No. 20-5054

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In The

United States Court of Appeals

For The District of Columbia Circuit

CATO INSTITUTE,

Plaintiff – Appellant,

v.

SECURITIES AND EXCHANGE COMMISSION; JAY CLAYTON, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE U.S. SECURITIES AND EXCHANGE COMMISSION; VANESSA ANN COUNTRYMAN, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE U.S. SECURITIES AND EXCHANGE COMMISSION,

Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIRCUIT RULE 28(A)(1)

A. Parties and *amici curiae*

Except for the following *amici*, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in Appellant's brief: Reporters Committee for Freedom of the Press, First Look Media Works, Inc., Gannett Co., Inc., International Documentary Assn., Investigative Reporting Workshop at American University, The Media Institute, MediaNews Group Inc., MPA - The Association of Magazine Media, National Press Photographers Association, The News Leaders Association, News Media Alliance, POLITICO LLC, Society of Environmental Journalists, Society of Professional Journalists, and Tully Center for Free Speech.

B. Rulings under review

References to the rulings at issue appear in Appellant's brief.

C. Related cases

Counsel for *amici* are not aware of any related case pending before this Court or any other court.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the Reporters Committee for Freedom of the Press certifies that it is an unincorporated association of reporters and editors with no parent corporation and no stock.

First Look Media Works, Inc. is a non-profit non-stock corporation organized under the laws of Delaware. No publicly held corporation holds an interest of ten percent or more in First Look Media Works, Inc.

Gannett Co., Inc. is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. BlackRock, Inc. and the Vanguard Group, Inc. each own ten percent or more of the stock of Gannett Co., Inc.

The International Documentary Association is a not-for-profit organization with no parent corporation and no stock.

The Investigative Reporting Workshop is a privately funded, nonprofit news organization based at the American University School of Communication in Washington. It issues no stock.

The Media Institute is a 501(c)(3) non-stock corporation with no parent corporation.

MediaNews Group Inc. is a privately held company. No publicly held company owns ten percent or more of its equity interests.

MPA - The Association of Magazine Media has no parent companies, and no publicly held company owns more than ten percent of its stock.

National Press Photographers Association is a 501(c)(6) nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

The News Leaders Association has no parent corporation and does not issue any stock.

News Media Alliance is a nonprofit, non-stock corporation organized under the laws of the commonwealth of Virginia. It has no parent company.

POLITICO LLC's parent corporation is Capitol News Company. No publicly held corporation owns ten percent or more of POLITICO LLC's stock.

The Society of Environmental Journalists is a 501(c)(3) non-profit educational organization. It has no parent corporation and issues no stock.

Society of Professional Journalists is a non-stock corporation with no parent company.

The Tully Center for Free Speech is a subsidiary of Syracuse University.

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INTEREST OF *AMICI CURIAE*

Amici curiae are the Reporters Committee for Freedom of the Press, First Look Media Works, Inc., Gannett Co., Inc., International Documentary Assn., Investigative Reporting Workshop at American University, The Media Institute, MediaNews Group Inc., MPA - The Association of Magazine Media, National Press Photographers Association, The News Leaders Association, News Media Alliance, POLITICO LLC, Society of Environmental Journalists, Society of Professional Journalists, and Tully Center for Free Speech.[1] *Amici* file this brief in support of the appeal of Plaintiff-Appellant the Cato Institute ("Cato") of the district court's decision dismissing its claims challenging the constitutionality of the policy and practice of the U.S. Securities and Exchange Commission ("SEC") to impose a mandatory "no deny" provision on all individuals or companies that enter into consent judgments to resolve enforcement actions. The "no deny" provision precludes such settling parties from ever publicly denying the allegations made by the SEC in its complaint or order for proceedings, including in communications with members of the press, while leaving the SEC free to publicly comment on the allegations. As representatives and members of the news media, *amici* have a strong interest in safeguarding the public's access to information about settlement

[1] A supplemental statement of identity and interest of *amici curiae* is included below as Appendix A.

agreements made between the public and the government, and in preserving the press's ability to report accurately and fairly on government allegations of misconduct. *Amici* submit this brief to emphasize the First Amendment interests at stake in this case and the impact that gag orders like those imposed by the SEC's the "no deny" policy have on all members of the media.

