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 THE HAMILTON LINCOLN LAW INSTITUTE AND MANHATTAN INSTITUTE *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Hamilton Lincoln Law Institute ("HLLI") is a public interest organization dedicated to protecting free markets, free speech, limited government, and separation of powers against regulatory abuse, overreach, and rent-seeking. *See, e.g.*, *Competitive Enter. Inst. v. FCC*, 970 F.3d 372 (D.C. Cir. 2020) (challenge to federal regulatory overreach); *Stock v. Gray*, 773 F. Supp. 3d 733 (W.D. Mo. 2025) (enjoining regulation that infringed pharmacist free speech); *Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (E.D. Pa. 2020) (enjoining regulation that infringed attorney free speech).

The Manhattan Institute for Policy Research ("MI") is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. MI scholars and affiliates are sought-after experts on constitutional law, financial regulation, and government enforcement actions. MI has historically sponsored scholarship and filed briefs supporting free speech and opposing government overreach.

Amici harbor concern that the Ninth Circuit's endorsement of the SEC's Gag Rule opens the door for government agencies to immunize themselves from criticism and erode the "prized American privilege to speak one's

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[1] No party's counsel authored any part of this brief and no person other than *amici* and their counsel funded its preparation and submission. *See* Sup. Ct. R. 37.6. *Amici* notified both parties of this brief ten days in advance of its filing. *See* Sup. Ct. R. 37.2.

mind…on all public institutions." *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (internal quotation omitted).

SUMMARY OF ARGUMENT

Respondent's Gag Rule imposes upon petitioners a burden on speech that has not just no relation, but a *negative* relation, to the interests it claims to advance.

The Securities Exchange Act gives the SEC the right to seek various forms of equitable relief. But, with enumerated exceptions, such injunctions are limited to the prohibition of practices that constitute "a violation of [its] provisions". 15 U.S.C. § 77t(b); *see generally* 15 U.S.C. chs. 2A & 2B. None of these remedies come close to the permanent ban on speech effectively imposed by the Gag Rule. In other words, because the SEC could not impose such restrictions on Petitioners even if it had found Petitioners responsible for their alleged conduct, its Gag Rule conditions settlement on "a result which [it] could not command directly", something that no governmental actor may do, nor have a legitimate interest in doing. *E.g., Nat'l Rifle Ass'n v. Vullo*, 602 U.S. 175, 190 (2024) (suppression through the coercion of third parties).

But even if the SEC could impose such conditions, it may not do so in *every* case. To impose a condition restricting a constitutional right, the government must show that the condition bears some "plausible relation" to a legitimate public interest. *Matal v. Tam*, 582 U.S. 218, 253 (2017) (Kennedy, J., concurring). It cannot, as it has in this case, rely on its "general interest in the settlement of litigation" to justify a policy of requiring *all* litigants to waive

those rights no matter the substance of the matter it is settling. *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987) (requiring an interest-balancing test). This blanket policy, which stifles the speech of 98% of all its enforcement targets, certainly cannot be narrow tailored—let alone "the least restrictive means"—to facilitate settlement. *McCullen v. Coakley*, 573 U.S. 464, 478 (2014). In reality, the Gag Rule serves only one, wholly illegitimate, purpose: stifling criticism of the SEC's enforcement policy.

And even if it were applied on a case-by-case basis, the SEC's claim that its policy is required to effect settlement is simply not tenable. *See McCullen*, 573 U.S. at 490 (a "truly exceptional" policy "raise[s] concern" that the government "has too readily forgone options that could serve its interest just as well"). For example, no private civil class action settlements enjoin the defendant from commenting publicly on the merits of the plaintiffs' allegations. And only one other agency, the U.S. Commodity Futures Trading Commission, has even a remotely similar policy. 17 C.F.R. App. A to pt. 10.

In other words, the Gag Rule expands the Commission's authority beyond its permissible limits, applies this authority indiscriminately to achieve an unconstitutional end, and does so in a way that almost no other agency, or, indeed, any private party does or has. It violates the First Amendment at every step. For those reasons alone, the rule must be vacated.

