No. 24-1899

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Thomas Joseph Powell., *et al*.,

Petitioners,

v.

United States Securities and Exchange Commission,

Respondent.

On Petition for Review from the United States Securities and Exchange Commission
No. 4-733

Brief of Americans for Prosperity Foundation, the Foundation for Individual Rights and Expression, and Freedom of the Press Foundation as *Amici Curiae* in Support of Petitioners

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INTEREST OF *AMICI CURIAE*[1]

Americans for Prosperity Foundation ("AFPF") is a 501(c)(3) nonprofit organization committed to educating and empowering Americans to address the most important issues facing our country, including civil liberties and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts. AFPF is interested in this case because protecting freedom of expression, guaranteed by the First Amendment, is essential for an open and diverse society, and because government may not circumvent constitutional limits by attempting to do indirectly what it may not do directly.

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended First Amendment rights on college campuses nationwide through public advocacy, targeted litigation, and *amicus curiae* filings in cases that implicate expressive rights. In June 2022, FIRE expanded its public advocacy beyond the university setting and now defends First Amendment rights both on

[1] All parties have consented to the filing of this brief. Pursuant to FRAP 29(a)(4)(E), *amici curiae* state that no counsel for a party other than *amici curiae* authored this brief in whole or in part, and no counsel or party other than *amici curiae* made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission.

campus and in society at large. *See, e.g.*, Brief of FIRE et al. as *Amici Curiae* in Support of Respondents, *Murthy v. Missouri*, No. 23-411 (argued Mar. 18, 2024). FIRE is committed to vindicating First Amendment rights without regard to speakers' views.

Freedom of the Press Foundation ("FPF") is a nonprofit organization that protects, defends, and empowers public-interest journalism. The organization works to preserve and strengthen First and Fourth Amendment rights guaranteed to the press through a variety of avenues, including the development of encryption tools, documentation of attacks on the press, training newsrooms on digital security practices, and advocating for the public's right to know. FPF is interested in this case because opposing prior restraints and protecting journalists' right to speak freely with willing sources are central to its mission.

SUMMARY OF ARGUMENT

"*E pur si muove*" (and yet it moves). The Securities and Exchange Commission's ("SEC") policy of demanding gag clauses in settlements is reminiscent of Galileo Galilei's fabled mumbled disclaimer after he was forced to publicly recant his discovery that the Earth revolves around the Sun. As with the then-official position that the Sun revolves around the Earth, the simple fact is that not *all* allegations in SEC complaints are true—regardless of whether they are ultimately resolved through a settlement agreement with a gag provision.

The SEC has recognized as much by including what it has described as "escape valves even as to denials of the allegations" such as "[a] defendant '*may testify truthfully* about any matter under oath in connection with a legal or administrative subpoena,' *which could include a denial of an allegation*."[2] If a defendant can *truthfully* deny an allegation in an SEC complaint under oath, then the veracity of the allegation is at least debatable, if not admittedly false. By implication, then, the SEC can use the gag provision to suppress truth in the public square, substituting its own narrative. The SEC has even used the provision to compel individuals and companies to "retract" or change their prior public statements.

It blinks reality and defies common sense to suggest every allegation in a complaint is true. As one district court put it, "[b]y definition, an allegation is an assertion without proof. Plaintiff[s] should heed the legal maxim—innocence until proven guilty."[3] Federal Rule of Civil Procedure 8 makes this pellucidly clear. This maxim holds true even where agencies may have a practice of "negotiating" the content of the complaint with the would-be settling defendant.[4]

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[2] Mem. in Supp. of Def's' Mot. to Dismiss, ECF 12-1, at 29, *Cato Inst. v. SEC*, No. 19-cv-47 (D.D.C. filed May 10, 2019) (emphasis added).

[3] *Rottmund v. Cont'l Assurance Co*., 761 F. Supp. 1203, 1207 (E.D. Pa. 1990).

[4] Settling defendants "often seek and receive concessions concerning the violations to be alleged in the complaint, the language and factual allegations in the complaint, and the collateral, administrative consequences of the consent decree." *SEC v. Clifton*, 700 F.2d 744, 748 (D.C. Cir. 1983).

Rather than supporting a pursuit of truth, SEC gag clauses operate as modern day *de scandalis magnutum* laws that protect the agency from the perception of error. The purpose of gag clauses is to bar settling defendants from "creating the impression that the complaint is without factual basis."[5] "[F]or the action to stay settled, [the settling defendant] 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 herself, or even permit others to contest the allegations."[6] It is the impression that matters—allowing "an agency of the federal government to shield itself from public view."[7] This is the same motivation that underlay *de scandalis magnutum* laws in the Middle Ages, and later sedition laws, which were used to silence criticism and promote only a favorable public perception regardless of truth. In this country, such laws have largely been repudiated. Compelling or silencing speech to burnish agency reputation is not a legitimate function of government.

