No. 21-1284

In The

Supreme Court of the United States

BARRY D. ROMERIL,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF CONSTITUTIONAL LAW & FIRST AMENDMENT SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE* [1]

Amici curiae are Constitutional Law and First Amendment scholars who have a keen and abiding interest in the freedom-of-speech issues presented by this appeal. They are filing this brief as individuals, not as representatives of the universities with which they are affiliated. Their brief discusses why the U.S. Securities and Exchange Commission (SEC) "Gag Rule" consent order policy raises serious First Amendment concerns that the Court should address for the benefit of the public as well as the SEC.

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[1] Petitioner's and Respondent's counsel of record were provided timely notice in accordance with Sup. Ct. R. 37.2(a) and have consented to the filing of this brief. In accordance with Sup. Ct. R. 37.6, *amici* certify that no counsel for a party authored this brief in whole or part, and that no party or counsel other than the *amici* or their counsel made a monetary contribution intended to fund preparation or submission of this brief.

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SUMMARY OF ARGUMENT

The Court should grant the Petition for a Writ of Certiorari to address First Amendment issues that have enormous practical importance to the operation of the American legal system—issues that long have vexed and confused lower courts—and for which this Court's guidance is critically needed.

The immediate issue posed by the petition is the constitutionality of the "SEC Gag Rule," 17 C.F.R. § 202.5(e), a policy which the SEC imposed on Petitioner Barry Romeril and applies universally in connection with all civil enforcement consent orders. The reasons for granting the petition, however, extend far beyond Mr. Romeril's personal interests and those of countless other SEC individual or corporate enforcement targets that have been and will continue to be unconstitutionally burdened by the SEC Gag Rule. Writ large, the petition reflects the urgent and more far-reaching need for clarity concerning the extent to which government agencies may coerce silence from a citizen as a condition imposed to resolve a dispute between the government and the citizen.

The Second Circuit's decision below conflicts with decisions from other circuits and state courts at a time when the principles governing the enforceability of non-disclosure, non-disparagement, and similar silence-imposing arrangements are in dramatic flux. This Court's intercession is particularly needed to bring greater clarity to the four important First Amendment doctrines with which courts have struggled in determining the enforceability of such gag provisions.

First, review is warranted so that this Court can address whether the SEC Gag Rule is a presumptively unconstitutional prior restraint. If it is a prior restraint, the Court should explain that the heavy presumption against prior restraints ought not be lightened merely because the restraint implicates allegations of civil or criminal wrongdoing.

Second, review is warranted because the SEC Gag Rule is not just any prior restraint, but a prior restraint on "steroids," fatally infected by content and viewpoint discrimination. The SEC Gag Rule is content-based and viewpoint-based on its face. Moreover, it is animated by the government's self-serving desire to shield itself from criticism, implicating powerful First Amendment norms against viewpoint discrimination.

Third, review is warranted because the SEC Gag Rule violates the unconstitutional conditions doctrine. Of all the First Amendment doctrinal principles in play, the unconstitutional conditions doctrine, as applied to coercive government efforts to secure silence and stifle criticism, is most sorely in need of this Court's attention and guidance. This doctrine

means at the very least that the government receives no free pass from what otherwise would be an open-and-shut violation of fundamental First Amendment principles merely because the conditions are attached to a plea bargain or settlement agreement. Moreover, the unconstitutional nature of the regime imposed by the SEC Gag Rule is exacerbated by its practical operation as an *in terrorem* "gun to the head," forcing submission by any who attempt resolution of disputes with the Commission.

Fourth, review is warranted so that this Court can address the SEC Gag Rule's adverse impact on the constitutional right of the public to receive information of public concern. The SEC Gag Rule does not merely muzzle Petitioner Romeril: The Gag Rule also withholds from the public at large vital truthful information and discourse regarding the conduct of government officials. As a prior restraint that withholds information and criticism from the public, the SEC Gag Rule undermines a fundamental and vital animating purpose of the First Amendment, namely the protection of wide-open, uninhibited, and robust discussion of political affairs.

