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, THE 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 AMICUS CURIAE COMPETITIVE ENTERPRISE INSTITUTE IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 9th Circuit Rule 26.1-2, the undersigned counsel hereby certify that no parent corporation, and no publicly held corporation has a 10% or greater ownership interest in the Competitive Enterprise Institute.

Dated: June 24, 2024

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

The Competitive Enterprise Institute is a nonprofit organization headquartered in Washington, D.C., dedicated to promoting the principles of free markets and limited government. Since its founding in 1984, the institute has focused on raising public understanding of the problems of overregulation. It has done so through policy analysis, commentary, and litigation. There is a public interest in government transparency generally; in particular, there is a public interest in the allegedly unlawful behavior of the U.S. Securities and Exchange Commission ("SEC"). Without such transparency, the public is unable to get first-hand accounts from those who were most likely to have been unlawfully harmed by the SEC due to the SEC's Gag Agreements. Ensuring that the actions of regulatory agencies are as transparent as reasonably possible has been a central mission of CEI's.

ARGUMENT

Petitioner New Civil Liberties Alliance petitioned the SEC to amend 17 C.F.R. § 202.5(e). That rule authorizes the SEC to include in

[1] *Amicus* affirms that no counsel for a party authored this brief in whole or in part, that no person other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief, and that all parties consented to the submission of this *amicus* brief.

settlement agreements provisions in which the defendant agrees not to deny the allegations in the complaint or order ("Gag Agreements"). On January 30, 2024, the SEC issued an order denying the petition ("the Order"). The Order should be vacated.

Gag Agreements are unconstitutional conditions that coerce citizens into giving up their First Amendment rights. Plea bargains in which the government attempts to suppress First Amendment-protected speech through consent decrees have regularly been rejected by courts. The government may not deny the benefit of a settlement agreement conditioned on the surrender of a constitutional right without both a legitimate reason and a close nexus to the specific interest the government seeks to advance. A legitimate settlement agreement that includes a gag provision might be valid if it ameliorated the harms of the underlying conduct, but the SEC's insistence on applying such Gag Agreements to all defendants demonstrates that such amelioration is not in play here. Likewise, a gag provision might be valid in a settlement agreement if it only provided what the agency could reasonably be expected to win in court, thereby preserving government resources.

However, the SEC's Gag Agreements have no such nexus to this kind of legitimate government interest.

SEC's Gag Agreements are also contrary to public policy and therefore unenforceable. If the SEC had applied the proper balancing test under the law, it would have discovered that the harms that the SEC's Gag Agreements cause to First Amendment interests are outweighed by the importance of the dissemination of information—and that would lead to the conclusion that the SEC's Gag Agreements are contrary to public policy and unenforceable. The SEC's Gag Agreements restrain the content of the future speech of the defendants and therefore must be reviewed under strict scrutiny—a test those Agreements will fail.

I. The SEC's Gag Agreements Are Unconstitutional Conditions

The SEC's requirement of a Gag Agreement as a condition of settlement is an unconstitutional condition, because it lacks the requirement of a nexus to a legitimate public purpose. *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1399 (9th Cir. 1991). The settlement is a discretionary benefit or privilege; the Gag Agreements restrict the defendant's First Amendment rights and are applied to every SEC settlement, thus demonstrably having no

relationship to any underlying conduct or legitimate public purpose. "In silencing defendants, the SEC seeks to shelter itself from critique, thereby using its coercive leverage to manipulate the marketplace of ideas." Rodney A. Smolla, *Why the SEC Gag Rule Silencing Those Who Settle SEC Investigations Violates the First Amendment*, 29 Widener L. Rev. 1, 14 (2023).

