No. 25-1100

In the Supreme Court of the United States

THOMAS J. POWELL, ET AL.,
Petitioners,
v.
SECURITIES AND EXCHANGE COMMISSION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the SEC's Gag Rule violates the First Amendment.

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INTEREST OF AMICUS CURIAE[1]

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing those policy solutions for implementation in Ohio and replication throughout the country. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization as defined by 26 U.S.C. § 501(c)(3). The Buckeye Institute files and joins amicus briefs that are consistent with its mission and goals.

The Buckeye Institute seeks to protect individual liberties—especially those liberties guaranteed by the Constitution of the United States—against government overreach. Government overreach increasingly comes in the form of agency rules and regulations imposed by unelected bureaucrats. The result is the insulation of important public policy decisions from any political or judicial accountability. This is incompatible with the representative democracy guaranteed by the Constitution. Thus, the Buckeye Institute has a strong interest in ensuring that agency action is subject to robust judicial review

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from amicus curiae made any monetary contribution toward the preparation or submission of this brief. Counsel timely provided the notice required by Rule 37.2.

keeping agencies within their constitutionally defined parameters.

SUMMARY OF THE ARGUMENT

The SEC's "Gag Rule," which bars settling defendants from publicly denying allegations, is unnecessary and creates a coercive enforcement regime that conflicts with the First Amendment. Federal securities laws were designed to promote transparency and accountability, yet the rule suppresses speech that could challenge the SEC's narrative. The SEC is nearly alone among federal agencies in imposing such restrictions. Other agencies—including the Environmental Protection Agency, the Department of Labor, and the Department of Justice—permit settlements without admissions of liability and do not impose comparable speech limits. Department of Justice policy, in fact, disfavors confidentiality provisions in civil settlements in favor of openness. These longstanding practices undermine any claim that the SEC's rule serves a compelling interest. The Ninth Circuit identified only a generalized interest in managing enforcement strategy—an interest it conceded was not "wholly illegitimate"—but it is insufficient to justify broad restraints on speech.

The SEC's implementation of the rule also exceeds its own regulation. While 17 C.F.R. § 202.5(e) allows defendants to settle while stating they "neither admit[ ] nor deny[ ]" allegations, the SEC has expanded that requirement in practice. The SEC further restricts the speech of non-parties and restricts the defendant's actions. The proposed amendment by the New Civil Liberties Alliance would

correct this by expressly permitting defendants to admit, deny, or neither admit nor deny allegations, restoring consistency with administrative law and constitutional protections.

The rule also creates a coercive and one-sided enforcement scheme. Defendants already face immense pressure to settle due to the high costs and risks of litigation against the SEC's vast resources. The Gag Rule intensifies this pressure by conditioning settlement on the waiver of core speech rights, forcing defendants to choose between costly, uncertain litigation or silence. This restriction applies only to defendants, allowing the SEC to publicize its version of events while silencing opposing perspectives.

At the same time, the structure of SEC settlements makes meaningful challenges to the Gag Rule practically impossible. Defendants may settle for a variety of reasons, including due to financial, professional, and personal pressures. Once a settlement is incorporated into a consent decree, it carries the force of a final judgment and triggers res judicata, barring later challenges. The collateral bar rule prevents defendants from violating the gag provision and contesting it afterward, and attempts to vacate such judgments under Rule 60(b) have been rejected. Courts have held that even potentially unconstitutional provisions do not render such judgments void, particularly where the defendant consented. Moreover, breaching the agreement risks severe consequences, including renewed enforcement proceedings, contempt sanctions, and even criminal liability for false statements or perjury. These barriers leave defendants without a realistic avenue to

challenge the rule as applied, and even courts have expressed concern about the rule's constitutionality while concluding they lack authority to reject such settlements under existing precedent.

Because the Gag Rule suppresses speech, exceeds the SEC's regulatory authority, distorts the fairness of enforcement proceedings, and effectively evades judicial review, a petition for rulemaking presents the most viable—and perhaps only—mechanism for addressing its legality. Without judicial intervention, the rule allows the SEC to compel waivers of First Amendment rights as a condition of settlement, leaving defendants with no meaningful recourse. The Court's review is necessary to ensure that SEC enforcement practices comply with constitutional guarantees and fundamental principles of transparency and accountability.