Moreover, the SEC's settlement agreements are obtained through the threat of crushing litigation and penalties, which requires a defendant to bet the farm to vindicate truth. It should come as no surprise then that many defendants sacrifice

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[5] *See* ER-61–62.

[6] ER-61.

[7] *SEC v. Moraes*, No. 22-CV-8343 (RA), 2022 WL 15774011, at *4 (S.D.N.Y. Oct. 28, 2022).

their First Amendment rights to avoid sacrificing everything else. Indeed, the overwhelming majority of SEC enforcement actions end in settlements including the ubiquitous gag clause. This Court should be sensitive to the tremendous disparity in bargaining power and resources between governmental and private parties that drives this outcome.

It should also consider that agencies sometimes force targets into settling on unfair terms. The enforcement techniques used by agencies are a matter of public interest; and understanding how our government operates is essential to self-governance. But gag clauses prevent the public from learning the extent to which agencies may pursue meritless investigations and enforcement actions, as the subjects of such actions are gagged from speaking. This means the gag provisions may enshrine in perpetuity a false or misleading government-propagated narrative. Worse, the SEC has shown a willingness to invoke the gag clause to *compel* pro-government speech and to demand public acquiescence from those it perceives as straying from the government's terms. The SEC has no legitimate interest in suppressing the truth about its actions or forcing others to advance its narrative. The First Amendment flatly prohibits it. In short, the SEC's gag clauses, which prohibit the settling defendant under threat of criminal contempt from creating the impression that the SEC's allegations may be inaccurate, are both an unconstitutional prior restraint and a barrier to the pursuit of truth.

For the foregoing reasons, this Court should hold that 17 C.F.R. § 202.5(e) violates the First Amendment and that the SEC's denial of the Petition for Rulemaking was therefore arbitrary and capricious and thus unlawful.

ARGUMENT

I. Gag Clauses Lack Justification.

At a minimum, "[t]he demand by the government that a defendant waive a fundamental constitutional right as a condition of settlement ought to be supported by a compelling rationale." ER-64. No such justification obtains here.

A. Allegations in SEC Complaints are Not Always True.

Any claim that the SEC can or should impose gag clauses on settling parties is undermined if the allegations are untrue. Like Galileo's famous demurrer, compelled agreements with the SEC are tainted by the same defect as confessions made under duress. Allegations that cannot be denied on threat of punishment have withstood no test of their veracity.

This Court should reject the all-too-common trope that defendants would not settle if the SEC's case was weak on the facts or law, or if the defendant had a decent chance of prevailing. The reality is few companies and individuals are brave enough to take on a federal agency, especially their own regulator. "Since 2002, the SEC's settlement rate has remained constant at about ninety-eight percent." Priyah Kaul, *Admit or Deny: A Call for Reform of the SEC's 'Neither-Admit-Nor-Deny' Policy*,

48 U. Mich. J. L. Ref. 535, 536 (2015); *see also Clifton*, 700 F.2d at 748 ("SEC has traditionally entered into consent decrees to settle most of its injunctive actions."). This means the vast majority of the SEC's allegations are never tested in court, and the agency is never required to prove its case. Does this mean that in every case the SEC settles, the allegations are true, and the defendant has done something wrong? Of course not.

As the Supreme Court has explained, consent decrees "are arrived at by negotiation between the parties and often admit no violation of law[.]" *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 236 n.10 (1975). And for good reason. "A settlement is by definition a compromise." *SEC v. Citigroup Glob. Mkts., Inc*., 673 F.3d 158, 166 (2d Cir. 2012). Permitting the defendant to deny liability is entirely consistent with the public interest. *See United States v. Google Inc*., No. 12-04177, 2012 U.S. Dist. LEXIS 164401, at *14–17 (N.D. Cal. Nov. 16, 2012).

Indeed, it "is customary" for consent decrees to "explicitly state[] that '[n]othing in [the] Consent Decree is intended to constitute an admission of fault by either party to this action.'" *Maher v. Gagne*, 448 U.S. 122, 126 n.8 (1980). This custom reflects an important reality: "A defendant may settle a case for a variety of reasons. He may have committed the conduct alleged in the complaint or he may not have[.]" *United States v. Bailey*, 696 F.3d 794, 800 (9th Cir. 2012). For instance, settlement "may be motivated by a desire for peace rather than from any concession

of weakness of position." Fed. R. Evid. 408, Advisory Comm. Note; *see also SEC v. Citigroup Glob. Mkts*., 752 F.3d 285, 295 (2d Cir. 2014) ("Consent decrees provide parties with a means to manage risk."). "[J]ust because a party agrees to settle does not mean that it is actually liable[.]" *In re Initial Pub. Offering Sec. Litig*., No. 21-92, 2003 U.S. Dist. LEXIS 23102, at *18 (S.D.N.Y. Dec. 24, 2003).

