No. 24-1899

IN THE 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; AND 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 CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* Chamber of Commerce of the United States of America states that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Constitution's guarantee of the freedom of speech is one such issue. "The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993). And "the free flow of commercial information is … indispensable to the formation of intelligent opinions as to how" the economy "ought to be regulated or altered." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

The SEC "is vested with sweeping investigatory and prosecutorial powers." 25A Marc I. Steinberg & Ralph C. Ferrara, *Securities Practice: Federal and State Enforcement* § 9:16 (2023). And the SEC, through its gag order policy at issue in this case, is abusing its authority and suppressing commercial and individual speech about a matter of utmost importance—government conduct. Many of the Chamber's members are subject to securities laws and thus directly affected by the SEC's policies and the ways in which the SEC uses (and misuses) its power.[1]

INTRODUCTION

For more than 50 years, the SEC has used its enforcement authority to stifle criticism from those most affected by, and most familiar with, its practices—the targets of SEC enforcement actions who settle with the Commission. Due to the tremendous (and sometimes financially devastating) burden regulated parties face in litigating against the Commission, SEC enforcement actions almost always settle.

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[1] All parties have consented to the filing of this brief. No party or counsel for a party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

And the SEC has refused to settle, unless parties submit to a "no-admit-no-deny" consent-decree provision—which, "[i]n its typical form," states

> Defendant … 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[.]

SEC v. Moraes, No. 22-CV-8343 (RA), 2022 WL 15774011, at *2 (S.D.N.Y. Oct. 28, 2022) (citing 17 C.F.R. § 202.5(e)).

The SEC's speech-suppressing policy is unconstitutional. The First Amendment does not allow the SEC to insist that settling parties forever forgo the right to question the Commission's allegations of wrongdoing. That these gag clauses are incorporated into self-styled "consent" orders should not obscure their coercive nature. The SEC threatens to proceed with enforcement action unless defendants surrender their freedom to criticize the Commission's charges. Those threats penalize protected speech in violation of the First Amendment. Indeed, the SEC is imposing not merely restraints, but *prior* restraints, on speech—a particularly pernicious form of censorship.

Given the Commission's immense power and the public interest in ensuring the Commission's power is responsibly exercised, the Chamber

agrees with Petitioners that the SEC has abused its discretion in denying their rulemaking petition.

ARGUMENT

The SEC's gag policy is unconstitutional for three reasons. First, the gag clauses suppress protected speech for no other reason than to avoid public scrutiny. Second, the gag clauses are not "voluntar[y]" waivers of First Amendment rights. *See* ER-60. Finally, this type of government silencing deeply harms the public who will never hear the full story of the SEC's investigations. The Chamber urges the Court to vacate the SEC's denial of Petitioner's rulemaking petition and remand with instructions to excise the gag language.

I. The SEC's Gag Policy Violates The First Amendment.

Under any analysis, the SEC's mandatory silencing provision violates the First Amendment. As a viewpoint-based restriction, the provision cannot survive strict scrutiny. And as a prior restraint, the provision does not provide for prompt judicial review or involve a permissible subject matter for suppression, such as obscenity or national security. The SEC therefore cannot reconcile its gag clauses with the Constitution's protections for free speech.

A. The Gag Policy Fails Strict Scrutiny.

The SEC's standard gag provision prohibits a defendant from making "any public statement denying, directly or indirectly, any allegation in the complaint." *Moraes,* 2022 WL 15774011, at *2. A defendant "is perfectly free," however, "to praise the SEC for its enforcement tactics[.]" *Id.* at *5. This is a viewpoint-based restriction on protected speech—an "egregious" form of censorship. *Reed v. Town of Gilbert*, 576 U.S. 155, 168 (2015) (cleaned up). Such restrictions are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling [government] interests." *Id.* at 163 (citations omitted).

What compelling interest could this type of silencing serve? In prior litigation, the SEC has maintained that allowing settling parties to criticize the agency could "undermine confidence in the Commission[] … by creating an unfair impression" of its enforcement practices. Mem. in Opp. to Mot. for Relief from J. at 20, *SEC v. Allaire*, No. 1:03-cv-04087-DLC, 2019 WL 6114484 (S.D.N.Y. Nov. 18, 2019), ECF No. 31 ("*Allaire* Opp."), *aff'd sub nom. SEC v. Romeril,* 15 F.4th 166 (2d Cir. 2021). This argument, which essentially says that the SEC should be protected from

embarrassment, has no basis in the law. It is "firmly established … that injury to official reputation," including government entities' "institutional reputation[s]," "is an insufficient reason for repressing speech that would otherwise be free." *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 841–42 (1978) (cleaned up). That is because robust "public scrutiny and discussion of governmental affairs" are the very values "which the First Amendment was adopted to protect." *Id.* at 839.