ARGUMENT

I. The SEC's blanket Gag Rule serves no legitimate government interest.

[T]he First Amendment does not permit the State to sacrifice speech for efficiency." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795 (1988). Nor does it acquiesce to abstract, theoretical, prophylactic, or undifferentiated governmental concerns. *E.g., United States v. Alvarez*, 567 U.S. 709, 726–27 (2012); *Edenfield v. Fane*, 507 U.S. 761, 774 (1993). Yet the SEC's justifications for its Gag Rule suggest only an amorphous need for the SEC to compromise and settle its investigations to conserve resources and a desire to avoid "some sort of battle by press release." Br. for Plaintiff-Appellee, *SEC v. Romeril*, No. 19-4197, 15 F.4th 166 (2d Cir. Jul. 10, 2020), at 37; *accord* App. 5a, 22a ("the Commission does not try its cases through press releases.") (quoting SEC's rationale). Neither amounts to a legitimate justification for restricting the flow of information.

Of course, no one disputes that the SEC may require defendants to waive certain rights, even constitutional rights, to conserve resources when entering consent decrees. *See, e.g., United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 235 (1975); Cert. Pet. 20. But that is not the issue. As discussed *infra*, the SEC does not have the power to impose a condition that it could not obtain in litigation. But even if *arguendo* it does have that power, two issues arise: (1) does the SEC's condition impermissibly burden the rights of the public to receive information from settling enforcement defendants? And (2) does a blanket

regulation requiring a gag order for all SEC consent decrees, ignoring case-specific circumstances, accord with the First Amendment? The answer to both questions is 'no'. *See Rumery*, 480 U.S. at 393

A. The SEC is accomplishing what it could not accomplish through exercise of its enumerated powers by threatening government action.

It is axiomatic that the federal government is one of "limited powers". *New York v. United States*, 505 U.S. 144, 155 (1992) (internal quotation omitted). As such, deprived of the broad grant of authority that exists under the common law, its agents may only act as authorized by Congress; "an agency literally has no power to act. . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n. v. F.C.C.*, 476 U.S. 355, 357 (1986). The government's interest is not legitimate if it cannot be located "within [its] constitutional power." *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *cf. also FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 389 (D.C. Cir. 1980) (if agency lacks jurisdiction, no compelling interest "can possibly exist"); *R.I. Latino Arts v. Nat'l Endowment for the Arts*, 777 F. Supp. 3d 87, 110 (D.R.I. 2025) (distinguishing, in unconstitutional conditions context, between agency imposing "extrinsic, extra-statutory condition" and enforcing an "intrinsic part of a specific government program").

The Securities and Exchange Act gives the SEC the authority to seek numerous forms of relief to rectify violations of the securities laws, including the general authority to seek an injunction to prohibit practices that constitute "a violation of the provisions" of the Act. 15 U.S.C. §

77t(b). But, simply put, no provision of the Act authorizes the injunction here: gagging a defendant from denying the SEC's allegations in perpetuity.

Neither would any of the SEC's other remedies authorize such an injunction no matter what conduct Petitioners have been accused of committing. The SEC may, *inter alia*, seek the prohibition of a person from acting as an issuer of securities or of offering a penny stock; disgorgement of unjust enrichment; the placing of a company into receivership; and various other remedial measures. *See* 15 U.S.C. §§ 77t(b), 78u(d); 80a-41(d); 80b-9. None of these authorities are remotely analogous to the authority that the SEC asserts through its application of the Gag Rule.

Because the SEC has no power to seek an injunction restricting the discussion of enforcement actions, it has smuggled them in through the backdoor of its settlement authority. By the SEC's lights, the imposition is voluntary: "a defendant is always free to eschew settlement and litigate." App. 34a. Presto! By the mere fact of consent, the agency can now do "indirectly what [it] is barred from doing directly." *Contra, e.g., Nat'l Rifle Ass'n*, 602 U.S. at 190; *cf. Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) (suppression through the acquiescence of third parties); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (suppression through retaliation by otherwise lawful means). But that prestidigitation cannot legitimate its interest.

