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 *AMICUS CURIAE* OF GOLDWATER INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

This case involves a challenge to the constitutionality of a virtually unprecedented regulatory restriction on speech. For over 50 years, the Securities and Exchange Commission's Gag Rule has required defendants who settle enforcement actions to commit to a lifetime prohibition on denying or criticizing—or even permitting others to criticize—the agency's allegations. *See* 17 C.F.R. § 202.5(e). In the SEC's view, this blatant prior restraint on speech is necessary to avoid the incorrect "impression" that "the conduct alleged did not, in fact, occur." *Id.* But in reality, the SEC's Gag Rule systematically deprives individuals of a quintessential American right—the right to criticize their government.

Petitioners—individuals and entities directly impacted by the Gag Rule—urged the SEC to amend the rule to permit agency defendants to freely share their views. The petition noted that the Gag Rule muzzles the individuals most familiar with—and thus best positioned to criticize—the SEC's enforcement practices. Over Commissioner Hester Peirce's dissent—which argued that the Gag Rule was "quintessential viewpoint discrimination" designed to improperly shield the agency's actions from public view, App. 52a—the agency denied the petition on the perverse ground that the Gag Rule is necessary to preserve the public's "confidence" in SEC enforcement actions. On review, the Ninth Circuit blessed the agency's rationale and approved the rule.

The question presented is whether the SEC's Gag Rule violates the First Amendment.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Goldwater Institute ("GI") is a public policy foundation devoted to individual freedom and limited government. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates and files amicus briefs when it or its clients' objectives are implicated.

One of GI's main objectives is the protection of individual rights against the often unaccountable regulatory agencies which, thanks largely to deference doctrines, contradict the separation of powers and exercise authority in undemocratic ways. GI has often appeared in this Court as an amicus in cases involving administrative agencies' abuse of their powers. *See, e.g.*, *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024); *Baldwin v. United States*, 140 S. Ct. 690 (2020); *Kisor v. Wilkie*, 588 U.S. 558 (2019). GI scholars have also published important research on the problems caused by administrative agencies. *See, e.g.*, Jon Riches & Timothy Sandefur, *Confronting the Administrative State*, Goldwater Institute (July 27, 2021)[2]; Timothy Sandefur, *The Permission Society* (2016).

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1. Pursuant to Rule 37, counsel for amicus affirm that no counsel for any party authored this brief in whole or part, and no person or entity, other than amicus, its members, or counsel, made any monetary contribution to its preparation or submission. All parties received notice of amicus' intention to file at least ten days before the due date.

2. https://www.goldwaterinstitute.org/wp-content/uploads/2020/04/Confronting-the-Administrative-State_web.pdf.

SUMMARY OF REASONS FOR GRANTING THE PETITION

The rights of free speech and petition are "inalienable." *303 Creative LLC v. Elenis*, 600 U.S. 570, 584 (2023). That means it is literally impossible for someone to entirely relinquish these rights. While a person might agree to refrain from speaking for a while, even a long while, and may make a contract to that effect, it is both morally and legally absurd to suppose that the government can contract with a citizen—on pain of punishment—to *permanently* waive the citizen's right to criticize (or even to speak in a manner that might be taken as criticism of) the government.[3] Yet that is exactly what the "contract" here purports to do.

Nevertheless, the Ninth Circuit said the *permanent waiver of freedom of speech and petition* that the SEC extracts (non-negotiably) from the accused is immune from challenge because it's "voluntary." It based that assertion on inapt analogies to *temporary* waivers of rights, or waivers among *private* parties, as opposed to the permanent waiver of fundamental constitutional rights against the government, extracted on pain of punishment, such as this case involves. It read *Town of Newton v. Rumery*, 480 U.S. 386 (1987), wrongly, to reach the shocking proposition that forcing a person to forever surrender his right to criticize the government—or even

3. "Is this a bargain to be proposed to those who are both intelligent and free?" asked Justice James Wilson when describing a contract of this nature. "No," he answered. "Freemen, who know and love their rights will not exchange their armour of pure and massy gold, for one of a baser and lighter metal." 2 *Collected Works of James Wilson* 1054-55 (Hall & Hall, eds., 2007).

seem like he's criticizing it—is somehow not perniciously anti-democratic.

