

No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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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.

PARTIES TO THE PROCEEDING

Petitioners (petitioners below) are Thomas J. Powell, Joseph Collins, Raymond J. Lucia, Christopher A. Novinger, Gary Pryor, Barry D. Romeril, Rex Scates, Michelle Silverstein, Marguerite Cassandra Toroian, The Cape Gazette, Reason Foundation, and the New Civil Liberties Alliance.

Respondent (respondent below) is the Securities and Exchange Commission.

RULE 29.6 STATEMENT

Petitioners The Cape Gazette, Reason Foundation, and the New Civil Liberties Alliance have no parent corporation, and no publicly held corporation owns 10% or more of their stock.

RELATED PROCEEDINGS

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Petitioners Thomas J. Powell, Joseph Collins, Raymond J. Lucia, Christopher A. Novinger, Gary Pryor, Barry D. Romeril, Rex Scates, Michelle Silverstein, Marguerite Cassandra Toroian, The Cape Gazette, Reason Foundation, and the New Civil Liberties Alliance respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-29a) is reported at 149 F.4th 1029.

JURISDICTION

The court of appeals entered its judgment on August 6, 2025 and denied rehearing on October 17, 2025. On January 8, 2026, Justice Kagan extended the time to file a petition for a writ of certiorari through March 16, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution and 17 C.F.R. § 202.5 are reproduced at App. 60a-64a.

INTRODUCTION

One of the most fundamental of all American rights is the right to criticize one's government. *See* U.S. Const. amend. I, cl. 2. This case concerns the government's authority to strip Americans of that right. Numerous regulatory agencies possess powerful enforcement authority that is virtually unchecked at the agency level. The mere assertion of

such authority can alter, and destroy, lives and livelihoods, even on the flimsiest of charges. Targets of agency enforcement actions thus are forced to settle, even when they vehemently disagree with the agency's charges and conduct. The basic question in this case is whether an agency may leverage its enforcement authority to silence its critics upfront by conditioning an individual's ability to settle an action, and move on with his life, on "agreeing" to a lifetime ban on denying the agency's allegations. This ban requires Americans to take their unspoken grievances against the agency to their graves. The First Amendment prohibits that most un-American result.

Enter the Securities and Exchange Commission. It has overwhelming power over individuals and entities across broad sectors of the financial services industry. Relative to any private party, it has a virtually unlimited budget and can spend years investigating and prosecuting. It has at its disposal an arsenal of punishing weapons, including lifetime industry bars, administrative sanctions, and enormous civil penalties. And the sheer expense and burden of defending against an agency with no financial restraints can itself impose an enterprise- and life-destroying burden on the targets of its proceedings. Faced with these high costs and higher risks—which combine to create an atmosphere of "regulatory extortion," *Axon Enter., Inc. v. FTC* and *SEC v. Cochran*, 598 U.S. 175, 216 n.4 (2023) (*Axon/Cochran*) (Gorsuch, J., concurring in the judgment)—it should come as no surprise that 98% of SEC defendants are ultimately forced to settle.

It is bad enough for an individual or business to be forced to settle an action that should never have been brought. But over the past 50 years, the SEC has

wielded this leverage to unilaterally impose the statutorily unauthorized Gag Rule as a condition of settlement: defendants must agree to lifelong, judicially or administratively enforced bans on ever contesting the allegations leveled against them. As Judges Jones and Duncan recently put it, the rule offers defendants an impossible choice: agree to “[h]old your tongue, and don’t say anything truthful—ever’—or get bankrupted by having to continue litigating with the SEC.” *SEC v. Novinger*, 40 F.4th 297, 308 (5th Cir. 2022) (Jones, J., joined by Duncan, J., concurring). “A more effective prior restraint,” they observed, “is hard to imagine.” *Id.*

The breadth and force of the Gag Rule is stunning. A settling defendant, for example, may not even make truthful statements about agency charges if those statements contradict—or even just create the *impression* of contradicting—the SEC’s allegations. The Gag Rule applies even when subsequent judicial decisions, in other cases, entirely reject the SEC’s theory of liability—barring settling defendants from denying liability for conduct that this Court itself later holds was perfectly lawful. The Gag Rule applies in perpetuity, silencing individuals from telling their own side of the story or voicing their objections to the SEC’s allegations and actions for the rest of their lives. The Gag Rule effectively silences news-gathering organizations—like Petitioner The Cape Gazette—too. They are deprived of defendants’ own side of a dispute in reporting on alleged wrongdoing and the agency’s actions against them. And this all is a “mandatory, non-negotiable term” foisted on targets as the price of ending the crushing personal, reputational, and financial toll of an SEC action. App. 54a (Peirce, Comm’r, dissenting).