To be fair to the SEC, it's not the only agency to unconstitutionally aggrandize power in this way; it has long been observed that "[c]onsent decrees create potential for an enforcement agency to extract from parties under investigation commitments well beyond what the agency could

obtain in litigation." Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Settlement: The Culture of Consent*, in 1 WILLIAM E. KOVACIC, AN ANTITRUST TRIBUTE 177 (N. Charbit et al. eds. 2013) (discussing the FTC's use of consent decrees in antitrust matters). *See also* James R. Copland, THE UNELECTED: HOW AN UNACCOUNTABLE ELITE IS GOVERNING AMERICA 107–08 (2020) (discussing how the Justice Department has utilized settlements to require defendants to pay money to unrelated third parties in an end-run around the Appropriations Clause). Precisely because they can extract concessions from defendants beyond those available under statute, federal enforcers can see settlement agreements as "a more powerful tool than actually going to trial," Rahul Rose, *Caldwell: Settlement a "More Powerful Tool" Than Convictions*, GLOBAL INVESTIGATIONS REV. (Dec. 3, 2014), http://globalinvestigationsreview.com/article/2121/caldwell-settlement-more-powerful-tool-convictions. Too often, government officials have viewed using a settlement process to go around statutory enforcement remedies as a feature, not a bug.

But there is no "settlement exception" to the limited scope of federal executive power. The non-negotiable, unrestricted, unreviewable imposition of terms with no statutory authorization is simply not compatible with a system of constitutionally limited federal powers. And as a practical matter, the distinction between settlement and judgment is almost irrelevant: the SEC settles as many as 98% of its enforcement actions. Cert. Pet. 8. What results is a commission of the federal government forcing into silence all defendants that are unwilling to spend more than is at

stake to defend themselves. This is something that no rational business owner would do. *Cf.* Copland, *supra*, at 97–98 (discussing government's handling of substantively identical claims against UPS and FedEx, permitting the former to settle for $40 million while seeking $1.6 billion in fines at trial against the latter).

Thus, the SEC's enforcement authority acts as an *in terrorem* tool to impose speech-suppressing terms that it "could not lawfully obtain any other way." *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 216 (2023) (Gorsuch, J., concurring in the judgment); *accord* App. 42a (statement of dissenting Commissioner Peirce). The First Amendment does not normally accept "a strategy [that] allows government officials to expand their regulatory jurisdiction to suppress the speech of organizations that they have no direct control over." *Nat'l Rifle Ass'n*, 602 U.S. at 197–98. Moreover, because prohibiting speech about its enforcement actions furthers none of the SEC's statutory interests, a waiver of that right to speak about the SEC's enforcement action does have the required nexus to the underlying securities law dispute which occasioned it. For that reason, such a waiver is inherently contrary to public policy. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) (a nexus must exist between the right waived and the dispute resolved by the agreement).

B. Mere consent is insufficient in the absence of a legitimate government interest.

It is not enough for the government to show that enforcement defendants "consent" to a gag order. The government must show the condition at least bears some

"plausible relation" to a legitimate public interest to impose a condition restricting a constitutional right. *E.g. Matal v. Tam*, 582 U.S. 218, 253 (2017) (Kennedy, J., concurring); *USAID v. Alliance for Open Soc'y Int'l*, 570 U.S. 205, 214–15 (2013); *cf. also Overbey v. Mayor of Baltimore*, 930 F.3d 215, 223 (4th Cir. 2019). Without such a relation, "non-germane conditions" may amount to "'an out-an-out plan of extortion.'" *Competitive Enter. Inst. v. FCC*, 970 F.3d 372, 387 (D.C. Cir. 2020) (quoting *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987)). *Cf.* Copland, *supra*, at 98 ("[M]ost companies have little choice but to agree 'voluntarily' to the government's terms. Essentially, like Don Corleone in The Godfather, the [federal government] tends to make companies 'offers they can't refuse.'" (citing THE GODFATHER, Albert S. Ruddy, 1972)).