ARGUMENT

Review Should Be Granted Because the SEC Gag Rule Raises Important First Amendment Issues That the Court Needs To Address

A. The SEC Gage Rule is a presumptively invalid prior restraint

This case presents the Court with an important and timely opportunity to decide whether the SEC

Gag Rule, which the SEC incorporates into every consent order and is judicially enforceable through the contempt power, is indeed a presumptively invalid prior restraint. "Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

Review is needed to dispel the notion that prior restraints issued incident to allegations of civil or criminal misconduct are somehow invisible to the First Amendment. Indeed, *even* in the criminal law context, prior restraints operate as "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

This Court has held that even convicted criminals retain First Amendment rights to discuss the facts of their crimes. That is the teaching of *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 118 (1991), striking down New York's "Son of Sam" law, which sought to confiscate income derived from a criminal's depiction of his crime. More recently, the Court struck down limitations on the access to social media platforms of convicted sex offenders. *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). It follows that no court could impose a sentence on a criminal that, in addition to incarceration or fine, includes an order preventing the convicted defendant from ever again speaking about his case in a manner that would criticize the prosecution or disclaim the defendant's culpability. Such a speech-crushing order would be an unconstitutional prior restraint, full-stop. It simply

cannot "be said that the constitutional freedom from previous restraint is lost because charges are made of derelictions which constitute crimes." *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 720 (1931).

Surely the same prior-restraint principle applies in the civil enforcement context, here, in connection with the SEC's unconstitutional Gag Rule.

B. The SEC Gag Rule is a presumptively unconstitutional exercise in content and viewpoint discrimination

The SEC Gag Rule is not just any prior restraint, but a prior restraint that is doubly tainted by its brazen embrace of content and viewpoint discrimination. "Even among First Amendment claims, gag orders warrant a most rigorous form of review because they rest at the intersection of two disfavored forms of expressive limitations: prior restraints and content-based restrictions." *In re Murphy-Brown, LLC*, 907 F.3d 788, 796-97 (4th Cir. 2018).

"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,* 576 U.S. 155, 163 (2015). "Content-based regulations 'target speech based on its communicative content.'" *Nat'l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (quoting *Reed*, 576 U.S. at 163).

Violation of the SEC Gag Rule is plainly triggered by the *subject matter* of the message. On its face the

Gag Rule bars a defendant from engaging in expression creating the "impression" that the defendant is "denying the allegations in the complaint or order." 17 C.F.R. § 202.5(e). The Rule thus meets the core, commonsense touchstone defining content-based discrimination: "This commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Reed*, 576 U.S. at 163. The SEC Gag Rule is thus a classic example of a policy that cannot be "justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

But it gets worse. The SEC Gag Rule "goes beyond mere content, to actual viewpoint, discrimination." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992). "Viewpoint discrimination is thus an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.*

Petitioner Romeril is constrained by the terms of the SEC Gag Rule "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." Pet. at 10. The draconian censorship here is not reciprocal. The door does not swing both ways. Nothing restrains the SEC from saying anything it pleases about Mr. Romeril. But Mr.

Romeril is not permitted to say anything he pleases about the SEC. He is not free to defend himself, not permitted to criticize the SEC for overkill or overreaching, and not permitted to speak what he believes to be the truth about the circumstances of his case.

The SEC Gag Rule does not impose upon Mr. Romeril any restraint from publicly confessing his culpability or praising the enforcement efforts of the SEC as sound and factually based. As long as Mr. Romeril sides with the government, he is home free. It is only if Mr. Romeril professes innocence, or suggests a critique of the SEC's analysis, thereby explicitly or implicitly criticizing the actions of the SEC, that he violates the gag. Put differently, if Mr. Romeril speaks, he must only convey a pro-government message. This is blatant viewpoint discrimination. The government "has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules." *R.A.V.*, 505 U.S. at 392.