ARGUMENT

I. The Gag Rule is unnecessary and contrary to public policy.

"In the aftermath of the Wall Street Crash of 1929, Congress passed a suite of laws designed to combat securities fraud and increase market transparency. . . . To enforce these Acts, Congress created the Securities and Exchange Commission." *SEC* v. *Jarkesy,* 603 U.S. 109, 115–16 (2024).

In a bit of hypocrisy, the SEC only wants transparency when it fits the SEC's narrative. The SEC is conspicuous as the only federal agency save one

other[2] to require a Gag Rule concealing information that might undermine its narrative. In fact, a review of other agencies' websites demonstrates that other federal agencies value compliance over obeisance, and publicly state that settlement does not require an admission of guilt. For example, the EPA's "Basic Information on Enforcement" webpage tells readers that while a defendant settling a civil enforcement action "must meet all of the terms of the settlement, [the defendant] does not have to acknowledge that he violated the law." *Basic Information on Enforcement*, U.S. Env't Prot. Agency, https://tinyurl.com/2zzdn2fb (last visited Apr. 18, 2026).

Similarly, the "Sample Standard OSHA Settlement Agreement" includes an optional section: "Non-Admission. Respondent's signing of this Agreement is not an admission or denial of a violation of any law, standard, or regulation enforced by OSHA." *Sample Standard OSHA Settlement Agreement*, U.S. Dep't of Labor, https://tinyurl.com/3kefenc9 (last visited Apr. 18, 2026). In fact, the Department of Justice has a codified policy against entering into settlements or consent decrees in civil matters that are subject to confidentiality provisions, explaining that "[t]his policy flows from the principle of openness in government and is consistent with the Department's policies regarding openness in judicial proceedings." See 28 C.F.R. § 50.23 (citations omitted).

If other agencies have operated successful civil enforcement programs for decades without a Gag

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[2] The Commodity Futures Trading Commission issued a similar policy statement. 17 C.F.R. pt. 10, app. A.

Rule, what compelling interest does the SEC have in its policy? The only answer that the Ninth Circuit gave was that "[t]he SEC has some interest in determining how to try its cases and prove its allegations, and in deciding upon settlement terms that are most consistent with its preferred enforcement strategy." Pet. App. at 22a. The court noted that it could not "say that the SEC's interest in [enforcing the Gag Rule] is wholly illegitimate." Pet. App. at 22a. The Ninth Circuit assures the regulated community, however, that at least the SEC's asserted interests are not as bad as the " 'utterly unpersuasive' and 'pernicious' anti-democratic justifications" that the Ninth Circuit rejected in *Davies*. Pet. app. at 22a. See *Davies* v. *Grossmont Union High School Dist*., 930 F.2d 1390, 1398 (9th Cir. 1991) (voiding settlement agreement prohibiting party from seeking public office). It is hard to imagine fainter praise with which to damn a policy.

II. The SEC's practice exceeds the scope of the regulation. NCLA's proposed rule would fix this.

The SEC's regulation states that the SEC will 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. In this regard, the Commission believes that *a refusal to admit the allegations is equivalent to a denial, unless the defendant or respondent states that he neither admits nor denies the allegations*.

17 C.F.R. § 202.5[e] (emphasis added).

So the rule, as it appears in the Code of Federal Regulations, allows a defendant to state that it neither admits nor denies the SEC's allegations. But the SEC has gone beyond the mandate in the regulation to also require the defendant to agree that the defendant:

> (i) will not *take any action* or make or permit to be made any public statement denying, directly *or indirectly*, any allegation in the complaint *or creating the impression that the complaint is without factual basis*; (ii) will not make *or permit to be made* any public statement to the effect that Defendant does not admit the allegations of the complaint, or that this Consent contains no admission of the allegations, without also stating that Defendant does not deny the allegations.

SEC v. *Moraes*, No. 22-CV-8343 (RA), 2022 WL 15774011, at *2 (S.D.N.Y. Oct. 28, 2022) (emphasis added).

One might say that the additional language is a reasonable outgrowth from the regulation. But the regulation is the regulation. While the SEC created the regulation without notice and comment, that does not give the SEC the right to create a new regulation without even publishing it. Yet that is what it has done.