The Supreme "Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Id.* "For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." *Id.* Government "may not deny a benefit to a person on a basis that infringes his ... freedom of speech even if he has no entitlement to that benefit." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214

(2013) (quoting *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006). It is simply "too late in the day to doubt that the libert[y] of ... expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

This Court has recognized that "[b]efore the government can require a citizen to surrender a constitutional right as part of a settlement or other contract, it must have a legitimate reason for including the waiver in the particular agreement," which is to say 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. That is why this Court invalidated a condition that prevented the defendant from making public comments concerning a county commissioner as violating the First Amendment. *United States v. Richards*, 385 F. App'x 691, 692-93 (9th Cir. 2010) ("the conclusion of this panel is that the restriction imposed upon the defendant, with respect to public comments concerning Candice Trummell, violates the defendant's First Amendment rights.").

The history of prohibiting such unconstitutional conditions goes back to the Founding Era, as recognized by the Tennessee Supreme Court in *Townsend v. Townsend* (1821), which asked:

> [S]hall it be permitted so to frame the condition, as to make it involve the relinquishment of a right secured by the constitution? .... By such inventions every constitutional right may in succession be bartered away. Constitutional rights are ... unalienable [,] ... and every such condition is utterly void. If execution can be suspended on any condition, then the legislature has an absolute power to suspend it forever. How easy it is to invent a thousand conditions, with which no man in his senses would comply? . . . [I]f the right be antecedent, suspension is an unconstitutional penalty; if it be newly created, the condition is unconstitutional and the right vests absolutely.

7 Tenn. (Peck) 1, 2.

An example of an unconditional condition in a plea bargain that sacrificed a First Amendment-protected right may illuminate matters here. In *Doe v. Phillips*, 81 F.3d 1204, 1207, 1211-12 (2d Cir. 1996), the defendant was required to swear their innocence on a copy of the Bible as a condition of the settlement agreement. The Second Circuit affirmed that this condition violated the defendant's rights and was so clearly established that any prospects for qualified immunity were eliminated. The prosecutor "contend[ed] that Doe was not in fact 'forced' to swear to her innocence in the Church, and that she did so of her own volition."

Still, the Second Circuit noted, "[e]ven a 'subtle coercive pressure' by a government official to engage in religious activity may violate the First Amendment." *Id.* at 1211-12. Indeed, that pressure violated the First Amendment in *Doe,* because the "only alternatives he offered Doe were to swear on a bible in the Church or to have the criminal charges go to trial." *Id.* Similarly, the only choice the SEC gives defendants here is to waive their First Amendment rights or to face trial.

When the government uses a consent decree to suppress First Amendment-protected speech, courts regularly reject such plea agreements. For instance, the government has unsuccessfully attempted to suppress magazines protected by the First Amendment. *Council for Periodical Distribs. Ass'n v. Evans*, 642 F. Supp. 552, 565 (M.D. Ala. 1986) (the government's "scheme ran afoul of the constitution when he sought to suppress, again by use of the consent decree, . . . magazine[s]."). The government once tried to force a defendant to waive his right to run for public office. *People v. Smith*, 918 N.W.2d 718, 729-30 (Mich. 2018) (invalidating term in plea agreement waiving defendant's right to run for office, explaining that the waiver lacked a "close nexus" to "the charged offenses"). Likewise, "[government attorneys'] attempt to persuade the

Court that the conditions they have demanded in exchange for non-prosecution . . . are merely ... normal plea bargain negotiations . . . misses the mark. . . . [Their] conduct amount[s] to threats of prosecution for constitutionally protected activity." *PHE, Inc. v. U.S. Dep't of Justice*, 743 F. Supp. 15, 18-19, 26 (D.D.C. 1990).

Fundamentally, a settlement agreement is nothing more than a contract, and contracts violating the First Amendment are unenforceable. *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1077 (6th Cir. 1994) ("[T]he city's 1979 contract ... constituted an attempt to condition Plaintiff's receipt of a benefit upon Plaintiff's waiver of its right to free expression. . . . As such, the contract is unenforceable.").