In effect, if obtaining consent was sufficient, then an agency could shoehorn unbounded authority into its consent decree power. Courts customarily reject any "conceit of unlimited agency power." *Acosta v. Cathedral Buffet, Inc.*, 887 F.3d 761, 770 (6th Cir. 2018) (Kethledge, J., concurring). Thus, it's no answer for the Ninth Circuit to rely on safeguards that consent be merely "knowing," "voluntary," and intelligent." App. 20a.

The interests that the Gag Rule *does* serve are not legitimate public interests. There is no legitimate public interest in suppressing otherwise protected speech simply because it criticizes or embarrasses the government. *E.g.*, *Pickering v. Bd. of Educ.*, 391 U.S. 563, 570 (1964) ("to the extent that the Board's position here can be taken to suggest that even comments on matters of public concern that are substantially correct … may furnish grounds for dis-

missal if they are sufficiently critical in tone, we unequivocally reject it"). "The right to 'examin[e] public characters and measures' through 'free communication' may be no less than the 'guardian of every other right.'" *Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 478 (2022) (quoting Madison's Report on the Virginia Resolutions (Jan. 7, 1800), in 17 Papers of James Madison 345 (D. Mattern, J. Stagg, J. Cross, & S. Perdue eds. 1991)). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (internal quotation omitted).

Nor does the SEC have a valid interest in "avoid[ing] the confusion and credibility issues that would result if a defendant could settle one day and deny the next." Br. for Plaintiff-Appellee, *SEC v. Romeril*, No. 19-4197, 15 F.4th 166 (2d Cir. Jul. 10, 2020) at 42–43; *accord* App. 37a ("that turnabout can negatively impact the public interest"). Open discussion of criminal enforcement, prosecution, and settlement practices undertaken by government agencies is of the utmost public interest and cannot be fairly conducted with one side silenced. The marketplace of ideas only flourishes with "[f]ree speech on both sides and for every faction on any side." *Houston Cmty. Coll. Sys*., 595 U.S. at 477 (quoting *Thomas v. Collins*, 323 U.S. 516, 547 (1945) (Jackson, J., concurring)). As public servants, agencies must live with the reality that free speech may "undermine confidence in the Commission's enforcement program." App. 38a. "Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates." *Alvarez*, 567 U.S. at 728. "Enforcing a waiver of First

Amendment rights for the very purpose of insulating public officials from unpleasant attacks would plainly undermine that core First Amendment principle." *Overbey*, 930 F.3d at 226; *cf. New York Times v. Sullivan*, 376 U.S. 254, 273 (1964) ("If judges are to be treated as men of fortitude, able to thrive in a hardy climate, surely the same must be true of other government officials.") (internal quotation omitted).

C. A blanket policy that settling defendants waive constitutional rights is *per se* unconstitutional.

The Ninth Circuit recognized that it "would be improper" "to silence defendants in order to promote public confidence in the SEC's work." App. 23a. Yet it concluded that the SEC's interest is not "wholly illegitimate" because it retains "some interest in determining how to try its cases and prove its allegations" and imposing its "preferred enforcement strategy." App. 23a. In so holding, the Ninth Circuit abandoned its correct position that the "general interest" in resolving cases via settlement is "insufficient" to "outweigh a substantial public interest" that accompanies the exercise of certain constitutional rights. *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1398–99 (9th Cir. 1991). "[A] promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Rumery*, 480 U.S. at 393. But, as the Fourth Circuit held, following *Davies*, "no balance-of-interests test would be required" if the "general interest in settling lawsuits" were enough. *Overbey*, 930 F.3d at 225.