The SEC has also suggested in prior litigation that its settlement provisions are permissible under the case law upholding gag orders on participants in ongoing governmental proceedings. *See Allaire* Opp. at 18. But these gag orders "have been upheld only where necessary either to ensure the impartial administration of justice in pending proceedings, or to prevent dissemination of private or confidential information acquired by participants through their involvement in the trial process." Aaron Gordon, *Imposing Silence Through Settlement: A First-Amendment Case Study of the New York Attorney General*, 84 Alb. L. Rev. 335, 377 (2021). *See Butterworth v. Smith*, 494 U.S. 624, 631–32 (1990); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1076 (1991).

Neither rationale applies to the SEC's gags. The suppressed speech—*i.e.*, settling parties' views on the SEC's allegations—is not "likely to have a materially prejudicial effect" on "a pending case" because any proceedings have been settled. *Gentile,* 501 U.S. at 1076. The conclusion of proceedings was enough to invalidate a statute prohibiting witnesses from disclosing their grand-jury testimony even after the grand jury's term ended. *See Butterworth*, 494 U.S. at 632–33. The end of an enforcement proceeding is an equally bright First Amendment line. And the gag order goes far beyond prohibiting the disclosure of confidential information obtained from the investigation. Rather, the gag prevents the settling party from saying anything negative, directly or indirectly, about the entirety of the investigation—even if the party believes there was no basis for it from the beginning. Thus, the SEC has offered no compelling reason for its sweeping and viewpoint-based restraint on speech.

B. The Gag Policy Is An Unconstitutional Prior Restraint.

Indeed, the SEC's gag clauses are not just restraints, but *prior* restraints, on protected speech. For those restraints, the presumption of invalidity "is heavier—and the degree of protection broader—than that

against limits on expression" enforced by later punishment. *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558–59 (1975).

The SEC enshrines its settlements in consent decrees, *see* ER-57, which have the same effect as any other judgment or decree. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 380–82 (1994); *Jones v. SEC*, 115 F.3d 1173, 1178 (4th Cir. 1997). And the gag provision in the consent decree is a "classic" prior restraint, *see Alexander v. United States*, 509 U.S. 544, 550 (1993), in that one who violates such an order cannot challenge its validity in a subsequent proceeding—a principle known as the collateral bar rule. *See Zal v. Steppe*, 968 F.2d 924, 927 (9th Cir. 1992); *see also* 2 Rodney A. Smolla, *Smolla & Nimmer on Freedom of Speech* § 15:72 (2024) (cleaned up) ("[C]ourts have been most likely to find that a speech restriction is a prior restraint when the collateral bar rule would apply to a violation of the restriction.").

Further, the SEC's gag clauses would constitute prior restraints even if they were *not* governed by the collateral bar rule. The Supreme Court has "given a broader definition to the term 'prior restraint' than was given to it in English common law[.]" *Alexander*, 509 U.S. at 553. The term now includes most "orders or administrative rules that operate

to forbid expression before it takes place." 2 Smolla & Nimmer, *supra,* § 15:1. In *Interstate Circuit, Inc. v. City of Dallas*, for instance, the Court held that an administrative board's power to classify films as "not suitable for young persons," thereby requiring exhibitors of the films to have special licenses, was an unconstitutional prior restraint. 390 U.S. 676, 681–82 (1968). The Court rejected the argument that constitutional defects were "cured merely by affording de novo judicial review" of the board's determinations after the fact. *Id.* at 685. In other words, the scheme was a prior restraint even though administrative determinations were not governed by the collateral bar rule.

Likewise, the Court held in *Bantam Books, Inc. v. Sullivan* that a state commission had effectively "subject[ed] the distribution of publications to a system of prior administrative restraints" in violation of the First Amendment even "though the Commission [was] limited to informal sanctions" for securing the distributors' cooperation. 372 U.S. 58, 67, 70 (1963). The commission's warnings apparently were not adjudicative orders governed by the collateral bar rule, but the Court held that they were prior restraints all the same.

The First Amendment "provid[es] greater protection from prior restraints than from subsequent punishments." *Alexander*, 509 U.S. at 554. Because the gag clauses cannot survive strict scrutiny, they certainly cannot survive the even stricter standards applied to prior restraints.

First, regarding procedure, a prior-restraint system must provide "safeguards … against the suppression of … constitutionally protected[] matter," including "judicial superintendence" and "an almost immediate judicial determination of the validity of the restraint." *Bantam Books*, 372 U.S. at 70. "Any restraint imposed in advance of a final judicial determination" must also "be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." *Freedman v. Maryland*, 380 U.S. 51, 59 (1965). Instead of ensuring that prompt judicial review is available, the SEC has adopted the opposite approach with a policy that requires the settler be gagged *for life* regarding the allegations. In other words, judicial review is *never* available.