The manifest purpose of the SEC Gag Rule exacerbates the content and viewpoint discrimination afoot. "The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791. As lower courts have observed, this is exactly what drives the SEC's gag efforts. "Here an agency of the United States is saying, in effect, 'Although we claim that these defendants have done terrible things, they refuse to admit it and we do not propose to prove it, but will simply resort to gagging their right to deny

it.'" *S.E.C. v. Vitesse Semiconductor Corp.*, 771 F. Supp. 2d 304, 309 (S.D.N.Y. 2011). "By virtue of their alleged past wrongs, the agencies are trying to assert active control over the defendants' future speech." James Valvo, *The CFTC and SEC Are Demanding Unconstitutional Speech Bans in Their Settlement Agreements*, Yale J. on Reg.: Notice & Comment Blog (Dec. 4, 2017), https://bit.ly/3IV5oP6.

The SEC's adoption of the gag policy in 1972 was generated largely by the agency's concerns over negative public perceptions of its actions. The policy arose in response to situations in which "defendants and respondents were entering into consent decrees and then publicly denying that they had done anything wrong or violated any law or regulation." David Rosenfeld, *Admissions in SEC Enforcement Cases: The Revolution That Wasn't*, 103 Iowa L. Rev. 113, 118–19 (2017). Contrary to the demands of a free society, the SEC hopes to continue to escape public scrutiny by stifling the flow of information from those most directly affected by its enforcement activities. The SEC may not like the heat, but as the Federal Trade Commission and almost all other federal regulatory agencies recognize, this is the cost of entering the kitchen.

In any consent order scenario, the SEC might well take fire from all directions, with some saying it was too soft and others too harsh. The SEC must accept the criticism either way. In the United States, there is no libel against the government. "For good reason, 'no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of

jurisprudence.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 292 (1964) (quoting *City of Chicago v. Tribune Co.*, 307 Ill. 595, 601 (1923)). A governmental entity's desire to shelter itself from critique or embarrassment is entitled to no credit in the First Amendment calculus.

C. The SEC Gag Rule is an unconstitutional condition

As demonstrated above, the First Amendment would bar a court order preventing a convicted defendant from later discussing his crime, criticizing the prosecution, or disclaiming, in whole or in part, the defendant's culpability. It follows that the First Amendment also should be construed as barring, through the artifice of a plea bargain—or civil enforcement settlement agreement—the extraction of such silence. If no court could impose such a prior restraint directly as an element of a criminal sentence, the First Amendment also should not countenance the conditioning of approval of a criminal plea bargain on the defendant's submission to a permanent gag order, barring the defendant from any future expression, even if truthful, creating the impression that the prosecution was in some respect unfounded. The same is true for imposition of a gag rule in connection with what the SEC's gag policy describes as any SEC civil action or administrative proceeding "of an accusatory nature." 17 C.F.R. § 202.5(e).

Any other rule would permit the government *indirectly* to accomplish, through its coercive leverage, a result it could not command *directly*. The Court has long warned that First Amendment principles are sufficiently hale to interdict such artifice,

admonishing against regimes that "place limitations upon the freedom of speech which if directly attempted would be unconstitutional." *Speiser v. Randall*, 357 U.S. 513, 518 (1958).

Yet the SEC Gag Rule, in the civil enforcement context, imposes such a condition across the board, operating as a coercive gun to the head, threatening all who fall within its ambit. Review is warranted by this Court in order to make it clear that the extraction of such perpetual silence is an unconstitutional condition.

The "unconstitutional conditions doctrine" instructs that "the Government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . 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) (citations omitted). The doctrine fully applies to the SEC policy of requiring submission to a gag order as a condition of settling an investigation through a consent order. The truism that no defendant is entitled to a consent order does not mean that the government may condition the receipt of such a "benefit" on the surrender of First Amendment freedoms.

The SEC Gag Rule effectively offers a defendant such as Mr. Romeril an "offer he can't refuse."[2] No actual choice exists. What is presented is a "gun to the head." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 581 (2012). In silencing defendants such as Mr.

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[2] *See* Mario Puzo, *The Godfather* (New York: G.P. Putman's Sons, 1969).