Like most settlement agreements, a plea bargain is essentially a "compromise[] in which the parties give up something they might have won in litigation and waive their rights to litigation." *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 235 (1975). Any plea bargain or settlement agreement with the government will therefore involve waiving the right to appeal or otherwise litigate the case; that is the legitimate public purpose of such instruments. Confined to this nexus,

such agreements are lawful. *Emmert Indus. Corp. v. City of Milwaukie*, 307 F. App'x 65, 67 (9th Cir. 2009) ("The condition the government imposed—a litigation waiver—directly advanced" the City's "legitimate interest in settling a dispute. . . . The benefit Emmert was to receive—a [] settlement—was also closely connected to the [] waiver and the City's need for resolution."); *Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084, 1097 (3d Cir. 1988) (upholding a settlement that was appropriately "put[ting] an end to all disputes . . . raised in . . . litigation."); *La. Pac. Corp. v. Beazer Materials & Servs., Inc.*, 842 F. Supp. 1243, 1253-54 (E.D. Cal. 1994) ("Moreover, the constitutional right sought to be waived is directly implicated by the benefit the Government sought [:] . . . a termination of litigation."); *Cf. Lil' Man In The Boat, Inc. v. City & County of San Francisco*, No. 17-cv-00904-JST, 2017 WL 3129913, at *9-10 (N.D. Cal. July 24, 2017) (a plea bargain "does not concern" or "resolve[] a pending dispute" if it is "overly broad and fails . . . the close nexus test.").

The state can reasonably bargain for anything that the court could lawfully award to the state if it wins at trial. Such agreements merely speed up litigation by resolving the ongoing conflict. In contrast, the SEC requires a waiver of a constitutional right: an outcome it can never

achieve in court. "A predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 612 (2013). The waiver the SEC demands is improper unless there is some nexus between that waiver and the underlying harms caused by the defendant. The government "cannot succeed merely by invoking its general interest in settling lawsuits. It must point to additional interests that, under the circumstances, justify enforcing [the defendant's] waiver of her First Amendment rights." *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 225 (4th Cir. 2019).

Notably, the SEC is not applying these Gag Agreements to the specific conduct and circumstances of individual defendants; this is a blanket policy applied to all defendants. Memorandum in Opposition to Motion for Relief from Judgment at 1, *SEC v. Allaire*, No. 1:03-cv-4087-DLC, (S.D.N.Y. June 18, 2019) ("Commission will accept a settlement only if the defendant agrees to . . . a no-deny provision."); 17 C.F.R. § 202.5(e) (SEC requires this of all defendants).

Even among private parties, as "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights, courts must consider whether there was "no bargaining over contractual terms" or the parties are "far from equal in bargaining power," such as when the "waiver provision was . . . part of a form sales contract and a necessary condition of the sale." *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972); *see also D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 188 (1972) (waivers of constitutional rights in private contracts are suspect "where the contract is one of adhesion" or "there is great disparity in bargaining power").

As the Supreme Court noted in *Koontz*, when the set of conditions required by the government "is more valuable than" the benefit the defendant "could hope to receive," then that person "is likely to accede to the government's demand, no matter how unreasonable." *See Koontz*, 570 U.S. at 605. That is the case here: when the government conditions decades of jail time on giving up First Amendment-protected rights, any reasonable person will accede to such a demand—even if the demand is essentially unrelated to the underlying conduct.

It appears that the purpose of the SEC Gag Agreements is not to remedy any harm caused by those gagged; instead, the SEC's apparent

goal is to leverage its coercive litigation authority to silence its potential critics. That is not a legitimate government interest; it is a condition that makes the SEC's settlement agreements unlawful.

II. The SEC's Gag Agreements Are Contrary to Public Policy and Unenforceable.

Citing *SEC v. Romeril*, 15 F.4th 166 (2d Cir. 2021), the Order defends the Gag Agreements by arguing that constitutional rights can be waived in agreements. In *Romeril,* the court held that First Amendment rights, like other constitutional rights, are waivable. *Id.* at 172. The SEC's Order asserts that "*Romeril* followed the Supreme Court's decision in *Town of Newton v. Rumery*, 480 U.S. 386, 393 (1987), in which the Court established a balancing test for deciding whether to enforce waivers—which presumes that rights *can* be waived—and then upheld the enforcement of a waiver under the facts presented in that case." (Order 5.) Although the SEC gestures at *Rumery*'s balancing test for the enforceability of a waiver, it does not actually discuss that test or analyze how it applies to the waiver it requires. Indeed, *Romeril* did not discuss or apply the test either. Rather, it simply cited *Rumery* for the proposition that rights can be waived, and then perfunctorily held that the defendant-appellant waived his rights in acceding to the SEC's Gag