Second, regarding substance, courts have held that "prior restraints might be permissible" when they involve content such as obscenity or

"imminent threats to national security[.]" 2 Smolla & Nimmer, *supra,* § 15:7. Yet the speech stifled by SEC gag clauses does not "fit within one of the[se] narrowly defined exceptions." *Se. Promotions*, 420 U.S. at 559. Settling parties' criticisms of SEC allegations are neither obscene nor harmful to national security.

Thus, the SEC's gag clauses violate the First Amendment twice over as both viewpoint-based restrictions and as prior restraints.

II. The SEC's Gags Are Not "Voluntary" Waivers.

In this case, the SEC has not even attempted to say the gag clauses are constitutional. Rather, the SEC insists that these clauses are voluntary waivers of First Amendment rights. "[I]n the First Amendment context, courts must 'look through forms to the substance' of government conduct." *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) (quoting *Bantam Books*, 372 U.S. at 67). And here, the waiver is not voluntary, but coerced. The pressure to settle with the SEC is immense, and settling parties have no opportunities to negotiate the inclusion or language of the gag clauses.

As this Court has recognized, an agency enforcement investigation itself may chill First Amendment rights. *Id.* at 1228. "Informal

measures, such as 'the threat of invoking legal sanctions and other means of coercion …' can violate the First Amendment also." *Id.* (quoting *Bantam Books*, 372 U.S. at 67). Nor may officials "deny a benefit to a person on a basis that infringes his … freedom of speech," *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013) (cleaned up)—regardless of whether that benefit consists of material aid or relief from a legal burden, *see Coszalter v. City of Salem*, 320 F.3d 968, 975 (9th Cir. 2003); and "regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right," *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013).

Thus, Courts have invalidated contractual waivers of First-Amendment rights if public officials secured those waivers with threats of reprisal. *See Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1399 (9th Cir. 1991); *G&V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1077 (6th Cir. 1994); *United States v. Marchetti*, 466 F.2d 1309, 1317 (4th Cir. 1972). And the First Amendment "bar[s], through the artifice of a plea bargain or settlement agreement, the extraction of … silence[,]" Rodney A. Smolla, *Why the SEC Gag Rule*

Silencing Those Who Settle SEC Investigations Violates the First Amendment, 29 Widener L. Rev. 1, 13 (2023).

Those principles apply to invalidate the coerced gag provisions here and necessitate vacatur of the SEC's denial of the petition for review.

A. Defendants Cannot Outlast or Outspend the SEC, Nor Do They Have Negotiating Power Regarding Settlement Terms.

Experts, including former SEC staff, agree: The threat of SEC litigation is a serious one. Roberta S. Karmel, *Creating Law at the Securities and Exchange Commission: The Lawyer as Prosecutor*, 61 L. & Contemp. Probs. 33, 45 (1998) (former SEC Commissioner). "The primary disincentive to litigating against the SEC is the enormous resources that the SEC has at its disposal[.]" 8 Keith Miller, *Business and Commercial Litigation in Federal Courts* § 92:2 (5th ed. 2022) (former SEC enforcement lawyer). The defendant "must incur the costs, distress, and adverse publicity," making "the pressure to settle … over-powering even when the SEC case lacks merit." Andrew N. Vollmer, *Four Ways to Improve SEC Enforcement*, 43 Sec. Regul. L.J. 333, 336 (2015) (SEC's former Deputy and Acting General Counsel).

Also pushing accused parties toward settlement are the bleak prospects for those who *do* defend against the SEC's charges. "[T]he SEC is litigating, to an increasing degree, in the administrative proceeding rather than federal court forum." 25 Steinberg & Ferrara, *supra*, § 2:2. In fiscal year 2023, 53.9% of the SEC's standalone actions were administrative proceedings. *See* U.S. Sec. & Exch. Comm'n, Addendum to Division of Enforcement Press Release [2023-234], Fiscal Year 2023, at 1–2 (Nov. 14, 2023), https://www.sec.gov/files/fy23-enforcement-statistics.pdf ("SEC 2023 Report"). Administrative adjudications "employ relaxed rules of procedure and evidence—rules [the SEC] make[s] for [it]sel[f]. The numbers reveal just how tilted this game is. From 2010 to 2015, the SEC won 90% of its contested in-house proceedings compared to 69% of the cases it brought in federal court." *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 215 (2023) (Gorsuch, J., concurring in judgment).

Given these combined pressures, it is unsurprising that the "vast majority" of SEC enforcement actions settle. *See id.* at 216 (Gorsuch, J., concurring in judgment) (citation omitted); *accord* Gordon, *supra*, at 363. These considerations also undercut the SEC's absurd contention that, in

settling an action, "[t]he Commission is not bestowing a benefit on the defendant," and so constitutional constraints on using government power to suppress speech do not apply. ER-60. Once one takes stock of the tremendous burdens of defending against SEC charges, it is undeniable that the discontinuation of an enforcement action indeed "benefit[s]" the defendant.

