No. 21-1284

IN THE
Supreme Court of the United States

BARRY D. ROMERIL,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

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

BRIEF OF THE COMPETITIVE ENTERPRISE INSTITUTE, CATO INSTITUTE, INSTITUTE FOR JUSTICE, AND INSTITUTE FOR FREE SPEECH AS *AMICI CURIAE* SUPPORTING PETITIONER

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TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS AND IS PROFOUNDLY WRONG. 4

II. GRANTING THE PETITION IS THE ONLY WAY TO PREVENT THE CONTINUED VIOLATION OF FIRST AMENDMENT RIGHTS. 8

III. THE PUBLIC HAS NOT BEEN SERVED BY THE PROLIFERATION OF COMMISSION GAG ORDERS. 12

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Cases

44 Liquormart, Inc. v. *Rhode Island*,
517 U.S. 484 (1996).....5

Arthur Andersen LLP v. *United States*,
544 U.S. 696 (2005).....10

Bd. of Cnty. Comm'rs v. *Umbehr*,
518 U.S. 668 (1996).....1

Boyd v. *United States*,
116 U.S. 616 (1886).....7, 8

Brumfield v. *La. State Bd. of Educ.*,
806 F.3d 289 (5th Cir. 2015).....8

Cato Inst. v. *SEC*,
4 F.4th 91 (D.C. Cir. 2021) 2, 4

Cent. Vt. Pub. Serv. Corp. v. *Herbert*,
341 F.3d 186 (2d Cir. 2003) 7

Chaffin v. *Stynchcombe*,
412 U.S. 17 (1973).....6

Citizens United v. *FEC*,
558 U.S. 310 (2010).....7

City of Arlington v. *FCC*,
569 U.S. 290 (2013).....9

Collins v. *Yellen*,
141 S. Ct. 1761 (2021).....7

Digital Realty Tr., Inc. v. *Somers*,
138 S. Ct. 767 (2018).....13

Flannery v. *SEC*,
810 F.3d 1 (1st Cir. 2015).....13

Free Enter. Fund v. *Pub. Co. Accounting Oversight Bd.*,
561 U.S. 477 (2010).....10

