No. 25-1100

# In the Supreme Court of the United States

THOMAS J. POWELL, ET AL.,

*Petitioners*,

*v.*

SECURITIES AND EXCHANGE COMMISSION,

*Respondent*.

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

## BRIEF OF FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION, FREEDOM OF THE PRESS FOUNDATION, INSTITUTE FOR FREE SPEECH, AND THE RUTHERFORD INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS


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## INTEREST OF *AMICI CURIAE*[*]

The **Foundation for Individual Rights and Expression** (FIRE) is a nonpartisan nonprofit that defends the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended First Amendment rights nationwide without regard to speakers' views through public advocacy, strategic litigation, and participation as *amicus curiae* in cases that implicate expressive rights. *See, e.g.*, *D.A. v. Tri County Area Schs.*, No. 25-1143 (U.S. pet. filed Mar. 26, 2026); *Stanford Daily Publ'g Corp. v. Rubio*, No. 5:25-cv-06618, 2026 WL 125241 (N.D. Cal. Jan. 16, 2026); *Trump v. Selzer*, No. 4:24-cv-00449 (S.D. Iowa dismissed Dec. 2, 2025); *Volokh v. James*, 148 F.4th 71 (2d Cir. 2025); *Novoa v. Diaz*, 641 F. Supp. 3d 1218 (N.D. Fla. 2022), *appeal docketed*, No. 22-13994 (11th Cir. argued June 14, 2024).

The **Freedom of the Press Foundation** (FPF) is a nonpartisan, nonprofit organization founded in 2012 with a mission to protect public interest journalism. FPF is a prominent advocate of free speech and press freedom that advocates for the rights of reporters and whistleblowers. FPF also monitors press freedom violations in the United States and advocates for a free

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[*] Pursuant to Supreme Court Rule 37, *amici curiae* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of the intention of *amici* to file this brief.

press and the public's right to information. FPF has a strong interest in ensuring that journalists and news organizations can do their jobs effectively and that a free press continues to flourish.

The **Institute for Free Speech** (IFS) is a nonpartisan, nonprofit organization dedicated to the protection of the First Amendment rights of speech, assembly, petition, and the press. Along with scholarly and educational work, IFS represents individuals and civil society groups in litigation securing their First Amendment liberties.

**The Rutherford Institute** is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated, and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The First Amendment's guarantees of speech, press, assembly, and petition operate together to ensure that citizens can scrutinize and challenge those who govern them. Since the Magna Carta, the right to petition has been understood as a critical mechanism by which the people hold their government to account.

Speech, press, and assembly support that end by enabling citizens to form, develop, and share views about public affairs. Together, these rights reflect a foundational prohibition: The government may not manipulate public discourse to secure its account of its own conduct against contestation.

The SEC's gag rule violates that prohibition on an enormous scale. For more than fifty years, the gag rule has permanently silenced the people best positioned to speak about the SEC's enforcement practices: the individuals and entities investigated, charged, and induced into settlement. The rule thus systematically eliminates an entire category of firsthand experience from the marketplace of ideas.

The resulting democratic harm extends well beyond any individual settling defendant. When the government permanently silences those it has pursued—as the target's price of ending that pursuit—it severs the information flow on which democratic self-governance depends. It deprives citizens of the transparency necessary to learn of government overreach, denies the press the sources it needs to perform its institutional function, and reduces the right to petition to an exercise uninformed by the very experience most relevant to it. This is true irrespective of whether individual defendants may waive constitutional rights as a part of settlement.

A government that can silence its own critics has secured for itself exactly what the First Amendment forbids. The Court should grant the petition and say so.

## ARGUMENT

### I. THE FIRST AMENDMENT'S INTERLOCKING GUARANTEES CREATE THE PRECONDITIONS FOR DEMOCRATIC ACCOUNTABILITY

The "cognate rights" of petition, speech, press, and assembly work together to secure "the public's exercise of its sovereign authority." *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *McDonald v. Smith*, 472 U.S. 479, 489 (1985) (Brennan, J., concurring). The Framers accordingly saw the First Amendment "both as an end and as a means." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). It is an end "because the freedom to think and speak is among our inalienable human rights," but it is also a means because "the freedom of thought and speech is 'indispensable to the discovery and spread of political truth.'" *303 Creative LLC v. Elenis*, 600 U.S. 570, 584 (2023) (quoting *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring)). "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that it was adopted in part to protect the free discussion of government affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *see also Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 478 (2022).