To make matters worse, defendants who succumb to the tremendous pressure to settle have no ability to negotiate some of the terms of the settlement, including the gag clauses. As Justice Gorsuch recently pointed out, agencies are aware "that few can outlast or outspend" them, and so they "sometimes use this as leverage to extract settlement terms they could not lawfully obtain any other way." *Axon*, 598 U.S. at 216 (Gorsuch, J., concurring in judgment); *see also* Danné L. Johnson, *SEC Settlement: Agency Self-Interest or Public Interest*, 12 Fordham J. Corp. & Fin. L. 627, 661 (2007) (former SEC enforcement attorney explaining that "[t]he SEC is more powerful than most respondents," who "cannot realistically walk away from the settlement" or "modify the terms.").

Indeed, the SEC refuses to settle enforcement proceedings unless the target submits to a settlement that includes a lifetime gag provision. ER-57. And if a settling party speaks about the allegations in a way the SEC deems inappropriate, the agency can petition "to vacate the final judgment and restore the action to the active docket." *Id.*

In short, the SEC's gag policy says to defendants, "'Hold your tongue, and don't say anything truthful—ever'—or get bankrupted by having to continue litigating with the SEC." *SEC v. Novinger*, 40 F.4th 297, 308 (5th Cir. 2022) (Jones, J., concurring). That is a far cry from a voluntary surrender of First Amendment rights.

B. The SEC's Comparison to Other Civil and Criminal Settlements Fails.

The SEC defends its characterization of the gags as "voluntar[y]" by insisting that "a large body of precedent confirm[s] that a defendant can waive constitutional rights as part of a civil settlement, just as a criminal defendant can waive constitutional rights as part of a plea bargain." ER-60, ER-59. But this argument rests on false equivalence.

As a general matter, in both the criminal and civil contexts, courts have upheld waivers of certain rights when necessary to achieve a settlement. A criminal defendant accepting a plea deal, for example,

must forfeit certain procedural guarantees, such as the right to a jury trial. Although the deal may have "a discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices is an inevitable … attribute of any legitimate system which tolerates … negotiation of pleas." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (cleaned up). "Allowing the punishment of a defendant to be increased because he wishes … to go to trial is … pragmatically justified by the [government's] interest in efficient criminal administration[.]" *United States v. Ruppel*, 666 F.2d 261, 267 (5th Cir. Unit A 1982) (cleaned up). But prosecutors cannot "retaliate[] against specially protected actions by defendants, such as the exercise of [F]irst [A]mendment rights[.]" *Id; cf. United States v. Haensgen*, 775 F. App'x 284, 286 (9th Cir. 2019) ("[G]uilty pleas waive … only rights that exist in the confines of the trial[.]" (cleaned up)).

In the civil setting, too, courts uphold the waivers of certain rights as conditions of settlement if such waivers are necessary to resolve underlying controversies—that is, to achieve "a full compromise of the dispute between the parties[.]" *Davies*, 930 F.2d at 1399; *see Emmert Indus. Corp. v. City of Milwaukie*, 307 F. App'x 65, 67 (9th Cir. 2009).

By contrast, where settling parties "have been strong-armed by government into relinquishments of constitutional liberty that were *not* reasonably necessary to effectuate settlement of the underlying dispute," courts—including this one—"have properly found these 'waivers' invalid in virtually every instance." Gordon, *supra*, at 347–48 (collecting authorities).

As this Court has explained: "Before the government can require a citizen to surrender a constitutional right as part of a settlement or other contract," there must be "a close nexus—a tight fit—between the specific interest the government seeks to advance in the dispute underlying the litigation involved and the specific right waived." *Davies*, 930 F.2d at 1399. In *Davies*, this Court invalidated a school district's attempt to "extract[] a waiver of" a citizen's First Amendment right to run for office, explaining that "the nexus between the individual right waived and the dispute … is not a close one": "[h]ad it not been for the [district's] insistence on the inclusion of the waiver provision in the settlement agreement," the waiving party's "right to run for elective office could not have been affected by a resolution of the litigation." *Id.*; *see also Lil' Man In The Boat, Inc. v. City & Cnty. of San Francisco*, No. 17-CV-00904-JST,

2017 WL 3129913, at *9–10 (N.D. Cal. July 24, 2017). And in *United States v. Richards*, this Court invalidated on First Amendment grounds a term of a criminal plea agreement that prevented the defendant from making public comments concerning a county commissioner. *See* 385 F. App'x 691, 692–93 (9th Cir. 2010).