The reality is companies often settle with agencies even when the allegations in the complaint are untrue. Not because they did anything wrong but because the time, monetary, and reputational cost of fighting the agency is too great, or to avoid the uncertainty of litigation. As the ABA Section of Antitrust Law has explained:

> Government investigations and enforcement actions are inherently different from private disputes. They are not contests between equals—federal agencies have enormous advantages in terms of resources and power. Businesses, especially smaller companies and their principals, simply cannot afford in many cases to take on the risks and costs of defending themselves during an investigation or when confronted with a complaint and order.

ABA Section of Antitrust Law, Presidential Transition Report: The State of Antitrust Enforcement, 29 (Jan. 2017).

This places enormous pressure on targets to settle. As an SEC Commissioner explained, "[o]ften, given the time and costs of enforcement investigations, it is easier for a private party just to settle than to litigate a matter." Hester Peirce, Comm'r, SEC, The Why Behind the No: Remarks at the 50th Annual Rocky Mountain Securities Conference, *available at* https://bit.ly/34ghu1I.

The same Commissioner, dissenting from the Commission's Denial of Request for Rulemaking here, observed:

> For most individuals, and even for many well-resourced corporate defendants, the time, expense, and difficulty of litigating against the federal government makes settling the only economically viable option to resolve Commission enforcement actions. Commission investigations preceding the settlement negotiations are themselves long and costly. Retaining counsel to respond to the Commission's document requests and subpoenas, to represent witnesses during sworn testimony, and to prepare and submit a response to a Wells notice (which allows defendants to respond to charges the staff is planning to recommend to the Commission) consumes enormous financial resources. Add to that monetary cost, the intangible yet often even more onerous emotional, physical, and relational tolls of litigation, and it is unremarkable that nearly all defendants in Commission actions settle.

ER-63. "Aware, too, that few can outlast or outspend the federal government, agencies sometimes use this as leverage to extract settlement terms they could not lawfully obtain any other way." *Axon v. FTC*, 598 U.S. 175, 216 (2023) (Gorsuch, J., concurring in judgment). That well describes the gag provision. And this Court should not overlook the practical reality that the gag clause may prohibit truthful speech and enshrine the SEC's narrative in perpetuity.

B. Silencing Critics Is Not a Legitimate Aim of Government.

One of the key characteristics of a free people is the liberty to criticize government. Toward this end, this country has largely striven to uphold freedom and eschew obeisance to the powerful, rejecting *de scandalis magnutum* laws and hotly debating application of seditious libel. Nevertheless, the SEC has rejected this

tradition by adopting a practice that is designed to protect its reputation from statements that might reflect poorly on it.

Governments have long sought to silence their critics. In England, for example, "the collection of acts concerning *Scandalum Magnatum* (1275 and later) . . . created a statutory offense of defamation, under which it was illegal to invent or spread either spoken or written 'false news' or tales concerning the king or the magnates of the realm."[8] Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 Stan. L. Rev. 661, 668 (1985). "English courts applied the *De Scandalis Magnatum* statutes to prosecute those who undermined the reputations of government officials." Jonathan Turley, *Rage Rhetoric and the Revival of American Sedition*, 65 William & Mary L. Rev. 1409, 1431 (2024). This "not only chilled critics but created a sense of license among officials to crush those who refused to remain silent." *Id.*

Indeed, the United States was founded against a background of abuse of sedition laws "to target those with dissenting views of the government." *See id.* at 1423. In 1794, for example, "the use of sedition to criminalize speech was vividly

[8] "*Scandalum Magnatum* may have condemned only material that was untrue. The prospect of the defense exploiting its legal right to explain the truth of the 'news,' thus simultaneously establishing the defendant's innocence and embarassing the Crown, could not have recommended *Scandalum Magnatum* prosecutions to attorneys general." Hamburger, 37 Stan. L. Rev. at 668. Conversely, "[t]ruth is no defense" to alleged SEC gag clause violations. *Moraes*, 2022 WL 15774011, at *1.