Frost v. *Corp. Comm'n*,
278 U.S. 515 (1929).....7

In re G.A.D., Inc.,
340 F.3d 331 (6th Cir. 2003).....7

Jackson v. *FIE Corp.*,
302 F.3d 515 (5th Cir. 2002).....7

Jarkesy v. *SEC*,
803 F.3d 9 (D.C. Cir. 2015).....11

Koontz v. *St. Johns River Water Mgmt. Dist.*,
570 U.S. 595 (2013).....5, 6

Ex parte Lange,
85 U.S. (18 Wall.) 163 (1873).....7

Legal Services Corp. v. *Velazquez*,
531 U.S. 533 (2001).....5

Montgomery v. *Louisiana*,
577 U.S. 190 (2016).....7

Mt. Healthy City Sch. Dist. Bd. of Educ. v. *Doyle*, 429 U.S. 274 (1977) 5

N.Y. Times Co. v. *Sullivan*, 376 U.S. 254 (1964) 4

Perry v. *Sindermann*, 408 U.S. 593 (1972) 5

Philos Tech., Inc. v. *Philos & D, Inc.*, 645 F.3d 851 (7th Cir. 2011) 7

Regan v. *Taxation With Representation of Wash.*, 461 U.S. 540 (1983) 5

Saad v. *SEC*, 873 F.3d 297 (D.C. Cir. 2017) 12

Seila Law LLC v. *CFPB*, 140 S. Ct. 2183 (2020) 9, 10

Ex parte Siebold, 100 U.S. 371 (1879) 7

Thomas v. *Collins*, 323 U.S. 516 (1945) 2

Tilton v. *SEC*, 824 F.3d 276 (2d Cir. 2016) 11

United Student Aid Funds, Inc. v. *Espinosa*, 559 U.S. 260 (2010) 8

Constitutional Provisions

U.S. Const. art. III, § 3 7

U.S. Const. art. IV, cl. 2 7

Statutes

15 U.S.C. § 78u-2 11

15 U.S.C. § 78u-3 11

15 U.S.C. § 78u-6(a)(6) 13

15 U.S.C. § 78u(d) 11

Rules

Fed. R. Civ. P. 60(b)(4) 3, 7, 8

Regulations

17 C.F.R. § 201.100 12

17 C.F.R. § 201.411(a) 12

Administrative Proceedings

In re John P. Flannery,
2014 WL 7145625
(SEC Dec. 15, 2014) 12

In re John Thomas Capital Mgmt. Grp.,
2013 WL 1180836
(SEC Mar. 22, 2013) 11

In re John Thomas Capital Mgmt. Grp.,
2015 WL 728006
(SEC Feb. 20, 2015) 11

In re John Thomas Capital Mgmt. Grp.,
2020 WL 5291417
(SEC Sept. 4, 2020) 11

In re State Street Bank & Trust Co.,
2010 WL 421154 (SEC Feb. 4, 2010).....13

Other Authorities

8 Annals of Cong. 2099 (1798) 9

John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models*,
101 Yale L.J. 1875 (1992) 11

Jean Eaglesham, *Fairness of SEC Judges Is in the Spotlight*,
Wall St. J. (Nov. 22, 2015),
on.wsj.com/3p30kkI.....11

Jean Eaglesham, *SEC Is Steering More Trials to Judges It Appoints*,
Wall St. J. (Oct. 21, 2014),
on.wsj.com/3p0IRJK 11

Excerpts From Exchange of Letters,
N.Y. Times (May 2, 2003),
tinyurl.com/3w5dteda 14

Exec. Order No. 13,843,
83 Fed. Reg. 32,755 (July 13, 2018) 11

James Madison, *National Gazette*, Dec. 19, 1791 10

Brian Mahoney, *SEC Could Bring More Insider Trading Cases In-House* (June 11, 2014), bit.ly/3BILzap 12

Office of Investigations, SEC, *Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme* (Aug. 31, 2009).....14

Russell G. Ryan, *Get the SEC Out of the PR Business*, Wall St. J. (Nov. 30, 2014), on.wsj.com/3FYeium 10

SEC Press Release 16-270 (Dec. 20, 2016), 2016 WL 7367640 13

Mary Jo White, Chair, SEC, *A New Model for SEC Enforcement* (Nov. 18, 2016), tinyurl.com/ul7njec 1

INTEREST OF *AMICI CURIAE*

The Competitive Enterprise Institute, Cato Institute, Institute for Justice, and Institute for Free Speech are nonprofit 501(c)(3) organizations dedicated to promoting the principles of limited government, individual liberty, or freedom of speech.[1] To those ends, *Amici* want to oppose overreach by the Securities and Exchange Commission in the settlement context. They want to hear from those—like Petitioner Barry Romeril—who have been subject to the Commission's "bold and unrelenting" enforcement tactics. Mary Jo White, Chair, SEC, *A New Model for SEC Enforcement* (Nov. 18, 2016), tinyurl.com/ul7njec. And they want to publicize those stories in *Amici*'s scholarship, commentary, and congressional testimony.

But *Amici* cannot do so. And neither can anyone else, because for the last fifty years the SEC has leveraged its enormous enforcement discretion to coerce thousands of defendants into agreeing to lifetime gag orders barring them from publicly questioning the veracity—and thus the legitimacy—of the Commission's cases against them. This systematic silencing of the Commission's critics has impoverished the public debate. And it has deprived *Amici*—and everyone else—of the right to hear from those who are "in the best position to know" of the government's abuses. *Bd. of Cnty. Comm'rs* v. *Umbehr*, 518 U.S. 668, 674 (1996).