Courts have repeatedly found that nonprosecution agreements that purport to prohibit signing parties from distributing constitutionally protected magazines or videos violated the First Amendment. *See PHE, Inc. v. U.S. Dep't of Just.*, 743 F. Supp. 15, 18–19, 26 (D.D.C. 1990); *Council for Periodical Distribs. Ass'n v. Evans*, 642 F. Supp. 552, 565 (M.D. Ala. 1986), *aff'd in relevant part*, 827 F.2d 1483 (11th Cir. 1987); *cf. Baker v. Glover*, 776 F. Supp. 1511, 1517 n.6 (M.D. Ala. 1991); *Cohen v. Barr*, No. 20 CIV. 5614 (AKH), 2020 WL 4250342, at *1 (S.D.N.Y. July 23, 2020) (provision of supervised release agreement prohibiting former President's attorney from speaking to media violated First Amendment); *United States v. Oliveras*, 905 F.2d 623, 627–28 (2d Cir. 1990).

Judged according to this case law, the SEC's policy of silencing settling defendants is an extortionate exaction of constitutional rights—not a voluntary waiver. "[C]onsent decrees are normally compromises in

which the parties give up something they might have won in litigation[.]" *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 235 (1975). But the right that SEC consent decrees "take from settling parties (the right to publicly criticize the basis for the [agency's] allegations) is not one that they would have lost" had the SEC "successfully pursued enforcement actions against them, nor is it a right necessarily surrendered when a matter is resolved out of court (such as the right to an impartial adjudicator)." Gordon, *supra*, at 350 (footnote omitted).

Put differently, the requisite "close nexus" is absent. A defendant's right to criticize the SEC "is extraneous to [the] civil-settlement process," *id.*, in that the right "could not have been affected by a resolution" of a contested enforcement action, and so the SEC cannot "extract[] a waiver of" that "right … as a condition to settling[.]" *Davies*, 930 F.2d at 1399.

Moreover, and as noted above, unlike criminal plea bargaining, the SEC demands that defendants surrender their First Amendment rights under an "across-the-board policy[.]" Gordon, *supra*, at 355. The Commission "will not agree to a settlement … unless the defendant agrees not to publicly deny the allegations in the complaint," and this "policy binds the Enforcement staff," ER-57; *see* 17 C.F.R. § 202.5(e). The

Constitution prohibits this kind of "unilateral imposition of a penalty upon" someone who "cho[oses] to exercise a legal right," "a situation very different from the give-and-take negotiation common in plea bargaining[.]" *Bordenkircher*, 434 U.S. at 362–63 (cleaned up).[2]

These features distinguish the SEC's gag policy from the waivers of rights upheld in the case law cited by the SEC in denying the rulemaking petition. For instance, the SEC relied on this Court's holding that a public-sector union validly waived its First Amendment rights in a collective bargaining agreement providing that, if the union successfully advocated for state legislation that increased the city's payroll burden, the city's additional costs would be chargeable against its salary agreement with the union. *See Leonard v. Clark*, 12 F.3d 885, 886, 888 (9th Cir. 1993). But the provision at issue in *Leonard*, unlike the SEC's gags, was proposed *by the union*, not imposed by the city. *Id.* at 890. Moreover, there was a "close nexus" between the right surrendered by

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[2] For example, the Supreme Court invalidated a statute under which only criminal defendants who pleaded not guilty or asserted their right to a jury were eligible for the death penalty. Although a similar distinction among defendants might have resulted from plea bargaining, its imposition by statute "needlessly chill[ed] the exercise of basic constitutional rights." *United States v. Jackson*, 390 U.S. 570, 582 (1968).

the union and the benefit contractually conferred on it—the union would bear the cost of any legislation for which it lobbied that affected the other terms of its employment agreement with the city. *Id.* at 891 n.10. In this respect, *Leonard* is unlike this case—and similar to others cited by the SEC where rights waivers plainly satisfied the "close-nexus" standard.[3]

The SEC's invocation of *Town of Newton v. Rumery* is equally unhelpful. In *Rumery*, the Supreme Court upheld an agreement in which a criminal defendant, in return for dismissal of charges against him, waived the right to file a civil-rights action. The Court acknowledged "that in some cases these agreements may infringe" defendants' rights, but rejected "a *per se* rule" of invalidity. 480 U.S. 386, 392 (1987). The Court upheld that particular agreement only because "the prosecutor had an independent, legitimate reason to make th[e] agreement" that was "directly related to his prosecutorial responsibilities." *Id.* at 398. As the Court explained, "[t]he agreement foreclosed both the civil and criminal

