

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

**Brief of the Liberty Justice Center as
Amicus Curiae Supporting Petitioners**

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Question Presented

Whether the Securities and Exchange Commission's Gag Rule violates the First Amendment.

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Interest of the Amicus Curiae

Liberty Justice Center (LJC) is a nonprofit, nonpartisan public-interest litigation firm that pursues strategic, precedent-setting litigation aimed at revitalizing constitutional restraints on government power and protecting individual rights.¹

LJC is interested in this case because it frequently litigates important cases regarding violations of Americans' First Amendment rights. For example, in *Cal. Pol'y Ctr., Inc. v. Garcia-Brower*, No. 25-6173, (9th Cir. filed Mar. 24, 2026) LJC has argued that a law that forbids an employer from talking about specific topics with its employees violates the First Amendment.

LJC also files amicus briefs on similar issues, such as its brief in *Chiles v. Salazar*, 116 F.4th 1178 (10th Cir. 2024), *reversed and remanded*, 146 S. Ct. 1010 (2026), which argued that First Amendment protections apply to professional speech. This Court agreed that the law regulated speech rather than conduct and was viewpoint discrimination prohibited by the First Amendment.

Summary of Argument

This case presents a simple but incredibly important issue worthy of this Court's decision—can the government silence constitutionally protected

¹ Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than Amicus funded its preparation or submission. All parties received timely notice of Amicus's intent to file this brief.

speech to avoid criticism of its actions? The answer should clearly be no, and yet the Securities and Exchange Commission (SEC) acts as though the answer is yes. And the court below agreed. This Court should grant the petition to confirm such action is unconstitutional and correct the errors below.

The SEC's Gag Rule prevents individuals who have settled their cases from denying—or even taking actions that imply they might be denying—the allegations against them—for life. This lifetime ban on speech infringes on fundamental constitutional rights and should not stand. It prevents the individuals who have settled from discussing their experiences. It prevents them from being able to discuss their cases to petition their government. And it prevents the press from having these individuals' perspectives when reporting on SEC activities. The Gag Rule also prevents criticism of the SEC, even in legal actions like this case and even under oath when the SEC is a party.

The reason for the Gag Rule? To prevent the SEC from looking bad. This justification is invalid and the content- and viewpoint-based discrimination imposed by the Gag Rule is unconstitutional. The government cannot suppress speech just to keep up appearances.

The decision in this case is easy, but vital. This Court should grant the petition to make clear the First Amendment prevents the government from controlling speech to try to control the narrative. This foundational principle nonetheless bears repeating.

Argument

I. **The court below erred by not analyzing the Gag Rule as a prior restraint and finding it unconstitutional.**

The SEC's Gag Rule is a prior restraint. The court below erred by not analyzing the Gag Rule as such and instead considering it a simple voluntary waiver of First Amendment rights.

“The term ‘prior restraint’ is used ‘to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.’” *Alexander v. United States*, 509 U.S. 544, 550 (1993) (quoting M. Nimmer, *Nimmer on Freedom of Speech* § 4.03, p. 4–14 (1984)) (emphasis in original removed). “[E]ven a short-lived ‘gag’ order in a case of widespread concern to the community constitutes a substantial prior restraint and causes irreparable injury to First Amendment interests as long as it remains in effect.” *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1304 (1983). Therefore, for good reason, “[t]he Supreme Court has roundly rejected prior restraint.” *Kinney v. Barnes*, 443 S.W.3d 87 at n.7 (Tex. 2014) (quoting Sobchack, W., *The Big Lebowski*, 1998).

The SEC's Gag Rule is clearly a prior restraint: it is an indefinite gag order that forbids individuals who have settled their cases with the SEC from communicating about their cases for the rest of their lives. They cannot talk about their experiences with their family, their friends, the press, or their elected representatives. They cannot discuss their situations even when advocating for change—like in this case—and even if they are under oath when the SEC is a

party. Their perspectives and experiences must be kept hidden from everyone forever.

