No. 21-1284

In the Supreme Court of the United States

BARRY D. ROMERIL,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

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

BRIEF OF HAMILTON LINCOLN LAW INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

Hamilton Lincoln Law Institute ("HLLI") is a public-interest law firm dedicated to protecting free markets, free speech, limited government, and separation of powers, and against regulatory abuse and rent-seeking.[1] For example, HLLI has fought government and regulatory overreach by litigating to overturn unlawful conditions imposed by the Federal Communications Commission on a merger between three major U.S. cable companies. The D.C. Circuit ultimately agreed, granting relief. *Competitive Enter. Inst. v. FCC*, 970 F.3d 372 (D.C. Cir. 2020). Likewise, HLLI won recent victories defending free speech principles from the Commonwealth of Pennsylvania's threats to discipline attorneys' use of protected speech. *Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (E.D. Pa. 2020); *Greenberg v. Goodrich*, No. 20-cv-03822, 2022 U.S. Dist. LEXIS 52881 (E.D. Pa. Mar. 24, 2022).

SUMMARY OF ARGUMENT

HLLI shares petitioner's conclusion: the gag order included by the U.S. Securities and Exchange Commission ("SEC") in its consent decrees barring the sharing of any information that might imply the SEC's case lacked merit violates bedrock First Amendment principles.

The SEC lacks any legitimate government interest in the use of these gag orders both because the interests it

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[1] Under Rule 37.6, *Amicus Curiae* affirms that no counsel for a party authored this brief in full or in part, and that no person or entity other than *Amicus* or their counsel financially contributed to preparing or submitting this brief. The parties have consented to the filing of this brief.

has set forth as justification are insufficient and because, even if credited, several less restrictive means exist to protect those stated interests. An analysis of private civil class settlements, including one arising from the facts here, evidence the unwarranted nature of the SEC's gag order. Similarly, all but one other government enforcement agency has declined to adopt the SEC's speech-suppressive practice.

The Court should take the opportunity before it to cease the SEC's continued unconstitutional practice of restricting speech protected by the First Amendment in fear of theoretical reputational harms.

ARGUMENT

I. The SEC's use of the gag order serves no legitimate government interest.

"[T]he First Amendment does not permit the State to sacrifice speech for efficiency." *Riley v. National Federation 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 provided below for the use of a gag order go no further than an amorphous need for the SEC to compromise and settle its investigations to conserve resources and a need to prevent denials of those who have entered into consent decrees to avoid "some sort of battle by press release." Brief for Plaintiff-Appellee at 37, *SEC v. Romeril*, No. 19-4197 (2d Cir. Jul. 10, 2020). Neither amounts to a legitimate legal interest justifying the restriction of the flow of information.

Of course, the SEC may enter into consent decrees to conserve resources; that is clear. *See, e.g.*, *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 235 (1975). But that is not the question here. Rather, it is whether the SEC may impose a particular condition within that consent decree—a provision forever binding defendants from denying the allegations against them—that it could not obtain in litigation, and thereby preventing the public from receiving that information. And it is whether a blanket SEC regulation requiring a gag order for all SEC consent decrees may be squared with free-speech principles. The Court should answer both questions in the negative.

It is not enough for the government to show that Mr. Romeril has consented to the gag order. To impose a condition restricting a constitutional right, the government still must show that the condition at least bears some "plausible relation" to a legitimate public interest. *Matal v. Tam*, 137 S. Ct. 1744, 1768 (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) (government must show that "[i]nterest in enforcing the waiver [of a constitutional right] is not outweighed by a relevant public policy that would be harmed by enforcement."). 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)). 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).

For example, a prospective civil litigation waiver as in *Newton v. Rumery*, easily meets a proper standard: the state has a legitimate interest in protecting the public fisc and preventing the diversion of public resources in defending against civil claims. 480 U.S. 386, 393 (1987). Likewise, an appeal waiver serves similar interests.