The gag order imposed by the SEC's "no deny" provision imposes unconstitutional restrictions on the ability of reporters and news organizations to keep the public informed about the SEC's enforcement actions. Moreover, the importance of this Court's resolution of the appeal before it extends beyond this case. At the federal level, enforcement agencies including the Commodity Futures Trading Commission and the Consumer Financial Protection Bureau employ similar gag orders in their settlement agreements. It is vital that the federal government be prohibited from shielding information about settlements from the public. Limiting the ability of non-government parties to discuss the terms of their settlement with the SEC and the details of the claims that have been resolved goes against strong public policy that favors public access to settlement agreements.

SOURCE OF AUTHORITY TO FILE

Amici have obtained the consent of all parties to file this amicus brief. Fed. R. App. P. 29(a)(2).

FED. R. APP. P. 29(C)(5) STATEMENT

Amici state that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than the *amici curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

The SEC's regulation and policy of imposing mandatory "no deny" provisions on all parties that enter into settlements of enforcement actions with the SEC places unconstitutional restrictions on the media's ability to engage in vital newsgathering.[2] The settlements allow the SEC to impose punishment in civil or administrative actions without actually establishing that any law was broken and the "no deny" provisions silence parties who may choose to settle with the SEC even though they

[2] The SEC has promulgated a regulation announcing its "policy not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings." 17 C.F.R. § 202.5(e) (1972). Cato alleges that the SEC requires that an express "no deny" provision prohibiting settling defendants from "publicly asserting that any of the SEC's allegations are untrue or otherwise lack a factual basis" be included in the consent judgment as a condition of settling any civil or administrative action brought by the agency and that the SEC's "policy and practice of demanding gag orders in all settlements, as required by its interpretation of 17 C.F.R. § 202.5(e), violates the guarantees of the First Amendment." JA10 ¶¶ 16, 21; JA19 ¶ 73. *Amici* refer to the challenged SEC policy embodied in both the regulation and "no deny" provisions in the consent judgments as the "SEC's policy" or the "SEC's no deny policy."

dispute the allegations against them. The result is a system where the press and the public hear only one side of the story: The SEC issues press releases detailing its allegations at the beginning of an enforcement action, and then it enters into settlements in which the accused is forced to promise never to publicly dispute any of those allegations.

These one-sided "gag orders" on parties accused of SEC violations prevent members of the news media from accurately and fairly reporting on issues of significant public interest and importance. It is vital for citizens of a democracy to know how their government operates, particularly when it accuses fellow citizens of wrongdoing. The SEC's policy of demanding gag orders as a condition of settlement conflicts with the First Amendment because it prevents the media from fully covering actions taken by the government. Because of the SEC's policy of silencing settling parties, Cato, which covers SEC proceedings on its website, blog, and other publications, and seeks to publish a book on the topic, has been unable to fully and fairly report to the public on the nature and cause of settlements in SEC enforcement actions.

The district court erred in holding that Cato lacks standing to challenge the SEC's "no deny" policy. The First Amendment protects information-gathering activities by organizations like Cato, just as it protects newsgathering by members of the press, like *amici*. Cato has been injured by the SEC's "no deny" policy, which

cuts off access entirely to a critically important source of information about settlement agreements between the SEC and those individuals and entities subject to enforcement actions—namely, the accused. Under longstanding First Amendment principles, Cato has standing to challenge the SEC's policy of imposing gag orders on those who settle with the agency through consent judgments and who wish to publicly tell their side of the story.

In addition, the imposition of mandatory "no deny" provisions on all individuals and entities who enter into consent judgments with the SEC contravenes a clear federal policy of maintaining open access to government settlement agreements embodied in the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA" or "the Act").

For all of these reasons, and in light of the important First Amendment interests at stake, *amici* urge this Court to vacate the decision of the district court.

ARGUMENT

I. CATO HAS STANDING TO CHALLENGE THE SEC'S "NO DENY" POLICY

A. The news media's access to sources who settle enforcement claims with the federal government is critical to their ability to report fairly and accurately on claims and settlements.