Prior restraints on speech “are the most serious and least tolerable infringement on First Amendment rights.” *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976). In fact, “the main purpose of [the First Amendment] is ‘to prevent all such previous restraints upon publications as had been practiced by other governments.’” *Near v. Minnesota*, 283 U.S. 697, 714 (1931) (emphasis in original). To Joseph Story, “the language of this [first] amendment import[ed] no more, than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint.” 3 Joseph Story, *Commentaries on The Constitution of the United States* § 1874 (4th ed. 1883). If America’s protection for free speech means anything, it means that prior restraints are anathema to our law.

For this reason, a prior restraint “comes to this Court bearing a heavy presumption against its constitutional validity.” *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968); *Near*, 283 U.S. at 716). To be permissible under the First Amendment, a prior restraint “can be imposed only for a specified brief period and only for the purpose of preserving the status quo” and “a prompt final judicial determination must be assured.” *Id.* at 560.

As part of the SEC’s mandatory terms of settlement, individuals waive any further hearing and

agree that the decision is final. The SEC's Gag Rule is indefinite and has no judicial review and thus fails First Amendment scrutiny.

II. The court below further erred by not analyzing the other First Amendment issues with the Gag Rule.

In addition to being an unconstitutional prior restraint, the Gag Rule also infringes on other First Amendment rights. The court below erred by not addressing these at all in its decision.

A. The Gag Rule infringes on the right to petition government for redress of grievances.

By preventing individuals from discussing their SEC cases, even with their elected representatives, the Gag Rule infringes on their right to petition.

This Court has recognized the right to petition is “integral to the democratic process” because it “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). “The right to petition is in some sense the source of other fundamental rights, for petitions have provided a vital means for citizens to request recognition of new rights and to assert existing rights against the sovereign.” *Id.* at 397.

By preventing “one class of knowledgeable and motivated citizens” “from engaging in petitioning activity”—namely individuals who have settled with the SEC from discussing their experiences—the government prohibits “the public airing of disputed

facts” and “the evolution of the law by supporting the development of legal theories,” benefits which this Court has recognized flow from the right to petition. *Id.* at 397–98 (quoting *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 532 (2002)) (internal quotation marks omitted). This infringement of individuals’ right to petition should not be permitted.

B. The Gag Rule infringes on the freedom of the press.

The Gag Rule also has negative implications for the freedom of the press, which the court below also did not address.

The First Amendment protects the “right to receive information and ideas, regardless of their social worth” as it “is fundamental to our free society.” *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (citing *Winters v. New York*, 333 U.S. 507, 510 (1948)). By preventing individuals who settle with the SEC from discussing their cases, the press cannot receive information from them, thereby infringing on their freedom.

This Court has warned that “[t]he damage can be particularly great when [a] prior restraint falls upon the communication of news and commentary on current events.” *Neb. Press Ass’n*, 427 U.S. at 559. The risk of that danger is present here.

This Court has also held that “the protection against prior restraint should have particular force as applied to reporting of criminal proceedings.” *Id.* While the SEC’s investigations are not criminal, they impose penalties like those given by criminal punishment and for acts that could be criminal and

thus are of similar public interest and warrant similar First Amendment importance.

C. The Gag Rule compels speech.

The SEC's Gag Rule as enforced through settlement Gag Provisions requires that if an individual *is* to speak, they cannot say they did not admit to the allegations against them if they do not *also* say they did not deny them. This impermissibly compels speech.

The First Amendment protects against forced speech as “the choice to speak includes within it the choice of what not to say.” *Pac. Gas & Elec. Co. v. Pub. Utils. Com.*, 475 U.S. 1, 16 (1986) (citing *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 258 (1974)). The government cannot “compel a person to speak its message when he would prefer to remain silent or to force an individual to include other ideas with his own speech that he would prefer not to include.” *303 Creative LLC v. Elenis*, 600 U.S. 570, 586–87 (2023) (citing *Hurley v. Irish-American Gay*, 515 U.S. 557, 568–70 (1995); *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 63–64 (2006) (discussing cases)). And it does not matter whether the compelled statements are “statements of opinion” or “statements of ‘fact.’” *Riley v. Nat’l Fed’n of Blind*, 487 U.S. 781, 797–98 (1988). Preventing “misperceptions” is also not a sufficiently weighty reason to compel speech, especially when other alternatives, such as counter speech, are available. *See id.* at 798 (refusing to uphold a requirement for professional fundraisers to inform donors about how the money they contribute is spent, even “to dispel the alleged misperception that

the money they give to professional fundraisers goes in greater-than-actual proportion to benefit charity”).