[3] *See Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084, 1097 (3d Cir. 1988); *Lake James Cmty. Volunteer Fire Dep't, Inc. v. Burke County*, 149 F.3d 277, 281–82 (4th Cir. 1998). Also, in *Lake James*, the party contractually waiving its rights "did not give away anything that it had prior to entering into the … contract." 149 F.3d at 281. Here, by contrast, those gagged by SEC settlements *did* lose a right they enjoyed beforehand: the right to publicly criticize the Commission's allegations.

trials concerning [the plaintiff], in which [an assault victim] would have been a key witness." *Id.* The victim "therefore was spared the … embarrassment she would have endured if she had had to testify in either of those cases." *Id.*

Here, the speech rights exacted by SEC gags have no such "direct[] relat[ionship]" to the Commission's enforcement duties. "[I]n *Rumery*," this Court later explained, "the interests the government sought to advance in the underlying litigation were closely related to the underlying interest waived. Both the criminal charges … and Rumery's civil suit against the prosecutor involved the same incident." *Davies*, 930 F.2d at 1399. Thus, "a full compromise of the dispute between the parties necessitated resolving both matters." *Id.*

The same cannot be said of the SEC's gag policy. Those charged by the Commission, after all, are not being charged with publicly criticizing it. The SEC thus cannot claim that a perpetual surrender of a defendant's right to criticize the agency is necessary to resolve the underlying charges against that defendant.

None of the remaining case law the SEC cited in denying the rulemaking petition supports the gag clauses. *See* ER-59–60 & n.4. The

SEC's reliance on cases involving waivers of rights in contracts between *private* parties fails, since the First Amendment "prohibits only *governmental* abridgment of speech." *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 808 (2019). Another case the SEC cites—a decision upholding a union's waiver of speech rights as part of a consent decree—is inapposite, since the union did not argue that it had to surrender its rights as a condition of settlement. *See United States v. Int'l Bhd. of Teamsters*, 931 F.2d 177, 188 (2d Cir. 1991).

That leaves only one case on which the SEC can hang its hat: the misguided holding in *SEC v. Romeril*, which brushed off a First Amendment challenge to a SEC gag provision by holding, with only cursory analysis, that the gagged party "waived" his speech rights. 15 F.4th 166, 172–73 (2d Cir. 2021). But *Romeril* was poorly reasoned—indeed, no court outside the Second Circuit has endorsed its reasoning regarding First-Amendment waivers—and *Romeril*'s holding is inconsistent with binding precedent from this Court.

For one, *Romeril* neglected to explain how the "waiver" at issue was valid given its involuntary nature. And the Second Circuit relied on substantially the same lines of precedent as the SEC in denying the

rulemaking petition here. *See id.* at 172–73 & n.4. For the reasons explained above, that precedent does not justify the SEC's speech suppression.

Otherwise, the *Romeril* court cited only *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam). But that case, too, is inapposite. *Snepp* upheld terms in a CIA agent's employment contract that prohibited him, after leaving the agency, from publishing any writings that discussed its activities unless he first allowed the CIA to screen the writings for classified information. *Id.* at 510–11. In *Snepp*, however, the Court explained that "even in the absence of an express agreement[,] the CIA could have … impos[ed] reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment." *Id.* at 510 n.3 (citations omitted). That is because "[t]he Government has a compelling interest in protecting" information critical to national security. *Id.*; *see* 2 Smolla & Nimmer, *supra,* § 15:7 (noting prior restraint doctrine's treatment of imminent threats to national security). No such interests are implicated when defendants settling with the SEC merely *opine* on the allegations against them—and even if they were, the SEC's

gags are not narrowly tailored, as they suppress far more than just confidential information.

Finally, *Romeril*'s reasoning is inconsistent with this Court's precedent. The Second Circuit in *Romeril* did not even mention *Davies*, and *Romeril*'s sweeping approval of settlements in which private parties surrender rights under threat of government retaliation cannot be squared with *Davies*' holding requiring a "close nexus" between the right surrendered and the governmental interests in the underlying litigation. 930 F.2d at 1399. This Court's holding in *Davies*, not the Second Circuit's holding in *Romeril*, is binding here.

III. The SEC's Speech-Suppressing Policy Is Contrary To The Public Interest.

The speech-suppressing provisions of the SEC's settlements are constitutionally objectionable for another reason—they stifle speech about important public issues, namely the validity of the SEC's actions.

The First Amendment "serves significant societal interests" beyond "those of the party seeking … vindication" of its right to speak. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978). The guarantee protects the right to disseminate speech and "the right to receive it." *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943). "[T]o preserve an uninhibited

marketplace of ideas," not only the right to speak, but also "the right of the public to receive … ideas and experiences," "is crucial[.]" *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

Thus, even a voluntary waiver of constitutional rights—which the SEC's gag clauses are not—"is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Rumery*, 480 U.S. at 392. And it is the party seeking to enforce such a waiver who bears "the burden … to plead and prove that the agreement serves the public interest." *Lynch v. City of Alhambra*, 880 F.2d 1122, 1128 (9th Cir. 1989).

