No. 25-1100

In the Supreme Court of the United States

THOMAS JOSEPH POWELL, ET AL.,
Petitioners,
v.
SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* ADVANCING AMERICAN FREEDOM; AMERICAN ASSOCIATION OF SENIOR CITIZENS; AMERICAN LAND RIGHTS ASSOCIATION; FRONTIERS OF FREEDOM; INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS; JCCWATCH.ORG; NEW YORK STATE CONSERVATIVE PARTY; ORTHODOX JEWISH CHAMBER OF COMMERCE; RIO GRANDE FOUNDATION; RUSSELL KIRK CENTER FOR CULTURAL RENEWAL; 60 PLUS ASSOCIATION;

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STARS AND STRIPES UNITED; TAXPAYERS PROTECTION ALLIANCE; TEA PARTY EXPRESS; THE FAMILY FOUNDATION OF VIRGINIA; THE JUSTICE FOUNDATION; THE WAGNER CENTER; WALLBUILDERS; WEST VIRGINIA CENTER-RIGHT COALITION; YANKEE INSTITUTE; BOB CARLSTROM, PRESIDENT, THE CARLSTROM GROUP; TIM JONES, FORMER SPEAKER, MISSOURI HOUSE, FOUNDER, LEADERSHIP FOR AMERICA INSTITUTE; AND MELISSA ORTIZ, PRINCIPAL & FOUNDER, CAPABILITY CONSULTING IN SUPPORT OF PETITIONERS

QUESTION PRESENTED

Whether the SEC's Gag Rule violates the First Amendment.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including freedom from arbitrary power.[1] AAF "will continue to serve as a beacon for conservative ideas, a reminder to all branches of government of their responsibilities to the nation,"[2] and believes American prosperity depends on ordered liberty and self-government.[3] AAF files this brief on behalf of its 155,355 members nationwide.

Amici American Association of Senior Citizens; American Land Rights Association; Frontiers of Freedom; International Conference of Evangelical Chaplain Endorsers; JCCWatch.org; New York State Conservative Party; Orthodox Jewish Chamber Of Commerce; Rio Grande Foundation; Russell Kirk Center for Cultural Renewal; 60 Plus Association; Stars and Stripes United; Taxpayers Protection Alliance; Tea Party Express; The Family Foundation of Virginia; The Justice Foundation; The Wagner

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[1] All parties received timely notice of the filing of this amicus brief. No counsel for a party authored this brief in whole or in part. No person other than Amicus Curiae and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

[2] Edwin J. Feulner, Jr., Conservatives Stalk the House: The Story of the Republican Study Committee, 212 (Green Hill Publishers, Inc. 1983).

[3] Independence Index: Measuring Life, Liberty and the Pursuit of Happiness, Advancing American Freedom available at https://advancingamericanfreedom.com/aaff-independence-index/.

Center; WallBuilders; West Virginia Center-Right Coalition; Yankee Institute; Bob Carlstrom, President, The Carlstrom Group; Tim Jones, Former Speaker, Missouri House, Founder, Leadership for America Institute; and Melissa Ortiz, Principal & Founder, Capability Consulting are organizations that believe in the importance of Freedom of Speech and are concerned about government overreach that infringes on those rights.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The purpose of the Constitution is to protect the rights of individuals from government officials and to limit the powers of government to that end. However, it is increasingly the case that the federal government is using private consent as an "unconstitutional pathway for control"[4] to expand its power and accomplish indirectly what it could not constitutionally do directly.

In this case, Petitioners challenge the Securities and Exchange Commission's (SEC) gag rule which prohibits those who are subject to SEC enforcement actions and who ultimately settle with the agency from ever maintaining their innocence of the charges they face, or even of allowing others to do so on their behalf. Commissioner Hester M. Peirce, *Unsettling Silence: Dissent from Denial of Request for Rulemaking to Amend 17 C.F.R. § 202.5(e)* (Jan. 30, 2024). The agency attempts to justify this censorious policy on the grounds that the prohibited criticism, if allowed, might undermine confidence in the SEC's enforcement actions. *Id.* The agency, further, maintains that the policy does not violate the First Amendment because it depends on the consent of those facing enforcement actions. *Powell v. Securities and Exchange Comm'n*, 149 F.4th 1029, 1035 (9th Cir. 2025) (alteration in original) ("The SEC further rejected petitioners' First Amendment objections, explaining that '[t]here is a large body of precedent

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[4] Philip Hamburger, *Purchasing Submission: Conditions, Power, and Freedom* 156 (2021).

confirming that a defendant can waive constitutional rights as part of a civil settlement, just as a criminal defendant can waive constitutional rights as part of a plea bargain.").

As this Court has recognized, "First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002). The consent of a private party, especially one facing the arduous, time-consuming, and costly prospect of protracted agency proceedings and litigation, is no shortcut around the First Amendment.