shown in the arrest of Henry Redhead Yorke." *Id*. Yorke, an admirer of Thomas Paine, helped another Paine associate, Joseph Gales, organize an event "billed as 'A Meeting of the Friends of Justice, Liberty, and Humanity[.]'" *Id.* The English government accused Yorke of working to "seditiously combine, conspire, and confederate with each other, and with divers other disaffected and ill-disposed subjects . . . to break and disturb the peace and tranquility of this realm, and to rise and excite riots, commotions, and tumults therein." *Id.* at 1424 (citation omitted). "At the trial, the prosecution argued that Yorke's criticism of the government was enough to make him a criminal since his words served 'to undermine the government of the country, to spread disaffection and discontent among the minds of his majesty's subjects, and particularly to draw into the disrespect of his majesty's subjects . . . the Commons House of Parliament.'" *Id.* at 1426 (citation omitted). This case and similar cases attacking free speech and criticism of the Crown were known to the Founding generation. *See id.* at 1430.

Despite First Amendment protections of speech and petition, in the United States, the "Alien and Sedition Acts . . . made it a crime to 'print, utter, or publish ... any false, scandalous, and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States.'" *See id.* at 1439 (citing Sedition Act of 1798, § 2, ch. 74, 1 Stat. 596 (1798) (expired 1801)). Like in England, claims of sedition were

used against political critics, sparking outrage. *See id.* at 1438–40. Thomas Jefferson allowed the Acts to expire and pardoned those convicted under them.

Since that time, the Supreme Court has generally protected the right to criticize the government. *See generally NRA of Am. v. Vullo*, 144 S. Ct. 1316 (2024). Indeed, the Court has described this right as being "at the very center of the constitutionally protected area of free discussion." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966); *see McConnell v. FEC*, 540 U.S. 93, 248 (2003) (Scalia, J., dissenting in part, concurring in part) (describing "the right to criticize the government" as "the heart of what the First Amendment is meant to protect"), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010). Accordingly, "[c]riticism of those responsible for government operations must be free, lest criticism of government itself be penalized." *Rosenblatt*, 383 U.S. at 85.

The SEC's use of gag clauses runs counter to this tradition by requiring not just the silencing of any criticism but, in some circumstances, compelled recanting and *mea culpa* for any post-settlement dissent.

The SEC uses the gag clause not only to censor speech but to compel settling defendants and respondents to make pro-government statements. As a former Director of the SEC's Division of Enforcement has candidly advised, "the SEC goes one step further [than other agencies] and not only prohibits defendants from denying wrongdoing in a settlement, but has demanded a retraction or correction on

those occasions when a defendant's post-settlement statements are tantamount to a denial." *Examining the Settlement Practices of U.S. Financial Regulators*, Hearing Before H. Comm. On Fin. Servs., 112th Cong. (2012) (statement of Robert Khuzami, Dir., Div. of Enforcement, Secs. & Exchange Comm'n).

Take, for example, the case of Michael Angelos. The SEC "construed" "[s]tatements made on behalf of" him "as denials of the allegations in the Complaint," filing a motion to vacate the settlement.[9] The SEC conditioned withdrawal of its motion on a statement from Mr. Angelos:

> I settled this case without admitting or denying the allegations of the complaint. To comply with my settlement with the [SEC], I withdraw any statement made on my behalf that may have been inconsistent therewith. I am pleased that this settlement resolves the SEC's lawsuit against me. I will have no further comment other than any sworn testimony I may give in this or any other matter.

Id.

The SEC also weaponized the gag clause in a public dispute with Morgan Stanley. In 2003, "the day after the details of the settlement were announced" Morgan Stanley's CEO reportedly told investors at a conference: "'I don't see anything in the settlement that will concern the retail investor about Morgan Stanley. Not one thing.' A reporter from *The New York Times* attended the conference" and

[9] *See* Secs. & Exchange Comm'n, Litigation Release No. 14886 (Apr. 22, 1996), *available at* https://bit.ly/34hrh84 (regarding *SEC v. Michael P. Angelos*, No. B96-834 (D. Md.)).

published an article the next day. Floyd Norris, *Morgan Stanley Draws S.E.C.'s Ire*, N.Y. Times (May 2, 2003), https://bit.ly/2wWt5Hj. Immediately thereafter, the SEC Chairman wrote a scathing letter to the CEO; apparently, according to agency officials, the CEO's "remarks had been regarded as cavalier and had provoked anger at the agency." *Id*.

The SEC Chairman's "letter began with a reference to the *Times* article." *Id*. Although the CEO had merely expressed his opinion that the settlement itself should not concern investors, and did not even purport to comment on or deny the allegations in the SEC's complaint, the SEC felt that Morgan Stanley did not express sufficient "contrition" for the agency's purposes. *See Excerpts from Exchange of Letters*, N.Y. Times (May 2, 2003) (emphasis added), https://nyti.ms/2V6sZoj. The SEC's threatening letter had its intended effect, leading Morgan Stanley not only to retract its statement of opinion but publicly *praise the SEC for its efforts*. *See id.* (Philip J. Purcell, Morgan Stanley CEO) (emphasis added).