Parties to SEC consent judgments are vital sources of information for journalists who report on such settlements. Generally, when reporting on settlement agreements, journalists have an ethical obligation to seek out and attempt to speak

to both parties to the agreement. The Society of Professional Journalists' Code of Ethics states that reporters should "[d]iligently seek subjects of news coverage to allow them to respond to criticism or allegations of wrongdoing." SPJ Code of Ethics, https://www.spj.org/ethicscode.asp (last visited June 26, 2020); *see also* Reuters, *Handbook of Journalism*, available at http://handbook.reuters.com/index.php?title=Freedom_from_bias (stating in section on Freedom from Bias that news stories "need to reflect all sides, not just one," and that journalists "have a duty of fairness to give the subjects of . . . stories the opportunity to put their side"). The SEC's policy of imposing a mandatory "no deny" provision on all those who agree to settle with the agency restricts the news media's ability to thoroughly and fairly report on those agreements because it interferes with their ability to get both sides of the story.

Across the country, reporters routinely rely on individuals who settle government enforcement actions to gather information and report on terms of those settlements and the reasons for agreeing to settlement. *See, e.g.*, Kate Conger, *Uber Settles Federal Investigation Into Workplace Culture*, N.Y. TIMES (Dec. 18, 2019), https://perma.cc/3MHP-TCS9; Paul Guzzo, *Tampa man goes from 'Extreme Weight Loss' contestant to alleged scammer*, TAMPA BAY TIMES (June 12, 2020), https://perma.cc/UHU8-5UQV (stating that the accused said he "made the business decision to settle with the FTC. We look forward to moving past this matter.");

Brian Pietsch, *AdvoCare, endorsed by quarterback Drew Brees, to pay $150 million to settle pyramid scheme charges*, REUTERS (Oct. 2, 2019), https://reut.rs/2BcoKla (reporting that company denied that it admitted to operating as a pyramid scheme, as claimed by the FTC, saying in a statement that Smith's statement is "categorically false" and that "to this day, AdvoCare denies it operated as a pyramid"). More specifically, reporters speak to individuals and companies who settle agency enforcement actions in order to inform the public about those settlements and the impact they may have on the public and regulated industries. *See, e.g.*, Kate Gibson, *AdvoCare fined $150 million as FTC calls it a pyramid scheme*, CBS NEWS (Oct. 2, 2019), https://perma.cc/RJ5L-EX99 ("We strongly disagree with the FTC allegations, but we are committed to abiding by this agreement and moving forward.").

Since 1972 when the SEC first adopted its "no deny" regulation, "no deny" provisions have been a non-negotiable term of settlement in hundreds of cases. The SEC's policy prevents the news media from engaging in necessary newsgathering by prohibiting defendants to enforcement proceedings who settle with the SEC but who deny the allegations against them from speaking truthfully to reporters—or to anyone else—about their settlement agreements or the events that underlie them.

When the news media cannot speak to citizens who enter consent judgments with the SEC about their denials of the allegations against them, it is the public that

loses. News reporting on government settlements is more accurate and complete when reporters can speak to the targets of government enforcement proceedings and learn the details of their settlement agreements, including any claims that the settling parties dispute the charges against them. It is not enough for news organizations to simply rely on the government's press releases about settlement agreements to report these stories. As veteran reporter Toni Locy has explained, "[w]ithout human sources to interpret and fill the gaps often left in documents, reporters cannot provide the public with the information it needs to decide how it wants its government to act." Toni Locy, COVERING AMERICA'S COURTS 84 (2013). Rather, a reporter's success often depends on his or her "ability to develop human sources willing to provide information." *Id.* Reporters must be able to speak to settling parties directly, and get their honest views on their settlements, in order to fill in the gaps that may be left from simply reading pre-settlement court papers or agency press releases. In addition, only by interviewing settling parties about their denials of the claims against them can reporters ask questions necessary to probe their sincerity and veracity.