Perhaps the most revealing fact about this case is that *even in the Petition for Certiorari itself,* the Petitioners feel constrained not to say anything that might be interpreted as suggesting their factual innocence. In other words, **they are gagged even in this Court.** Yet no government entity can have any legitimate interest in outlawing public, good-faith criticism of itself, least of all in the Supreme Court of the United States.

In any event, the whole point of "inalienability" is that such rights *cannot be* "voluntarily" waived or abandoned. For the SEC to force people to surrender their right to assert their actual innocence—and to forever hold over their heads the threat of punishment (without any procedural due process) if they speak in a manner that "creat[es] or *permit[s] to be created*, [the] impression that … the conduct alleged [against them] did not, in fact, occur," 17 C.F.R. § 202.5(e) (emphasis added)—is so plainly unreasonable as to vastly exceed the government's legitimate interests.

Given the split between the decision below and the Fourth Circuit's decision in *Overbey v. Mayor of Baltimore*, 930 F.3d 215 (4th Cir. 2019), as well as the extreme importance of this issue and the extraordinary reach of the SEC, this Court should grant certiorari.

REASONS FOR GRANTING THE PETITION

I. The rights of freedom of speech and petition are inalienable.

One of our Constitution's most basic premises is that some rights are inalienable. *See* Declaration of Independence, 1 Stat. 1 (1776). Among our inalienable rights are speech[4] and petition.[5] The SEC gag rule is an egregious violation of this inalienability principle and is legally unenforceable for that reason alone.

An "inalienable" right is one that cannot be lost, abandoned, or contracted away. *Black's Law Dictionary* 759 (8th ed. 1990). The proposition that some individual rights are inalienable—a discovery of the seventeenth century classical whigs such as John Locke—played, and still plays, an absolutely indispensable role in our constitutional order. Craig A. Stern & Gregory M. Jones, *The Coherence of Natural Inalienable Rights*, 76 UMKC L. Rev. 939, 984-91 (2008).

To appreciate why, recall that admirers of Thomas Hobbes and William Blackstone claimed at the time of the Revolution that the people of British America had permanently and voluntarily surrendered some of their rights, either upon becoming British subjects—that is, upon entering into political society—or by accepting their colonial charters. At the time, the "Tory" argument was

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4. This Court referred to speech as an inalienable right as recently as *303 Creative*, 600 U.S. at 584.

5. *Adderley v. Florida,* 385 U.S. 39, 49 n.2 (1966) (Douglas, J., dissenting).

that while people might indeed have originally possessed the kind of Lockean natural rights for which the Patriots contended, they nevertheless had subsequently chosen to relinquish those rights to the government (perhaps tacitly) by becoming or remaining members of the British empire. *See, e.g.,* 1 W. Blackstone, *Commentaries* *161.

Thus Massachusetts Governor Thomas Hutchinson told that colony's House of Representatives in 1773 that when Americans came to the New World they had by "their voluntary removal … relinquished" the right to only be taxed by representatives of their own choosing. *Speeches of the Governors of Massachusetts from 1765 to 1775* at 340 (1818). In other words, they had "give[n] up part of their natural rights" by coming to America. *Id.* The House (in a response coauthored by John Adams) refuted that argument. On the contrary, it said, Americans still had their right to representative government—because that right was "so essential and indisputable" that any people "destitute of it, is destitute of freedom." *Id.* at 350.

The right to petition was considered no less inalienable (i.e., unwaivable) than the right to free speech. As John Quincy Adams was later to observe, this

> is … a right belonging to every human creature, … which cannot be denied to man in any condition…. [It is the] first and humblest right given from God to every human being…. Will you put the right of petitioning, of craving for help and mercy and protection, on the footing of political privileges? It is an idea which has not even been entertained by the utmost extreme of human despotism; no despot, of any age or

> clime, has ever denied this humble privilege to the poorest or the meanest of human creatures.

13 *Register of Debates* 1673-75 (Feb. 9, 1837).

During the American Revolutionary era, the refusal of king and Parliament to receive petitions against taxes and other imperial impositions may have been considered the gravest of all Britain's acts, for it was George's refusal to accept the Olive Branch Petition that was widely seen as the last straw for independence. When the First Amendment was initially proposed, Representative Theodore Sedgwick even moved to delete the freedom-of-assembly clause as unnecessarily obvious: the right to petition for redress was, he said, "a self-evident, unalienable right." 1 Annals of Cong. 732 (1834).