In both these cases, the SEC's demanded retraction goes beyond a simple neither-admit-nor-deny, requiring public groveling that accedes to the state's view of the case. None of this is authorized by the Constitution, either in regard to an individual speaker or to a corporation. *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943); *see also Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 16 (1986) (corporations

are protected against compelled speech). Moreover, to the extent the Morgan Stanley CEO's initial remarks were truthful and accurate, it raises the troubling specter that the SEC's sensitivity to its public image is more pressing than its mission to ensure shareholders have access to reliable information. The SEC should not be able to strongarm companies into publicly praising it whenever it wishes.

II. Gag Clauses Undermine the Rule of Law.

A. The SEC Gag Clause Violates the First Amendment and Thus Cannot Form a Lawful Contract.

Consent judgments have "attributes both of contracts and of judicial decrees." *ITT Cont'l Baking Co*., 420 U.S. at 236 & n.10. Consent judgments are interpreted and construed as a contract. *Id.* at 238. To be enforceable, they must not be illegal, including when the government is a party. *See Overbey v. Mayor of Balt*., 930 F.3d 215, 223–25 (4th Cir. 2019). *Cf. In re CFTC*, 941 F.3d 869, 873 (7th Cir. 2019) ("So if we understand the consent decree as an effort to silence individual members of the Commission, it is ineffectual[.]"). Most importantly, they must not be unconstitutional—either in regard to the parties or in regard to everyone else. *Kasper v. Bd. of Election Comm'rs of the City of Chicago*, 814 F.2d 332, 338 (7th Cir. 1987) ("Before entering a consent decree the judge must satisfy himself that the decree is consistent with the Constitution and laws, does not undermine the rightful interests of third parties, and is an appropriate commitment of the court's limited resources."); *see also Citigroup Global Markets, Inc.,* 752 F.3d at 294 ("A court evaluating a

proposed S.E.C. consent decree for fairness and reasonableness should, at a minimum, assess the basic legality of the decree."). SEC gag provisions do not meet this test.

Gag clauses violate the First Amendment by both compelling and silencing speech. In addition to SEC Commissioner Hester Peirce,[10] numerous courts have recognized that "[o]n its face, the SEC's no-denial policy raises a potential First Amendment problem." *SEC v. Citigroup Glob. Mkts. Inc*., 827 F. Supp. 2d 328, 333 n. 5 (S.D.N.Y. 2011) (Rakoff, J.), *vacated and remanded on other grounds*, 752 F.3d 285 (2d Cir. 2014);[11] *see Moraes,* 2022 WL 15774011, at *3 ("[A]t a minimum . . . the Court is concerned that the SEC's use of the Provision is inconsistent with the spirit of the First Amendment and our Nation's time-honored tradition of protecting free expression."). *Cf. SEC v. Novinger*, 40 F.4th 297, 308 (5th Cir. 2022) (Jones, J., joined by Duncan, J., concurring) ("I write to note that nothing in the opinion (or in the district court opinion, for that matter) approves of or acquiesces in the SEC's longstanding policy that conditions settlement of any enforcement action on parties'

[10] *See* ER-63 ("[A] regulatory policy that prevents people from speaking against government action necessarily raises First Amendment concerns.").

[11] "This might be defensible if all that were involved was a private dispute between private parties. But here an agency of the United States is saying, in effect, 'Although we claim that these defendants have done terrible things, they refuse to admit it and we do not propose to prove it, but will simply resort to gagging their right to deny it.'" *SEC v. Vitesse Semiconductor Corp*., 771 F. Supp. 2d 304, 309 (S.D.N.Y. 2011).

giving up First Amendment rights." (citing 17 C.F.R. § 202.5(e)). Recognition of a constitutional problem merits a remedy, which the Commission refuses to address.