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[1] All parties received timely notice of and have consented to the filing of this brief. *Amici* affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

Amici respectfully urge this Court to grant certiorari and reopen the public debate. Mr. Romeril has a right to speak, and *Amici* have a right "to hear what he [has] to say." *Thomas* v. *Collins*, 323 U.S. 516, 534 (1945).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Securities and Exchange Commission cannot seriously dispute that the order below violates the First Amendment. An American citizen named Barry Romeril is subject to a judicial order that exposes him to ruinous fines and a potential prison sentence if—*and only if*—he publicly criticizes the Commission. If he *remains silent* about the Commission's enforcement conduct for the rest of his life, then his ordeal with this powerful federal agency is over. The same is true if he *praises* the Commission's investigation of him. But if he dares to *criticize* the Commission by making (or even "permit[ting]" anyone else to make) "any public statement" that so much as "creat[es] the impression" that the Commission abused its powers by sanctioning him "without factual basis," all bets are off. Pet. App. 37. Backed by the judgment of an Article III court, the Commission can seek to have him imprisoned, *see Cato Inst.* v. *SEC*, 4 F.4th 91, 95 (D.C. Cir. 2021), and socked with nearly $2 million in additional fines, *see* SEC Opp'n to Mot. for Relief from J. 20 & n.3, 24, No. 03-cv-4087 (S.D.N.Y. 2019), ECF No. 31. And to what end?

The gag order appended to the judgment below does not even purport to concern itself with investor protection, the SEC's traditional charge. Indeed, the Commission's own counsel admits that Mr. Romeril can solicit investors by telling them in "*private*" conversations that the agency's allegations were entirely

fabricated. SEC Opp'n to Mot. for Relief from J. 23, No. 03-cv-4087 (S.D.N.Y. 2019), ECF No. 31 (emphasis added). The one thing—*the only thing*—Mr. Romeril cannot do is share with the "public" (including Congress) his view that the Commission has sanctioned an innocent man. *Id.* A more obvious attempt to suppress public criticism of government officials could scarcely be imagined.

Remarkably, the Second Circuit upheld the district court's unconstitutional order. *See* Pet. App. 12. But it did so only by ignoring the unconstitutional conditions doctrine. The unconstitutional conditions doctrine bars the government from manipulating incentives to coerce an individual to surrender a constitutional right. Yet that is exactly what the Commission did here. It offered various "benefits" in the form of investigatory "concessions" in exchange for a promise to refrain from criticizing the SEC for life. SEC Opp'n to Mot. for Relief from J. 11, No. 03-cv-4087 (S.D.N.Y. 2019), ECF No. 31. That is flagrantly unconstitutional.

And for that reason, the Second Circuit should have set Mr. Romeril's lifelong gag aside. Federal Rule of Civil Procedure 60(b)(4) requires courts to set aside orders that are "void." And a court order that itself violates the First Amendment by locking into place an agency's unconstitutional condition is unquestionably void. In holding otherwise, the Second Circuit effectively insulated the Commission from all accountability, not only in the court of public opinion but also in a court of law.

It is thus left to this Court to stop the Commission's continued trampling of First Amendment rights. Turning to the political branches for a solution is not an option because the Commission's gag orders

prevent public debate and even bar complaints to Congress. *See* SEC Opp'n to Mot. for Relief from J. 23, No. 03-cv-4087 (S.D.N.Y. 2019), ECF No. 31 (explaining that Mr. Romeril is free to "petition 'appropriate government bodies'" "so long as he does not" tell anyone that the Commission sanctioned an innocent person).

These ever-proliferating gag orders have not served the public or the Commission. As a result of these gag orders, Congress has less accurate information to oversee the activities of the administrative state. SEC officials face less scrutiny, both at the SEC and when they seek higher office. And the Commission's policing of "troubling" statements reported in the press, in alleged violation of these gag orders, distracts it from rooting out actual misconduct.

This Court's intervention is warranted.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS AND IS PROFOUNDLY WRONG.

A. There can be no serious dispute that the district court's gag order violates the First Amendment. The order threatens to imprison an American citizen if he makes certain statements that are critical of a powerful federal agency. *See Cato Inst.*, 4 F.4th at 95 (violation of the order is "punishable by criminal contempt"). In no way is that constitutional. *See* Pet. 13–23; *see also N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964) (recognizing our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials").

The Second Circuit blessed this suppression anyway—on the ground that Mr. Romeril "consented" to it when he agreed to settle the Commission's charges against him. Pet. App. 12. But that disregards the unconstitutional conditions doctrine and decades of this Court's precedents enforcing it.