The NCLA's proposed revised regulation makes a minor working change that would resolve the SEC's regulatory overreach and excessive intrusion on the

First Amendment, by allowing a defendant or respondent to consent to a judgment or order in which he *may deny*, or admit, or state that he neither admits nor denies the allegations in the complaint or order for proceedings. See Pet. to Amend at 33, *In re SEC Rule Imposing Speech Restraints in Consent Orders 17 C.F.R. § 202.5(e)* (Oct. 30, 2018), https://www.sec.gov/files/rules/petitions/2018/petn4-733.pdf.

III. The Gag Rule creates an unfair and coercive enforcement scheme by restricting only the regulated party's speech.

The SEC's settlement terms place its targets between a rock and a hard place. "Throughout the entire administrative process—regardless of whether enforcement has begun—the target must choose whether to settle or bet the farm." *Cochran* v. *SEC*, 20 F.4th 194, 230 (5th Cir. 2021), *aff'd and remanded sub nom. Axon Enter., Inc.* v. *FTC*, 598 U.S. 175 (2023). The Gag Rule insures the SEC against its targets by providing the agency with additional cover from critique. The SEC, like any government agency, need not look hard for critics. See generally Urska Velikonja, *Are the SEC's Administrative Law Judges Biased? An Empirical Investigation*, 92 Wash. L. Rev. 315, 364 (2017); Norman S. Poser, *Why the SEC Failed: Regulators Against Regulation*, 3 Brook. J. Corp. Fin. & Com. L. 289 (2009) (citing the 2008 financial crisis and the Bernie Madoff ponzi scheme). But that does not justify gagging its critics, especially with such lopsided terms.

A key function of an adversarial system—in a civil, criminal, or administrative setting—is that the

parties zealously advocate for themselves with the belief that the *process* will reveal the truth. But "speech is an essential mechanism of democracy—it is the means to hold officials accountable to the people." *Citizens United* v. *FEC*, 558 U.S. 310, 339 (2010).

The Gag Rule's lopsided nature enables the SEC to write the narrative on its cases after a settlement, with no recourse for its targets. The SEC's targets, the very people and organizations most familiar with the SEC's practices and processes, are striped of any ability to defend themselves against the SEC's post-settlement accusations. While sophisticated investors, securities lawyers, and a few judges will understand the Gag Rule, most others have no clue that it exists, let alone its impact on the defendant's speech. When there is only one message—the SEC's message—the defendant's clients, customers, and the public suffer. Here are just a few examples.

In 2024, the SEC settled five cases with JPMorgan Chase, where JPMorgan agreed to pay $151 million but did not admit or deny wrongdoing. Jonathan Stempel, *US SEC says JPMorgan Chase settles five enforcement cases, to pay $151 million*, Reuters (Oct. 31, 2024), https://tinyurl.com/2dcehfk6. Yet the acting director of the SEC's enforcement division ignored the neutral settlement provision that JPMorgan neither admitted nor denied the SEC's allegations, and affirmatively stated that "JPMorgan's conduct across multiple business lines violated various laws designed to protect investor from the risks of self-dealing and conflicts of interest . . . ." *Id.*

Perhaps JPMorgan was guilty as charged, but perhaps not. The Gag Rule prevented JPMorgan from

giving any justifications or explanations for its actions, unless it also says: "but we do not deny what the SEC charged us with." Perhaps JPMorgan would like to have responded to its investors, clients, and the public with: "We disagree that the company engaged in any unlawful conduct, but we have agreed to settle to avoid the uncertainty of litigation." People could then investigate and draw their own conclusions. But they were not given that opportunity.

The SEC settled with Goldman Sachs for $550 million in 2010. *Goldman Sachs to Pay Record $550 Million to Settle SEC Charges Related to Subprime Mortgage CDO*, U.S. Sec. & Exch. Comm'n (July 15, 2010), https://tinyurl.com/mr42ak52. Goldman admitted its marketing contained incomplete information but otherwise settled without admitting or denying wrongdoing. *Id.* That did not prevent the Deputy Director of Enforcement from asserting that "[t]he unmistakable message of this lawsuit and today's settlement is that half-truths and deception cannot be tolerated . . . ." *Id.*[3]

Based on the Deputy Director's statement, people might well conclude that Goldman is deceptive. After

[3] More than half of the settlement, $300 million, was to be paid to the U.S. Treasury. This payment, paired with the lack of transparency the Gag Rule perpetuates, causes one to question if the SEC is really trying to "protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation." *About*, U.S. Sec. & Exch. Comm'n, https://www.sec.gov/about (last visited Apr. 16, 2026). See generally James J. Park, *The SEC as an Entrepreneurial Enforcer*, 119 Nw. U. L. Rev. 689, 727–29 (2024) (explaining that "the collection of penalties is a measure of its success" and that the "SEC faces political pressure to report strong enforcement numbers").

all—Goldman did not issue a statement denying it—so it must be true! But what if it's not? We can never know.