1. The SEC Gag Clause is an Unconstitutional Content-Based Prior Restraint on Speech.

A provision in a consent order that is a prior restraint on truthful speech violates the First Amendment. *See Crosby v. Bradstreet Co*., 312 F.2d 483, 485 (2d Cir. 1963); *see also Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) ("[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."). That is exactly what gag provisions do. *See generally* James Valvo, *The CFTC and SEC Are Demanding Unconstitutional Speech Bans in Their Settlement Agreements*, Yale Journal on Regulation (Dec. 4, 2017), https://bit.ly/3a8XDUu. "[T]his content-specific and permanent restraint on speech effectively shields the Commission's allegations from criticism[.]" ER-63. "The upshot: so long as a defendant says what the SEC wants to hear (or says nothing at all), he does not violate the No-Admit-No-Deny Provision." *Moraes*, 2022 WL 15774011, at *5. The SEC's practice of "condition[ing] settlement of any enforcement action on parties giving up First Amendment rights" thus tells settling defendants to "'[h]old your tongue, and don't say anything truthful—ever'—or get bankrupted by having to continue litigating with the SEC. A more effective prior

restraint is hard to imagine."[12] *Novinger*, 40 F.4th at 308 (Jones, J., concurring) (quoting 17 C.F.R. § 202.5(e)).

The First Amendment bars the government from imposing content-based prior restraints on speech enforced by threats of prosecution. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68–71 (1963). And an "injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights." *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971). The SEC gag clause is exactly that. The gag provision's vagueness as to its sweep further exacerbates this constitutional problem.[13] *See* ER-64 (gag provision's "mandatory language is so ambiguous as to only aggravate my concerns").

2. The SEC Gag Clause Imposes an Unconstitutional Condition on Resolving a Claim.

The Supreme Court has long recognized, if the government "may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

[12] "[A] court may [also] institute criminal contempt proceedings against an SEC defendant who violates a no-deny provision . . . even absent the SEC's consent[.]" *Cato Inst. v. SEC*, 4 F.4th 91, 95 (D.C. Cir. 2021) (citation omitted).

[13] For that reason, the provision appears to violate Federal Rule of Civil Procedure 65's specificity requirements and raises due process problems. *See* Fed. R. Civ. P. 65(d)(1); *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974).

Frost & Frost Trucking Co. v. R.R. Com. of Cal., 271 U.S. 583, 594 (1926); *see, e.g.*, *Lafayette Ins. Co. v. French,* 59 U.S. 404, 407 (1855). To guard against this, "the unconstitutional conditions doctrine . . . vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up."[14] *Koontz v. St. Johns River Water Mgmt. Dist*., 570 U.S. 595, 604 (2013). The doctrine "holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415, 1415 (1989).

Thus, "[e]ven though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right." *44 Liquormart v. Rhode Island*, 517 U.S. 484, 513 (1996); *see United States v. Am. Library Ass'n,* 539 U.S. 194, 210 (2003). As relevant here, this means the government cannot make a "benefit[] contingent on endorsing a particular message or agreeing not to engage in

[14] "The problem of unconstitutional conditions arises whenever a government seeks to achieve its desired result by obtaining bargained-for *consent* of the party whose conduct is to be restricted. There is, for example, an ordinary first amendment issue when the government seeks to impose prior restraints on publication. That question is transformed into an unconstitutional conditions issue when a government benefit is conditioned upon acceptance of prior restraint." Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 7 (1988).

protected speech." *Ark. Times LP v. Waldrip*, 37 F.4th 1386, 1391 (8th Cir. 2022) (citing *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 309 (2012); *Speiser v. Randall*, 357 U.S. 513, 518 (1958)).

Under Supreme Court precedent, courts must first analyze whether the condition at issue complies with the Constitution before reaching the question whether the government's conduct violates the unconstitutional conditions doctrine. "A predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing." *Koontz*, 570 U.S. at 612; *see Rumsfeld v. Forum for Acad. & Institutional Rights, Inc*., 547 U.S. 47, 60 (2006) ("Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds."). Here, of course, the government could not directly ban a speaker from discussing his own concerns, allegations made against him, or his opinions about those topics. The answer to the first question—whether the condition complies with the Constitution—is thus a resounding no.

The next question therefore need not be reached. But even if it were, it is clear that government cannot condition settlement on surrendering First Amendment rights, including the fundamental right to criticize the government. Could, for

example, the SEC condition settlement of a case on a defendant renouncing his religion? Renouncing his U.S. citizenship? The questions answer themselves. How then is the speech clause of the First Amendment different?

At bottom, the unconstitutional conditions doctrine is about coercion.[15] The whole point is to prevent the government from wielding its vast authority to leverage incentives to make people give up their constitutional rights. Here, "the mandatory nature of the no-deny policy presents defendants with no real choice; it demands: 'If you want to settle, . . . "'Hold your tongue, and don't say anything truthful—ever"—or get bankrupted by having to continue litigating with the SEC.'" ER-63, ER-67 n.32 (quoting *Novinger*, 40 F.4th at 308 (Jones, J., concurring)). Particularly given the disparity in bargaining power between the SEC and its targets and the coercive nature of the Hobson's choice the SEC offers would-be settling defendants, the gag provision is an unconstitutional condition of settlement.