The idea that certain rights are "inalienable" is not a mere figure of speech or rhetoric. It is a substantive and effective limitation in law. The founders invoked inalienability as the very basis of their right to overthrow colonial rule. *See e.g.,* Va. Decl. of Rights § 1 (1776). Courts today continue to invoke the inalienability of the rights of speech and petition. *See, e.g., United States v. Alvarez*, 567 U.S. 709, 728 (2012); *FDRLST Media, LLC v. NLRB*, 35 F.4th 108, 127 (3d Cir. 2022) (Matey, J., concurring); *Frankel v. United States*, 131 F.2d 756, 759 (6th Cir. 1942). Even today's copyright law recognizes and enforces the concept of an inalienable right. *See, e.g., Classic Media, Inc. v. Mewborn*, 532 F.3d 978, 983 (9th Cir. 2008). Today, inalienability is usually subsumed under the concept of "unconscionability" in contract law.

Alvarez is especially noteworthy here, because, unlike this case, it involved false and offensive speech:

a person's false claim to have won the Medal of Honor, which Congress made a crime. This Court nevertheless reversed the conviction, with the plurality observing that the government's asserted interest in preventing the general public from losing respect for military honors was not sufficient to justify punishment. There was little reason to think the public would be "misled by the claims of charlatans," it said, or "become cynical of those whose heroic deeds earned them the Medal by right." 567 U.S. at 727. Thus the government's interest could not justify punishing speech.

In words that are strikingly apt here, the Court observed that free speech "flows not from the beneficence of the state but from the inalienable rights of the person," and that censoring speech "can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse … [which is] not well served when the government seeks to orchestrate public discussion through content-based mandates." *Id.* at 728.

These words are prescient in this case because the idea of a government agency "contracting" with the citizen—under severe pressure that may amount to duress—to *abandon, for the rest his life,* his right to *truthfully* assert his innocence, or to protest against the government's prosecution of himself, or even to speak in a manner that *might be construed* as asserting his innocence, is an egregious violation of this inalienable right.

Obviously, people may contract to limit their expression in some respects, and for certain limited periods. The government may also ask that they waive their constitutional rights in exchange for benefits, in

certain narrow circumstances. *See, e.g., Ostergren v. Frick*, 856 F. App'x 562, 570 (6th Cir. 2021). But a total, lifetime ban on speech criticizing the government is plainly anathema to our institutions. As discussed in detail below, the SEC can have no legitimate interest whatever in insulating itself from good-faith criticism, and certainly not to the degree called for by the waiver here.

Inalienability does not just turn on the importance of a right to the individual. In fact, this Court has said that a "right conferred on a private party, but affecting the public interest" may often be unwaivable. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704 (1945). If an individual right is important enough to the operation of public institutions, the citizen's capacity to abandon that right may be legally limited. This is frequently true of rights in the criminal procedure context.

For example:

- The right to a unanimous jury verdict cannot be waived under any circumstances. *United States v. Smedes*, 760 F.2d 109, 113 (6th Cir. 1985); *United States v. Ullah*, 976 F.2d 509, 512 (9th Cir. 1992).

- A defendant cannot waive the statute-of-limitations defense. *Sgambati v. United States*, 172 F.2d 297, 298 (2d Cir. 1949).

- Nor can a defendant waive her rights under the Speedy Trial Act, *United States v. Willis*, 958 F.2d 60, 63 (5th Cir. 1992),

- or her right to challenge an illegal sentence, *United States v. Michelsen*, 141 F.3d 867, 872 (8th Cir. 1998),

- or her right to invoke the right to counsel. *Edwards v. Arizona*, 451 U.S. 477, 482 (1981).

- Thirteenth Amendment rights cannot be waived. *United States v. King*, 840 F.2d 1276, 1281–82 (6th Cir. 1988).

- Perhaps most revealingly, a person cannot waive her right to be protected against invalid waivers. *Bouchillon v. Collins*, 907 F.2d 589, 592 (5th Cir. 1990).[6]

The reason for these inalienability rules is that such rights are not only important to defendants but to society in general. Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in A Positive State*, 132 U. Pa. L. Rev. 1293, 1387-88 (1984).