The compelled speech required under the SEC’s Gag Rule, as implemented, epitomizes the danger this Court warned about, as it “require[s] speakers to affirm in one breath that which they deny in the next.” *Pac. Gas & Elec. Co.*, 475 U.S. at 16. Gagged individuals must say they do not deny the SEC’s allegations if they wish to say they did not admit them. This is impermissible compelled speech.

III. Even if the Gag Rule is not a prior restraint, it would be unconstitutional because the government cannot suppress speech to avoid criticism.

Regardless of what type of speech infringement the Gag Rule is, it fails First Amendment scrutiny because the government’s interest in preventing criticism is illegitimate.

D. The Gag Rule discriminates based on content.

The SEC’s Gag Rule discriminates based on content as it is focused specifically on the allegations of SEC complaints that result in settlements, and because as implemented it compels speech regarding those allegations.

“[A] speech regulation is content based if the law applies to particular speech because of the topic discussed or the idea or message expressed.” *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015). And “a speech regulation targeted at specific subject matter

is content based even if it does not discriminate among viewpoints within that subject matter.” *Id.* at 169.

Additionally, “[m]andating speech that a speaker would not otherwise make” is also “a content-based regulation of speech.” *Riley*, 487 U.S. at 795 (citing *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc.*, 418 U.S. at 256 (statute compelling newspaper to print an editorial reply “exact[s] a penalty on the basis of the content of a newspaper”)). Since the Gag Rule as applied compels speech, it is also content based for that reason.

“Content-based regulations are presumptively invalid.” *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011) (quoting *R. A. V. v. St. Paul*, 505 U.S. 337, 382 (1992)). The reason for a content-based regulation does not affect its constitutionality because “[i]nnocent motives do not eliminate the danger of censorship” and “future government officials may one day wield such statutes to suppress disfavored speech.” *Reed*, 576 U.S. at 167.

Content-based regulations must pass the “most exacting scrutiny” to be justified. *United States v. Alvarez*, 567 U.S. 709, 724 (2012) (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994)). This requires the restriction to be “‘actually necessary’ to achieve its interest” and “a direct causal link between the restriction imposed and the injury to be prevented.” *Id.* at 725 (quoting *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 799 (2011)). The restriction must also be the “least restrictive means among available, effective alternatives.” *Id.* at 729 (quoting *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004)). The government must show that “counterspeech would not suffice to achieve its

interest” to meet this standard. *Id.* at 726. Here, the SEC has not met that standard and cannot.

E. The Gag Rule also discriminates based on viewpoint.

The SEC’s Gag Rule also discriminates based on viewpoint as it targets the speech of individuals who have settled regarding their case, while allowing for speech by the government on the same topic.

“The government must abstain from regulating speech when . . . the opinion or perspective of the speaker is the rationale for the restriction.” *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (citing *Perry Ed. Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37, 46 (1983)). And even if the government discriminates “against an entire class of viewpoints,” it engages in viewpoint discrimination. *Id.* at 831.

Here, the government restricts the speech of all individuals who settle because of their perspective. In doing so, the SEC engages in unconstitutional viewpoint discrimination.

The SEC goes even further by allowing for individual who settle to praise the SEC’s efforts, but forbids them from being critical or creating an impression of criticism of the SEC. An individual cannot even give the “impression” that they are “denying the allegations in the complaint or order for proceedings.” 17 C.F.R. § 202.5(e). By allowing only pro-government speech, and forbidding government criticism, the SEC clearly discriminates based on viewpoint.

