

No. 25-1100

IN THE
Supreme Court of the United States

THOMAS JOSEPH POWELL, *et al.*,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

**BRIEF OF ATLANTIC LEGAL FOUNDATION
AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS**

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INTEREST OF THE *AMICUS CURIAE* ¹

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm. ALF's mission for the past five decades has been to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, ALF pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. See atlanticlegal.org.

* * *

As a champion of individual liberty, limited and responsible government, and civil justice, ALF has an abiding interest in the question presented by this case: Whether the SEC's "Gag Rule," 17 C.F.R. § 202.5(e), violates the First Amendment. The Gag

¹ Petitioners' and Respondent's counsel were provided timely notice of this brief in accordance with Supreme Court Rule 37.2. No counsel for a party authored this brief in whole or part, and no party, counsel for a party, or person other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

Rule establishes an SEC policy—“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”—that unconstitutionally restricts an enforcement target’s freedom of speech. In so doing, the Gag Rule shields the nation’s most powerful and aggressive independent regulatory agency from criticism that in many cases is warranted, or would serve the public interest, or both.

SUMMARY OF ARGUMENT

“The SEC Gag Rule is not just any prior restraint, but a prior restraint on steroids, doubly tainted by its brazen embrace of content and viewpoint discrimination.” Rodney A. Smolla, *Why the SEC Gag Rule Silencing Those Who Settle SEC Investigations Violates The First Amendment*, 29 Widener L. Rev. 1, 18 (2023). Under the Gag Rule, 17 C.F.R. § 202.5(e), “no person or entity agreeing to a settlement with the SEC and voluntarily entering into a consent decree may deny the allegations of wrongdoing.” *Id.* at 1.

Amicus curiae Atlantic Legal Foundation leaves it to petitioners to discuss why the Gag Rule is an egregious violation of the First Amendment. Instead, the focus of this brief is the unconstitutional conditions doctrine. As relevant here, under the unconstitutional conditions doctrine “[t]he 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.*” *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 608 (2013) (internal quotation marks omitted). The significant governmental benefit involved in this case are SEC consent judgments, which enable civil enforcement targets to avoid the substantial burdens, costs, risks, and reputational and other harms of attempting to litigate against an omnipotent independent regulatory agency.

The SEC’s willingness to settle the vast majority of its own civil enforcement actions does not begin to describe the enormous pressure that enforcement targets are under to enter into a consent judgment even though its terms are dictated by the SEC and incorporate the Gag Rule. Despite the real-world compulsion to accede to the SEC’s settlement terms, including the Gag Rule, the Ninth Circuit’s opinion is predicated on the legal fiction that signing an SEC consent judgment is entirely voluntary—merely an option that an enforcement target can either take or leave. But even if agreeing to an SEC consent judgment truly were voluntary, it is well settled that consent to an unconstitutional condition, *i.e.*, voluntarily giving up a constitutional right in return for a governmental benefit, is irrelevant to the operation of the unconstitutional conditions doctrine.

The Court should grant certiorari, and based on the unconstitutional conditions doctrine, hold that the Gag Rule is categorically unconstitutional.

ARGUMENT

The Court Should Grant Review and Hold That the Unconstitutional Conditions Doctrine Invalidates the SEC's Gag Rule

A. The Court long and repeatedly has held that the government cannot impose an unconstitutional condition in return for receiving a governmental benefit

1. The unconstitutional conditions doctrine reflects an “overarching principle . . . that vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up.” *Koontz*, 570 U.S. at 604. “[R]egardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution’s enumerated rights by coercively withholding benefits from those who exercise them.” *Id.* at 606; *see also Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 584 U.S. 325, 342 n.4 (2018) (“The doctrine prevents the Government from using conditions ‘to produce a result which it could not command directly.’”) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

From an historical perspective, the unconstitutional conditions doctrine goes back at least a century. *See, e.g., Frost Trucking Co. v. R.R. Comm’n of Cal.*, 271 U.S. 583, 598 (1926) (“a state is without power to impose an unconstitutional requirement as a

condition for granting a privilege”); *Koslow v. Pennsylvania*, 302 F.3d 161, 173, 174 (3d Cir. 2002) (quoting *Frost*); see generally Louis W. Fisher, *Contracting Around the Constitution: An Anticommodificationist Perspective On Unconstitutional Conditions*, 21 U. Pa. J. Const. L. 1167, 1176-79 (2019) (“Unconstitutional Conditions: Current Doctrine and Theories—A Brief Doctrinal History”).

Even though “[v]irtually all of [the Supreme Court’s] unconstitutional conditions cases involve a gratuitous governmental benefit of some kind . . . [the Court has] repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional rights.” *Koontz*, 570 U.S. at 608; see Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1989) (“The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold the benefit altogether.”).