But the SEC's gag order, barring any statement that even suggests that any allegation in an SEC Complaint is insupportable, stands differently. It bears no relationship to the SEC's conceded aim of "settl[ing] cases to benefit the *public* by obtaining the best possible outcome for the public interest, while managing risk and maximizing its allocation of finite resources." Brief for Plaintiff-Appellee at 40, *SEC v. Romeril*, No. 19-4197 (2d Cir. Jul. 10, 2020). A "general interest in using settlement agreements to expedite litigation is not enough" to justify a condition that restricts a defendant's speech going forward. *Overbey*, 930 F.3d at 225.

The interests the SEC's gag order *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 dismissal 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*, __S. Ct.__, 212 L. Ed. 2d 303, 312 (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." Brief for Plaintiff-Appellee at 42-43, *SEC v. Romeril*, No. 19-4197 (2d Cir. Jul. 10, 2020). Open discussion of criminal enforcement, prosecution, and settlement practices undertaken by government agencies is of the utmost public importance 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.*, 212 L. Ed. 2d at 311 (quoting *Thomas v. Collins*, 323 U.S. 516, 547 (1945) (Jackson, J., concurring)). As servants of the People, agencies must live with a reality in which free speech is permitted to "undermine confidence in the Commission's enforcement program." "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. also 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." (quoting *Craig v. Harney*, 331 U.S. 367, 376 (1947))).

The SEC's response to this below was largely faulting Romeril for "rhapsodiz[ing]" about the "truth" and "public

discourse" and for his role in accepting the consent decree. Brief for Plaintiff-Appellee at 47, *SEC v. Romeril*, No. 19-4197 (2d Cir. Jul. 10, 2020). This is not persuasive because, regardless of Romeril's acquiescence, a federal agency must always seek 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. *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 the Gag Rule might serve valid interests in certain circumstances and cases, the SEC's blanket rule definitely does not.

Especially troubling about the SEC's policy to gag defendants is that there are many alternative means to combat fears that later denials would undermine the SEC's mission and credibility. After all, it is the government's duty to solve its problems without unnecessary infringement upon the First Amendment. *See McCullen v. Coakley*, 573 U.S. 464, 486 (2014). Although mocking the idea of "some sort of battle by press release" between itself and a defendant publicly denying the allegations against her, the SEC offers no actual rationale for why it needs to gag defendants through consent orders and could not avoid embarrassment and confusion through speech of its own. *See* Brief for Plaintiff-Appellee at 37, *SEC v. Romeril*, No. 19-4197 (2d Cir. Jul. 10, 2020). 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 scenario, 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 has instead chosen the "highly paternalistic approach." *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 best fitting the public. For nearly one hundred years this Court has repeated that the best defense to potential or actual falsehoods is more speech, not the restriction of 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. That is the necessary solution here too; not universal gag orders.

II. A comparison to private civil class action settlements demonstrates the unwarranted nature of the SEC's gag order.

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 and private shareholder class settlements reveals just how much of an outlier the Gag Rule is.

In HLLI's experience reviewing thousands and objecting to over a hundred private class-action "no admission" settlements, amicus is aware of zero settlements that enjoin the defendants 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 Mr. Romeril's enforcement action, the 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; yet the sky has not fallen. We have arrived at a misbegotten state of affairs 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.

Similarly, by comparison to other public agencies, the SEC's Gag Rule is an aberration. As far as amicus is aware, only the U.S. Commodity Futures Trading Commission employs a similar gag rule as part of enforcement action settlements. *See* 17 C.F.R. pt. 10, App. A. 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 into "no admit" settlements, it insists on them even when presiding courts try to hold them to that policy. *See SEC v. Citigroup Glob. 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 insistence on "no admit" consent decrees is a good idea, *Citigroup* undermines the notion that the SEC only aims to combat public confusion.

In reality, it is the SEC's no admit/no deny approach that 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 such a 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.* The idea of "confusion" cannot rationalize the unconstitutional condition.

CONCLUSION

For too long the SEC's unconstitutional gag orders have thwarted the free flow of information to members of the public.

The petition for a writ of certiorari should be granted to allow the Court to prohibit this behavior.

Respectfully submitted,

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