The Gag Rule is especially pernicious because it is targeted at the individuals best positioned to shed light on the SEC's conduct (those who have been subjected to its authority), and at the speech most likely to be critical of the agency. Nor does the SEC deny that the Gag Rule is a transparent attempt to limit public criticism of SEC enforcement actions: to the contrary, it has consistently justified the rule based on a need to avoid public "impression[s]" that might contradict those espoused by the agency. 17 C.F.R. § 202.5(e); *see* App. 36a-38a. It is no exaggeration to say that Americans fought a revolution to prevent this kind of blatant censorship. Agencies may wield far greater power than the Framers would have envisioned, but they do not—and cannot—possess the power to eradicate constitutional rights, much less the SEC's claimed power to squelch speech critical of the agency's own actions.

The SEC's Gag Rule warrants this Court's review. For starters, it contravenes perhaps the single most fundamental First Amendment protection: the right of citizens to criticize government action and expose government abuses. It imposes an unconstitutional condition on charged parties who see no practical option but to settle with the agency to get their lives back. And it violates this Court's precedents. Indeed, this Court has made clear that government officials may not "attempt to coerce private parties in order to punish or suppress views that the government disfavors." *National Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 180 (2024). The government is "constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue," "[e]specially" if it desires to "give one side of a

debatable public question an advantage.” *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 784-85 (1978). The Gag Rule blatantly violates those principles.

The Ninth Circuit’s contrary holding fundamentally misunderstood this Court’s First Amendment jurisprudence. Invoking the fractured decision in *Town of Newton v. Rumery*, 480 U.S. 386 (1987)—which this Court specifically cabined to the waiver of *statutory* rights to litigate under 42 U.S.C. § 1983—the Ninth Circuit reasoned that the supposedly voluntary nature of settlements permits the government to condition settlement on waiving *First Amendment* rights to criticize the agency’s case. That holding badly misread *Rumery*’s already shaky foundation and overlooked *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991), *Vullo*, and other more recent decisions by this Court recognizing that the government cannot suppress disfavored speech. And what the Ninth Circuit perversely characterized as “optionality,” App. 25a, is instead a glaring unconstitutional condition, which flunks precedents both preceding and following *Rumery*.

The Ninth Circuit’s decision also directly conflicts with the decisions of other circuits that have rejected government attempts to condition settlements on giving up First Amendment rights. The Fourth Circuit, for example, held per se void and unenforceable non-disparagement clauses that the City of Baltimore demanded in police-misconduct settlement agreements. *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 220-21 (4th Cir. 2019). As the court explained, such clauses constitute “a government-defined and government-enforced restriction on government-critical speech,”

implicating the citizenry's First Amendment interest in "uninhibited, robust debate." *Id.* at 223-24. Attempting to condition freedom from the ruinous toll of an SEC enforcement action on silence is far more coercive than doing so for a lucrative damages award.

The constitutionality of such non-disparagement conditions is extraordinarily important and squarely presented here. And this petition provides a clean vehicle—and likely the last, best opportunity—for the Court to review the SEC's Gag Rule. Two circuits have already refused, on procedural grounds, to hear *post-judgment* constitutional challenges by individual defendants whose settlements with the SEC implement the Gag Rule's restrictions. In a recent case involving such a challenge, two Fifth Circuit judges explicitly noted that this rulemaking petition was the appropriate mechanism for challenging the SEC's rule. *See Novinger*, 40 F.4th at 308 (Jones, J., joined by Duncan, J., concurring). Yet, because of the SEC's foot-dragging, the petition has taken almost eight years to reach this Court. It thus presents the only practical opportunity for this Court to consider critically important First Amendment issues raised by the Gag Rule—and to eliminate a blatantly unconstitutional prior restraint on speech challenging the SEC's enforcement practices.

The petition should be granted.