Elon Musk and Tesla each agreed to pay the SEC $20 million dollars to settle claims against them in 2018. *Elon Musk Settles SEC Fraud Charges; Tesla Charged With and Resolves Securities Law Charge*, U.S. Sec. & Exch. Comm'n (Oct. 2, 2018), https://tinyurl.com/mth44px6. Again, while neither Musk nor Tesla admitted or denied wrongdoing, the SEC affirmatively claimed wrongdoing: "The total package of remedies and relief announced today are specifically designed to address the misconduct at issue by strengthening Tesla's corporate governance and oversight in order to protect investors . . . ." *Id.*

The SEC's soundbite is as powerful as it is self-serving. But what if Tesla's pre-settlement existing governance was actually better, and that structure made Tesla one of the most valuable companies in the world—valued by mutual funds, individual investors, and customers? But Tesla might have explained that, rather than devote resources to fighting bureaucrats, it chose to settle and focus on building better electric cars. Again, we will never know. See generally Br. of the Cato Inst. as Amicus Curiae in Support of Pet'r's at 8–9 (explaining that SEC investigations and litigation forces investigated entities to forego significant business opportunities).

JPMorgan, Goldman, and Elon Musk are three of the wealthiest and most powerful institutions/people in the country. If they can be silenced from "telling the

rest of the story,"[4] and possibly salvaging their reputation, then smaller businesses and individuals have no hope of doing any better. See Br. of the Cato Inst. as Amicus Curiae in Support of Pet'r's at 9–10 (explaining the reputational harm caused by SEC action against investigated entities).

In all fairness, the SEC saves its press releases for major settlements. But that does not mean that defendants can share their views of the settlement. For example, the SEC "construed" "[s]tatements made on behalf of" settling party Michael Angelos "as denials of the allegations in the Complaint," and filed a motion to vacate the settlement. See Sec. & Exch. Comm'n, *Litigation Release No. 14886* (Apr. 22, 1996), https://bit.ly/34hrh84 (regarding *SEC* v. *Angelos*, No. B96-834 (D. Md.)). 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.

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[4] See generally Carlos Watson, *The Rest of the Story: Paul Harvey, Conservative Talk Radio Pioneer*, NPR (Oct. 9, 2014), https://tinyurl.com/mvv693kt.

Id.

Giving the SEC the pen to write the story allows it to taint its targets' public image without recourse. The targets' options: speak up and unwind the settlement or take the flacking silently. See Hester Peirce, Comm'r, Sec. & Exch. Comm'n, *Unsettling Silence: Dissent from Denial of Request for Rulemaking to Amend 17 C.F.R. § 202.5(e) U.S. Securities and Exchange Commission*, U.S. Sec. & Exch. Comm'n (Jan. 30, 2024), https://www.sec.gov/newsroom/speeches-statements/peirce-nand-013024.

The four highlighted cases illustrate the SEC's oppressive and cyclical practice of perusing, settling with, and silencing its target. Some may argue that the SEC is doing its job by protecting the public. See generally *Examining the Settlement Practices of U.S. Financial Regulators: Hearing Before the H. Comm. on Fin. Serv.*, 112th Cong. 74 (2012) (statement of Robert Khuzami, Dir., Div. Enf't U.S. Sec. & Exch. Comm'n). But the current settlement-to-silence scheme makes the SEC the arbiter of truth. And "it is perilous to permit the [government] to be the arbiter of truth." *United States* v. *Alvarez*, 567 U.S. 709, 752 (2012) (Alito, J., dissenting).

