No. 24-1899

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS JOSEPH POWELL; BARRY D. ROMERIL; CHRISTOPHER A. NOVINGER; RAYMOND J. LUCIA; MARGUERITE CASSANDRA TOROIAN; GARY PRYOR; JOSEPH COLLINS; REX SCATES; MICHELLE SILVERSTEIN; REASON FOUNDATION; CAPE GAZETTE, LTD.; AND THE NEW CIVIL LIBERTIES ALLIANCE,
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 THE THOMAS MORE SOCIETY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Thomas More Society is a nonprofit public benefit corporation organized under the laws of the State of Illinois. It has no parent companies, subsidiaries, or affiliates and does not issue shares to the public.

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INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae Thomas More Society is a non-profit, national public-interest law firm dedicated to restoring respect in law for life, family, and religious liberty. The Thomas More Society provides legal services to clients free of charge and often represents individuals who cannot afford a legal defense with their own resources. Throughout its history, the Thomas More Society has advocated vigorously for the protection of First Amendment rights.[1]

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *Amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Security & Exchange Commission exercises great power over the economy and those it regulates. One of the most dramatic ways the SEC discharges its powers is by enforcement of 17 C.F.R. § 202.5(e). Through use of this regulation, the SEC demands that defendants it has sued agree to consent judgment terms that effectively bar the defendant from ever criticizing the SEC's case against them. Such an order is a content and viewpoint based prior restraint on the defendant's speech. And to make matters worse, this gag order language is included in the SEC's "consent" judgments as a matter of course without any individualized assessment of the purported need or countervailing public interests.

While the SEC's Gag Rule infringes on the First Amendment rights of the defendant, it also inflicts grievous injury on the public at large, which is being denied information about the manner in which its government is functioning. Our system of government depends on the ability of citizens to obtain information about how our leaders are exercising the trust reposed in them. This necessarily includes information critical of those leaders. The SEC's Gag Rule stifles public access to such information, leading to a more powerful, less accountable bureaucracy that is able to operate in secret.

Given the SEC's expansive powers and the means by which it extracts "consent" from settling defendants, it cannot be said that the gag language is the product of a process that is fair, either substantively or procedurally. Even if the defendant's consent were valid, however, courts must exercise their authority to protect the public's access to crucial information about its government rather than permit a powerful federal agency to regulate in the shadows away from public scrutiny.

For these reasons, this *Amicus* agrees with Petitioners that the Court should vacate the SEC's denial of the petition to amend and order the SEC to engage in rulemaking consistent with the First Amendment.

ARGUMENT

Americans like receiving news and information. Americans especially like receiving news and information about what the United States government is doing in their name. The SEC, however, prefers to ensure that, when it comes to its enforcement actions, only one side of the story ever gets told—its own. The First Amendment demands more to protect the rights of not only settling defendants, but also the rights of the public generally, who have strong interest in being able to evaluate how one of the federal government's most powerful agencies is behaving. Accordingly, this Court should vacate the Commission's denial of the rulemaking petition and remand with instructions for the SEC to engage in rulemaking to amend

17 C.F.R. § 202.5(e) to make it compatible with the First Amendment.

I. THE SEC'S GAG RULE CENSORS SPEECH CRITICAL OF THE GOVERNMENT, UNCONSTITUTIONALLY DEPRIVING MEMBERS OF THE PUBLIC VITAL INFORMATION ABOUT THEIR OWN GOVERNMENT'S CONDUCT.

A. The SEC, through its Own Rules and Practices, Invariably Requires the Loss of First Amendment Liberties as a Condition for Settlement of a Case.

The Securities & Exchange Commission's Gag Rule seeks to ensure Americans receive only the SEC's side of the story regarding enforcement actions in which it is involved. In 1972, the SEC adopted 17 C.F.R. § 202.5(e) (*i.e.*, the "SEC Gag Rule"), which states in relevant part:

> [I]t is important to avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur. Accordingly, [the SEC] hereby announces its policy not to 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.

Furthermore, the SEC regularly includes language in the consent judgments entered by the court that effectively prohibits those whom it has sued from ever contradicting the SEC's position on the matter for *the rest of their lives*.

Therefore, any settling defendant who appears to later suggest that the SEC was incorrect about the case risks both breaching the settlement agreement and being held in contempt of court. *See, e.g., Cato Inst. v. SEC*, 4 F.4th 91, 95 (D.C. Cir. 2021) ("[A] court may institute criminal contempt proceedings against an SEC defendant

who violates a no-deny provision . . . 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[.]") (internal citations omitted).