Further, in cases relating to such disparate issues as speech, equal protection, and unreasonable searches, this Court has long recognized that the government cannot circumvent the limits on its power by accomplishing through some indirect means what it could not accomplish directly.

This Court should grant the petition for certiorari.

ARGUMENT

I. The SEC's Extortionate Settlement Gag Rule Unconstitutionally Attempts to Accomplish by Consent What the Government Could Not Accomplish Directly.

In *National Rifle Association v. Vullo*, the National Rifle Association (NRA) alleged that Maria Vullo, superintendent of the New York Department of Financial Services (DFS) pressured insurance

companies "to help her stifle the NRA's pro-gun advocacy." 602 U.S. 175, 180-81 (2024). As this Court held, while "Vullo was free to criticize the NRA" for its Second Amendment advocacy, "[s]he could not wield her power . . . to threaten enforcement actions against DFS-regulated entities in order to punish or suppress the NRA's gun-promotion advocacy." *Id.* at 187.

The SEC's censorship activity in this case is even more perverse. For many targets of SEC enforcement, including those who are innocent, the process is the punishment. Such enforcement proceedings are time consuming, emotionally taxing, and expensive, often prohibitively so. And many of the targets who carry these burdens do not even receive a fair trial before an impartial tribunal. Instead, "[a]gnecies like the SEC and FTC combine the functions of investigator, prosecutor, and judge under one roof." *Axon Enter., Inc. v. Fed. Trade Comm'n*, 598 U.S. 175, 215 (2023) (Gorsuch, J., concurring). Proceedings before the SEC's administrative law judges (ALJ) "employ relaxed rules of procedure and evidence," which the agency itself creates, and almost always result in wins for the agency. *Id.*

The harm of such proceedings has been partially mitigated in some cases by the Court's decision in *Securities and Exchange Comm'n v. Jarkesy*, finding that, under the Seventh Amendment, "[a] defendant facing a fraud suit has the right to be tried by a jury of his peers before a neutral adjudicator." 603 U.S. 109, 140 (2024). Nonetheless, even for those who face SEC allegations in an Article III court, litigation is costly and time-consuming. And

for those who face allegations that do not amount to fraud, the former SEC gauntlet remains.

It is thus unsurprising that the overwhelming majority of SEC targets choose to settle with the agency. *Axon Enter.*, 598 U.S. at 216 (Gorsuch, J., concurring). But that settlement comes with a grave cost. Under the SEC's gag rule, a "settling defendant, for the action to stay settled, must agree both to rescind her past in-court statements contesting the truth of the Commission's allegations and promise never again to contest the truth of the Commission's allegations, or even permit others to contest the allegations." Peirce, *supra*.

Thus, the target of any SEC enforcement action, innocent or not, is faced with an unenviable choice: face, at best litigation before an Article III court and at worst proceedings before the SEC's in-house adjudicators, or accept a settlement agreement and thus face a lifetime of censorship as to her own integrity.

The First Amendment prohibits Congress from making any law "abridging the freedom of speech." U.S. Const. amend I. As this Court recognized almost ninety years ago, "freedom of thought and speech . . . one may say," are "the matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937). The freedom of speech is a "fundamental personal libert[y]," and the Framers believed that the exercise of this right "lies at the foundation of free government by free men." *Schneider v. New Jersey*, 308 U.S. 147, 150-51 (1939).

And "the right to criticize the government," is at "the heart of what the First Amendment is meant to protect." *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 248 (2003) (Scalia, J., concurring in part and dissenting in part).

As at least one current SEC Commissioner recognizes, this ability to criticize the government is one of the things that keeps Americans free:

> One thing I love about this country is that Americans can and often do criticize their government . . . This freedom to speak against the government and government officials is essential in a free society committed to the preeminence of the people. Of course, some criticisms of government policies, practices, or personnel may be baseless, but the American public, not government censors, should be the arbiters of validity.

Peirce, *supra*.

Contrary to this venerable and constitutionally mandated respect for speech, including criticism of the government, "the SEC's policy says, 'hold your tongue and don't say anything truthful—ever'—or get bankrupted by having to continue litigation with the SEC." *Securities and Exchange Comm'n v. Novinger*, 40 F.4th 297, 308 (5th Cir. 2022) (Jones, J., concurring).

On what grounds does the SEC justify this prohibition on maintaining one's innocence? The

agency claims that the gag rule "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." 17 C.F.R. 202.5(e). The supposed justification, then, for the SEC's censorship policy is that, if those who settle maintain their innocence, it might undermine confidence in the agency's prosecutions.

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). The same holds true if the speech is banned because some arm of the government finds speech counterproductive or offensive.