Romeril, the SEC shelters itself from critique, using its coercive leverage to manipulate the marketplace of ideas in the government's favor. This illicit motivation exposes the SEC Gag Rule as an unconstitutional condition, implicating the key distinction "between conditions that define the federal program and those that reach outside it." *Alliance*, 570 U.S. at 217. The SEC's gag regime is a quintessential example of impermissible "conditions that seek to leverage [a benefit] to regulate speech." *Id.* at 214-15.

Importantly, the SEC Gag Rule is not saved by decisions holding that obligations of confidentiality are enforceable when the speaker who possesses the confidential information gained access to the information *because of* a promise to keep the information confidential. In *Snepp v. United States*, 444 U.S. 507 (1980), for example, the author Snepp gained access to the national security information he sought to disclose only because he had agreed to keep the government's secrets as a condition of employment. In *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), the Court held that a newspaper could be held liable for violating its undertaking not to reveal the name of a confidential source, who agreed to speak to the newspaper "only if he was given a promise of confidentiality." *Id.* at 665. Similarly, in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), the Court held that the First Amendment was not offended by a protective order limiting the dissemination of information gained by a litigant "only by virtue of the trial court's discovery processes." *Id.* at 32.

Here, however, whatever Mr. Romeril wants to say about his ordeal with the SEC is based on facts known

to, or opinions held by, Mr. Romeril that he possessed *independently*. He did not gain access to the information he seeks to disclose through any promise not to speak.

The SEC admittedly has a generalized interest in enforcing the law and in pursuing settlements as a tool for enforcement. The extraction of silence, however, is unconstitutional piling on. As the Ninth Circuit has observed, "where a substantial public interest favoring nonenforcement is present, the interest in settlement is insufficient." *Davies v. Grossmont Union High School Dist.*, 930 F.2d 1390, 1398 (9th Cir. 1991). The *generalized* policy favoring enforcement of private agreements and the encouragement of settling litigation cannot, in the nature of things, be a sufficient basis alone for justifying clauses in settlements restricting the exercise of constitutional rights, because the generalized policy is present in *all* settlements of legal disputes. If the general interest in settling claims were enough to do the trick, then *all* waiver clauses in settlement agreements would be impermeable to attack. *See id.* at 1398. As important as the interest in encouraging settlements may be, it "is an interest that will be present in every dispute over the enforceability of an agreement terminating litigation." *Id.*

Amici commend to this Court the insights offered in *Overbey v. Mayor & City Council of Baltimore*, 930 F.3d 215 (4th Cir. 2019). The Fourth Circuit's decision stands in dramatic tension with the Second Circuit's decision below. *Overbey* held unenforceable a non-disparagement clause entered into between the City of Baltimore and Ashley Overbey, arising from the

settlement of a police misconduct claim. Overbey's suit challenged Baltimore's practice of including non-disparagement clauses in virtually all such settlement agreements. The Fourth Circuit held that "the non-disparagement clause in Overbey's settlement agreement amounts to a waiver of her First Amendment rights and that strong public interests rooted in the First Amendment make it unenforceable and void." *Id.* at 222.

In defending the non-disparagement clause, Baltimore advanced the strained argument that the clause was not properly characterized as a "waiver" of anything, but was simply an exercise by Overbey of her constitutional right "not to speak," which she exercised in exchange for payment by the government. The Fourth Circuit summarily dispatched this implausible framing of the problem, correctly observing that the right to refrain from speaking was simply not implicated. The government was not forcing Overbey to speak against her will; it was attempting to prevent her from speaking *according* to her will. As the court explained, "no one tried to punish Overbey for refusing to say something she did not want to say." *Id.* at 223. Instead, "Overbey agreed, on pain of contractual liability to the City, to curb her voluntary speech to meet the City's specifications." *Id.* The court held that Baltimore's inclusion of the waiver in the settlement agreement was void and unenforceable, for public policy reasons animated by the First Amendment, stating that "[w]e do not presume that the waiver of a constitutional right—even one that appears in an otherwise valid contract with the government—is enforceable." *Id.*