Agreement. *Romeril*, 15 F.4th at 172-73. However, a brief examination of how *Rumery*'s test applies to the Gag Agreement reveals that the Gag Agreement is contrary to public policy and unenforceable.

A. The Gag Agreements Should Be Reviewed under Strict Scrutiny.

In *Rumery*, a Section 1983 action against the town of Newton and its officials was dismissed because the plaintiff had agreed to release any claims against the town or its officials in exchange for dismissal of criminal charges. 480 U.S. at 390-91. As the SEC's Order states, the Court established a balancing test for deciding whether to enforce a waiver. In that regard, the Court said,

> We begin by noting the source of the law that governs this case. The agreement purported to waive a right to sue conferred by a federal statute. The question whether the policies underlying that statute may in some circumstances render that waiver unenforceable is a question of federal law. We resolve this question by reference to traditional common-law principles, as we have resolved other questions about the principles governing § 1983 actions. *E.g., Pulliam v. Allen*, 466 U.S. 522, 539–540, 104 S. Ct. 1970, 1979–1980, 80 L.Ed.2d 565 (1984). The relevant principle is well established: a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement.

Id. at 392.

In *Davies v. Grossmont High School District*, 930 F.2d 1390 (9th Cir. 1991), this Court discussed *Rumery* and observed that it "involved surrender of a *statutory remedy*" whereas in *Davies* this Court "confront[ed] the waiver of a *constitutional right*." *Id.* at 1397. That distinction implied two others:

> First, because constitutional rights are generally more fundamental than statutory rights, a stricter rule than the one embodied by the *Rumery* balancing test may be appropriate in such cases. Second, foregoing a remedy of money damages for a past injury that cannot be undone may not implicate the public interest to the same extent as does the surrender of the right itself. It could well be argued therefore that the District must meet a higher burden here than is required under the *Rumery* test.

Id. Amicus respectfully agrees that it could well be argued that a higher burden and a stricter rule must be satisfied to enforce the surrender of a constitutional right. That is precisely on point with regard to the SEC's required surrender of First Amendment rights.

Rumery requires the court to weigh the interest in enforcement of a promise against "the public policy harmed" by its enforcement. 480 U.S. at 392. The relevant public policy or policies are those underlying the right being waived. *Rumery* concerned waiver of "a right to sue conferred by a federal statute." *Id.* Hence, the question presented there was

"whether the policies underlying that statute may in some circumstances render that waiver unenforceable." *Id.* The same question is presented by a waiver of a constitutional right—i.e., whether that waiver "impairs to an appreciable extent any of the policies behind the rights involved." *Id.* at 392 n.2 (quoting *McGautha v. California*, 402 U.S. 183, 213 (1971)).

In this case, the policies underlying the First Amendment must be examined. Those policies directly conflict with the Gag Agreement.

> The policy of the First Amendment favors dissemination of information and opinion, and "(t)he guarantees of freedom of speech and press were not designed to prevent 'the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential.'"

Bigelow v. Virginia, 421 U.S. 809, 829 (1975) (quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 150 (1967) (opinion of Harlan, J.) (quoting 2 Cooley, Constitutional Limitations 886 (8th ed.)). The Gag Agreement "impairs to an appreciable extent . . . the policies behind"[2] the guarantee of free speech because the provision prevents criticism of governmental enforcement of a law, which is unmistakably a public matter. "Whatever differences may exist about interpretations of the First Amendment,

[2] *Rumery*, 480 U.S. at 392 n.2 (quoting *McGautha v. California*, 402 U.S. 183, 213 (1971)).

there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). *See also Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

Freedom of speech not only protects self-government, but it is also "the matrix, the indispensable condition, of nearly every other freedom." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937). First Amendment freedoms "are delicate and vulnerable, as well as supremely precious in our society. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in this area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963).