B. Our System of Government Depends on Free Speech, Including the Right of the Public to Receive Information.

Contrary to the position embodied in the SEC's Gag Rule, "it is our law and our tradition that more speech, not less, is the governing rule." *Citizens United v. FEC*, 558 U.S. 310, 361 (2009). The constitutional protection of free speech is not merely intended to encourage self-expression. "[F]ree speech is 'essential to our democratic form of government.' Without genuine freedom of speech, the search for truth is stymied, and the ideas and debates necessary for the continuous improvement of our republic cannot flourish." *Meriwether v. Hartop*, 992 F.3d 492, 503 (6th Cir. 2021) (Thapar, J.) (quoting and citing *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018)).

The First Amendment creates a marketplace of ideas because our Founders were confident in their belief "that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth[.]" *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). The Constitution accordingly seeks to "maintain a free marketplace of ideas, a marketplace that provides access to 'social, political, esthetic, moral, and other ideas

and experiences.'" *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 583 (2011) (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390, (1969) and citing *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

For the existence of a marketplace of ideas sufficient to sustain a healthy civic society, the rights of both speakers and listeners must be respected. Thus, the Constitution generally prevents the government from interfering with "the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *see, e.g., Martin v. Struthers*, 319 U.S. 141, 143 (1943). "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyer." *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (citations omitted). Unfortunately, the SEC Gag Rule stifles the marketplace of ideas by preventing willing listeners from receiving information. Such interference in the free exchange of information would be troubling enough as a general matter, but it is especially egregious and damaging to civic health for information about the manner in which a government agency is discharging its duties to be suppressed.

C. The SEC's Gag Rule Empowers Bureaucracy at the Public's Expense.

Even though, "[a]s a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear," *Ashcroft v. Free*

Speech Coalition, 535 U.S. 234, 245 (2002), the SEC Gag Rule engages in precisely that kind of censorship as a matter of course. With a rule that discriminates on the basis of both content and viewpoint, the SEC boldly claims that it has an interest in not being contradicted *after a case has been resolved*. *See* 17 C.F.R. § 202.5(e).

It is a rare admission by a governmental entity that it is seeking not only to censor a certain perspective, but that it is specifically seeking to censor that perspective because it would be critical of the government. It beggars the imagination how a government agency can claim a legitimate, let alone compelling, interest in insulating itself from criticism. "The right of free public discussion of the stewardship of public officials . . . [is] a fundamental principle of the American form of government." *New York Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964); *see Schacht v. United States*, 398 U.S. 58, 63 (1970) (commenting that all persons "in our country, enjoy[] a constitutional right to freedom of speech, including the right openly to criticize the Government").

While at odds with America's traditional First Amendment principles, the SEC's Gag Rule is perfectly consistent with the unfortunate tendency of government bureaucracies to use secrecy as a means to increase their own powers at the expense of the public. Writing over twenty years ago, the bipartisan Commission on Protecting and Reducing Government Secrecy chaired by then-U.S. Senator Daniel Patrick Moynihan condemned the federal government's covetous treatment of public

information, which resulted in an excessive amount of government secrecy. Daniel Patrick Moynihan et al., *Report of the Commission on Protecting and Reducing Government Secrecy*, S. Doc. No. 105-2, app. A at Ch. 3 ("Secrecy: A Brief Account of the American Experience") (1997), *available at* https://sgp.fas.org/library/moynihan/appa3.html (last visited June 24, 2024) [hereinafter, "Moynihan"]. This tendency was nothing new to government and nothing unique to the U.S. government, the Commission explained. Instead, the Commission attributed it to the natural inclinations of bureaucracies as described by the German sociologist Max Weber:

> Every bureaucracy seeks to increase the superiority of the professionally informed by keeping their knowledge and intentions secret. Bureaucratic administration always tends to be an administration of "secret sessions" [and] in so far as it can, it hides its knowledge and action from criticism . . . The concept of the "official secret" is the specific invention of bureaucracy, and nothing is so fanatically defended by the bureaucracy as this attitude[.]

Id. (quoting Weber's *Wirtschaft und Gesellschaft*).

The secrecy and insulation from criticism a bureaucracy like the SEC naturally seeks cannot be squared with what the First Amendment demands. Therefore, this Court should rein in the SEC Gag Rule from further depriving those whom the SEC has sued from disclosing to the American public how their government has acted.

II. THE SEC'S BLANKET GAG RULE RUNS COUNTER TO OUR NATION'S BEST JURIDICAL TRADITIONS AND PERPETUATES THE ILL EFFECTS OF EXCESSIVE GOVERNMENT SECRECY.