In sum, whatever generalized interest a governmental entity or agency may assert in settling cases, "when a settlement agreement contains a waiver of a constitutional right, the government's general interest in using settlement agreements to expedite litigation is not enough to make the waiver enforceable—otherwise, no balance-of-interests test would be required." *Id.* at 225. The SEC thus "cannot succeed merely by invoking its general interest in settling lawsuits." *Id.* "It must point to additional interests that, under the circumstances, justify enforcing . . . waiver of . . . First Amendment rights." *Id.*

The only conceivable interests the SEC might assert are the interests in sheltering itself from critique—which as a matter of law is entitled to no weight whatsoever—or the interests in sheltering the public from Mr. Romeril's speech—which (as discussed below) are also insufficient as a matter of law, partaking in paternalistic assumptions that run contrary to the animating principles of the First Amendment, and violating the public's right to receive information.

D. The SEC Gag Rule is paternalistic and violates the public's First Amendment rights to receive information

"It is now well established that the Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). The First Amendment "freedom embraces the right to distribute literature, . . . and necessarily protects the right to receive it." *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 143 (1943) (citing *Lovell v. Griffin*, 303 U.S. 444,

452 (1938)). "[T]he right to receive publications is such a fundamental right. . . . It would be a barren marketplace of ideas that had only sellers and no buyers." *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring). "'It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.'" *Kleindienst v. Mandel*, 408 U.S. 753, 763, (1972) (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969)). "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010).

Many scholars have recognized the threats to these First Amendment values posed by the indiscriminate enforcement of silence-imposing agreements. *See* Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 Cornell L. Rev. 261, 356 (1998); Burt Neuborne, *Limiting the Right to Buy Silence: A Hearer-Centered Approach*, 90 U. Colo. L. Rev. 411, 439 (2019); Clay Calvert, *Gag Clauses and the Right to Gripe: The Consumer Review Fairness Act of 2016 & State Efforts to Protect Online Reviews from Contractual Censorship*, 24 Widener L. Rev. 203, 212 (2018); Genelle I. Belmas & Brian N. Larson, *Clicking Away Your Speech Rights: The Enforceability of Gagwrap Licenses*, 12 Comm. L. & Policy 37 (2007); Rodney A. Smolla, 2 *Smolla & Nimmer on Freedom of Speech* § 15:59.50 (2022 updated ed.).

The right to receive information should weigh heavily in the calculus applied by this Court. "[S]trong

arguments support the idea that courts should apply a more stringent standard to the waiver of First Amendment rights." Garfield, *supra* at 356. These First Amendment interests include both the right to speak and the right to receive information, "[b]ecause free speech rights are at the core of our democratic system, and because a waiver of speech rights implicates both the public's interest as well as the individual's interest." *Id.*; *see also* Neuborne, *supra* at 429 ("In any event, a nonparty hearer who can demonstrate significant public interest in access to the information protected by the NDA of a public figure has the raw material for an effective First Amendment challenge. That's just one more reason to continue the disaggregation of the First Amendment from a solidly speaker-centered doctrine to a more complex doctrine reflecting the interests of speakers, hearers, conduits, targets, and regulators."); Calvert, *supra* at 229 ("[T]he unenumerated First Amendment right to receive speech is deployable for buttressing the argument that speaker autonomy is thwarted by gag clauses.").

Mr. Romeril's speech may be believed or disbelieved by the public. To the extent his speech is critical of the SEC, the public may credit or discredit his critique. Protection of such debate and critique, and its concomitant power to check and render accountable the processes of government, is a defining purpose of the First Amendment. In *Overbey* the Fourth Circuit identified this interest as one of the key "public interests favoring non-enforcement." *Overbey*, 930 F.3d at 223. "Famously, one of the interests at the heart of the First Amendment is 'a profound national

commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Id.* at 224 (*quoting New York Times Co. v. Sullivan*, 376 U.S. at 270).

Debate over issues of public concern in turn operates as a check on governmental abuse of power. "Standing shoulder to shoulder with the citizenry's interest in uninhibited, robust debate on public issues is this nation's cautious 'mistrust of governmental power.'" *Overbey*, 930 F.3d at 223.