In many cases, the reason for a constitutional rule is because individual citizens acting individually are unable for some reason to defend the right at issue, or to withstand overbearing pressure to surrender that right. This creates a "coordination problem," which is why the people gather together to adopt a constitution in the first place. *See* Richard A. Epstein, *Bargaining with the State*

6. Relatedly, a labor union cannot waive the free speech rights of its members. *NLRB v. Magnavox Co. of Tenn.*, 415 U.S. 322, 324-26 (1974).

76 (1993) ("There is … no effective system of voluntary transactions that allows a coordinated social response to the use of force."). Government is thus a response to this collective action problem—a response which would be fatally undermined if the government could then bring pressure to bear upon each individual to waive all of his or her personal rights.

Thus "[t]he theory of limited government that restricts the government's use of force also should restrict the government's ability to get its way by contract." *Id.* at 79. *See also United States v. Scott*, 450 F.3d 863, 866-67 (9th Cir. 2005) ("Government is a monopoly provider of countless services, notably law enforcement, and we live in an age when government influence and control are pervasive…. Giving the government free rein to grant conditional benefits creates the risk that the government will abuse its power by attaching strings strategically … gradually eroding constitutional protections.").

It was with these things in mind that the Fourth Circuit held in *Overbey, supra*, that the government cannot demand that a person waive First Amendment rights as a condition of settling a lawsuit regarding police misconduct. The court acknowledged that people can agree to refrain from speaking, and may exercise that right by contract. But Baltimore's policy of demanding waivers was unconscionable because it was "contrary to the public's well-established First Amendment interest in 'uninhibited, robust, and wide-open' debate on 'public issues.'" 930 F.3d at 224 (citation omitted). The public obviously has a vital need to know about police misconduct, and to empower a city to extract silence from the victims of such misconduct would mute those in the best position

to inform the public. Thus, in words directly applicable to this case, the court said that

> when the government (1) makes a police-misconduct claimant's silence about her claims a condition of settlement; (2) obtains the claimant's promise of silence; (3) retains for itself the unilateral ability to determine whether the claimant has broken her promise; and (4) enforces the claimant's promise by, in essence, holding her civilly liable to itself, there can be no serious doubt that the government has used its power in an effort to curb speech that is not to its liking.

Id. That perfectly describes the SEC's gag rule.

Nevertheless, the Ninth Circuit disregarded all these considerations—and also disregarded the corollary principle that courts should strongly presume against the waiver of constitutional rights, *see, e.g., Brookhart v. Janis*, 384 U.S. 1, 4 (1966); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), and demand clear and convincing evidence of *true* voluntariness even where waivers are acceptable. *See Janus v. AFSCME*, 585 U.S. 878, 930 (2018).

Remarkably, the court even likened the SEC gag rule to an employment contract with the government whereby an employee "agree[s] to restrictions on their First Amendment rights as a condition of employment." App. 13a. But in fact, "the day has long since passed when individuals surrendered their right to freedom of speech by accepting public employment." *Sanguigni v. Pittsburgh Bd. of Pub. Educ.*, 968 F.2d 393, 396 (3d Cir. 1992).

Instead, in the context of employee waivers, "[n]ot only must the means chosen be rationally related to furthering a paramount or vital governmental interest, but the means must also be closely drawn to avoid unnecessary abridgement of first amendment freedoms." *Tanner v. McCall*, 625 F.2d 1183, 1189 (5th Cir. 1980).

Of course, a non-disclosure or non-disparagement contract by a government employer is obviously different from the SEC gag rule—but only in way that make the gag rule even more constitutionally offensive. In the former situation, the government is acting as a market participant, which backs up its demand with the threat of termination of employment. In a case like this, though, it acts as a sovereign, and backs up its demands with criminal penalties. And even in the public-employment context, "[e]mployers cannot be said to have a legitimate interest in silencing reports of corruption or potential illegality." *Hufford v. McEnaney*, 249 F.3d 1142, 1149 (9th Cir. 2001). *Cf. McGehee v. Casey*, 718 F.2d 1137, 1141 (D.C. Cir. 1983) ("[t]he government has no legitimate interest in censoring unclassified materials" via employment contracts); *United States v. Marchetti*, 466 F.2d 1309, 1313 (4th Cir. 1972) ("the First Amendment limits the extent to which the United States, contractually or otherwise, may impose secrecy requirements upon its employees and enforce them with a system of prior censorship. It precludes such restraints with respect to information which is unclassified….").