#### A. The Right To Petition Is A Central Check On Government Power

Among the cognate rights, the right to petition occupies a distinctive role. While speech, press, and assembly equip citizens to form, develop, and share views about public affairs, petition is the mechanism by which

those views reach the government as a demand for accountability. Its efficacy depends on those with direct knowledge being free to speak.

The right traces its lineage to Chapter 61 of the Magna Carta, which established a multi-step petitioning process as the charter's sole enforcement mechanism to call the king to account for breach of his commitments. *See* Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 Hastings Const. L.Q. 15, 22 & n.38 (1993); Norman B. Smith, *"Shall Make No Law Abridging ..."*, 54 U. Cin. L. Rev. 1153, 1155 (1986). The English Bill of Rights of 1689 further protected the right, declaring "all commitments and prosecutions for [] petitioning are illegal." 1 W. & M. 2d Sess., ch. 2, § 5 (Eng. 1689).

By the time of the American Revolution, the Declaration of Independence cited the Crown's refusal to heed petitions as a central indictment: "In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury." The Declaration of Independence (U.S. 1776). Multiple colonial charters—including those of Delaware, New Hampshire, North Carolina, Pennsylvania, and Vermont—explicitly protected the right to petition local governing bodies. Spanbauer, *supra*, at 28. Before the First Congress, James Madison declared: "[T]he people may [] publicly address their representatives, may privately advise them, or declare their sentiments by petition to the whole body; in all these ways they may communicate their will." 1 Annals of Cong. 738 (1789).

This Court has recognized that the right to petition the government for grievances is implicit in the "very idea of a government, republican in form[.]" *United States v. Cruikshank*, 92 U.S. 542, 552 (1876). The petition right "allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives," *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 388 (2011), and "extends to all departments of the Government," *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 525 (2002) (quotation omitted)—including administrative agencies, *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

The petition right thus constitutes one of "the citizenry's two constitutional means of approaching the government: periodic election and continual instruction through petitioning." Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 Yale L.J. 142, 162 (1986). While the right to vote ensures the people can replace ineffectual leaders, elections are necessarily episodic. The petition right, by contrast, operates continuously—it "not only assure[s] popular control of government, but also attach[es] to each citizen responsibility for the nation's laws[.]" *Id.*

These goals are achievable only if citizens with relevant knowledge can exercise the right. The benefits of petitioning "may not accrue if one class of knowledgeable and motivated citizens is prevented from engaging in petitioning activity." *Borough of Duryea*, 564 U.S. at 398.

### B. Speech, Press, And Assembly Are Essential To Meaningful Petitioning

The First Amendment's guarantees of speech, press, and assembly are the means by which citizens acquire, develop, and share the knowledge that meaningful petitioning requires.

The Speech Clause protects, above all else, the free flow of information on matters of public concern. The Court has been "particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions," because the "First Amendment recognizes no such thing as a 'false' idea"—even ideas that the government considers mistaken, inconvenient, or damaging to its reputation are protected. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988).

In safeguarding and preserving the marketplace of ideas, the Speech Clause protects not only speakers, but also listeners. The public has a right "to receive information and ideas," *Stanley v. Georgia*, 394 U.S. 557, 564 (1969), which is "vital to the preservation of a free society," *Martin v. City of Struthers*, 319 U.S. 141, 146-47 (1943). "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); *Moody v. NetChoice, LLC*, 603 U.S. 707, 728-29 (2024) (describing "the First Amendment's antipathy to state manipulation of the speech market").

The Press Clause serves an integral structural function in sustaining that marketplace. An informed public "is the most potent of all restraints upon misgovernment," and a "free press stands as one of the great interpreters between the government and the people."

*Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). The press enables the citizenry "to vote intelligently or to register opinions on the administration of government generally." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975). It can fulfill this function only when it has access to sources with firsthand knowledge of government conduct. *See Branzburg v. Hayes*, 408 U.S. 665, 729-30 (1972) (Stewart, J., dissenting).

The Assembly Clause reflects the same structural understanding. The right to assemble is "cognate to those of free speech and free press and is equally fundamental." *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937). Together, these guarantees supply what petition alone cannot: the information, deliberation, and shared understanding that transforms individual grievance into meaningful democratic demand.

### C. The First Amendment Prohibits Government Manipulation Of The Informational Environment On Which These Rights Depend

The interlocking operation of the "Democratic First Amendment" rests on a structural premise: "the government must remain neutral in the marketplace of ideas." *FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978); *see also* Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948). That neutrality is not an end in itself but a condition under which citizens can form views, share them, and convert them into demands for accountability. *See* Owen Fiss, *The Irony of Free Speech* (1996).

"To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 538 (1980); *Reed v. Town of Gilbert*, 576 U.S. 155, 176-77 (2015) (Breyer, J., concurring). This Court has consistently prohibited it from doing so. The government may not "choose which issues are worth discussing or debating," *Consol. Edison Co.*, 447 U.S. at 537-38 (citation modified), skew "public debate" in its "preferred direction," *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578-79 (2011); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 785-86 (1978), or "compel a person to speak its own preferred messages," *303 Creative*, 600 U.S. at 586.

That neutrality obligation reflects a constitutional judgment that the "interrelated components of the public's exercise of its sovereign authority" secured by the First Amendment, *McDonald*, 472 U.S. at 489-90 (Brennan, J., concurring), rest on the understanding that "speech concerning public affairs" is "the essence of self-government," *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964), and cannot be realized if the government is free to shape the informational environment in which it operates. Speech critical of the government lies "at the very center of the constitutionally protected area of free expression," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 292 (1964), because when citizens lack the information and ability to "discuss the public issues of the day" and "seek redress of alleged grievances," the "security of the Republic, the very foundation of constitutional government" is threatened, *De Jonge*, 299 U.S. at 365. A government that controls

what citizens can hear forecloses what they can demand, which is precisely what the First Amendment forbids.

## II. THE GAG RULE GIVES THE SEC UNCHECKED CONTROL OVER THE PUBLIC ACCOUNT OF ITS CONDUCT

Across fifty years and thousands of settlements, the SEC has ensured that its account of its enforcement actions is the only one the public may hear. Its gag rule "prohibit[s] defendants who settle civil enforcement actions without admitting [liability] from publicly 'denying the allegations in the complaint' filed against them." *SEC v. Novinger*, 40 F.4th 297, 300 (5th Cir. 2022) (quoting 37 Fed. Reg. 25,224 (Nov. 29, 1972)); *Powell v. SEC*, 149 F.4th 1029, 1044 (9th Cir. 2025). And it has justified the rule by casting its distortion of the marketplace of ideas as a virtue, not a vice.

The Commission "adopted the policy" in 1972 because it believed it was "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." 17 C.F.R. § 202.5(e); *see SEC v. Vitesse Semiconductor Corp.*, 771 F. Supp. 2d 304, 308-09 (S.D.N.Y. 2011); *see also* Rodney A. Smolla, *Why the SEC Gag Rule Silencing Those Who Settle SEC Investigations Violates the First Amendment*, 29 Widener L. Rev. 1, 9 (2023) (explaining that the rule "was adopted in response to critiques of the actions of the Commission," and in particular, because of "the agency's concerns over public perceptions of its actions"). The Commission thus justified the gag rule by reference to the impact—the "impression"—that

speech with which it disagrees would have in the public arena.

That rationale is as startling as it is shaky. For one, the gag rule applies only when the SEC agrees to settle a case; if the Commission believes it essential to demonstrate to the public that particular alleged conduct "did, in fact … occur," 17 C.F.R. § 202.5(e), it can simply prove its case on the merits. More fundamentally, silencing settling defendants as a mechanism to promote public confidence in the agency's conduct is deeply cynical. By that logic, an agency could deny a defendant any right to dispute the charges at all, on the theory that such questioning could cause the public to doubt the legitimacy of the agency's action. The SEC's position is also self-defeating; if the public knows that settling defendants are barred from criticizing the agency, the absence of such criticism is not likely to build public confidence. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) ("People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."). Compelled silence is a poor substitute for public trust.