Not only are many smaller SEC targets in a settle-or-bet-the-farm dilemma, but the Gag Rule makes settlement mightily oppressive. The Gag Rule is the antithesis to the First Amendment and allows the SEC to operate without accountability. This is not the way to effectuate just enforcement, nor is it consistent with the First Amendment. See Rodney A. Smolla, *Why the Sec Gag Rule Silencing Those Who Settle Sec*

Investigations Violates the First Amendment, 29 Widener L. Rev. 1, 3 (2023). At its core, the Gag Rule is one part of the SEC's broader coercive scheme, and "the traditional norms prohibiting coercion and duress are insufficient to police the legal monopoly that" the SEC "exercises over" enforcement actions. See Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 102 (1988). "When the government uses only its monopoly of force to achieve its ends, classic constitutional questions arise under particular constitutional provisions. But when the government uses its power to contract or grant, then the issue of unconstitutional conditions proper is raised." *Id.* That is the case here, and judicial intervention is necessary to end this coercive and oppressive rule.

IV. This is the proper vehicle to address the SEC's Gag Rule because all other avenues are foreclosed.

An overwhelming percentage of SEC defendants settle, rather than going to trial.[5] Why? In some instances, defendants are guilty of something and want to get the best deal possible. Others may settle even if they believe they are innocent because they are afraid of the consequences of losing, or alternatively, they cannot afford to fight. The penalties for losing are great—they can result in an untold amount of fines, and, if the case is referred to the Department of Justice, possible prison time. And the litigation costs can be astronomical, while facing the SEC's virtually unlimited resources and aggressive litigation tactics, described by at least one as "totally abusive."[6] Jeff Cox, *Leon Cooperman: SEC insider trading case was 'extraordinarily abusive'*, CNBC (May 30, 2017), https://www.cnbc.com/2017/05/30/leon-cooperman-tells-cnbc-sec-case-was-extraordinarily-abusive.html (estimating trial costs of $20 million in addition to other indirect costs). See also Br. of the Cato Inst. as Amicus Curiae in Support of Pet'r's at 7 ("SEC

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[5] In 2013, SEC Commissioner Aguilar put the percentage at 98%. Louis A. Aguilar, Comm'r, Sec. & Exch. Comm'n, Speech at 20th Annual Securities Litigation and Regulatory Enforcement Seminar: A Stronger Enforcement Program to Enhance Investor Protection (Oct. 25, 2013), https://www.sec.gov/newsroom/speeches-statements/2013-spch102513laa.

[6] In contrast to other post-settlement defendant denials, the SEC did not respond to Mr. Cooperman's statement implying a denial of the charges.

investigations and enforcement actions impose severe financial burdens on investigated entities.").

In her dissent from the denial of NCLA's petition for amendment, Commissioner Hester Peirce commented that adding to the financial burden, "the intangible yet often even more onerous emotional, physical, and relational tolls of litigation" make it "unremarkable that nearly all defendants in Commission actions settle." Peirce, *supra*. While David had the faith to fight Golaith, even he might sue for peace from the SEC.

Those defendants who would like to fight to prove their innocence—but cannot afford the cost or the risks—are faced with a Hobson's Choice—go to trial with the possibility of jail and heavy fines, or fight and lose millions and maybe destroy their business or livelihood in the process. But even in settlement, the defendants face great harm. The Gag Rule destroys a defendant's ability to tell its clients and the public that it maintains its innocence but settled out of a business necessity. This would still allow the clients to decide who to believe—the SEC or the defendant.

Many defendants who feel coerced into a settlement want to retain the right to challenge the mandatory gag provision. Yet they face legal and practical roadblocks at every junction. SEC settlements are not only a settlement between the parties. They are also often signed by a judge and become a binding court order. See, *e.g.*, *SEC* v. *Romeril*, 15 F.4th 166, 170 (2d Cir. 2021) (characterizing an SEC settlement agreement as a "consent" signed by the defendant and incorporated into a court judgement requiring the defendant to

"comply with all of the undertakings and agreements set forth" in the Consent").