A. The SEC Gag Rule Results in Enforceable Court Judgments Against Settling Defendants While Evading the Strong Constitutional Presumption in Favor of Public Trials.

The impropriety of the SEC Gag Rule becomes apparent when contrasted with the constitutional protections on the public's right to know what occurs in both criminal and civil trials. Decisions of the U.S. Supreme Court make clear that there is a public right to access the records and proceedings of both criminal and civil cases. *See Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 510, (1984) (describing the public's First Amendment right to access judicial proceedings and records); *see also Waller v. Georgia*, 467 U.S. 39, 44-45 (1984) (describing a criminal defendant's Sixth Amendment right to a public trial). "For many centuries, both civil and criminal trials have traditionally been open to the public. As early as 1685, Sir John Hawles commented that open proceedings were necessary so 'that truth may be discovered in civil *as well as* criminal matters' (emphasis added). Remarks upon Mr. Cornish's Trial, 11 How. St. Tr. 455, 460." *Gannett Co., v. DePasquale*, 443 U.S. 368, 387 n.15 (1979).

As a result of these principles, courts may close trials to the public only upon there being a record of certain showings, including that there is an "overriding interest" in closing the proceedings, that the proceedings are not closed any more

than necessary to protect that overriding interest, and that the court has considered alternatives to closing the public out of the proceedings. *See, e.g., Bell v. Jarvis*, 236 F.3d 149, 166 (4th Cir. 2000); *see also Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908-10 (2017). It is certainly true that the SEC's settlements are not courtroom trials. These settlements, however, are not merely contracts between the SEC and the settling defendant. They become federal court judgments enforceable with the full contempt powers of the federal judiciary, including the possibility of criminal contempt.

Moreover, the SEC settles approximately 98% of the cases it brings. *See* Pet. 10 (citing sources). A necessary component of this high settlement rate is the immense power the SEC possesses as part of the modern administrative state. *See* Philip Hamburger, IS ADMINISTRATIVE LAW UNLAWFUL?, 349-62 (2014) (describing overwhelming power of modern administrative agencies). By utilizing this power, the SEC has cut off the ability of those it has sued from *forever* uttering a critical word about the SEC's suit by means of a categorical rule that applies in every case, without any individualized examination of the specific facts, without any consideration of alternatives, and without any but the flimsiest of justifications.

B. Excessive Government Secrecy, Like that Embodied in the SEC Gag Rule, is Fundamentally Injurious to the Public Interest.

The motivations for our national tradition of open trials apply with equal force to the SEC's "consent" judgments. "Information is power, and it is no mystery to

government officials that power can be increased through controls on the flow of information." Moynihan, *supra*, at "Ch. I. Overview: Protecting Secrets and Reducing Secrecy," *available at* https://sgp.fas.org/library/moynihan/chap1.html (last visited June 24, 2024). With its Gag Rule, the SEC effectively monopolizes the power to tell the story of how it is exercising its authority. Yet, the free exchange of conflicting information and views is the cornerstone of discovering truth. Even a speaker whose criticisms are misguided or inaccurate is nonetheless protected by the First Amendment because it has long been recognized that "a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" *New York Times*, 376 U.S. at 279 n.19 (1964) (quoting John Stuart Mill, *On Liberty* (Oxford: Blackwell 1947), at 15, and citing John Milton, *Areopagitica*, in *Prose Works* (Yale 1959), Vol. II, at 561).

The public likewise has an interest in knowing how its officials are discharging their powers. "'[I]t is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.'" *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1069 (3d Cir. 1984) (quoting *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884)). Yet, the SEC interferes with this ability in the most extreme of ways—a total, complete,

lifetime gag rule against any criticism from settling defendants at any point in the future. The result is less public information and a greater danger for public mistrust and cynicism.

The SEC Gag Rule is long overdue for a constitutional reckoning, which this Court can and should provide.

III. THE SEC'S RULE CANNOT BE RESCUED BY RELIANCE ON PRINCIPLES OF WAIVER AND CONSENT.

A. A Party's "Consent" to the SEC's Gag Rule is the Product of a Fundamentally Unconscionable Process.

Given the substantive and procedural unfairness of the means by which the SEC obtains the settling defendant's purported waiver of its First Amendment rights, it is no answer that the SEC's gag language is the product of consent between the parties. *Cf. Gideon v. Wainwright*, 372 U.S. 335, 344 (1964) ("From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.").