Surely the point of criticizing government is to undermine confidence in some particular government activity or policy. And, thus, the liberty to seek to undermine one's fellow Americans' confidence in some government policy is at "the heart of what the First Amendment is meant to protect." *McConnell*, 540 U.S. at 248 (Scalia, J., concurring in part and dissenting in part).

Americans cannot consent away their First Amendment rights. If the government wishes to enter into an agreement with a person under any circumstances that would limit the person's ability to speak and that agreement, if imposed directly would face First Amendment review, then it must face the same review when imposed through a supposedly voluntary agreement.

The unconstitutional conditions doctrine often applies where a private party's consent is involved, but consent need not be relevant. In *Perry v. Sindermann*, the Court explained that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." 408 U.S. 593, 597 (1972). In that case, a state college did not renew a professor's employment contract. *Id.* at 595. The question in the case was whether the college chose not to renew his contract because of his speech and, if so, whether the professor was entitled to due process in relation to his termination.

The question in the case was not whether the professor had waived his First Amendment rights. The question was whether terminating him for speech implicated the First Amendment. Consent is ultimately beside the point. The government simply cannot use conditions, even if theoretically consented to, to accomplish unconstitutional ends.

The government employment context introduces its own wrinkle because a court reviewing a speech limitation imposed by a government employer must consider whether, in the context, the overriding relationship is that of an employer and its employee or that of a government and a citizen. *See Connick v. Meyers*, 461 U.S. 138, 142 (1983) (alteration in original) (quoting *Pickering v. Bd. of Ed. of Tp. High Sch.*, 391 U.S. 563, 568 (1968) ("Our task, as we defined it in *Pickering,* is to seek 'a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the

interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'"). Where the reviewing court determines that the paramount relationship, in context, is that of government and citizen, the government must have a justification for the speech-restrictions it imposes on its employees.

As the Court has explained, where a government employee speaks as a citizen on a matter of public concern, the question is "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Garcetti v. Cabellos*, 547 U.S. 410, 418 (2006) (citing *Pickering*, 391 U.S. at 568). Any restrictions the government-employer imposes "must be directed at speech that has some potential to affect the entity's operations." *Id.* Thus, even in the employment context, the government cannot obtain a waiver of employees' First Amendment rights generally.

Especially where there is no special employer-employee relationship between the government and its target, consent cannot release the government from the limitations the Constitution imposes upon it. As Professor Philip Hambuger has explained, the Constitution's limitations on government power are "not variable with the consent of any state or private person. No such consent can relieve the federal government of the Constitution's limits."[5] This is because, "constitutional rights are not merely personal claims . . . they are legal limits on

[5] Hamburger, *supra* note 4 at 156.

government."[6] After all, "rights were adopted as structural limits on government power."[7]

The SEC's gag rule is undoubtedly extortionate, abusing the supposed consent of those who have little practical choice but to comply with the agency's settlement demands. If those facing an enforcement action want to be able to defend their innocence, they must choose to face the gauntlet of SEC proceedings and litigation against the government. But fundamentally, this case is not about the consent of enforcement targets. It is about the Constitution's limitations on government power and whether the government can accomplish indirectly, whether by the consent of a private party or otherwise, what it could not accomplish directly. The answer, as this Court has recognized in numerous contexts, is no.

II. This and Lower Courts' Existing Precedent Embodies the Principle that Efforts to Indirectly Circumvent the Constitution's Protections are Subject to Judicial Review Just as Direct Efforts to Violate Them.

Governments are "instituted among Men" to secure their individual rights to "life, liberty, and the pursuit of happiness." *The Declaration of Independence* para. 2 (U.S. 1776). Yet government itself represents a significant danger to individual rights. According to James Madison, because men are not angels, "the great difficulty" in "framing a government" is that "[y]ou must first enable the

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[6] *Id.*
[7] *Id.*

government to controul the governed; and in the next place, oblige it to controul itself."[8] The Constitution binds the authority of government officials in order to protect the rights with which individuals were endowed "by their Creator." *The Declaration of Independence* para. 2 (U.S. 1776). As the Founders would be unsurprised to learn, government officials today are seeking to remove, go around, or leap over the barriers erected by the Constitution. If such efforts are successful, the guarantees of the Constitution will be reduced to little more than "parchment barriers."[9]

"The Constitution deals with substance, not shadows," and its prohibition on the infringement of First Amendment rights ought to be "levelled at the thing, not the name." *Students for Fair Admissions v. Presidents and Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2176 (2023) (internal quotation marks omitted) (quoting *Cummings v. Missouri*, 4 Wall. 277, 325 (1867)). This Court and lower courts have recognized limitations not only on overt and direct violations of the rights protected in the Constitution but also limitations on the government's ability to circumvent constitutional protections of individual rights.

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[8] The Federalist No. 51, at 269 (James Madison) (George Carey & James McClellan eds., The Liberty Fund 2001).