The unconstitutional conditions doctrine "vindicates the Constitution's enumerated rights by preventing the government" from wielding its discretionary authority to manipulate incentives to "coerc[e] people into giving them up." *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). So even where the "government is under no obligation to provide a person . . . a particular benefit," the government may not "condition[ ]" the "conferral of [that] benefit . . . on the surrender of a constitutional right." *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 513 (1996).

Thus, in *Perry* v. *Sindermann*, 408 U.S. 593 (1972), for example, the Court held that the First Amendment forbids the government from conditioning the renewal of an employee's contract on his agreement to refrain from criticizing the government. *Id.* at 597–98; *accord Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 283 (1977). And in *Legal Services Corp.* v. *Velazquez*, 531 U.S. 533 (2001), the Court held that the government cannot condition the funding of certain legal services on an agreement to refrain from raising specific legal arguments. *Id.* at 546–49. As the Court explained, the unconstitutional conditions doctrine bars the government from selectively withholding benefits to attempt to "suppress[ ] . . . ideas thought inimical to the Government's own interest." *Id.* at 549 (citing *Regan* v. *Taxation With Representation of Wash.*, 461 U.S. 540, 548 (1983)).

That is exactly what the Commission is doing here. As the agency's lawyers argued below, "[i]f [Mr.] Romeril wanted to deny the Commission's allegations against him"—if he wanted to retain the right to speak on a matter of immense personal and political importance—"he did not have to accept the benefits that accrue to defendants from compromise . . . . [D]efendants like [Mr.] Romeril . . . often seek and receive concessions concerning the violations to be alleged in the complaint" and other "administrative consequences" in exchange for agreeing to the Commission's terms. SEC Opp'n to Mot. for Relief from J. 11, No. 03-cv-4087 (S.D.N.Y. 2019), ECF No. 31. That is a textbook example of trading "benefits" in exchange for an agreement to refrain from engaging in government-critical speech.

The Second Circuit ignored this defect and this Court's unconstitutional-conditions precedents by observing that parties often "waive their rights," such as the right to a trial, in "resolving legal proceedings," Pet. App. 12—but that is beside the point. Waivers of procedural rights have an "essential nexus" to the settlement itself. *Koontz*, 570 U.S. at 606. There can't be a settlement with a jury trial, for example—waiver of that right is "inevitable" in any compromise. *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 31 (1973). Here, in contrast, the Commission sought and obtained a waiver of First Amendment rights that has nothing to do with effectuating the settlement or furthering any even conceivably legitimate government interest. The Commission has no business policing the public debate on the agency's conduct, and this Court should say so.

B. The Second Circuit should have set the unconstitutional gag order aside. Federal Rule of Civil Procedure 60(b)(4) requires courts to set aside a "void" order. *Cent. Vt. Pub. Serv. Corp.* v. *Herbert*, 341 F.3d 186, 189 (2d Cir. 2003); *accord*, *e.g.*, *Philos Tech., Inc.* v. *Philos & D, Inc.*, 645 F.3d 851, 855 (7th Cir. 2011); *In re G.A.D., Inc.*, 340 F.3d 331, 335 (6th Cir. 2003); *Jackson* v. *FIE Corp.*, 302 F.3d 515, 522 (5th Cir. 2002). A judicial order that itself violates the Constitution *is* void.

The Constitution is the "supreme Law of the Land," U.S. Const. art. IV, cl. 2, and it "automatically displaces any conflicting . . . provision from the moment of the provision's enactment," *Collins* v. *Yellen*, 141 S. Ct. 1761, 1788–89 (2021). As a result, an "unconstitutional provision is never really part of the body of governing law" at all, *id.*, and is "a nullity" from day one, *Frost* v. *Corp. Comm'n*, 278 U.S. 515, 526–27 (1929); *see*, *e.g., Montgomery* v. *Louisiana*, 577 U.S. 190, 203–04 (2016) (an "unconstitutional law is void," and a conviction under it "is not merely erroneous, but is illegal and void" (quoting *Ex parte Siebold*, 100 U.S. 371, 376 (1879))).