So, too, the SEC can have no legitimate interest in silencing an accused's professions of innocence.

Most importantly, the court below ignored the inalienability of speech and petition rights. The kinds of

waivers it gave as examples, such as employment non-disclosure clauses, are simply not comparable to lifetime bans on speech critical of the government, or speech asserting one's factual innocence. On the contrary, such waivers are every bit as "pernicious" and "'offensive to basic democratic principles'" as the ban on running for office that the court invalidated in *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1398-99 (9th Cir. 1991) (citation omitted).

II. As the Fourth Circuit said in *Overbey,* the demand that the accused waive free speech rights deprives the public of information it needs—and chills speech beyond our capacity to measure.

A. The SEC has no legitimate interest in shielding itself from criticism.

The Ninth Circuit admitted that the SEC could have no legitimate interest in shielding itself from public criticism or in manufacturing an unearned public confidence, App. 9a, but then it concluded that the SEC's real interest was in preventing the accused from asserting innocence in any forum other than court. App. 24a. The truth, however, is that the latter is really just the former in disguise.

Take the fact that **Petitioners cannot say in their very Petition for Certiorari to this Court that they believe they are factually innocent**. Whether they actually contend this is unclear, precisely because the gag rule forbids them to be candid even to the Supreme Court of the United States. For them to make a statement *to this Court* that "creat[es], or permit[s] to be created, [the] impression" that they are factually innocent, would risk the SEC's wrath. 17 C.F.R. § 202.5(e). That is obviously a

severe restriction on their right to petition the government for a redress of grievances.

What's more, if confining assertions of innocence to the courtroom actually were the SEC's goal, it would not have fashioned its gag rule so broadly as to forbid speech that "permit[s] to be created, [the] impression" of factual innocence. *Id.*[7] The breadth and vagueness of this restriction is such that it is plainly excessive in relation to such an interest. The far more rational explanation for so vague and broad a gag is that it is, indeed, designed to prevent criticism of the SEC and thus to help generate possibly false public confidence in the SEC.

That raises another crucial aspect of this case, one the Ninth Circuit entirely ignored in its opinion: the rights of Petitioner *Cape Gazette*, and of its readers, to know what their government is doing. The *Cape Gazette* wishes to publish truthful information about the SEC's prosecutions, and particularly that of Petitioner Marguerite Toroian. Yet the gag forbids that. The *Gazette* interviewed Ms. Toroian four years ago, but now she is forbidden from talking to them so the SEC's gag, naturally, infringes on the *Gazette*'s own freedom of the press.

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7. The Ninth Circuit unaccountably accepted at face value the SEC's "assur[ance] … in its briefing that '[d]efendants who enter into settlements with the Commission remain free to speak about the Commission, enforcement actions, and a host of other topics so long as they do not publicly deny the Commission's allegations.'" App. 11a. But the gag by its own terms goes beyond that, forbidding defendants from even *allowing the impression* of their innocence to be conveyed. And in any event, courts should be skeptical of—not deferential to—an agency's self-serving litigation positions. *E.I. Du Pont De Nemours & Co. v. Smiley*, 585 U.S. 1033, 1033-34 (2018) (Gorsuch, J., dissenting from denial of certiorari).

Obviously media coverage of government action, especially a prosecution, is at the very bullseye core of what the First Amendment was designed to protect. That right is critical to enabling the voting, taxpaying public to know what their government is up to. But the SEC has conjured up a method for evading meaningful public scrutiny of its prosecutions: to twist the arms of the accused into agreeing never to speak to the press—and thereby silencing precisely those people who are in the best position to inform the general public, or who are at least in a good position to raise questions that the public has a right to see answered.

That's just what the Fourth Circuit found unconstitutional in *Overbey, supra*, in direct conflict with the decision below.

Actually, the SEC's gag does not require silence *per se*; it only requires that Petitioners not cast doubt upon the accusations of their guilt. They remain perfectly free to publicly, and perhaps falsely, say they're *guilty* of what the SEC has charged them of. They're only barred from asserting that they're *innocent*. They can *praise* the SEC, but not disparage it. As in *Overbey, supra*, the gag here operates to permit pro-government speech, but to ban speech critical of the government—speech in which the public has an extremely vital interest in our, or any, democracy.