Thus, the significance and fragility of the policies underlying the First Amendment call for special protection of freedom of speech. In terms of relative importance, concerns about free speech tower over other policy concerns. The appropriate test for balancing the right to free speech against government interests depends upon the regulation at issue; when speech is regulated because of its content, the regulation is subject to strict scrutiny. *Lac Vieux Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd.*, 172 F.3d 397, 409 (6th Cir. 1999).

The Gag Agreement is content based—and thus subject to strict scrutiny—because it forbids a denial of a charge, but takes no notice of its admission. "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015).

To summarize, *Rumery* requires consideration of the relevant policies underlying the right being waived. A review of First Amendment policies establishes that the Gag Agreement impairs a substantial public interest under those policies—and that the appropriate test for weighing those policies against the interest in enforcement of the Gag Agreement is strict scrutiny.

B. The Gag Agreements Fail Strict Scrutiny.

Where, as here, there is a substantial public interest in nonenforcement of a waiver in a settlement agreement, the state interest that must be weighed against that interest must be more than merely an interest in settling cases in general. *Davies v. Grossmont High School District*, 930 F.2d 1390, 1398 (9th Cir. 1991). Rather, the state's interest

must be its interest in enforcing the promise in question: in this case, the Gag Agreement. *See Rumery*, 480 U.S. at 392 ("a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement").

The SEC's interest in the Gag Agreement is set forth in the regulation it promulgated on this subject, 17 C.F.R. § 202.5(e), as the Order explains. (Order 2-3.) The interest that the SEC asserts is apparently based on the desire to avoid any appearance that a decree or sanction is being entered or imposed at the same time that the defendant denies the allegations or order. The text of the regulation makes clear that the concern is to prevent these two events from occurring contemporaneously at entry of judgment:

> The Commission has adopted the policy that in any civil lawsuit brought by it or in any administrative proceeding of an accusatory nature pending before it, it 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, it 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. 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).

Measured against this rationale, the Gag Agreements the SEC requires are overbroad. They are not limited in time. "If you want to settle," wrote Circuit Judge Jones, "SEC's policy says, '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 characterization of the Gag Agreement is accurate. There appear to be two versions of it. The version that appears more frequently and more recently in the jurisprudence is decidedly in the future tense:

> 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. . . .
>
> If Defendant breaches this agreement, the Commission may petition the Court to vacate the Final Judgment and restore this action to its active docket.

SEC v. Moraes, No. 22-CV-8343 (RA), 2022 WL 15774011 at *2 (S.D.N.Y. Oct. 28, 2022); *see also, e.g., SEC v. Novinger,* 96 F.4th 774, 777 (5th Cir. 2024). An earlier version that appears less often in the jurisprudence provides:

> Defendant understands and agrees to comply with the [SEC]' s policy "not to permit a defendant . . . to consent to a judgment or order that imposes a sanction while denying the allegation in the complaint. . . ." 17 C.F.R. § 202.5. In compliance with this policy, Defendant agrees not to take any action or to 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. If Defendant breaches this agreement, the [SEC] may petition the Court to vacate the Final Judgment and restore this action to its active docket.

SEC v. Romeril, 15 F.4th 166, 170 (2d Cir. 2021); *see also, e.g., SEC v. Franco*, No. 01–CV–3872, 2002 WL 32001587 at *2 (S.D.N.Y. Dec. 4, 2002).

Both versions establish an ongoing, lifetime obligation and a permanent threat of a sanction should the defendant ever create the wrong impression. These Gag Agreements are not narrowly tailored to serve the SEC's asserted interest in preventing the entry of judgment pursuant to an agreement while at the same time the defendant denies the charges.