The SEC wields enormous influence and power by using consent orders. *See* Pet. at 4 n.1 (indicating that the SEC settles approximately 98% of its enforcement cases). Any notion that the public must accept the SEC's assurances that it only deploys this power wisely is fundamentally inconsistent with the values that inspired the Constitution's Framers, who were fundamentally mistrustful of government. The public is not required to respect assurances of *noblesse oblige*. *See United States v. Stevens*, 559 U.S. 460, 480 (2010) ("Not to worry, the Government says: The Executive Branch construes [18 U.S.C.] § 48 to reach only 'extreme' cruelty, and it 'neither has brought nor will bring a prosecution for anything less' . . . . But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.") (citations omitted). "The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory." *Whitman v. Am. Trucking Assn's., Inc.*, 531 U.S. 457,

473, (2001). "Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints." *Citizens United*, 558 U.S. at 340.

There is no First Amendment value in sheltering the public from Mr. Romeril's views, whatever they may be. The First Amendment does not operate like the famous line from the movie *A Few Good Men*, in which Jack Nicholson, playing the role of Colonel Nathan Jessup, indignantly exclaims: "You can't handle the truth!"[3] "Those who seek to censor or burden free expression often assert that disfavored speech has adverse effects. But the 'fear that people would make bad decisions if given truthful information' cannot justify content-based burdens on speech." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 577 (2013) (quoting *Thompson v. Western States Medical Ctr.*, 535 U.S. 357, 374 (2002)); *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 738 (1996) (Thomas, J., concurring) ("In case after case . . . the Court, and individual Members of the Court, have continued to stress . . . the antipaternalistic premises of the First Amendment"); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 497 (1995) (Stevens, J., concurring) ("Any 'interest' in restricting the flow of accurate information because of the perceived danger of that knowledge is anathema to the First Amendment . . . the Constitution is most skeptical of supposed state interests that seek to keep people in the dark for what the government believes to be their own good."); *Simon & Schuster*, 502 U.S. at 121 ("The Board disclaims, as it must, any state interest in

[3] *A Few Good Men*, available at https://tinyurl.com/yc4sp5f5.

suppressing descriptions of crime out of solicitude for the sensibilities of readers."); *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91, 105 (1990) ("We reject the paternalistic assumption that the recipients of petitioner's letterhead are no more discriminating than the audience for children's television."); *Riley v. Nat'l Fed. of the Blind of North Carolina, Inc.*, 487 U.S. 781, 790-91 (1988) ("The State's remaining justification—the paternalistic premise that charities' speech must be regulated for their own benefit—is equally unsound. The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it."); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791-792 & n.31 (1978) (criticizing a State's paternalistic interest in protecting the political process by restricting speech by corporations).

It also is possible, of course, that Mr. Romeril might make statements about his case critical of the SEC. But Mr. Romeril is constitutionally entitled to his *opinions* about the SEC, and to the extent that any statements he might make are nothing more than that—mere subjective expressions of rhetorical hyperbole or his opinions of government of the sort not capable of objective proof or disproof—they are fully protected by the First Amendment. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

At the end of the day, if the SEC is not pleased by Mr. Romeril's remarks, it may engage in its own expression countering those remarks, entering the marketplace of ideas on its own. The SEC here "has not shown, and cannot show, why counterspeech

would not suffice to achieve its interest." *United States v. Alvarez*, 567 U.S. 709, 726 (2012).

The protection of the free flow of information and free trade of ideas is the foundation upon which modern First Amendment law is built. "The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth." *Id.* at 727; *see also Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence"). "The theory of our Constitution is 'that the best test of truth is the power of the thought to get itself accepted in the competition of the market.'" *Alvarez*, 567 U.S. at 728 (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

The SEC's gag policy cannot be squared with these First Amendment principles. "[S]uppression of speech by the government can make exposure of falsity more difficult, not less so." *Alvarez*, 567 U.S. at 728. The SEC Gag Rule requiring gag provisions in all consent orders undermines society's "right and civic duty to engage in open, dynamic, rational discourse." *Id.* "These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates." *Id.*

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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