The SEC's gag is so broad that it would even prevent Petitioners from testifying before Congress regarding their personal circumstances. Were a Congressional committee to seek information regarding the SEC's prosecutions, and invite the Petitioners to testify, the Petitioners would either have to say they were guilty of

what they were accused of … or decline the invitation. Thus the gag rule bars the public from obtaining accurate information about SEC's operations. This is particularly egregious given that the SEC is an administrative agency operating outside the notice of most members of the general public—part of what is "routinely described as the 'headless fourth branch of government,' reflecting not only the scope of their authority but their practical independence." *City of Arlington v. FCC*, 569 U.S. 290, 314 (2013) (Roberts, C.J., dissenting).

B. The SEC gag rule is so plainly excessive in comparison to any legitimate interests that it violates due process of law.

Even laying that aside, for the SEC to confine the Petitioners to denying the allegations against them solely "in a particular forum, i.e., in court," App. 24a, is still an illegitimate interest. All Americans have a fundamental—indeed, inalienable—right to contact their Congressional representatives (for example) to seek redress of grievances or to complain about what they consider government wrongdoing. Could the SEC demand that an accused defendant surrender, *for the rest of her life*, her right to call her Congressional representative about her case?

Given that the gag at issue here appears to bar Petitioners from being frank about their cases even to this very Court, it would seem that the SEC thinks the answer is yes. In a similar vein, query whether the SEC could:

- Demand that a defendant waive her right against self-incrimination in any potential

future lawsuit, as a condition of settling this one?

- Require the defendant to *permanently* waive her Fourth Amendment rights, as a condition of settling a lawsuit?

- Insist upon a waiver of a defendant's right to be represented in any subsequent litigation, as a condition of settling the case at hand?

- Demand that a defendant permanently waive her Second Amendment right to self-defense?

- Insist that a defendant conceal the fact that she has even been accused of wrongdoing?

- Require a defendant to issue a public statement praising her prosecutor?

There simply must be *some* limit. Yet there's no principled difference between the above extreme hypotheticals and the SEC's gag rule.

What's more, there is nothing confining this matter to the SEC. Under the Ninth Circuit's theory, nothing stands the in the way of, say, the Environmental Protection Agency requiring that anyone whose property it claims is a "wetland" surrender their right—vindicated by this Court in *Sackett v. EPA*, 598 U.S. 651 (2023)—to deny such as a condition of settlement. Nor is there anything in the decision below that would bar Immigration and Customs Enforcement from demanding that someone

accused of being a removable alien—but who is actually a U.S. Citizen—to sign a paper waiving her right to proffer proof of citizenship as a condition of being deported to one country instead of another.

The propriety of a waiver of constitutional rights has always been tested by some kind of balancing test. *See, e.g., Coughlen v. Coots*, 5 F.3d 970, 974 (6th Cir. 1993) (citing *Rumery, supra*). But the SEC's *non-negotiable* demand that defendants *permanently* give up their right *even to suggest* that they're innocent is so out of proportion to the SEC's legitimate interests that the balance tips far into the realm of unconstitutionality.

What the SEC calls its interest in keeping assertions of innocence confined to the courtroom is really chimerical, for the courtroom itself is a process that must be overseen by a vigilant citizenry to ensure the fair administration of justice. And just as there was, in *Alvarez*, no reason to believe the general public would be unable to tell those who had earned the Medal of Honor from those who had not, so there's no reason here to think the general public is incapable of distinguishing between false assertions of innocence in the media and those who pursue the "benefits and protections of the judicial process." App. 24a.

To deny a person the right to protest his innocence in the event that he believes a court has erroneously convicted him is therefore to intrude into areas of grave social interest.[8] And as noted above, there's no principled

8. At a minimum because, as Justice Brandeis famously said, the Constitution's framers knew that fear and repression are ultimately dangerous to civil government and "that the path of

distinction between the SEC's gag and a requirement that a defendant conceal the fact that he was put on trial in the first place. Such a demand would be intolerable because the demand is so out of proportion to any legitimate interest in the orderly administration of justice. In other words, the demand is so disproportionate that it crosses the boundary into arbitrariness and is for that reason a violation of due process of law.

