what the Constitution prohibits it from doing directly. *NRA v. Vullo*, 602 U.S. 175, 190 (2024). And everyone agrees—or should agree—that neither Congress nor the SEC could enact a regulation that automatically imposed a gag order as a penalty for anyone who is found to have committed a securities violation. *See* Pet.21. The agency therefore cannot “produce” the same “result” by other means simply by using the threat of enforcement to extract First Amendment waivers out of regulated parties. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

This straightforward principle is reflected in the Supreme Court’s unconstitutional conditions doctrine. The government generally “may not deny a benefit to a person because he exercises a constitutional right” or, conversely, use a benefit as an incentive to induce a person “into giving ... up” that right. *Koontz*, 570 U.S. at 604 (cleaned up). This is true even if “the government is under no duty to grant” the benefit in the first place, *United States v. Scott*, 450 F.3d 863, 866 (9th Cir. 2006), and even if the person “knowingly and voluntarily consent[s]” to the condition, *Moraes*, 2022 WL 15774011, at *4.

The only circumstance in which the government can impose otherwise unconstitutional terms as a condition for receiving a benefit is when there is “a close nexus” between “the specific interest the government seeks to advance” and “the specific right waived.” *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1399 (9th Cir. 1991). The government can, for example, require a criminal defendant to surrender his trial rights in exchange for a plea deal because pleading guilty “necessarily” requires foregoing a trial. *United States v. Spaeth*, 69 F.4th 1190, 1198 (10th Cir. 2023). But there is no specific connection between remedying a securities violation and indefinitely stripping a defendant of their right to speak about the *process* that led to that remedy. Instead, the SEC’s practice of gagging defendants looks much more like an extra “penal[ty]” designed to “chill the assertion of constitutional rights.” *United States v. Jackson*, 390 U.S. 570, 581 (1968). And that is “patently unconstitutional.” *Id.*

The rule against unconstitutional conditions has particular force when free speech rights are involved. “Indeed, the unconstitutional conditions doctrine specifically bars the government from” withholding benefits “to suppress ‘ideas thought inimical to the Government’s own interest.’” *Moraes*, 2022 WL 15774011, at *4. Simply put, the government “may not deny a benefit to a person on a basis that infringes his ... freedom of speech.” *Agency for Int’l Development v. Alliance for Open Soc’y Int’l*, 570 U.S. 205, 214 (2013).

CONCLUSION

This Court should grant the petition for a writ of certiorari.

J. Michael Connolly
Counsel of Record
Paul R. Draper
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
mike@consovoymccarthy.com

April 20, 2026

Attorneys for Amicus Curiae