The "no deny" provisions included in consent judgments as part of the SEC's policy also impede accuracy in news reporting because they permit the SEC to discuss the events leading to a consent judgment and the settlement terms itself, while silencing parties to those agreements who would deny the allegations against

them from doing the same. This restriction is at odds with the tenets of ethical journalism, which demands both accuracy and fairness. *See supra* Society of Professional Journalists' Code of Ethics. In accordance with these tenets, news organizations reporting on settlements often present statements of both parties to a government settlement agreement to give the public both sides of the story. *See, e.g.*, Danielle Douglas-Gabriel, *FTC reaches $191 million settlement with University of Phoenix in deceptive-advertising probe*, WASH. POST (Dec. 10, 2019), https://perma.cc/64M2-HVCU?type=image ("The University of Phoenix denies all wrongdoing and insists the school had relationships with the companies highlighted in the advertising campaign. University officials said they felt confident about the school's ability to win in court but wanted to put the matter to rest."; "[FTC] Investigators say the University of Phoenix ran an advertising campaign that featured Microsoft, Twitter, Adobe and Yahoo, giving a false impression the school worked with those companies to employ its students."). The SEC's policy, however, creates an ethical dilemma for reporters, who may be unable to report each party's perspective because the settling party is prohibited from providing it. Most importantly, it renders news reporting less accurate and incomplete, to the detriment of the public.

B. Cato has standing to challenge the SEC's policy of requiring "no deny" provisions in all enforcement action settlement agreements.

The Supreme Court has repeatedly affirmed the principle that "[a] broadly defined freedom of the press assures the maintenance of our political system and an open society." *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967); *see also Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983) ("An untrammeled press is a vital source of public information, and an informed public is the essence of working democracy.") (internal alterations and citation omitted). In furtherance of these values, the Court has underscored "the significance of . . . [the] press . . . to the country's welfare," and that the First Amendment provides protection for newsgathering because "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). This Circuit has embraced and affirmed First Amendment newsgathering protections. *See, e.g.*, *Sherrill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977) (affirming "the protection afforded newsgathering under the first amendment guarantee of freedom of the press").

The SEC's "no deny" policy infringes Cato's constitutionally protected right to gather information for publication, just as it infringes the news media's right to gather the news. Cato has suffered an injury in fact because the "no deny" provision effectively cuts it off from any access to important sources of information about claims of government overreach and settlement agreements by forbidding settling

parties from discussing their denials the allegations against them when speaking with Cato.

The Fourth Circuit's decision in *Overbey v. Mayor of Baltimore*, 930 F.3d 215 (4th Cir. 2019), is instructive. There, the Fourth Circuit ruled that the City of Baltimore's practice of prohibiting plaintiffs who settle police misconduct cases from speaking about the events precipitating their cases, on pain of losing half their settlement proceeds, violated the First Amendment. The court also considered the First Amendment claim of another plaintiff, the *Baltimore Brew*, a local news website, which the district court had dismissed for lack of standing. The Fourth Circuit reversed the dismissal, holding that the news site had standing to challenge City's pervasive use of non-disparagement clauses based on allegations that the practice "impedes the ability of the press generally, and Baltimore Brew specifically, to fully carry out the important role the press plays in informing the public about government actions." *Id*. at 230. The court concluded that "the Brew [had] sufficiently alleged that the City's pervasive use non-disparagement clauses in settlement agreements with police brutality claimants has interfered with its right to receive newsworthy information from willing speakers." *Id*. at 228–29. The decision of the district court in the case on review here is thus directly at odds with the Fourth Circuit's confirmation that third-parties have standing to seek redress for

injury to their First Amendment-protected right to obtain information for purposes of publication.

The lower court's decision is also at odds with the decision of the Sixth Circuit in *CBS Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975) (per curiam). In that case, a district court order forbade all parties in numerous civil actions arising from the Kent State shooting from discussing the case with members of the news media. The court held that CBS had standing to challenge the gag order because "in denying [CBS] access to potential sources of information," it "at least arguably impairs rights guaranteed to the petitioner by the First Amendment." *Id*. at 237. The Court found that CBS had standing to challenge the gag order because it was "effectively cut off from any access whatever to important sources of information about the trial." *Id.* Accordingly, the Sixth Circuit found that, although CBS was not named in the gag order, "as applied to CBS, this order affected its constitutionally guaranteed right as a member of the press to gather news." *Id*. at 238.