Nevertheless, the Commission continues to defend the gag rule on the same grounds that it announced during the Nixon Administration: It warns that allowing settling defendants to speak freely would "negatively impact the public interest," which it conveniently defines as "confidence in the Commission's enforcement program." Pet. App. 37a-38a. "[T]he Commission's reputation" apparently demands this protective measure. *Id.* at 45a.

The gag rule achieves its purpose at near-universal scale. Few "can outlast or outspend the federal government," and the SEC relies on this asymmetry "as leverage to extract settlement terms they could not lawfully obtain any other way." *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 216 (2023) (Gorsuch, J., concurring). The SEC settles approximately 98 percent of its enforcement cases, and will settle only if the gag rule is in place. Luis A. Aguilar, *A Stronger Enforcement Program to Enhance Investor Protection*, SEC (Oct. 25, 2013), https://www.sec.gov/newsroom/speeches-statements/2013-spch102513laa; Letter from Vanessa Countryman, Sec'y, SEC, to Peggy Little, New Civil Liberties Alliance (Jan. 30, 2024), https://www.sec.gov/files/rules/petitions/2024/4-733-letter-013024.pdf. The rule therefore operates not as an occasional condition but as systematic suppression of an entire category of speakers: every individual and entity who resolves an enforcement action with the agency. Those speakers are precisely the people most likely to be critical of the Commission—and the people most capable of speaking knowledgeably about its enforcement practices.

The gag rule's breadth makes silence the only means of compliance. A settling defendant, under the gag rule, may not "indirectly" make, or "permit to be made," any public statement denying any allegation in the SEC's complaint, or "creat[e] the impression that the complaint is without factual basis." *E.g.*, Final Judgment as to Defendant Fernando Motta Moraes at 9, *SEC v. Moraes*, No. 22-Civ.-08343 (S.D.N.Y. Oct. 28, 2022), ECF No. 13 (Consent of Defendant Fernando Motta Moraes, ¶ 11). This language is sufficiently ambiguous as to prevent a settling defendant from ever speaking about his SEC case, or the SEC's pursuit of

it. As Judges Jones and Duncan remarked, the rule prevents even truthful statements about the Commission, as it tells defendants: "'Hold your tongue, and don't say anything truthful—ever'—or get bankrupted by having to continue litigating with the SEC." *Novinger*, 40 F.4th at 308 (Jones & Duncan, JJ., concurring).

The asymmetry the gag rule creates through its viewpoint discrimination is stark. "Nothing restrains the SEC from saying anything it pleases about a defendant. But a defendant is not permitted to say anything the defendant pleases about the SEC." Smolla, *supra*, at 10. Indeed, the SEC routinely issues press releases following the settlement of enforcement actions, promoting its own perspective while excluding others' views. *See* SEC, *Press Releases*, https://www.sec.gov/newsroom/press-releases. The result is that "[o]nce the government charges a private party, the person is labeled publicly as a law breaker," even if that is not true. Andrew N. Vollmer, *Four Ways to Improve SEC Enforcement*, 43 Sec. Reg. L.J. 333, 336 (2015).

## III. THE GAG RULE'S SYSTEMATIC SUPPRESSION OF SPEECH CREATES DEMOCRATIC HARM

By banning the "public airing of disputed facts," *Borough of Duryea*, 564 U.S. at 397-98, the gag rule denies the public information "vital to the preservation of a free society," *Martin*, 319 U.S. at 146-47. Self-governance requires that citizens be able to hear what their government would prefer they not. The public needs free access to firsthand accounts of the Commission's conduct to form an independent view of how one of the

nation's most powerful regulatory agencies exercises its authority. Without it, democratic deliberation is replaced with a government-curated narrative that insulates it from critique. *Cf. Bellotti*, 435 U.S. at 785-86.