In short, the doctrine “limits the ability of governments to force individuals to choose between retaining a right and enjoying a government benefit.” Kay L. Levine et al., *Protecting State Constitutional Rights from Unconstitutional Conditions*, 56 U.C. Davis L. Rev. 247, 249-50 (2022). It thus “reflects the triumph of the view that government may not do indirectly what it may not do directly over the view

that the greater power to deny a benefit includes the lesser power to impose a condition on its receipt.” Sullivan, *supra*, at 1415.

2. “[T]he modern administrative state [has] contributed to the proliferation of unconstitutional conditions problems.” Fisher, *supra*, at 1176. See *Koontz*, 570 U.S. at 608 (“We have said in a variety of contexts that ‘the government may not deny a benefit to a person because he exercises a constitutional right.’”) (quoting *Regan v. Taxation With Representation of Wash.*, 461 U. S. 540, 545 (1983)) (collecting cases).

The Court’s unconstitutional conditions jurisprudence includes government-imposed conditions that infringe on freedom of speech. See, e.g., *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.* (“AID”), 570 U.S. 205, 214 (2013) (“[W]e have held 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.”) (cleaned up). Similarly, in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006), the Court explained 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” (cleaned up); see also *Elrod v. Burns*, 427 U.S. 347, 358 n.11 (1976) (noting the Court’s “[p]rotection of First Amendment interests” by “invalidation of conditions”); *Perry v. Sindermann*, 408 U.S. at 597 (the 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”). The Court recently “reaffirm[ed] [that] Government officials cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors.” *Nat’l Rifle Ass’n of Am. v. Vullo*, 602 U.S. 175, 180 (2024).

B. Avoiding the burdens, costs, risks, and reputational harm of an SEC enforcement action by acceding to an SEC consent judgment is a significant governmental benefit

The SEC wields tremendous power over corporations and individuals, especially in the enforcement arena. During FY 2025 alone, the Commission filed 303 “standalone” enforcement actions and obtained orders for monetary relief totaling \$17.9 billion. SEC Press Release, *SEC Announces Enforcement Results for Fiscal Year 2025* (Apr. 7, 2026).²

As an independent regulatory agency, “the SEC retains complete discretion over when, whether and to what extent to investigate and bring an action against an individual or entity.” *Molchatsky v. United States*, 713 F.3d 159, 162 (2d Cir. 2013); *see also* Stephen J. Choi, *Measuring the Impact of SEC Enforcement*

² <https://www.sec.gov/newsroom/press-releases/2026-34>.

Decisions, 89 Fordham L. Rev. 385, 385-86 (2020) (“[T]he SEC enjoys wide discretion in its enforcement decisions, including decisions on whether to bring an action at all, against whom to bring the action, the timing of the initiation and resolution of the action, the venue of enforcement (civil court or an administrative proceeding), and the remedy sought from enforcement.”).³ Under the auspices of the SEC’s Enforcement Division, “[i]nvestigation and enforcement are two stages of the same administrative process . . . the SEC blends the two activities in a variety of ways.” *Cochran v. SEC*, 20 F.4th 194, 228 (5th Cir. 2021) (Oldham, J., concurring), *aff’d sub nom. Axon Enterprise, Inc. v. FTC & SEC v. Cochran*, 598 U.S. 175 (2023). The Enforcement Division’s “lengthy investigation-and-enforcement amalgam” extends from commencement of investigations to prosecution of alleged violations of the securities laws. *Id.* at 228-29.

There can be no dispute that “the SEC places substantial pressure on targets” to settle rather than litigate. *Id.* at 230. To describe an enforcement target’s consent judgment with the SEC as a valuable governmental benefit is an understatement. Few defendants have the resources or courage to “bet the farm” by litigating SEC enforcement complaints and

³ In *SEC v. Jarkesy*, 603 U.S. 109 (2024), the Court held that when the SEC seeks civil penalties for securities fraud, the defendant is entitled to a jury trial.

risk devastating financial penalties, disgorgement of profits, lifetime industry bars, and other draconian sanctions. *Id.* Even more important, the vast majority of SEC enforcement targets have a compelling need to avoid or mitigate the burdens and costs of litigation, and the attendant, and often irreparable, reputational harm to both businesses and individuals.

Given these circumstances, nearly all SEC civil enforcement targets have “no actual choice” but to settle enforcement complaints by acceding to SEC-dictated consent judgments that incorporate the Gag Rule. Smolla, *supra*, at 13. But the steep price that the SEC requires enforcement targets to pay for receiving the benefit of a consent judgment is their everlasting *silence*. “Such decrees are inherently coercive, placing them in manifest tension with the doctrine of ‘Unconstitutional Conditions.’” *Id.* at 3.