B. The Aggregate Effect of the Gag Clause is to Bypass the First Amendment for Non-Parties.

Gag clauses in SEC consent decrees also undermine the First Amendment rights of third parties.[16] *See Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("[T]he

[15] Actual coercion is unnecessary. *See Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013).

[16] This holds particularly true for the press. "The right to gather information plays a distinctly acute role in journalism." *People for the Ethical Treatment of Animals, Inc. v. N.C. Farm Bureau Fed'n, Inc.*, 60 F.4th 815, 829 (4th Cir. 2023). That is

Constitution protects the right to receive information and ideas."); *see also First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978) (First Amendment "prohibit[s] government from limiting the stock of information from which members of the public may draw.").

It works like this: First, the SEC refuses to settle cases that do not include the gag clause, thus engendering a vast body of "negotiated agreements" the terms of which are secret from the American people.[17] Courts give those settlements the force of law by entering consent decrees allowing them to be enforced under the courts' inherent authority. Despite the broad-ranging effect of these agreements, non-parties (including the public, press, or future defendants) cannot get access to the underlying facts and are thus prohibited from knowing what the terms of settlement actually are—because they do not get to know the what the defendant gave up in consideration for the contract, what their own government is doing, or just what the "law" is.

Congress, by contrast, if it directly prohibited discussion of agency

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because "[t]he protected right to publish the news would be of little value in the absence of sources from which to obtain it." *CBS, Inc. v. Young*, 522 F.2d 234, 238 (6th Cir. 1975); *see also Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) ("Without some protection for seeking out the news, freedom of the press could be eviscerated.").

[17] The defendant is required to remain silent—but silent about what? Without the ability to disclose how much truth or fiction is included in the allegations, a large portion of the so-called contract is essentially undefined.

investigations and enforcement techniques would run smack into the strict scrutiny applicable to content-based restrictions on speech. Nor could the Executive working alone import the force of law into a contractual gag provision. To achieve the desired legal effect, contract law must be married to the courts' inherent authority to create a system in which the Executive selects targets to bargain away their First Amendment rights, and through them, limit the First Amendment rights of others.

Indeed, since 1972, the SEC has systematically muzzled settling defendants and respondents, announcing it would not "permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings." 17 C.F.R. § 202.5(e); *see Cato Inst.,* 4 F.4th at 93. Under this policy, "[s]ilence was not allowed. The SEC announced that it would treat 'refusal to admit the allegations' as 'equivalent to a denial' unless the settling target explicitly stated that 'he neither admits nor denies the allegations.'" Verity Winship & Jennifer K. Robbennolt, *An Empirical Study of Admissions in SEC Settlements*, 60 Ariz. L. Rev. 1, 5 (2018).

These decrees, of course, are not a ruling on the merits and should not affect non-parties. "[P]arties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement." *Loc. No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 529 (1986). As

explained by the First Circuit: "The way in which a consent judgment or consent decree resolves, between the parties, a dispute over a legal issue is not a ruling *on the merits* of the legal issue that either (1) becomes precedent applicable to any other proceedings under the law of *stare decisis* or (2) applies to others under the law of claim preclusion or issue preclusion." *Langton v. Hogan*, 71 F.3d 930, 935 (1st Cir. 1995) (emphasis in original) (citing *Martin v. Wilks*, 490 U.S. 755 (1989) (parties to litigation cannot enter into a consent judgment that will preclude a non-party from bringing a later suit alleging violation of his or her legal rights)). But neither is it a contract because the "parties to [the] case are bound by the rules of law declared in the Permanent Injunction, although no other parties are so bound." *Id*.

This creates a conundrum in which non-parties are excluded from the negotiation and nominally "not bound" by the decree, and therefore cannot challenge injury done by loss of their First Amendment rights. This makes injury of the many uncurable and allows the First Amendment to suffer death by a thousand cuts.

Attempts to resolve this issue have been thus far rebuffed by the courts. For example, when the Cato Institute was prevented from publishing information regarding an SEC settlement agreement, it tried to challenge the gag order. *See Cato Inst.*, 4 F.4th at 93 ("Cato alleges that it cannot publish the manuscript because the consent decree prohibits the author from disputing any allegations made by the SEC against him, which, in the manuscript, he does"). In upholding dismissal of Cato's

case, the D.C. Circuit effectively found that once the consent decree has been entered, the First Amendment infringement of third parties becomes uncurable even if the court reviewing the constitutional challenge agrees that the gag rule violates the Constitution. This is because the reviewing court cannot require the issuing court to refrain from enforcing its own order. *See id.* at 96; *see also Peacock v. Thomas*, 516 U.S. 349, 356 (1996); *Shillitani v. United States*, 384 U.S. 364, 370 (1966) ("There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt."). "So regardless of whether the SEC is enjoined from seeking to enforce the no-deny provisions in its consent decrees, the courts that issued the consent decrees would still be able to enforce the no-deny provisions contained therein." *Cato Inst.*, 4 F.4th at 95.