Since *Rumery*, other courts that have not yet considered truly unrelated burdens apply a slightly different

framework in relation to release-dismissal agreements, which by their very nature have a *far* closer nexus to the waived right. *Cain v. Darby Borough*, 7 F.3d 377, 383 (3rd Cir. 1993) (*en banc*) (requiring an individualized "case-specific" analysis that a waived claim was "marginal or frivolous," invalidating a release-dismissal agreement for failure to make a finding even though the plaintiffs' claim was in fact precluded by program rules); *cf. Coughlen v. Coots*, 5 F.3d 970, 973 (6th Cir. 1993) (requiring that "enforcement of [a release-dismissal] agreement…not adversely affect relevant public interests"). The only circuit to apply no balancing test in relation to the Gag Rule is the Second Circuit, but it did so only in dicta after concluding it lacked jurisdiction under Federal Rule of Civil Procedure 60. *SEC v. Romeril*, 15 F.4th 166, 172–73 (2d Cir. 2021).

By flatly disallowing consideration of each circumstance under which an agreement is to be made, the SEC's Gag Rule fails under the test *Rumery* demands. Regardless of whether an enforcement attorney concludes that justice would be served by declining to impose a gag against a particular defendant in a particular action, the Gag Rule demands it as a condition of any settlement. No exceptions. In doing so, the SEC fails to connect a "specific interest the government seeks to advance" with a "specific right waived" and imposes an across-the-board harm to the marketplace of ideas that otherwise "could not have been affected by a resolution of the litigation." *Davies*, 930 F.2d at 1398–99.

Even if the Gag Rule served a genuine interest as in *Rumery* (relieving pressure on the public fisc), this still wouldn't suffice. This is because the SEC does not make

any determination as to whether the public interest will be adversely affected by the condition. *Coughlen*, 5 F.3d 970. And this failure naturally precludes any finding that an enforcement defendant's defense was "marginal or frivolous." *Cain*, 7 F.3d at 383.

The right to speak, as the very first right to be incorporated against the states as "fundamental," is perhaps *the* quintessential "public policy" that outweighs others. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Whenever the SEC curbs a settling defendant's right to speak, it not only burdens that defendant's right to speak, but limits the fundamental right of the public to hear and receive information from that defendant. *See Martin v. City of Struthers*, 319 U.S. 141, 143 (1943); Cert. Pet. 31. Put simply, the government may not "control the flow of ideas to the public." *Lamont v. Postmaster General*, 381 U.S. 301, 302 (1965). But this is the SEC's stated aim in gagging defendants. The SEC's stated policy for its Gag Rule is "to avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed, when the conduct did not, in fact, occur." 17 C.F.R. 202.5(e); *accord* App. 32a–33a, 37a. As members of the press, Petitioners Cape Gazette and Reason Foundation suffer a First Amendment violation because of their inability to receive the gagged defendants' reflections on the SEC. No one could claim they consented to any waiver of their rights.

Our Constitution "entrust[s]" "the people" "with the responsibility for judging and evaluating the relative merits of conflicting arguments"—not the government. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791–92 (1978). Preventing settling defendants—i.e., people who will have more intimate knowledge of the SEC than the

average citizen—from speaking about their experience with the SEC removes crucial voices from the nation's important conversations about the unquestionably public concern of securities regulation. App. 55a (dissenting statement of Commissioner Peirce). The government seeks to shut down the civic participation of its adversaries—"countless potential speakers." App. 56a (dissenting statement of Commissioner Peirce). Simultaneously, the government collaterally damages even more citizens, impeding them from listening, deliberating, and reaching their own independent judgments.

Any burden on speech must be narrowly tailored to serve a significant governmental interest, and it must be the least restrictive means of achieving that interest. *McCullen*, 573 U. S. at 478. Here, the SEC's Gag Rule lacks *any* tailoring to the SEC's purported aim of "minimiz[ing] litigation risk, maximiz[ing] limited resources, and accelerating the resolution of the case." App. 40a. To the contrary, a policy of mandating one specific non-negotiable non-monetary term—what's more, one almost unheard of in other contexts—makes settlement *more* difficult, not less! It does worse than nothing to protect the public fisc. *Contrast Rumery*, 480 U.S. at 393 (civil claims waivers safeguard public funds).