Another requirement of strict scrutiny is that the SEC's asserted interest would have to be a compelling state interest. Section 202.5(e) does not offer any reason why "it 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." Although this regulation, which the SEC adopted without going through the APA required notice-and-comment, does not assert a state interest in a permanent waiver, the Order attempts to make a case for one:

> In settlements without admissions, a defendant who later denies the allegations in the complaint can create the incorrect impression that there was no basis for the Commission's enforcement action. Because such a denial would come only after the Commission had relinquished the opportunity to prove its case in court with evidence, it could undermine confidence in the Commission's enforcement program.

(Order 4-5.)

"[T]he post hoc rationalizations of the agency," such as this, "cannot serve as a sufficient predicate for agency action." *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U. S. 490, 539 (1981). "The functional reasons for requiring contemporaneous explanations apply with equal force regardless whether post hoc justifications are raised in court by those appearing on behalf of the agency or by agency officials themselves."

Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 23 (2020).

There is some precedent in the law for the concern that someone could undermine confidence in the government or create the impression that the government did not have a basis for what it did, but that precedent does not help the SEC. That precedent is pre-Constitutional: it derives from the royal prerogative that the king of England could do no wrong. As a consequence of that prerogative, the law would attribute to an agent of the crown rather than to the king "those little inadvertencies, which, if charged on the will of the prince, might lessen him in the eyes of his subjects." 2 William Blackstone, Commentaries on the Laws of England *246. The state's reputational interest in avoiding any impression that would lessen the king in the eyes of his subjects had its echo in the criminal law: "Contempts or misprisions against the king's *person* or *government*, may be by speaking or writing against them, . . . or doing any thing that may tend to lessen him in the esteem of his subjects. . . ." 5 William Blackstone, Commentaries on the Laws of England *123.

This royal prerogative, however, cannot be exercised by the Securities and Exchange Commission. The First Amendment was intended to abolish such features of English law. *See Bridges v. California*, 314 U.S. 252, 264-66 (1941). Not even the judiciary (nor any other public institution) has a legitimate interest in protection of its esteem from criticism, either temporarily or permanently:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

Id. at 270-71. Americans have a fundamental right to discuss their government without fear of being hauled into court by the government for doing so. *City of Chicago v. Tribune Co.*, 139 N.E. 86, 88 (Ill. 1923). The Constitution does not tolerate in any form an action for libel on government. *Rosenblatt v. Baer*, 383 U.S. 75, 81 (1966).

Accordingly, the Gag Agreement fails strict scrutiny because it serves no compelling government interest and is not narrowly tailored to serve such an interest. (Indeed, there appears to be no government

interest in existence here at all, much less a compelling one.) Because the Gag Agreement cannot withstand application of the appropriate balancing test that weighs the interest in enforcement against the public policy harmed by enforcement, under *Rumery* the Gag Agreement is void as against public policy and unenforceable.

Even if strict scrutiny were not applied, the SEC would still bear the burden of proving that the Gag Agreement serves the public interest. *See Lynch v. Alhambra*, 880 F.2d 1122, 1128 (9th Cir. 1989). How could it do so? In the absence of a legitimate interest in enforcing the Gag Agreement, that is a burden the SEC cannot sustain.

CONCLUSION

The New Civil Liberties Alliance proposed a rule change to end the SEC's practice of requiring an unconstitutional condition in their settlements that is also contrary to public policy. The SEC's refusal to amend its rule to end that unlawful practice was arbitrary and capricious, an abuse of discretion, and in violation of the Administrative Procedure Act. For that reason, we ask this court to remand the agency action of denying rulemaking back to the agency.

Dated: June 24, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with (1) the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7) because it contains 5144 words excluding the portions exempted by Rule 32(f); and (2) the typeface and type-style requirements of Rule 32(a)(5)-(6) because it has been prepared in 14-point Century Schoolbook (a proportionally spaced typeface) using Microsoft Word.

Dated: June 24, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 24, 2024, the foregoing brief was electronically filed with the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: June 24, 2024

Respectfully submitted,

/s/ Nicolas Morgan
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