STATEMENT OF THE CASE

A. Legal Background

1. The SEC possesses vast regulatory powers that can have a life-altering and, in some cases, reputation- or life-destroying impact on individuals and entities in the securities industry. Tasked with regulating virtually all facets of the nation's securities and financial markets, the SEC is empowered to conduct intrusive investigations; to initiate enforcement actions both through in-house proceedings and in federal court; and to levy massive sanctions against targets, including cease-and-desist orders, lifetime industry bars, disgorgement, and large monetary penalties. Playing judge, jury, and executioner, the SEC almost always wins in its home court. "The numbers reveal just how tilted this game is. From 2010 to 2015, the SEC won 90% of its contested in-house proceedings compared to 69% of the cases it brought in federal court." *Axon/Cochran*, 598 U.S. at 215 (Gorsuch, J., concurring in judgment).

With little incentive of its own to wrap things up quickly, the SEC's enforcement actions often drag on for years. Running this gauntlet inflicts an enormous personal, financial, and reputational toll on the SEC's targets, who are in professional limbo at best, and in many cases become industry pariahs, during this period. The burdens are so great that 98% of those charged by the SEC—often despite vigorously asserting their innocence and objecting to the agency's actions—are ultimately forced to capitulate through settlement. *See Cochran v. SEC*, 20 F.4th 194, 229-30 (5th Cir. 2021) (en banc) (Oldham, J., concurring) (collecting authorities), *aff'd sub nom.*, *Axon/Cochran*, 598 U.S. 175. For even the most

adamant objectors, there comes a time when there is no practical option but to throw in the towel.

The SEC is aware of the emotional and financial toll enforcement actions place on targets—and the agency leverages it. “Throughout the entire administrative process,” the SEC “places substantial pressure on targets” to settle. *Cochran*, 20 F.4th at 230 (emphasis omitted) (Oldham, J., concurring). In some cases, the SEC’s supposedly neutral administrative law judges have themselves urged defendants to settle, including one who allegedly told respondents that “he had never ruled against the agency’s enforcement division.” Jean Eaglesham, *Fairness of SEC Judges Is in Spotlight*, Wall St. J. (Nov. 22, 2015). Moreover, because “few can outlast or outspend the federal government,” the SEC is able to engage in “regulatory extortion,” using the ruinous costs of litigation “as leverage to extract settlement terms [it] could not lawfully obtain any other way.” *Axon/Cochran*, 598 U.S. at 216 n.4 (Gorsuch, J., concurring in the judgment) (citation omitted).

2. The Gag Rule further turns the screws on enforcement targets. First published in 1972 and made “effective immediately,” without notice and comment, 37 Fed. Reg. 25,224, 25,224 (Nov. 29, 1972), the Gag Rule codifies the SEC’s inflexible “policy”—in both civil and administrative enforcement actions—“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.” 17 C.F.R. § 202.5(e). The only justification the SEC gave for the rule was the self-serving interest 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.” *Id.*

In a typical settlement, the SEC implements the Gag Rule through several related provisions of the final consent judgment entered by the district court. App. 3a-4a. The individual or entity settling with the SEC must agree to “comply with” Section 202.5(e) and therefore not make “any public statement denying, directly or indirectly, any allegation in the complaint or creating the impression that the complaint is without factual basis.” *Id.* at 4a, 26a (emphasis and citations omitted). But the SEC goes further: Defendants must agree not to publicly make “indirect[]” denials or “permit” others to make such denials. *Id.* at 26a (emphasis and citations omitted).

Outside of litigation and sworn testimony, defendants may not even make even *truthful* factual statements if those statements contradict the SEC’s allegations, nor may they deny the allegations even if courts or the SEC itself subsequently determines that the charged conduct was legally permissible. *See id.* at 4a; *id.* at 43a-44a (Peirce, Comm’r, dissenting). Defendants must also waive all their procedural rights related to any aspect of the settlement, including the requirements of Federal Rule of Civil Procedure 65(d). *See* CA9 E.R. 82, 88, 103, 110. Notably, these provisions are not the product of give-and-take: the agency typically unilaterally drafts the settlement agreements and informs defendants that the gag provisions are non-negotiable. *See, e.g., id.* at 130, 134, 138, 142, 146, 150, 154, 158, 161.

