No. 24-1899

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS JOSEPH POWELL, et al.,

Appellants,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Appellee.

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

BRIEF OF THE LIBERTY JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS' PETITION FOR REVIEW

Reilly Stephens
Counsel of Record
LIBERTY JUSTICE CENTER
13341 W. U.S. Highway 290
Building 2
Austin, Texas 78737
512-481-4400
Rstephens@ljc.org

June 24, 2023

DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(a)(4)(a), Liberty Justice Center states that it is a nonprofit corporation registered in the State of Texas, and has no parent company and no stockholders.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF THE AMICUS CURIAE[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. LJC pursues its goals through strategic, precedent-setting litigation to protect core First Amendment rights. *Amicus* secured consent from counsel for both Plaintiffs and Defendants to file this brief. *See* Fed. R. App. P. 29(a)(2).

[1] Fed. R. App. P. 29(a)(4)(E) statement: No counsel for any party authored any part of this brief, and no person or entity other than *Amicus* funded its preparation or submission.

INTRODUCTION

The Securities and Exchange Commission ("SEC") insists that anyone who does not want to spend years of their life and millions of dollars disputing accusations must agree to censor themselves. That is a basic violation of the First Amendment: the government may not condition a government benefit on people refusing to speak.

The SEC's asserts an entitlement to extort via pressure something that no court could ever impose: a perpetual prior restraint against criticism of the agency—or even the barest insinuation that the agency got it wrong. If, as part of a conviction for securities fraud, the government asked that a fraudster be enjoined from ever suggesting that the case against him was bogus, this Court would reject that perpetual, content-based restriction on speech. But the SEC insists that it is proper to coerce people into agreeing never to subject the agency to criticism in exchange for the benefit of not being investigated.

In a free society, the state must always be subject to potential criticism. This court should apply that principle to find that the SEC's attempt to insulate itself from criticism cannot survive First Amendment scrutiny.

ARGUMENT

The Government may not use its enforcement authority to extort abridgments of fundamental rights.

The United States Securities and Exchange Commission ("SEC") is very concerned that the public might not agree with one of its enforcement actions. Indeed, the agency is so concerned it has adopted an explicit policy of censorship: anyone who can't afford to spend years defending themselves must agree to a settlement with the SEC, which includes the SEC's standard "Gag Order"—an explicit abridgement of speech. The federal government is extorting promises not to criticize the federal government. That is not a legitimate government purpose, or goal, or principle, or activity. And the government's insistence that this is simply a contract provision in a standard settlement negotiation falls flat.

Settlement negotiations are, in fact, subject to external legal restraint. Take the case of former celebrity attorney Michael Avenatti, who was convicted of criminal charges based on his demand that settlement of his client's claim against Nike include Nike paying Avenatti a multimillion-dollar retainer, ostensibly to conduct an investigation of the company. This demand for a personal pecuniary

benefit untethered from his client's actual claim against the company qualified as extortion. *United States v. Avenatti*, 81 F.4th 171, 186 (2d Cir. 2023). He was free to ask—and even over-ask—on behalf of his client, but instead he attempted to leverage a potentially legitimate activity (his client's claim against Nike) for his own personal gain. He was free to make money off the deal. But he was not free to use settlement negotiations to sneak in a bunch of ancillary benefits for himself.

Nor can the government use plea bargaining to impose censorship. The SEC in this case falls back on the idea that this is a simple contract question—like plea bargains, for instance. But even in a criminal case, a plea is understood as a waiver only as to the specific proceeding—a plea does not, can not, and should not concede all facts and resolve every question. A defendant absolutely still may challenge many aspects of his situation—indeed, he can always attack the constitutionality of his conviction, or anything else that goes to the court's "jurisdiction," broadly defined, if not the facts of the case. *See. e.g. United States v. Caperell,* 938 F.2d 975, 977 (9th Cir. 1991) ("although a guilty plea generally waives all claims of constitutional

violation occurring before the plea, 'jurisdictional' claims are an exception to this rule").

Some things should be obvious. For instance: just because you cut a deal to minimize litigation risk doesn't mean you conceded all relevant points and gave up all First Amendment rights. When this court encountered a man who plead guilty, whom the court below sentenced to not speaking ill, this Court thought the First Amendment violation so obvious the opinion wasn't even published. *See United States v. Richards*, 385 F. App'x 691, 693 (9th Cir. 2010) (restriction on criticizing a public official violated the First Amendment despite the defendant's decision to plead guilty).