Numerous other courts also have concluded that news organizations have standing to challenge gag orders that inhibit their ability to obtain information or to access judicial records or proceedings even when those organizations are neither parties to the litigation nor restrained directly by the orders. *See, e.g.*, *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 777 (3d Cir. 1994); *In re Application of Dow Jones & Co.*, 842 F.2d 603, 608 (2d Cir. 1988); *Journal Publ'g Co. v. Mechem*, 801

F.2d 1233, 1235 (10th Cir. 1986); *Radio & Television News Ass'n v. United States Dist. Ct.*, 781 F.2d 1443, 1445 (9th Cir. 1986); *United States v. Gurney*, 558 F.2d 1202, 1206-07 (5th Cir. 1977). Here too, Cato has sufficient standing to challenge the SEC's policy and practice of imposing a gag order on parties who settle enforcement proceedings, even though Cato is not a party to the settlement agreements, because the policy "affect[s] its constitutionally guaranteed right" to gather information. *See CBS Inc.*, 522 F.2d at 238.

In addition, Cato has standing to bring its action because the First Amendment protects the right to receive protected speech. This Court has recognized that "a cause of action exists under the First Amendment which allows a recipient to allege that government conduct has chilled the speech of a willing speaker." *Martin v. EPA*, 271 F. Supp. 2d 38, 47 (D.D.C. 2002) (citing *Taylor v. Resolution Tr. Corp.*, 56 F.3d 1497, 1508 (D.C. Cir. 1995)). Indeed, "[i]t is now well established that the Constitution protects the right to receive information and ideas" from a willing speaker. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *see also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 756 (1976) (explaining that, where a willing speaker exists, "the protection afforded [by the First Amendment] is to the communication, to its source and to its recipients both"). The "willing speakers" here are individuals who want to share details of SEC enforcement actions but for the agency's "no deny" policy. As one court observed,

"these settlements do not always take adequate account of another interest ordinarily at stake as well: that of the public and its interest in knowing the truth in matters of major public concern." *SEC v. CR Intrinsic Inv'rs, LLC*, 939 F. Supp. 2d 431, 443 (S.D.N.Y. 2013), *abrogated by S.E.C. v. Citigroup Glob. Mkts., Inc.*, 752 F.3d 285 (2d Cir. 2014).

The SEC's "no deny" policy prevents Cato from gathering information for purposes of publication by speaking to sources that are otherwise willing to speak to them. Indeed, the Amended Complaint alleges that Cato has been prevented from speaking to sources that refuse to speak to them based on gag orders imposed by their settlements with the SEC. *See* JA7 ¶ 2; JA13 ¶ 36; JA15 ¶¶ 42-44. News organizations have been similarly prevented from speaking to otherwise willing sources as a result of the "no deny" clause in the source's settlement agreement. *See* Matthew Goldstein & Randy Pennell, *Elon Musk Calls S.E.C. 'the Shortseller Enrichment Commission' on Twitter*, N.Y. TIMES (Oct. 4, 2018), https://perma.cc/6HTD-2C5M (noting Elon Musk tweet criticizing SEC "[l]ess than a week after he reached a settlement with federal regulators who had sued him, claiming he misled investors," and explaining "the terms of the settlement with the commission prevent [Musk] from saying he did nothing wrong in his communications with investors"). Here, Cato has pleaded the necessary "direct connection between an identifiable willing speaker and . . . a willing listener,"

including allegations that some settling parties "would have spoken to [the media, including Cato] in the past but for the speech restriction or would speak with [the media, including Cato] in the future but for the speech restriction." *ACLU v. Holder*, 673 F.3d 245, 255 (4th Cir. 2011); *see* JA7 ¶ 2; JA13 ¶ 36; JA15 ¶¶ 42-44.