The SEC's "more mechanical" interest in proving its allegations in court ceases to be legitimate when it becomes contingent on the out-of-court public statements of a defendant. *Contra* App. 24a.

The Ninth Circuit found that "on its face," the Gag Rule "is a relatively narrow limitation on speech," expressing concern that "every waiver of First Amendment rights

can in some sense be described as a content-based prior restraint." App. 19a, 24a. But petitioners aren't challenging every individual waiver; they are challenging the SEC's indiscriminate requirement that all consent decrees must contain a waiver. And that indiscriminacy flies in the face of First Amendment narrow tailoring principles. *See Globe Newspaper Co. v. Super. Ct. for Norfolk County*, 457 U.S. 596, 608-09 (1982) (invalidating blanket sealing law for lacking the tailoring of a case-by-case approach).

In earlier litigation over the Gag Rule, the SEC faulted petitioners for "rhapsodiz[ing]" about the "truth" and "public discourse" and for their role in accepting the consent decree. Br. for Plaintiff-Appellee, *SEC v. Romeril*, No. 19-4197, 15 F.4th 166 (2d Cir. Jul. 10, 2020) at 47. But even if an enforcement defendant acquiesces to an exercise of sovereign power, the agency wielding that power must, in the first place, exercise that power solely to further the public interest. And here, the First Amendment instructs that the public interest consists in maximizing the free flow of information available in the marketplace of ideas. *See, e.g., Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (refusing to allow New York to "drive" speech depicting past crime "from the marketplace"). Even if a gag order might serve valid interests in certain circumstances and certain cases, the SEC's blanket rule, like any other blanket rule as to the waiver of a constitutional right, necessarily fails to do this. *Rumery*, 480 U.S. at 392.

II. The SEC's Gag Rule is essentially unprecedented in both public and private litigation.

When a regulation is unprecedented, that "raise[s] concern" that the government "has too readily forgone options that could serve its interest just as well, without substantially burdening the kind of speech in which petitioners wish to engage." *McCullen*, 573 U.S. at 490. Looking at the landscape of both government enforcement practice and private shareholder class settlements reveals just how much of an outlier the Gag Rule is.

In amicus HLLI's experience reviewing thousands and objecting to over a hundred private "no admit" class-action settlements, it is aware of **zero** settlements that enjoin the defendant from commenting publicly on the merits of the plaintiffs' allegation. Quite to the contrary, private settlements typically put the defendants' denial of the veracity of the claim directly into the agreement's recitals. For example, in the parallel private action arising out of the same events at issue in the enforcement action in *Romeril*, this unequivocal denial came right in the settlement agreement:

> The Defendants have denied and continue to deny any wrongdoing whatsoever and this Stipulation, whether or not consummated, any proceedings related to any settlement, or any terms of any settlement, whether or not consummated, shall in no event be construed or be deemed to be evidence of an admission or concession on the part of any Defendant with respect to any claim or [sic] of any fault or liability or wrongdoing or damage whatsoever.

Carlson v. Xerox Corp., No. 00-cv-01621-AWT, Dkt. 463 at 2 (D. Conn. Mar. 27, 2008). Again, this language is routine and typical, but the sky has not fallen. With the SEC's Gag Rule, we arrive at an upside-down situation where private plaintiffs, with no duty under the First Amendment, are more solicitous of the marketplace of ideas than is a federal agency. Put simply, even if one could view the SEC as a market participant engaged in the enterprise of settling litigation, there is no legitimate interest in imposing a prospective speech ban on defendants.

By comparison to other public agencies too, the SEC's Gag Rule is an aberration. App. 48a & n.18 (dissenting statement of Commissioner Peirce). As far as amici are aware, only the U.S. Commodity Futures Trading Commission ("CFTC") has a similar policy as part of enforcement action settlements, though unlike the SEC it at least engages in an analysis of whether those settlements are warranted in a specific case. 17 C.F.R. pt. 10, App. A; Commodity Futures Trading Comm'n, Div. of Enforcement, Advisory Regarding Penalties, Monitors and Consultants, and Admissions in CFTC Enforcement Actions (Oct. 17, 2023), https://www.cftc.gov/media/9466/EnfAdv_Resolutions/download.