Here, the SEC's gag clauses cause grave and widespread harm to the business community and the marketplace by suppressing information about the agency's investigations.

Starting with the scope of the harm, the SEC has brought 4,732 standalone enforcement actions in the last ten fiscal years. *See* SEC 2023 Report, *supra*, at 2; U.S. Sec. & Exch. Comm'n, Addendum to Division of Enforcement Press Release [2021-238], Fiscal Year 2021, at 2 (Nov. 18, 2021), https://www.sec.gov/files/2021-238-addendum.pdf ("SEC 2021 Report"); Press Release 2016-212, U.S. Sec. & Exch. Comm'n, SEC

Announces Enforcement Results for FY 2016 (Oct. 11, 2016), https://www.sec.gov/news/press-release/2016-212. And there are far more defendants than actions. During the period for which there is data on defendants (fiscal years 2018-2023), there were 2,818 SEC actions but 5,951 defendants. *See* SEC 2023 Report, *supra*, at 1; U.S. Sec. & Exch. Comm'n, Addendum to Division of Enforcement Press Release [2022-206], Fiscal Year 2022, at 1 (Nov. 15, 2022), https://www.sec.gov/files/fy22-enforcement-statistics.pdf; SEC 2021 Report, *supra*, at 1; Div. of Enf't, U.S. Sec. & Exch. Comm'n, 2020 Annual Report 29 (Nov. 2, 2020), https://www.sec.gov/files/enforcement-annual-report-2020.pdf; Div. of Enf't, U.S. Sec. & Exch. Comm'n, 2019 Annual Report 28–29, https://www.sec.gov/files/enforcement-annual-report-2019.pdf; Div. of Enf't, U.S. Sec. & Exch. Comm'n, 2018 Annual Report 19–20, https://www.sec.gov/files/enforcement-annual-report-2018.pdf. By any estimate of settlement rates, then, many thousands of businesses and individuals have been forever silenced about the SEC's allegations against them.

Compounding this problem are the perils of the SEC's pursuit of a regulation-by-settlement approach. Even when the Commission's "legal

theory is new and untested," "the pressure to settle is over-powering." Vollmer, *supra*, at 336. Settlement thus affords regulators "extra-ordinary discretion" to press "novel legal theories" that "no judge will ever scrutinize"—since those regulators can simply "threaten the industries with the risk of such large penalties that they'll agree to a deal[.]" Robert Reich, *Smoking, Guns*, Am. Prospect (Dec. 19, 2001), https://prospect.org/features/smoking-guns/; *see also* Gordon, *supra*, at 363. The SEC has made no bones about this; a former chair declared, "we must be aggressive and creative in the way we use [our] enforcement tools[.]" Mary Jo White, Chair, Council of Inst'l Investors, Speech at Fall Conference: Deploying the Full Enforcement Arsenal (Sept. 26, 2013), (available at https://www.sec.gov/news/speech/spch092613mjw).

The potential for abuse of this authority underscores the need for open discourse regarding SEC allegations. After all, the First Amendment "protect[s] the free discussion of governmental affairs" so that "abuses of power by governmental officials" may be exposed. *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966). Indeed, even *private* companies' inclusion of non-disparagement clauses in consumer contracts was banned in 2016. *See* 15 U.S.C. § 45b. The rationale for

this prohibition surely applies with greater force to *government* agencies like the SEC.

The public's interest in monitoring the SEC suffers acutely when the Commission silences targets of its investigations, as they are the ones "most likely to have informed and definite opinions" on the SEC's practices. *See Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 572 (1968). "Accordingly, it is essential that they be able to speak out freely" on that subject. *Id.* But settling parties—the very people most acutely affected by the agency's allegations—must sit quietly even as the SEC can freely propagate its own narrative, resulting in a one-sided presentation of cases to the public.

Even more concerning from a public-interest standpoint, the SEC's gag clauses contemplate suppression of *truthful* speech. By stipulating that settlors *may* criticize the SEC's allegations if "testimonial obligations" of truthfulness so require, *Romeril*, 15 F.4th at 170, the SEC all but admits that it is suppressing truthful criticisms of its conduct; "[i]f this were not so," the "proviso would have been entirely unnecessary." *See In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 650 n.32 (1978). Suppression of such information is in tension with the First

Amendment's "historic function" of safeguarding "the liberty to discuss publicly and truthfully all matters of public concern." *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940).