Moreover, even absent a willing speaker, organizations like Cato have standing to challenge gag orders like the SEC's policy here by virtue of their independent First Amendment right to gather information for purposes of publication. Indeed, many circuits have found that members of the media have standing to challenge confidentiality orders without expressly finding the existence of a willing speaker. As the Second Circuit observed, in such circumstances, "[i]t is hard, in fact, to imagine that there are no willing speakers. Without them there would be no need for a restraining order; it would be superfluous." *Dow Jones & Co.*, 842 F.2d at 607; *see also CBS Inc.*, 522 F.2d at 238 (finding that CBS had standing to challenge gag order without discussing a willing speaker requirement). Of course, in the present case, the Court need not decide whether, in every case, an organization like Cato must demonstrate the existence of a willing speaker to establish standing to challenge a court's confidentiality order, because, in the present case, Cato has sufficiently alleged that a willing speaker exists.

Thus, Cato has alleged an injury in fact that is fairly traceable to the SEC's enforcement of the "no deny" provision in its consent judgments that is likely to be

redressed by the relief requested. The SEC's "no deny" policy, which imposes a gag order on all parties who settlement enforcement proceedings with the agency, impedes news organizations' abilities to gather the news and to receive protected speech, abilities which are protected by the First Amendment. The relief requested—that the Court declare that the SEC's "no deny" policy is illegal, unenforceable, and unconstitutional under the First Amendment and void as against public policy—would redress this injury by allowing Cato to discover information about the SEC's enforcement proceedings. Because Cato's injury in fact is directly caused by the "no deny" clause, and such injury will be redressed by a decision striking down its mandatory use in SEC enforcement proceeding settlements, Cato has established its standing to bring the instant action.

II. THE SEC'S "NO DENY" POLICY IS CONTRARY TO THE STRONG PUBLIC POLICY IN FAVOR OF GOVERNMENT TRANSPARENCY

The Freedom of Information Act, 5 U.S.C. § 552 ("FOIA" or "the Act"), "was enacted to facilitate public access to Government documents," *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991), in order to provide "a means for citizens to know 'what their Government is up to.'" *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004). The Act represents a strong Congressional commitment to transparency through the official disclosure of government information, and is recognized as a "structural necessity in a real democracy." *Id.* at 172. Because FOIA

mandates public access to agency records unless they are exempt, FOIA's pro-disclosure structure evinces a strong public policy in favor of transparency in government. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) ("The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."); *see also SEC v. Am. Int'l Grp.*, 712 F.3d 1, 3 (D.C. Cir. 2013) ("The public has a fundamental interest in 'keeping a watchful eye on the workings of public agencies.'") (quoting *Wash. Legal Found. v. U.S. Sentencing Comm'n*, 89 F.3d 897, 905 (D.C. Cir. 1996)).

With respect to settlements, courts routinely presume that the FOIA requires the production of settlement agreement, unless an exemption applies. *See, e.g.*, *Prison Legal News v. Samuels*, 787 F.3d 1142 (D.C. Cir. 2015) (Bureau of Prisons' categorical explanation for redactions from documents showing settlement agreements and money paid by BOP for lawsuits and claims against it was inadequate). Indeed, "[f]inal dispositions" of matters by an agency can never be exempt from FOIA under exemption 5. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153–54 (1975). And, this Circuit has likewise rejected the argument that factual information pertaining to the amount offered by a third party to an agency in settlement negotiations is privileged. *See, e.g.*, *Senate of Commonwealth of P.R. v. U.S. Dep't of Justice*, 823 F.2d 574, 587 (D.C. Cir. 1987); *Mead Data Cen. Inc. v.*

U.S. Dep't of Air Force, 566 F.2d 242, 257–58 (D.C. Cir. 1977); *Greenberg v. U.S. Dep't of Treasury*, 10 F. Supp. 2d 3, 17 (D.D.C. 1998) (stating that "factual information about negotiations between an agency and an outside party" does not fall within exemption 5).

It is beyond question that the consent judgments at issue between the SEC and citizens are public records for purposes of FOIA. The settlement proceeds were paid to a federal agency, and the agreements resolve a claim between a federal agency and a citizen, thus negating any notion that the agreement concerned purely personal or non-governmental matters.