If a settling defendant breaches these prohibitions, the SEC can move the district court to void the settlement and reopen the case, App. 21a—exposing the defendant to potentially devastating penalties, not to mention all the burdens of litigating

against the federal regulatory machinery that drove them to settlement in the first place.

Since 1972, the Gag Rule has silenced “countless potential speakers” who settled with the SEC, subjecting them to lifetime bans that prevent them from ever contesting the agency’s public allegations against them. *Id.* at 56a (Peirce, Comm’r, dissenting); see *SEC v. Moraes*, No. 22-cv-8343, 2022 WL 15774011, at *2 (S.D.N.Y. Oct. 28, 2022) (noting that the SEC’s reliance on its Gag Rule “to dispose of enforcement actions is breathtaking”). It has muzzled nearly everyone charged by the agency—the only parties with actual experience facing off against the SEC and who are in the best position to educate the public on the agency’s actions and abuses—since 98% of all targets ultimately are forced to settle. And once an SEC target has been cowed into settlement, the Gag Rule’s nominally voluntary character has insulated it from all legal challenges except this one.

3. Numerous defendants and third parties have tried to challenge the Gag Rule, but they have found themselves in a procedural Catch-22. The collateral bar rule requires defendants challenge the gag in the court that entered it. See *Walker v. City of Birmingham*, 388 U.S. 307, 316-17 (1967). But courts have held that defendants are barred from moving *after the fact* to challenge the Gag Rule on First Amendment grounds. See, e.g., *Novinger*, 40 F.4th at 307; *SEC v. Romeril*, 15 F.4th 166, 172 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 2836 (2022). And *before the fact*, the Gag Rule is a non-negotiable condition of getting one’s life and livelihood back. This leaves only a direct petition for review, which two members of the Fifth Circuit recently observed was the correct way to challenge the Gag Rule—pointing to the petition that

is the subject of this very proceeding. *See Novinger*, 40 F.4th at 308 (Jones, J., joined by Duncan, J., concurring).

B. The SEC’s Rulemaking Denial

In October 2018, the New Civil Liberties Alliance petitioned the SEC to amend the Gag Rule so that defendants could settle enforcement actions with admissions, denials, or on a no-admit/no-deny basis. *See App. 4a; CA9 E.R. 39.* Though the petition emphasized the grave First Amendment problems involved with any government-mandated restraint on speech, especially the prototypical prior restraint challenged here, the SEC did not respond to the petition for over five years. *App. 4a.* In December 2023, NCLA filed a renewed petition, which added several individuals as petitioners. *Id.* at 4a-5a.

In January 2024, the SEC denied the rulemaking petition, over Commissioner Peirce’s dissent. *Id.* at 36a-58a. In a short and conclusory analysis, the SEC majority claimed that the Gag Rule was necessary to vindicate its allegations. *Id.* at 36a-41a. In the agency’s view, an SEC enforcement target should not be permitted to settle—and thereby prevent a trial-based resolution of the SEC’s claims—but then be able to question the allegations once the agency no longer had a forum to prove its case (something every criminal defendant in America who enters into a plea deal can freely do).

The SEC feared that allowing such individuals to criticize the agency would “undermine confidence in the Commission’s enforcement program” and “create the incorrect impression that there was no basis for the Commission’s enforcement action.” *Id.* at 37a-38a. In true Orwellian fashion, the agency

proclaimed that, instead of allowing the public to “sort out the truth in the free marketplace of ideas,” it was “acting in the public interest” by simply silencing the critical speech of those who settle. *Id.* at 37a, 40a.

The SEC then declared that the Gag Rule had no constitutional infirmities. Because “a defendant can waive constitutional rights as part of a civil settlement,” the Commission reasoned, a “mutually acceptable resolution” implicates no First Amendment issues. *Id.* at 38a-41a. In so reasoning, the Commission relied on this Court’s decision in *Rumery*, explaining that “there is no ‘per se rule of invalidity’ for waivers of constitutional rights.” *Id.* at 38a. According to the SEC, settling defendants simply make “a ‘highly rational judgment’ that the advantages of settlement exceed[] any costs of waiver.” *Id.* at 40a (quoting *Rumery*, 480 U.S. at 394).