Involving the courts in this circular reasoning highlights the error of these agreements. Where the Executive violates the Constitution, the Judiciary must be able to check that violation—not become a tool in promoting it so the SEC may accomplish through a decree what the First Amendment prevents it from doing directly.[18] *See In re CFTC,* 941 F.3d at 873 ("no litigant may accomplish through a consent decree something it lacks the power to accomplish directly").

[18] As Judge Abrams put it in the context of approving an SEC Consent Agreement containing a gag clause: "Perhaps most concerning, the federal judiciary is made complicit in this practice—normalizing lifetime gag orders in the process. . . . This is troubling indeed." *Moraes*, 2022 WL 15774011, at *1.

This is a frontal attack on our constitutional system by allowing individual litigants to effectively waive the constitutional rights of an array of speakers, researchers, attorneys (and their clients), historians, policy makers, activists, and countless others with legitimate interests. "The public cannot be sure what to believe if the government actively seeks to squelch contrary voices." ER-64. But that is what the SEC's gag clause accomplishes by design.

This state of affairs cannot continue. And proper resolution of the question whether the SEC's denial of the Petition for Rulemaking was unlawful requires this Court "to fully consider [the gag clause] policy," *Novinger*, 40 F.4th at 308 (Jones, J., concurring), and reach the merits of Petitioners' weighty constitutional objections. *See SEC v. Chenery Corp*., 318 U.S. 80, 94 (1943) (agency action "may not stand if the agency has misconceived the law").

C. The Gag Clause Impairs Oversight and Transparency.

John Milton, in his speech in opposition to the Printing Ordinance of 1643—which allowed seizure of "scandalous and lying Pamphlets"—highlighted the importance to good government of information and the speedy correction of error made possible by liberty in printing.[19] Prior restraints were thus "opposed on functionalist grounds as inimical to an informed populace and accountable government." Turley, 65 William & Mary L. Rev. at 1422.

[19] *See* John Milton, *Areopagitica* (Nov. 23, 1644).

Gag clauses prevent such healthy correction by insulating the SEC from criticism by those best positioned to expose agency wrongdoing and abuse by virtue of their firsthand experience with an agency's enforcement process. By ensuring settlers of enforcement actions are unable to provide information that would aid oversight, the SEC insulates itself from criticism and the scrutiny accountability demands. That is wrong and nonsensical.

By way of example, in January 2020, the Office of Management and Budget ("OMB") issued a request for information on Improving and/or Reforming Regulatory Enforcement or Adjudication (the "RFI"). *See* 85 Fed. Reg. 5,483. The RFI requested "specific, concrete examples of current due process shortfalls" with agency adjudications and investigations, including on topics such as "When do regulatory investigations and/or adjudications coerce Americans into resolutions/settlements?" *Id.* at 5,484. The gag provision bars settling defendants from providing critical factual information to inform this type of important administrative reform process. Likewise, the gag provision, on its face, prevents settling defendants from providing critical information to congressional committees tasked with conducting oversight of the SEC's enforcement activities.

This error in approach has been highlighted by Commissioner Peirce as standing in tension with our system of representative self-government:

> One thing I love about this country is that Americans can and often do criticize their government. Without fearing

> reprisal, a person can condemn specific government actions, broad government policies, or the officials who carry out those actions and make those policies. 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. Our prohibition on denials prevents the American public from ever hearing criticisms that might otherwise be lodged against the government, let alone assessing their credibility.

ER-62. If the American people are to effectively oversee a federal government that is supposed to be of, by, and for the people,[20] then they must have visibility into what their government is doing. Like the prior restraints rejected by the Founders, this Court should reject the prior restraints imposed by the SEC and let the American people see what the SEC is doing.

CONCLUSION

The Court should grant the Petition for Review.

[20] Abraham Lincoln, Gettysburg Address (November 19, 1863).

Respectfully submitted,

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Dated: June 24, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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I hereby certify that on June 24, 2024, I electronically filed the above Brief of *Amici Curiae* Americans for Prosperity Foundation, the Foundation for Individual Rights and Expression, and the Freedom of the Press Foundation in Support of Petitioners with the Clerk of the Court by using the appellate ACMS system.

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Dated: June 24, 2024