That harm is neither speculative nor marginal. The SEC's enforcement authority reaches vast swaths of American economic and public life, and "[s]ociety has the right and civic duty to engage in open, dynamic, rational discourse" about it. *United States v. Alvarez*, 567 U.S. 709, 728 (2012). But the gag rule has ensured that for more than fifty years, the agency itself has shaped that understanding. The press has felt this problem acutely. It can fulfill its function of informing the public only when it has access to sources with firsthand knowledge of government conduct. The gag rule silences those sources, and news organizations, including petitioner the *Cape Gazette*, have been limited in how they can report on SEC enforcement as a result. The Ninth Circuit's observation that the longevity of the rule has occurred "seemingly without great fanfare," *Powell*, 149 F.4th at 1036, is not evidence the rule is harmless. It is evidence the rule is working as intended, producing a comprehensive, government-enforced blackout in one arena of public discourse.

The SEC and the court below insist this can all be disregarded because "[i]n proper circumstances, rights, including constitutional rights, can be waived." *Powell*, 149 F.4th at 1038; Pet. App. 10a. But the unconstitutional conditions doctrine prohibits such waiver, *see* Pet. 18-29, and, regardless, any waiver by settling defendants cannot extinguish the First Amendment interests of the public and press—interests that are not defendants' to surrender. "[T]he people lose when the

government is the one deciding which ideas should prevail." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 772 (2018). The right to receive information and ideas belongs to listeners, not speakers, and no individual waiver forecloses it. The Court made this plain in *Lamont v. Postmaster General*, 381 U.S. 301 (1965): Even where a foreign speaker had no First Amendment right of its own, the government could not burden willing recipients' access to that speech. Listener rights stand independent of speaker rights, and a speaker's waiver cannot foreclose them. *See Kleindienst v. Mandel*, 408 U.S. 753, 762-65 (1972) (First Amendment rights of domestic listeners implicated by government's exclusion of foreign speaker).

That principle applies with full force here. Whatever a settling defendant may accept, the public retains a First Amendment interest in receiving the firsthand account of that defendant's experience with the SEC. The waiver doctrine addresses what defendants may surrender; it says nothing about what the public loses. And what the public loses here—an entire category of firsthand knowledge about the exercise of federal power—is not a harm any individual defendant can consent to surrender.

The SEC's justification for the rule—protecting public confidence in its enforcement program—is similarly misguided. *See supra* at 10-11. Suppressing dissent has never been an effective form of boosting public confidence, as British colonial officials in America learned two and a half centuries ago. Under the First Amendment adopted in response to those failed efforts, a government entity may not "choose which issues are worth discussing or debating." *Consol. Edison Co.*, 447 U.S. at 537-38 (internal quotation omitted). Nor can it

invoke a self-serving definition of the public interest it purports to serve. The First Amendment forbids giving the SEC "a free hand to vindicate its own idiosyncratic conception of the public interest." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 395 (1969).

Whatever the intentions behind the SEC's approach, the First Amendment's answer is clear. "The remedy for speech that is false is speech that is true. This is the ordinary course in a free society." *Alvarez*, 567 U.S. at 727; *see Whitney*, 274 U.S. at 377 (Brandeis, J., concurring) ("[T]he remedy to be applied is more speech, not enforced silence."); *Chiles v. Salazar*, No. 24-564, slip op. at 23 (U.S. Mar. 31, 2026) (recognizing that the First Amendment "reflects ... a judgment that every American possesses an inalienable right to think and speak freely, and a faith in the free marketplace of ideas as the best means for discovering truth"). The SEC should establish its integrity through its actions, not by distorting discussion about them. That is good for both the SEC and the public.

"On the spectrum of dangers to free expression," "there are few greater than allowing the government to change the speech of private actors in order to achieve its own conception of speech nirvana." *Moody*, 603 U.S. at 741-42. A rule engineered fifty-four years ago to give the government a systemwide monopoly on the public narrative of its own conduct is antithetical to the First Amendment. The gag rule is a constitutional aberration, and it has persisted long enough.

## CONCLUSION

The Court should grant the petition and thereafter reverse the judgment of the court of appeals.

Respectfully submitted.

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