Moreover, if it is the genuine policy of the SEC 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), then the Commission's willingness to enter into settlements without admission of liability makes little sense. Indeed, the Commission is not only willing to enter "no admit" settlements, but it also insists on them even when

courts try to hold them to their professed policy of avoiding false impressions. *See SEC v. Citigroup Global Mkts. Inc.*, 827 F. Supp. 2d 328 (S.D.N.Y. 2011), *rev'd* 752 F.3d 285, 295 (2d Cir. 2014). Whether or not such an insistence on "no admit" consent decrees is a good idea, the SEC's position in *Citigroup* undermines the notion that its Gag Rule only aims to combat public confusion.

In practice, the SEC's no-admit/no-deny approach has created "a stew of confusion and hypocrisy." *SEC v. Vitesse Semiconductor Corp.*, 771 F. Supp. 2d 304, 309 (S.D.N.Y. 2011) (Rakoff, J.). After a no-admit/no-deny settlement, "[o]nly one thing is left certain: the public will never know whether the S.E.C.'s charges are true, at least not in a way that they can take as established by these proceedings." *Id.* Far from "avoiding confusion," the SEC's settlement policy produces the exact public uncertainty that it laments in this litigation.

Besides gag orders, there are alternative means to combat fears that later denials would undermine the SEC's mission and credibility. After all, the government may never unnecessarily infringe on free speech rights to solve its problems. *See McCullen*, 573 U.S. at 486. First, it could "make sure that settlements are rooted in fact,…fairly negotiated,…and legally sound" from the outset. App. 55a (dissenting statement of Commissioner Peirce). Second, despite complaining of "some sort of battle by press release" between itself and a defendant publicly denying the allegations against him, the SEC offers no actual rationale for why it cannot use its own public speech to avoid embarrassment and confusion, as other agencies do. A "public information campaign" is the "obvious[]" solution to a problem of educating the public. *Nat'l Inst. of Family &*

Life Advocates v. Becerra, 585 U.S. 755, 775 (2018); *accord Am. Beverage Ass'n v. City of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019) (*en banc*) (Ikuta, J., concurring in the result) (noting that public information campaign is less burdensome than compelling speech). Federal agencies have "plenty of statutory authority" allowing them to issue information to the public, and the SEC's resources are simply limitless in comparison to an enforcement defendant. *Apter v. HHS*, 80 F.4th 579, 589 (5th Cir. 2023). If a defendant's public denials truly risk the SEC's credibility, the SEC could easily publicize its own account of the factual and legal case it had against the defendant and describe its rationale for seeking a consent order rather than trying its case. In that situation, the public would receive both sides of the story and be able to assess for itself what it believes to be the truth. But instead of "open[ing] the channels of communication"—"the best means" of enlightening the public—the SEC instead chose the "highly paternalistic approach" of simply shutting them down. *Va. State Bd. v. Va. Citizens Consumer Council*, 425 U.S. 748, 770 (1976).

As it stands now, the public is left with only the SEC's word that it undertakes its investigative and prosecutorial decisions in the manner most conducive to advancing the public interest. For nearly 100 years, courts have reiterated that the best defense to potential or actual falsehoods is more speech, not restricting speech: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Whitney*

v. California, 274 U.S. 357, 377 (1927) (Brandeis, J, concurring); *see also Alvarez*, 567 U.S. at 719-20. More speech is the solution here, not none at all.

CONCLUSION

For too long the SEC's unconstitutional Gag Rule has silenced American citizens and thwarted the free flow of information to members of the public. This Court should grant Petitioner's petition for certiorari and resolve the split in interpreting *Rumery* among the Circuits.

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