Commissioner Peirce dissented. *Id.* at 42a-58a. In her view, the Gag Rule is “a plain prior restraint on speech” and a “content-specific” regulation that “necessarily raises First Amendment concerns.” *Id.* at 50a-51a. Commissioner Peirce also explained that while settlements are deemed voluntary, “nearly all defendants” realize that the “time, expense, and difficulty” of defending against the SEC “makes settling the only economically viable option.” *Id.* at 53a-56a. Going to trial “consumes enormous financial resources” and subjects defendants to the “even more onerous emotional, physical, and relational tolls of litigation.” *Id.* at 53a-54a. The Gag Rule therefore represents the “inevitable mismatch” between the regulator and the regulated, and it involves the “[e]mploy[ment] [of] superior bargaining power to extract an agreement.” *Id.* at 54a-55a.

Commissioner Peirce observed that, “[o]ne of the things I love about this country is that Americans can and often do criticize their government.” *Id.* at 44a. “Of course,” she continued, “some criticisms of government policies, practices, or personnel may be baseless, but the American public, not government censors, should be the arbiters of validity.” *Id.* at 44a-45a. Because the Gag Rule “squellch[es] contrary voices” and “prevent[s] the American public from ever hearing criticisms” of the agency, she concluded that it is “inconsistent with the spirit of the First Amendment and our Nation’s time-honored tradition of protecting free expression.” *Id.* at 45a, 51a, 55a (quoting *Moraes*, 2022 WL 15774011, at *3).

C. Ninth Circuit Proceedings Below

Petitioners sought review of the SEC’s denial of their rulemaking petition to abolish the Gag Rule, and the Ninth Circuit denied their petition for review. App. 1a-29a. The court of appeals recognized that the Gag Rule raised “legitimate First Amendment concerns,” *id.* at 10a, but it nevertheless dismissed those concerns, reasoning that settlements are “voluntary agreement[s]” in which “First Amendment rights can be waived,” *id.* at 10a-12a; *see id.* at 22a (explaining that the Gag Rule simply presents defendants with “a choice”).

Applying this Court’s splintered decision in *Rumery*, the Ninth Circuit held that the only question was whether the government’s “interest in [a waiver’s] enforcement [wa]s outweighed in the circumstances by a public policy harmed by enforcement of the agreement.” *Id.* at 14a (quoting *Rumery*, 480 U.S. at 392). Under that approach, the court reasoned that the SEC’s interest in “proving the

allegations supporting its enforcement actions,” while not “so compelling,” is also not “wholly illegitimate.” *Id.* at 21a-24a. And because the court believed there is a “close nexus” between that interest and the Gag Rule, the court “narrowly reject[ed]” the petition. *Id.* at 21a, 25a (citation omitted).

The court recognized that it is improper for the SEC to pursue a “rationale that it is necessary to silence defendants in order to promote public confidence in the SEC’s work.” *Id.* at 23a. But in the Ninth Circuit’s view, such concerns were “properly addressed in an *as-applied* challenge,” *id.* at 2a (emphasis added)—exactly the opposite of what the Fifth Circuit had ruled in a case brought by one of the petitioners here (Christopher Novinger) in denying his *as-applied* challenge and urging him and others like him to pursue *this* petition. *Supra* at 10-11.

Petitioners sought rehearing and rehearing en banc, both of which were denied. App. 59a.

REASONS FOR GRANTING THE PETITION

This case presents a fundamental question of exceptional national importance concerning the power of the administrative state to permanently squelch speech questioning an agency’s enforcement actions. The SEC’s Gag Rule—which a divided SEC refused to repeal or amend below—extorts an impermissible cost from a defendant who feels compelled to settle simply to regain control of his life and insulates a powerful regulatory agency from criticism on matters of public concern. The Ninth Circuit’s decision approving the Gag Rule under the First Amendment is rooted in an improper extension of this Court’s splintered decision in *Town of Newton v. Rumery*, 480 U.S. 386 (1987). It contravenes more

recent decisions of this Court and conflicts with the decisions of other circuits. And, as Judges Jones and Duncan recently recognized, this proceeding presents the best vehicle to review the SEC’s assertion of authority to silence the subjects of its enforcement efforts. The petition should be granted.