In fact, settling parties must remain silenced even when the SEC's charges against a defendant are no longer valid because of changes in the law. For instance, the SEC once generally prohibited forward-looking projections of economic performance in regulated firms' public disclosures. In 1976, however, the Commission amended its rules to permit such projections, *see* Notice of Adoption of an Amendment to Rule 14a-9 and Statement by the Commission on Disclosure of Projections of Future Economic Performance, S.E.C. Release No. 33-5699, 1976 WL 160385, at *2 (Apr. 23, 1976). And in 1982, the SEC adopted its current policy of "encourag[ing]" such projections. 17 C.F.R. § 229.10(b); 47 Fed. Reg. 11,402 (Mar. 16, 1982). The SEC has even "adopt[ed] several mandatory forward-looking statement requirements[.]" Joel Seligman, *The SEC's Unfinished Soft Information Revolution*, 63 Fordham L. Rev. 1953, 1963–75 (1995). Yet parties who settled SEC charges of unlawful forecasting under the former regulations are forever forbidden from publicly criticizing the basis for those charges, even if their alleged

misconduct is now encouraged (or even required). Those parties also may be barred from advocating for certain policy changes, insofar as that advocacy could be construed as "indirect[]" condemnation of the SEC's allegations in violation of the gag provision. *See Moraes*, 2022 WL 15774011, at *2.

That individuals and corporations alike are parties to SEC settlements only strengthens the public's interest in uninhibited discourse. Criticism of a powerful regulator "is the type of speech indispensable to decisionmaking in a democracy," and "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *Bellotti*, 435 U.S. at 777. Corporate speech can provide valuable perspectives on the practical impacts of government action. And corporations are more likely to have the means to reach wider audiences.

Citing these sorts of public-interest concerns, many cases have invalidated contractual gag clauses, including those in settlements, as First Amendment violations, even where no coercion was present. *See Ronnie Van Zant, Inc. v. Cleopatra Recs., Inc.*, 906 F.3d 253, 257 (2d Cir.

2018) (per curiam); *see also Rudd Equip. Co. v. John Deere Constr. & Forestry Co.*, 834 F.3d 589, 594–95 (6th Cir. 2016); *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002). For example, courts regularly invalidate such clauses in Fair Labor Standards Act settlements, not on "coercion" grounds, but because they "contravene FLSA policy and … rights under the First Amendment." *See DeGraff v. SMA Behavioral Health Servs., Inc.*, 945 F. Supp. 2d 1324, 1330 (M.D. Fla. 2013); Gordon, *supra*, at 372.

Particularly relevant here is the Fourth Circuit's decision in *Overbey v. Mayor of Baltimore*, refusing to enforce a nondisparagement provision in a settlement between the city of Baltimore and a plaintiff who had sued over alleged police misconduct. 930 F. 3d 215 (4th Cir. 2019). The Fourth Circuit held that "the City's asserted interests in enforcing [the citizen's] waiver of her First Amendment rights [we]re outweighed by strong policy interests that are rooted in the First Amendment and counsel[ed] against the waiver's enforcement." *Id.* at 223. Those policy interests included (1) "the public's well-established First Amendment interest in 'uninhibited, robust, and wide-open' debate on 'public issues,'" and (2) "this nation's cautious 'mistrust of governmental power.'" *Id.* at 224. Because the nondisparagement clause

at issue was "a government-defined and government-enforced restriction on government-critical speech," the enforcement of the clause directly undermined the public's First Amendment interests. *Id.*

The Fourth Circuit's reasoning applies even more forcefully here. In *Overbey*, it was the plaintiff who initiated an action against the city whereas here, the Commission initiates enforcement actions against regulated parties. The immense pressure on those regulated parties to settle, and their inability to reject or modify the gag provision, only heightens the concern regarding robust debate on public issues. Put differently, this case raises not only a "government-defined and government-enforced restriction on government-critical speech," *see id.*, but also a government-initiated action. And in that circumstance, the public interest in unencumbered discussion about government action weighs heaviest in favor of non-enforcement.

All told, the SEC's gag policy "is a stew of confusion and hypocrisy[.]" *SEC v. Vitesse Semiconductor Corp.*, 771 F. Supp. 2d 304, 309 (S.D.N.Y. 2011). The agency can claim that businesses and individuals "have done terrible things" without proving it and instead

"resort[ing] to gagging their right to deny it." *Id.* "The disservice to the public inherent in such a practice is palpable." *Id.*

CONCLUSION

The SEC unconstitutionally exacts the surrender of the constitutional right to free speech by silencing targets of its enforcement actions through a coercive settlement gag provision. That policy imposes an unlawful prior restraint on protected expression and is contrary to the public interest. The Commission abused its discretion in refusing to amend the regulation that imposes this censorious regime. This Court should vacate the SEC's denial of the rulemaking petition and remand with instructions to excise the gag language.

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I hereby certify that on this 24th day of June 2024, I electronically filed the foregoing brief with the Clerk of the Court of 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.

June 24, 2024

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