Litigants are precluded from attacking the settlement/judgment after it is entered, both legally and practically. Courts have held that "[a] consent decree is a judgment, has the force of res judicata, and it may be enforced by judicial sanctions . . . ." *SEC* v. *Randolph*, 736 F.2d 525, 528 (9th Cir. 1984) (citing *United States* v. *City of Miami*, 664 F.2d 435, 439–40 (5th Cir.1981) (en banc) (Rubin, J., concurring)). And "where a dismissal is 'based on a settlement agreement, . . . the principles of res judicata apply (in a somewhat modified form) to the matters specified in the settlement agreement . . . .'" *U.S. ex rel. May* v. *Purdue Pharma L.P.*, 737 F.3d 908, 913 (4th Cir. 2013) (first alteration in original) (quoting *Norfolk S. Corp.* v. *Chevron, U.S.A., Inc.*, 371 F.3d 1285, 1288 (11th Cir.2004)). As the Court has noted, res judicata creates "'a final judgment on the merits [and] bars further claims by parties or their privies based on the same cause of action.'" *Brown* v. *Felsen*, 442 U.S. 127, 131 (1979) (quoting *Montana* v. *United States*, 440 U.S. 147, 153 (1979)). The doctrine "prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *Id.* (citing *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371, 378 (1940); 1B J. Moore, Federal Practice ¶ 0.405[1] (2d ed. 1974)).

As applied to SEC settlement agreements incorporated into consent decrees, defendants agree to be bound by the Gag Rule, and the SEC only releases them if future litigation does not involve the SEC. See,

e.g., United States, *Offer of Settlement of FTE Networks, Inc.*, Sec. & Exch. Comm'n, https://www.sec.gov/Archives/edgar/data/1122063/000114420414055309/v388919_ex10-1.htm (last visited Apr. 15, 2026).

Further, litigants cannot simply ignore the Gag Provisions in the settlement agreement/court order and then assert the First Amendment as a defense. It has long been a rule that a "judgment or decree must be held conclusive against a collateral attack by either of the parties thereto." *Riverdale Cotton Mills* v. *Alabama & Georgia Mfg Co*, 198 U.S. 188, 198 (1905). The collateral bar rule precludes this legal path, and the practicality of the situation renders this path meaningless. First, the collateral bar rule forbids a speak-first defend-later challenge. See *Walker* v. *City of Birmingham*, 388 U.S. 307, 320 (1967). "[A] party may not challenge a district court's order by violating it. Instead, he must move to vacate or modify the order, or seek relief [from a higher] Court." *United States* v. *Cutler*, 58 F.3d 825, 832 (2d Cir. 1995). So, "[a]n injunction [or court order] . . . must be obeyed . . . however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case." *Howat* v. *State of Kansas*, 258 U.S. 181, 189–90 (1922).

But in the context of an SEC settlement, a more serious issue arises. The settlement agreement/judgment entry includes the defendant's statement: "I declare under penalty of perjury under the laws of the United States of America that the

foregoing is true and correct." See, *e.g.*, *Offer of Settlement of FTE Networks, Inc.*, *supra*.

If a defendant later challenges the validity of its own representation made to the SEC based on the First Amendment, the defendant may be liable for "knowingly and willfully" making a "materially false" "statement or representation" when signing the settlement agreement. 18 U.S.C. § 1001. Such false statement or representation can result in a five-year prison term. *Id.* Violation of that section constitutes a felony, 18 U.S.C. § 3559(a)(5), resulting in a fine up to $250,000 for an individual and up to $500,000 for an organization. 18 U.S.C. § 3571.

And there is more. The party signing the settlement agreement did so under oath. Signing the settlement agreement with the intention to renege on the representation constitutes perjury, which can result in an additional prison sentence of up to five years, 18 U.S.C. § 1623, and additional fines under 18 U.S.C. § 3571.

It does not stop there. Where the settlement agreement is later submitted to the court as part of a consent decree, see *Romeril*, 15 F.4th at 173, "[v]iolations of court orders are punishable by criminal contempt and a court may institute criminal contempt proceedings against an SEC defendant who violates a no-deny provision contained in a consent decree issued by that court even absent the SEC's consent," *Cato Inst.* v. *SEC*, 4 F.4th 91, 95 (D.C. Cir. 2021) (citations omitted).

Even if a defendant could get past the legal roadblocks, this path would have questionable value.

Upon violating the gag provisions, the SEC could move to vacate the consent decree and restart the investigation and/or litigation—putting the defendant in the exact same place as before. See *Romeril*, 15 F.4th at 170 ("If Defendant breaches this agreement, the [SEC] may petition the Court to vacate the Final Judgment and restore this action to its active docket."). So, the defendant settles the case to avoid the cost, uncertainty, and other trauma associated with the litigation, the defendant may end up in the exact same place as before with no better opportunity to legally challenge the SEC's insistence of the gag provisions.