First, the process by which the gag language comes to be included is procedurally unconscionable. The language prohibiting future speech is not a negotiated term of the settlement agreement that is included due to any specific and articulable needs of the particular case. To the contrary, the gag language—drafted by the SEC—must be included per 17 C.F.R. § 202.5(e), which is intended to justify

the SEC's position as to all of its enforcement actions in perpetuity. The settling defendant is given a Hobson's choice of either acceding to the Gag Rule or going through a complex and expensive trial where its exposure is enormous. *See, e.g., Nino v. Jewelry Exchange, Inc.*, 609 F.3d 191, 201 (3d Cir. 2010) ("We have consistently found that adhesion contracts—that is, contracts prepared by the party with greater bargaining power and presented to the other party 'for signature on a take-it-or-leave-it basis'—satisfy the procedural element of the unconscionability analysis.") (citations omitted); *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 996 (9th Cir. 2010) ("An agreement or any portion thereof is procedurally unconscionable if the weaker party is presented the clause and told to 'take it or leave it' without the opportunity for meaningful negotiation.") (internal quotation marks and citation omitted). The fact that only a tiny fraction of SEC suits does not settle before trial evidences the strong disincentive that defendants have to risk taking a case to verdict once they have been targeted by the SEC.

The gag language is also substantively unconscionable. Besides being collateral to the actual merits of the case and the substance of the settlement (*i.e.*, monetary relief and any changes in party conduct going forward), it is staggeringly broad. It is not limited to a set time period (*e.g.*, 5 years) or limited by the happening of a future event, such as the conclusion of related investigations and proceedings. Rather, the defendant is *forever* restrained from exercising his constitutional right to

free speech on the subject matter being settled. This is particularly disturbing in light of the fact that the gag language is imposed without any inquiry into a need for secrecy or confidentiality by the SEC or the court that enters the consent judgment. Such actions would be troubling enough between private parties. But here the case concerns a *government* actor, and courts have accordingly refused to enforce such language. *See, e.g., G & V Lounge v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1077 (6th Cir. 1994) ("[A] state actor cannot constitutionally condition the receipt of a benefit . . . on an agreement to refrain from exercising one's constitutional rights, *especially one's right to free expression*.") (emphasis added).

Thus, the SEC's Gag Rule cannot be supported by a party's purported "consent" to be bound by the gag language.

B. Reliance on Principles of Waiver and Consent Overlooks the First Amendment Rights of the Public.

Waiver and consent further fail as talismans for the SEC because an unconstitutional injunction cannot stand, even if the parties agree to it. "[J]ust as two parties cannot stipulate to subject-matter jurisdiction, two parties cannot stipulate to an injunction violative of substantive and procedural law." *See, e.g., SEC v. Farha*, No. 8:12-CV-47-T-23MAP, 2018 WL 11354497, 2018 U.S. Dist. LEXIS 244839, at *7 (M.D. Fla. May 1, 2018) (citing *Stovall v. City of Cocoa, Fla.*, 117 F.3d 1238 (11th Cir. 1997) (explaining that a district court must refuse to adopt an unlawful consent decree) and *League of United Latin Am. Citizens, Council No. 4434 v.*

Clements, 999 F.3d 831, 845-46 (5th Cir. 1993) (Higginbotham, J.) ("Even if all the litigants were in accord, it does not follow that the federal court must do their bidding.")).

The U.S. Supreme Court has repeatedly recognized that "[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010); *see Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 755 (2011) ("'[T]here is practically universal agreement that a major purpose of' the First Amendment 'was to protect the free discussion of governmental affairs[.]'") (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)). The SEC's Procrustean Gag Rule runs directly contrary to these rights and interests of the public.

Similar defects to those in the SEC Gag Rule led to the Second Circuit's rejection of analogous language in *Crosby v. Bradstreet Co.*, 312 F.2d 483 (2d Cir. 1963). *Crosby* concerned language that broadly "restrained the defendant from publishing any report, past, present or future, about certain named persons." 312 F.2d at 485. Despite the defendant having once agreed to the provision, the Second Circuit had little trouble finding it unconstitutional under the First Amendment. *Id.* at 485. "Such an injunction, enforceable through the contempt power, constitutes a prior restraint by the United States against the publication of facts which the

community has a right to know and which [the defendant] had and has the right to publish." *Id.* The injunction was not merely void. "The court was without power to make such an order; *that the parties may have agreed to it is* ***immaterial***." *Id.* (emphasis added).

CONCLUSION

For the foregoing reasons, this *Amicus* respectfully urges the Court to grant Petitioners' request to vacate the Commission's denial of the rulemaking petition and remand with instructions for the SEC to engage in rulemaking to amend 17 C.F.R. § 202.5(e) to remove the language that is incompatible with the First Amendment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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B. Tyler Brooks