Court orders are no exception. "Courts, too, are bound by the First Amendment." *Citizens United* v. *FEC*, 558 U.S. 310, 326 (2010). And their unconstitutional decrees are as void as any other governmental actor's. In *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873), for example, this Court observed that a "judgment of attaint" on treason, "whereby the heirs of the criminal could not inherit [the criminal's] property," would be "void as to the attainder, because in excess of the authority of the court, and forbidden by [Article III, § 3 of] the Constitution." *Id.* at 176–77. Likewise, in *Boyd* v. *United States*, 116 U.S. 616 (1886), the

Court held that an order compelling a defendant to produce evidence to be used against himself—in violation of the defendant's rights under the Fifth Amendment—is "unconstitutional and void." *Id.* at 638.

The gag order here is similarly void, and Mr. Romeril should have been freed from its effect.

The Second Circuit read this Court's decision in *United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260 (2010), as narrowing the concept of voidness, at least in the Rule 60(b)(4) context, but that is not accurate. In *Espinosa*, the Court expressly left open "the precise circumstances" in which a judgment would be "void." 559 U.S. at 271; *see also Brumfield* v. *La. State Bd. of Educ.*, 806 F.3d 289, 301 (5th Cir. 2015) (observing that *Espinosa* had "not definitively interpreted" Rule 60(b)(4)). And it "express[ed] no view" on whether a violation of certain *statutory* "conditions"—conditions that provided that certain "debts are not dischargeable under any circumstances"—could render a judgment "void." *Espinosa*, 559 U.S. at 273 n.10. It is inconceivable that this Court, without comment, would have held that *constitutional* errors do not render a judgment void, while having "no view" on mere *statutory* transgressions. *Id.*

The law is what it has always been: a judicial order that violates the Constitution is void—the order is "so affected by a fundamental infirmity" that it must be set aside. *Espinosa*, 559 U.S. at 270. The Second Circuit's contrary holding is profoundly wrong.

II. GRANTING THE PETITION IS THE ONLY WAY TO PREVENT THE CONTINUED VIOLATION OF FIRST AMENDMENT RIGHTS.

For fifty years, the Commission has systematically leveraged its enforcement discretion to coerce

thousands of Americans in to agreeing to lifetime gag orders. *See* SEC Mem. in Support of Mot. to Dismiss 2, *Cato Inst.* v. *SEC*, No. 19-cv-47 (D.D.C. 2019), ECF No. 12-1 (these orders "number in the thousands"); *see also* Pet. App. 5. Only this Court can put a stop to it. And now is the time to do so. The Commission has been gagging defendants, without interruption, for five decades, and this is the first and only petition to reach this Court. The Court should grant it.

A. There is no chance the Commission will fix the problem itself. When a federal agency's rationale for speech suppression echoes that of the proponents of the Sedition Act—arguing that disfavored speech will "undermine confidence in the [government's] program by creating an unfair impression" of the government's activities, SEC Opp'n to Mot. for Relief from J. 20, No. 03-cv-4087 (S.D.N.Y. 2019), ECF No. 31—there is no hope for self-correction. *Cf.* 8 Annals of Cong. 2099 (1798) (similarly pressing for "legal restraint[s]," in the form of the Sedition Act, to stop "scandalous representations" from unfairly "rob[bing]" the government of "public confidence").

B. A political solution is not in the cards either. The Commission already operates "outside the traditional executive departments," giving it a significant "practical independence" from the Nation's elected representatives. *City of Arlington* v. *FCC*, 569 U.S. 290, 314 (2013) (Roberts, C.J., dissenting). Its Commissioners are "neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is." *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183, 2203 (2020). The agency's ability to coerce the lifetime silence of nearly every target of its Enforcement Division does not "merely add" to this insulation from political accountability, "but transforms

it." *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 496 (2010). The gag orders eviscerate one of the last checks on the Commission's power: speech capable of generating public outrage and calls for reform. *See* James Madison, *National Gazette*, Dec. 19, 1791 ("Public opinion sets bounds to every government and is the real sovereign in every free one."). This extreme, unprecedented level of insulation from "political accountability" poses a serious threat to "individual liberty," warranting this Court's immediate attention. *Seila Law*, 140 S. Ct. at 2219 (Thomas, J., concurring).