Although the gag order imposed by the SEC "no deny" policy does not purport to make the settlement agreement confidential, it does restrict one of the parties from providing the public with information about the events leading to the settlement agreement and the content of the agreement itself. That restriction is directly in conflict with robust public policy—embodied by FOIA—that favors the ability of individuals to have "access to official information long shielded unnecessarily from public view[.]" *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted). Indeed, as Judge Jed Rakoff of the U.S. District Court for the Southern District of New York observed in *SEC v. Vitesse Semiconductor Corp.*, 771 F. Supp. 2d 304 (S.D.N.Y. 2011), the SEC's policy of allowing defendants to settle without admitting or denying allegations as long as they agree not to dispute the agency's

claims publicly results in "a stew of confusion and hypocrisy unworthy of such a proud agency as the S.E.C." *Id.* at 309.

Because a gag order such as the one imposed by the SEC's "no deny" policy on settling defendants violates the public policy of transparency embodied in FOIA, *see U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 775 (1989) (explaining that the "core purpose" of FOIA is to increase "public understanding of the operations or activities of the government"), this Court should affirm that news organization and publishers like Cato have standing to challenge policies that directly affect their access to sources, like the SEC's "no deny" policy, which circumvent this country's clear, enduring preference for openness, transparency, and accountability.

CONCLUSION

For the foregoing reasons, this Court should vacate the district court's order and remand.

RESPECTFULLY SUBMITTED this 29th day of June, 2020.

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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the requirements of Federal Rules of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32(e). The brief is proportionately spaced in Times New Roman 14-point type. According to the word processing system used to prepare the brief, Microsoft Word, the word count of the brief is 4,505, not including the table of contents, table of authorities, certificate of service, and certificate of compliance.

Undersigned counsel are not aware of any other amicus briefs being filed in support of the Plaintiff-Appellant, and submit the foregoing brief in compliance with Circuit Rule 29(d).

DATED this 29th day of June, 2020.

DAVIS WRIGHT TREMAINE LLP

By /s/ Lisa Zycherman
Lisa Zycherman

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on June 29, 2020.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DAVIS WRIGHT TREMAINE LLP

By /s/ Lisa Zycherman
Lisa Zycherman

Counsel for Amici Curiae

APPENDIX A

STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

First Look Media Works, Inc. is a non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting. First Look Media Works operates the Press Freedom Defense Fund, which provides essential legal support for journalists, news organizations, and whistleblowers who are targeted by powerful figures because they have tried to bring to light information that is in the public interest and necessary for a functioning democracy.

Gannett is the largest local newspaper company in the United States. Our 260 local daily brands in 46 states and Guam — together with the iconic USA TODAY — reach an estimated digital audience of 140 million each month.

The International Documentary Association (IDA) is dedicated to building and serving the needs of a thriving documentary culture. Through its programs, the

IDA provides resources, creates community, and defends rights and freedoms for documentary artists, activists, and journalists.

The Investigative Reporting Workshop, based at the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

The Media Institute is a nonprofit foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

MediaNews Group Inc. publishes the Mercury News, the East Bay Times, St. Paul Pioneer Press, The Denver Post, the Boston Herald and the Detroit News and other regional and community papers throughout the United States, as well as numerous related online news sites.

MPA – The Association of Magazine Media, ("MPA") is the industry association for magazine media publishers. The MPA, established in 1919, represents the interests of close to 100 magazine media companies with more than

500 individual magazine brands. MPA's membership creates professionally researched and edited content across all print and digital media on topics that include news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

The News Leaders Association was formed via the merger of the American Society of News Editors and the Associated Press Media Editors in September 2019. It aims to foster and develop the highest standards of trustworthy, truth-seeking journalism; to advocate for open, honest and transparent government; to fight for free speech and an independent press; and to nurture the next generation of news leaders committed to spreading knowledge that informs democracy.

The News Media Alliance is a nonprofit organization representing the interests of digital, mobile and print news publishers in the United States and Canada. The Alliance focuses on the major issues that affect today's news publishing industry, including protecting the ability of a free and independent media to provide the public with news and information on matters of public concern.

POLITICO is a global news and information company at the intersection of politics and policy. Since its launch in 2007, POLITICO has grown to nearly 300 reporters, editors and producers. It distributes 30,000 copies of its Washington newspaper on each publishing day and attracts an influential global audience of more than 35 million monthly unique visitors across its various platforms.

The Society of Environmental Journalists is the only North-American membership association of professional journalists dedicated to more and better coverage of environment-related issues.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.