Rule 60(b)(4) is another path to challenge the gag provisions that courts have foreclosed. In *Romeril*, the defendant sought relief from judgement under Fed. R. Civ. P. 60(b)(4) "because the 'gag order' was an unconstitutional prior restraint that violated the First Amendment, and the district court therefore was 'without power' to issue it." *Romeril*, 15 F.4th at 172. The court explained that even if the "gag order" violated the First Amendment, "the Judgment was not void 'simply because it is or may have been erroneous.'" *Id.* (quoting *United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260, 270 (2010)). Moreover, the court "reject[ed] the claim that there was legal error, for the district court did not err in accepting a decree to which Romeril consented." *Id.*

One might argue that the defendant might assert Fed. R. Civ. P. 60(b)(6) to vacate the consent decree embodying the settlement agreement. "Rule 60(b)(6) is a grand reservoir of equitable power" that "affords courts the discretion and power 'to vacate judgments

whenever such action is appropriate to accomplish justice'" where there are "extraordinary circumstances." *Suzuki* v. *Marinepolis USA, Inc.*, No. 25-499, 2026 WL 799739, at *2 (9th Cir. Mar. 23, 2026) (citing *Phelps* v. *Alameida*, 569 F.3d 1120, 1134 (9th Cir. 2009)). This is a high bar, and in the context of settlement agreements, it would be properly invoked—although rarely granted—where one party has reneged on the settlement, not when a non-breaching party asks for it.

In *Suzuki*, the court granted a vacatur of its prior dismissal entry under Rule 60(b)(6) because the defendants' conduct constituted "bad faith noncompliance with the settlement agreement and the litigation process." *Id.* (citation omitted). So in this situation, *the SEC* could use Rule 60(b)(6) in response to a defendant's breach. But a defendant moving for vacatur because it is unhappy with the term to which it now objects is unlikely to satisfy Rule 60(b)(6)'s "extraordinary circumstances" test.

Even if a court viewed a motion to vacate favorably, the court would likely vacate the entire order, not just the gag provision, again putting the defendant in the same place as before signing the settlement agreement. Hence, a motion to vacate is not an effective route to challenge the Gag Rule.

And even the courts seem powerless to challenge the SEC's Gag Rule. "In the past decade [ ] some [federal district courts] have questioned the Commission's practice of allowing defendants to settle enforcement actions without requiring them to admit the allegations in the complaint. See *SEC* v. *Citigroup Glob. Mkts.*, 752 F.3d 285, 295 (2d Cir. 2014) (holding

that a district court abused its discretion when it refused to enter a 'no admit/no deny' consent judgment because the defendant did not admit the allegations in the complaint)." Letter from Sec. & Exch. Comm'n to Margaret A. Little (Jan. 30, 2024), https://www.sec.gov/files/rules/petitions/2024/4-733-letter-013024.pdf (denying petition for rulemaking).

Indeed, one judge signed a consent decree under protest: "[c]onsistent with Second Circuit precedent, see *SEC* v. *Romeril*, 15 F.4th 166 (2d Cir. 2021), the Court will approve the Agreement, but it will not do so silently." *Moraes*, 2022 WL 15774011, at *1. The court proceeded to explain its concerns about the SEC's violation of the defendant's First Amendment rights but observed that the district court was powerless to do anything about it.

Finally, with nowhere else to turn, Petitioners here sought relief via a petition for rulemaking, asking the SEC to correct its usurpation of the First Amendment. The SEC refused—expressing no sympathy for defendants' First Amendment rights. See Letter from Sec. & Exch. Comm'n to Margaret A. Little, *supra*. The Ninth Circuit below asserted that the Petitioners' petition "is properly analyzed as a facial challenge," Pet. App. 9a, to the Gag Rule, and seemingly suggested that Petitioners should bring an as-applied challenge. However, the foregoing discussion shows the infeasibility of that approach.

CONCLUSION

A petition for rulemaking may be the best—and perhaps only—vehicle for the Court to address whether the Gag Rule trumps the First Amendment or if the First Amendment should reign supreme. The SEC would seemingly argue that the Gag Rule is immune from review in any context—defendants must either litigate to finality or submit to the SEC's mandatory waiver of defendants' First Amendment rights. At this point, this case certainly seems to be the last gasp for the fresh air of free speech when dealing with the SEC.

Therefore, amicus prays that the Court grants the petition and addresses the SEC's gag rule head on.

Respectfully submitted,

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