F. The government interest in the Gag Rule is illegitimate and therefore it does not pass any level of scrutiny.

The Gag Rule should fail any level of scrutiny because it is not even rationally related to any legitimate state interest. The government has no interest—and can have no interest, consistent with the First Amendment—in censoring criticism of the government.

The SEC’s own justification, from the beginning, was that it is “important to avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur.” 37 Fed. Reg. 25,224 (Nov. 29, 1974). In other words: it would be embarrassing for the agency if the public came to believe that it used its immense power and discretion to ruin the life of an innocent man.

But “[c]riticism of government is at the very center of the constitutionally protected area of free discussion.” *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). And “[i]t is as much [the citizen’s] duty to criticize as it is the official’s duty to administer.” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 282 (1964). “[W]here the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth.” *Garrison v. Louisiana*, 379 U.S. 64, 72–73 (1964).

The interest of the American people—and therefore the interest of the government, as the representative of those people empowered with the public trust—is precisely the opposite of what the SEC

claims. The use of law enforcement authority should always be subject to question, to skepticism, and indeed to criticism, to ensure those stewards carry out the role we have assigned them in a sober and responsible manner that in fact furthers the public interest. The SEC has a public duty to be embarrassed where appropriate—its recourse under the First Amendment is to not bring embarrassing cases or to explain for themselves why their cases are justified.

This Court has dealt with and denied such arguments before. It held that “[c]riticism of [] official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes [] official reputations. If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate.” *N.Y. Times Co.*, 376 U.S. at 273. This Court should grant the petition to reaffirm that principle in this case.

IV. The court below also erred by not finding the Gag Rule to be an unconstitutional condition.

The court below interpreted the Gag Rule as a voluntary waiver of First Amendment rights, rather than a prior restraint. It erred by not finding it to be an unconstitutional condition even though the SEC withholds the benefits of settlement unless individuals give up their First Amendment rights.

“[T]he unconstitutional conditions doctrine . . . vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up.” *Koontz v. St. Johns River*

Water Mgmt. Dist., 570 U.S. 595, 604 (2013). This is “especially” the case for “freedom of speech” because otherwise the government could “penalize[] and inhibit[]” that right. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

The unconstitutional conditions doctrine “forbids burdening the Constitution’s enumerated rights by coercively withholding benefits from those who exercise them.” *Koontz*, 570 U.S. at 606. It does not matter “if the government need not confer a benefit at all.” *Id.* at 608 (collecting cases). And it does not matter whether the constitutional right must be given up before receiving the benefit or after. *See id.* at 607 (collecting cases). What matters is whether “the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing.” *Id.* at 612 (citing *Rumsfeld*, 547 U.S. at 59–60).

Here, the SEC withholds a benefit—the opportunity to settle a case—unless an individual gives up their freedom of speech. The Gag Rule thus operates as an unconstitutional condition and the court below erred by holding otherwise.

V. This Court should grant the petition to make clear the government cannot suppress constitutionally protected speech simply to evade criticism.

The SEC’s Gag Rule prevents speech that is constitutionally protected and does so to avoid criticism of the agency. That purpose is improper and cannot justify the prior restraint on speech. The court below erred by finding the Gag Rule was not a prior restraint and by failing to address its impacts on other

First Amendment rights. It also erred by holding the Gag Rule was not an unconstitutional condition. This Court should grant the petition to rectify those errors and make clear the government cannot condition the provision of benefits on an individual giving up their right to criticize the government.

Conclusion

The court below got this case wrong, and in doing so gave the government a free pass to condition benefits on individuals promising to not criticize or question those in power. The holding should not stand. Criticism of government is essential to the functioning of this country and the preservation of Americans' freedoms. Preventing speech to try to make the government look better is never the answer. It steals the perspective of individuals with relevant experience from other citizens, the press, and elected officials.

This Court should grant the petition to send a clear message that the First Amendment is not a bargaining chip, and the government cannot condition benefits on Americans giving up their rights.

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