The SEC relies heavily on a theory of consent under which anyone the agency has compelled into one of these agreements has agreed to waive their right to tell the truth, just like anyone agreeing to anything in any ordinary contract. But Supreme Court precedent provides certain standards that must be met for a person to properly waive his or her constitutional rights—and the SEC has not in fact met them.

First, waiver of a constitutional right must be of a "known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Second, the

waiver must be freely given; it must be "voluntary, knowing, and intelligently made." *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-86 (1972). And the Court has long held that it will "not presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307 (1937).

And because the Court will "not presume acquiescence in the loss of fundamental rights," *Ohio Bell Tel. Co.*, 301 U.S. at 307, the waiver of constitutional rights requires "clear and compelling evidence." What's more, "[c]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights." *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (citing *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389,393 (1937)).

And nothing is—or could be—more fundamental than the right to speak in one's own defense; to say that the powers of the state were misused against you, and that you did not do that which is claimed. But the SEC—more or less alone among law enforcement agencies—asserts a need for special protection against criticism: it supposedly needs a prior restraint against anyone whom it has ever decided to go after,

completely banning any object of SEC enforcement from ever pointing out that the agency might have screwed something up.

That is not how First Amendment law is supposed to work. Prior restraints on speech "are the most serious and least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). In fact, "the main purpose of [the First Amendment] is 'to prevent all such previous restraints upon publications as had been practiced by other governments….'" *Near v. Minnesota*, 283 U.S. 697, 714 (1931) (emphasis in original). Therefore, for good reason, "[t]he Supreme Court has roundly rejected prior restraint." *Kinney v. Barnes*, 443 S.W.3d 87 at n.7 (Tex. 2014) (quoting Sobchack, W., The Big Lebowski (1998)); *see, e.g., Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

The prohibition on prior restraints is not simply at the core of our First Amendment jurisprudence—it was the motivation for the First Amendment in the first place. Blackstone explained that "[e]very freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press."

William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND (1769) 4:150-53. To Joseph Story, "the language of this [first] amendment import[ed] no more, than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint." COMMENTARIES ON THE CONSTITUTION (1883) 3:§ 1874. If our protection for free speech means anything, it means that prior restraints are anathema to our law.

One can, under limited circumstances, waive a First Amendment right. For instance, *Cohen v. Cowles Media Co*., 501 U.S. 663 (1991) involved an agreement between two private parties with equal bargaining position and with no external enforcement by the government. The newspaper reporters in *Cohen* agreed with their source not to reveal the identity of the source. 501 U.S. at 665-66. Having made that agreement, their editors then changed their minds and published the source anyway. *Id*. at 666. When sued, the newspaper attempted to cover its tracks by invoking the First Amendment. *Id*. The Petitioners here do not deny that such a waiver, in the proper circumstances, can be made. The question before this Court is how and under what circumstances can such a waiver be given.

Cohen involved an arms-length agreement between two private parties with equal bargaining positions. That is not the scenario when the SEC throws around its enforcement authority looking for people without the resources to fight back.

The SEC decision from which Petitioners appeal confronts little to any of this—and certainly doesn't justify the Gag rule under any level of scrutiny. But the Gag Rule should fail any level of scrutiny because it is not even *rationally related* to any legitimate state interest. The government has no interest—and can have no interest, consistent with the First Amendment—in censoring criticism of the government. The SEC's own justification, from the beginning, was that it's "important to avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur." ER-7. In other words: it would be embarrassing for the agency if the public came to believe that it used its immense power and discretion to ruin the life of an innocent man—perish the thought!

In fact, the interest of the American people—and therefore the interest of the government, as the representative of those people empowered with the public trust—is precisely the opposite: that the use

of law enforcement authority be ever subject to question, to skepticism, and indeed to criticism, to ensure those stewards carry out the role we have assigned them in a sober and responsible manner that in fact furthers the public interest. The SEC has a public duty to be embarrassed where appropriate—its only recourse under the First Amendment is to not bring embarrassing cases.

CONCLUSION

For the foregoing reasons, this Court should find that the SEC Gag Rule violates the First Amendment.

Respectfully submitted,

June 24, 2023

Reilly Stephens
Counsel of Record
LIBERTY JUSTICE CENTER
13341 W. U.S. Highway 290
Building 2
Austin, Texas 78737
512-481-4400
jhuebert@ljc.org

CERTIFICATE AS TO LENGTH

Pursuant to Fed. R. App. P. 32, counsel of record certifies that the body of this brief, including footnotes, contains 1,672 words.