This, again, is why this case is more akin to *Alvarez*, in which the government's asserted interest lay in preventing the dilution of public respect for military medals. Here, the SEC's legitimate interest is weaker, because *Alvarez* involved only *false* speech, whereas the SEC's gag applies regardless of the truth or falsity of the speech, or even of the actual *content* of the speech, if that speech "permit[s] to be created, [the] impression" of actual innocence. 17 C.F.R. § 202.5(e).

Thus what the *Alvarez* plurality said applies with even greater strength here: the suppression of speech by things like the gag rule actually makes it more difficult to expose either public or private wrongdoing, and short-circuits the "open, dynamic, rational discourse" that serves democratic decision-making. 567 U.S. at 728. *Accord, Overbey*, 930 F.3d at 224-25 ("enforcement of the non-disparagement clause … was contrary to the citizenry's First Amendment interest in limiting the government's ability to target and remove speech critical of the government from the public discourse.")

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safety lies in the opportunity to discuss freely supposed grievances and proposed remedies." *Whitney v. California*, 274 U.S. 357, 375-76 (1927).

C. In conflict with the Fourth Circuit, the Ninth Circuit placed the burden on the wrong party.

Finally, although it is blackletter law that First Amendment rights are especially treasured by the judiciary, and that courts should be so protective of them as to "'indulge every reasonable presumption against [their] waiver,'" *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (citation omitted), the Ninth Circuit did just the opposite, indulging every presumption in favor of the gag.

This was particularly egregious in light of the court's uncritical acceptance of the SEC's (non-binding) assertion that Petitioners and others like them can speak, "so long as they do not publicly deny the Commission's allegations." App. 25a (quoting the SEC's brief). That assertion is contradicted by the language of the gag itself, which forbids Petitioners from even "permitting to be created, [the] impression" of their innocence. 17 C.F.R. § 202.5(e). The court itself "question[ed] how easy the SEC's line will be to police in practice," given the breadth and vagueness of the gag—and yet at the same time it claimed that the gag isn't "vague" based on the "understanding" that the SEC would confine punishment only to those who make "bare denial[s]" of their guilt. App. 25a-26a. Then, in the very next paragraph, the court acknowledged that the gag "could be read to sweep more broadly." *Id.* at 26a.

In this confusing back-and-forth, one thing is clear: the Ninth Circuit was essentially *trusting* the SEC to behave in a manner that respects the First Amendment. Yet that's exactly the kind of trust that First Amendment jurisprudence, with its presumption against constitutionality and its heightened scrutiny requirements, is supposed to preclude. *Simon & Schuster,*

Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring) ("Regardless of how beneficent-sounding the purposes of controlling the press might be, we prefer 'the power of reason as applied through public discussion,' and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press." (citation omitted)).

That conflicts with the proper approach taken by the Fourth Circuit in *Overbey*, which rejected the government's assertion that there was no need to apply First Amendment scrutiny. 930 F.3d at 222.[9] Like the SEC here, the city in that case said that the waiver was just a contract, and wasn't the result of any coercion, and therefore that the individual's speech rights "were neither waived nor infringed." *Id.* Here, by contrast, the court showed little skepticism toward a government program that explicitly aims to silence one side of public discourse—speech critical of the government.

However much settlements between parties may be favored, a court *must* "insur[e] that the government has not breached its duty to the public in consenting to the

9. Particularly insightful in *Overbey* was the court's recognition that the individual's "promise not to speak about her case cannot be fairly characterized as an exercise of her right to refrain from speaking, because none of the interests protected by the right to refrain from speaking were ever at stake in this case." *Id.* at 223. In other words, Ms. Overbey's relationship with the government never raised concerns regarding freedom of conscience, or compulsory speech, etc.—which made clear that the government's real interest was "to curb her voluntary speech to meet the City's specifications." *Id.* The same is true here.

decree. The court is required to determine … whether the settlement is 'within the reaches of the public interest.'" *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981) (citation omitted). But it is contrary to the public interest for an agency to selectively silence its critics by extracting from them purported waivers of unalienable rights of speech and petition.

As one scholar has noted,

> Any notion that the public must accept the SEC's assurances that it only deploys this power wisely is fundamentally inconsistent with the values that inspired the Framers of the Constitution, who were fundamentally mistrustful of government. The public is not required to respect assurances of noblesse oblige. "Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints."

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) (quoting *Citizens United v. FEC*, 558 U.S. 310, 340 (2010)).

CONCLUSION

The petition should be *granted*.

Respectfully submitted,

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