C. The realities of the administrative process all but ensure that this coercion can continue at full pace.

The Commission has enormous, virtually unchecked enforcement powers. The SEC can drag out an investigation for essentially as long as it wishes, driving the target's reputation into the ground. The Commission can also charge whatever it likes—knowing that certain allegations, such as "fraud," will destroy a company's reputation with investors, dry up its access to capital, scare away its business partners and customers, and impose potentially crippling collateral consequences, years before the target could even dream of seeing the inside of a courtroom. *Cf. Arthur Andersen LLP* v. *United States*, 544 U.S. 696 (2005). At the same time, the Commission can amplify its message—and further destroy the target's reputation—with whatever public statements the agency wishes to make in its self-serving, one-sided, and often misleading press releases. *See* Russell G. Ryan, *Get the SEC Out of the PR Business*, Wall St. J. (Nov. 30, 2014), on.wsj.com/3FYeium. That is just the start.

The Commission can pick the playing field. It can bring almost any case, not only before an independent Article III court but, alternatively, in the Commission's own in-house court system. *See*, *e.g.*, 15 U.S.C. §§ 78u(d), 78u-2, 78u-3. There are no "constrain[ts]" on the "SEC's discretion" in this regard, *Jarkesy* v. *SEC*, 803 F.3d 9, 12 (D.C. Cir. 2015), and almost no one is willing to risk a trip to the agency's in-house tribunals—and for obvious reason: it's financial suicide. *See Tilton* v. *SEC*, 824 F.3d 276, 298 n.5 (2d Cir. 2016) (Droney, J., dissenting) (it's the "equivalent to 'betting the farm'"). The Commission takes years to resolve administrative proceedings, even in those cases it purports to expedite. *Compare, e.g.*, *In re John Thomas Capital Mgmt. Grp.*, 2013 WL 1180836 (SEC Mar. 22, 2013) (initiating proceedings), *and In re John Thomas Capital Mgmt. Grp.*, 2015 WL 728006, at *2 (SEC Feb. 20, 2015) ("expedit[ing]" matter), *with In re John Thomas Capital Mgmt. Grp.*, 2020 WL 5291417 (SEC Sept. 4, 2020) (ruling in the Commission's favor seven years later). Throughout the entire process, the costs continue to mount; only the extraordinarily wealthy can afford the fight. And in the end, "the SEC always seems to win." John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models*, 101 Yale L.J. 1875, 1887 (1992); *see*, *e.g.*, Jean Eaglesham, *SEC Is Steering More Trials to Judges It Appoints*, Wall St. J. (Oct. 21, 2014), on.wsj.com/3p0IRJK (reporting SEC victories in "all" contested cases in a twelve-month span).

The Commission, after all, handpicks the judges, *see* Exec. Order No. 13,843, 83 Fed. Reg. 32,755, 32,755 (July 13, 2018), including some who have "never ruled against the agency's enforcement division," Jean Eaglesham, *Fairness of SEC Judges Is in the Spotlight*, Wall St. J. (Nov. 22, 2015), on.wsj.com

/3p30kkI. The agency writes the rules. *See*, *e.g.*, 17 C.F.R. § 201.100 *et seq.* And if a target (somehow) prevails, the Commission can always appeal to itself. *See id.* § 201.411(a). The Commission can then overrule its own judges, *increase* the fine, and even bar a target from the financial industry for life—the "securities industry equivalent of capital punishment." *Saad* v. *SEC*, 873 F.3d 297, 306 (D.C. Cir. 2017) (Kavanaugh, J., concurring); *see*, *e.g.*, *In re John P. Flannery*, 2014 WL 7145625 (SEC Dec. 15, 2014) (reversing in-house judge's ruling for the defense). It is thus no wonder that, as the Commission's then-top enforcement official has publicly boasted, when the SEC "threaten[s] administrative proceedings"—when it tells the target "it [is] something" the agency is "going to do"—the "vast majority" of targets "settle," giving the Commission whatever "remedies" it "want[s]," including a lifetime gag order. Brian Mahoney, *SEC Could Bring More Insider Trading Cases In-House*, Law360 (June 11, 2014), bit.ly/3BILzap (quoting then-head of Enforcement).

Absent this Court's intervention, there is no end in sight.