[9] The Federalist No. 48, at 256 (James Madison) (George Carey & James McClellan eds., The Liberty Fund 2001).

A. This Court's and lower courts' precedent on racial discrimination in education makes clear that government actions that, in another context and aimed at a different purpose, might be legal, are nonetheless unconstitutional where it is clear those actions were directed at circumventing constitutional protections.

After this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), some school districts attempted to avoid the consequences of that decision without creating an opportunity for judicial review. Virginia, for example, passed a law creating a "Pupil Placement Board" which had authority to determine which schools students would attend. *Adkins v. Sch. Bd. of Newport News*, 148 F. Supp. 430, 441 (E.D. Va. 1957) Relatedly, the law prohibited students' changing schools unless approved by the Board, which approval would be given only for good cause. *Id.* Clearly, then, the law was meant to maintain *de facto* segregation even as it had been recognized as unconstitutional. Striking down this policy, the Eastern District of Virginia wrote, "Courts cannot be blind to the obvious, and the mere fact that Chapter 70 makes no mention of white or colored school children is immaterial when we consider the clear intent of the legislative body." *Id.* at 442. Because the purpose of the law in question was to continue segregation in contravention of the Court's decision in *Brown*, the district court struck down the law.

Courts recognized this for what it was; an attempt to treat black students as second-class citizens despite the requirements of the Fourteenth

Amendment's Equal Protection Clause. As this Court explained almost twenty years later:

> Any arrangement, implemented by state officials at any level, which significantly tends to perpetuate a dual school system, in whatever manner, is constitutionally impermissible. "[T]he constitutional rights of children not to be discriminated against . . . can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'"

Gilmore v. Montgomery, Alabama, 417 U.S. 556, 568 (1974) (alteration in original) (quoting *Cooper v. Aaron*, 358 U.S. 1, 17 (1958)). Nor should government officials be able to stifle the core political activities of association and speech "through evasive schemes."

In numerous contexts, both this Court and the Circuit Courts have recognized such action for the constitutional violation that it is.

B. This Court's and lower courts' precedent in other contexts make clear that government cannot enlist the help of third parties to accomplish what it otherwise could not.

Courts have also recognized this principle by holding that the government cannot accomplish an unconstitutional end by enlisting the help of a third party to do what it could not do itself. Lawfully, there can be no proxy war on constitutional rights. "The text

and original meaning of [the First and Fourteenth] Amendments, as well as this Court's longstanding precedents, establish that the Free Speech Clause prohibits only *governmental* abridgment of speech. The Free Speech Clause does not prohibit *private* abridgment of speech." *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 808 (2019) (emphasis in original) (citing *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 737 (1996) (plurality opinion); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 566 (1995); *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974)). The barrier between state and private action created by the state-action doctrine "protects a robust sphere of individual liberty." *Id.* Yet the First Amendment right to free speech must be protected against crafty government action that seeks to abuse that robust private sphere. The "will no one rid me of this meddlesome priest" approach is not a legitimate means of avoiding judicial review of unconstitutional actions.[10]

In the Fourth Amendment context, courts have found that a suspect or defendant's constitutional rights may be violated even where the government is not the one directly carrying out the violation. *See Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 614 (1989) ("Whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the

[10] *See generally* T.S. Eliot, *Murder in the Cathedral* (1935) available at https://archive.org/details/in.ernet.dli.2015.86641/mode/2up.

private party's activities."). As the 6th Circuit said, "[i]n the Fourth Amendment context, we have held that the government might violate a defendant's rights by 'instigating' or 'encouraging' a private party to extract a confession from a criminal defendant." *United States v. Folad*, 877 F.3d 250, 253 (6th Cir. 2017) (citing *United States v. Lambert*, 771 F.2d 83, 89 (6th Cir. 1985)). In the Fifth Amendment context as well, "courts have held that the government might violate a defendant's right by coercing or encouraging a private party to extract a confession from a criminal defendant." *Id*. (citing *United States v. Garlock*, 19 F.3d 441, 443-44 (8th Cir. 1994)). Similarly, in the State Action context, government coercion or some forms of government encouragement intended to bring about a certain result can transform an otherwise private actor into an agent of the government. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

Through its settlement agreement gag rule, the SEC seeks to accomplish indirectly what neither it nor Congress could accomplish directly: the silencing of Americans. This policy violates the First Amendment. The SEC cannot circumvent this constitutional limitation.

The SEC's gag rule is the exercise of a power "expressly and positively forbidden by" the First Amendment, particularly alarming "because it is levelled against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed, the only effectual guardian

of every other right."[11] The Court should grant the petition for certiorari and restore the right of those who have settled with the SEC to speak.

CONCLUSION

For these reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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[11] *Virginia Resolutions*, *in The American Republic: Primary Sources* 552 (Bruce Frohnen ed., Liberty Fund 2002).