C. “Consent” is irrelevant to whether government-imposed conditions are constitutional

1. The Ninth Circuit’s opinion—which fails to acknowledge the unconstitutional conditions doctrine—hinges on the notion that SEC enforcement targets have a “choice” about whether to enter into an SEC consent judgment that incorporates the Gag Rule. *See* Pet. App. 20a-22a. Although this premise defies reality, it is irrelevant to the operation of the unconstitutional conditions doctrine.

The doctrine applies where an individual or company must relinquish a constitutional right as a condition for receiving a governmental benefit. *See Koontz*, 570 U.S. at 606. “Consent” to such a condition is irrelevant; it does not magically transform an unconstitutional condition into one that is constitutional. *See* Philip A. Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 Va. L. Rev. 479 (2012). SEC consent judgments do not get “a free pass from First Amendment scrutiny when the word ‘consent’ is appended to them.” Smolla, *supra*, at 3. Even if an enforcement target’s accession to a consent judgment somehow were construed as voluntary, the unconstitutional conditions doctrine still would render it invalid if the non-negotiable Gag Rule that it incorporates violates the First Amendment.

Professor Hamburger’s often-cited article on *The Irrelevance of Consent* explains that “consent is irrelevant for conditions that go beyond the government’s power.” Hamburger, *supra*, at 480. He asks:

Can consent justify the government in exceeding its constitutional power?

The key is to distinguish between the role of consent within and beyond the government’s constitutional authority. . . . Undoubtedly the government can use consent within its authority, as defined by

its various powers; but where these powers are limited, either in themselves or through the [Constitution's] rights and structures, the question is whether the government can rely on consent to justify going beyond these limits and thus beyond its authority. . . .

The answer can be found in the simple recognition that the Constitution is a law. Being a law and, indeed, a law made by the people, *its limits are not alterable by private or state consent*, but only by the consent of the people. . . . Accordingly, the *government cannot escape its constitutional bounds by getting, let alone purchasing, the consent of any lesser body*, whether individuals, private institutions, or states. For such purposes, *their consent is irrelevant*.

Id. at 483 (emphasis added).

In other words, “waiver or voluntary consent is *never* sufficient to defeat an unconstitutional conditions claim.” Richard A. Epstein, *Confiscation by Consent—The warped economics of price regulation for pharmaceuticals under the Inflation Reduction Act*, 30 Texas Rev. L. & Pol. (forthcoming) (manuscript at 14).⁴ “[T]he doctrine of unconstitutional conditions is

⁴ Manuscript (posted Apr. 28, 2025) available at <https://tinyurl.com/2sr6x69x>.

always tied to the *irrelevance of consent.*” *Id.* (manuscript at 30) (emphasis added). The unconstitutional conditions doctrine thus establishes that the government cannot alter, much less ignore, the unalienable rights confirmed by the Bill of Rights on the theory that an individual or corporation has consented to forgo them in return for receiving a governmental benefit. *See Fisher, supra*, at 1181.

2. “[T]here is a risk in allowing the government to accomplish indirectly that which it cannot do directly. If a constitutional provision prohibits the government from violating a right, why can the government condition a valuable benefit on a person forsaking that right?” Levine, *supra* at 258; *see also* Ryan C. Williams, *Unconstitutional Conditions and the Constitutional Text*, 172 U. Pa. L. Rev. 747, 800 (2024) (“If the government conditions access to a particular benefit on waiver of a nonwaivable right, then the condition cannot be met without violating the Constitution.”). The First Amendment certainly would preclude the SEC from demanding, as part of a litigated rather than settled enforcement complaint, that the defendant be silenced forever about disputing the complaint’s allegations.

Legal scholars debate the exact contours of the unconstitutional conditions doctrine. But with the growth of the administrative state,

the threat from unconstitutional conditions [has] become of central importance, for they have become a *means*

of evading much of the Constitution, including the Bill of Rights. Only by recognizing this can one begin to understand the peril of casually assuming that the government can purchase its way out of constitutional rights and other limits.

Hamburger, *supra*, at 491 (emphasis added). The unconstitutional conditions doctrine is “charged with safeguarding liberty in the face of government’s ubiquitous programming and extraordinary resources,” and “is necessary to ensure that governments cannot circumvent constitutional imperatives simply by purporting to ask rather than tell.” Randy J. Kozel, *Leverage*, 62 B.C. L. Rev. 109, 124 (2021).

The time has come for the Court to apply the unconstitutional conditions doctrine to the SEC’s Gag Rule and hold that it violates the First Amendment’s guarantee of freedom of speech.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 2026