III. THE PUBLIC HAS NOT BEEN SERVED BY THE PROLIFERATION OF COMMISSION GAG ORDERS.

The Commission's ability to silence its critics has not served the agency or the public.

The Commission has coerced into settlements—and lifetime gag orders—individuals who are legally or factually innocent. In a 2016 case, for example, a defendant settled—and "consented" to a lifetime gag order—after the SEC alleged retaliation against a whistleblower who had reported securities fraud to a

superior, *see* SEC Press Release 16-270 (Dec. 20, 2016), 2016 WL 7367640, even though the pertinent statutory provision protected only those who provided information "to the Commission," 15 U.S.C. § 78u-6(a)(6). Soon after (in a different case between private parties), this Court unanimously held that a "plain-text reading of the statute" precluded such internal-whistleblower charges. *Digital Realty Tr., Inc.* v. *Somers*, 138 S. Ct. 767, 779, 782 (2018).

Likewise, in *In re State Street Bank & Trust Co.*, a firm settled with the Commission, agreeing to a gag order barring it (and all of its employees) from denying that it had sent "misleading" communications. 2010 WL 421154, at *10 (SEC Feb. 4, 2010). After some of the individual defendants took their case to trial, the First Circuit discovered that those same communications were "not misleading." *Flannery* v. *SEC*, 810 F.3d 1, 12 (1st Cir. 2015).

The Commission's gag orders have prevented the public from exploring how or why the Commission is coercing defendants into settlements for conduct that Article III courts have determined is perfectly legal or did not occur.

This is not just about individual defendants. The Commission's practice of silencing its critics has allowed it to present its enforcement results for congressional oversight without any opportunity for the people's elected representatives to learn all the facts. As the Commission's own lawyers admit, an innocent defendant who was coerced into settling with the Commission could not petition Congress regarding the one

fact that matters—that he "den[ies] the allegations."[2] SEC Opp'n to Mot. for Relief from J. 23, No. 03-cv-4087 (S.D.N.Y. 2019), ECF No. 31. This has not only shielded the Commission's officials from scrutiny while they were at the Commission; it has shielded them from scrutiny when they have sought Senate confirmation for even higher office throughout the government.

The Commission's gag-order obsession is bad for the agency as well. It invites agency officials to spend their time monitoring defendants' public commentary for "troubling lack of contrition," *Excerpts From Exchange of Letters*, N.Y. Times (May 2, 2003), tinyurl.com/3w5dteda, rather than attending to the agency's more important (and legitimate) business. The Commission, after all, could not find the "time[ ]" to follow up on leads that "would have uncovered" the Bernie Madoff Ponzi scheme, Office of Investigations, SEC, *Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme* 28–30 (Aug. 31, 2009)—even though it had time, that same month, to force Morgan Stanley to retract public statements that allegedly violated a gag order, *see Excerpts From Exchange of Letters*, *supra*.

The SEC can do better. Aside from the Commodity Futures Trading Commission, the SEC is the *only* agency in the entire federal bureaucracy that sees the need to suppress the speech of every settling defendant. *See* Oral Argument at 14:25, No. 19-4197 (2d Cir.

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[2] The Commission's attempt to prevent an American citizen from telling his elected representatives that the Commission has wrongfully prosecuted him blatantly violates the Petition Clause. That the Commission even thinks that this is a legitimate use of the agency's prosecutorial power underscores the need for this Court's immediate intervention.

2021) (SEC counsel failing to identify any additional agency that does this). Other agencies settle cases all the time without imposing gag orders. *See*, *e.g.*, *United States* v. *Causey*, No. CR-H-04-25(S-2) (S.D. Tex. 2005), ECF No. 604 (guilty plea of Enron official). And many even allow defendants to deny allegations in the settlement documents themselves. *See*, *e.g.*, Consent Order 4, *United States* v. *Countrywide Fin. Corp.*, No. 2:11-cv-10540 (C.D. Cal. 2011), ECF No. 4. Surely the Commission can find a way to operate without having to systematically silence thousands of people in the process.

This Court should grant certiorari and force it to do so. The Commission's flagrant defiance of the First Amendment must end.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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