I. The SEC’s Gag Rule Blatantly Violates Two Core Protections Of The First Amendment

Because it not only muzzles would-be speakers but does so preemptively based on the content and viewpoint of their speech, the SEC’s Gag Rule “rest[s] at the intersection of two disfavored forms of expressive limitations: prior restraints and content-based restrictions”—and therefore “warrant[s] a most rigorous form of review.” *In re Murphy-Brown, LLC*, 907 F.3d 788, 796-97 (4th Cir. 2018) (Wilkinson, J.).

1. Government efforts to censor criticism—particularly through “prior restraints” that stop such criticism before it happens—constitute the “most serious and the least tolerable infringement on First Amendment rights.” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 558-59 (1976). Indeed, our country’s forefathers were well-versed in the harms of governmental “censorship,” and a “chief purpose” of the First Amendment was to “prevent [prior] restraints” on speech. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713-16 (1931); see *Patterson v. Colorado ex rel. Att’y Gen.*, 205 U.S. 454, 462 (1907). Prior restraints are thus “presumptively unconstitutional,” *Nebraska Press Ass’n*, 427 U.S. at 558 (citation omitted), and cannot be sustained absent the most “exceptional” circumstances, *Near*, 283 U.S. at 716.

The Gag Rule is a textbook prior restraint. It mandates a government-imposed prohibition on

speech for the rest of the settling individual’s life. See *Alexander v. United States*, 509 U.S. 544, 550 (1993) (“[O]rders that actually forbid speech activities ... are classic examples of prior restraints.”). As Judges Jones and Duncan observed, it is “hard to imagine” a “more effective prior restraint” than the “SEC’s policy,” which essentially “says ‘Hold your tongue, and don’t say anything truthful—ever’—or get bankrupted by having to continue litigating with the SEC.” *SEC v. Novinger*, 40 F.4th 297, 308 (5th Cir. 2022) (concurring opinion); see *SEC v. Moraes*, No. 22-cv-8343, 2022 WL 15774011, at *4 (S.D.N.Y. Oct. 28, 2022) (noting the Gag Rule “has all the hallmarks of a prior restraint on speech”). Commissioner Peirce likewise acknowledged that the Gag Rule is “a plain prior restraint on speech.” App. 50a.

2. At the same time, the Gag Rule is a content- and viewpoint-based restriction on speech. For that reason, too, it is “‘presumptively invalid’ and subject to strict scrutiny.” *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 358 (2009) (quoting *Davenport v. Washington Educ. Ass’n*, 551 U.S. 177, 188 (2007)). Because “content discrimination ‘raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace,’” the government “may not regulate use based on hostility—or favoritism—towards the underlying message expressed.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386-87 (1992) (quoting *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)). Where, as here, the target of the government’s restriction on speech “is not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is

all the more blatant.” *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

The Gag Rule plainly violates these principles. It penalizes two specific categories of statements: first, outright denials or even the impression of a denial, and second, non-admissions, if not accompanied by an additional statement that the speaker also does not deny the allegations. The SEC thus regulates speech both because of its content (the agency’s allegations) and its viewpoint (that those allegations are wrong), a double whammy under the First Amendment.

Importantly, the censorship here is not reciprocal. Nothing restrains *the SEC* from saying whatever it pleases about an enforcement target after a settlement, but a settling defendant can never deny the allegations against him or suggest the agency overreached. See Rodney A. Smolla, *Why the SEC Gag Rule Silencing Those Who Settle SEC Investigations Violates the First Amendment*, 29 Widener L. Rev. 1, 8 (2023). Thus, “[a]lthough a defendant cannot ‘create the impression’ that he is ‘denying the allegations in the complaint,’ 17 C.F.R. 202.5(e), he is perfectly free to praise the SEC for its enforcement tactics.” *Moraes*, 2022 WL 15774011, at *5. The SEC cannot grant itself a monopoly on the right to speak. Such a censorship regime takes a page out of the Soviet Union’s old playbook—it has no place in America. Strict scrutiny is therefore warranted.

The Gag Rule cannot survive strict scrutiny, and the SEC does not even try to argue otherwise. The government’s interest in suppressing public criticism of itself is the opposite of compelling; indeed, speech in opposition to the government lies at “the very center of the constitutionally protected area of free expression.” *New York Times Co. v. Sullivan*, 376

U.S. 254, 292 (1964). It is the reason we have a First Amendment to begin with. And in any event, as Commissioner Peirce recognized, there is no “compelling rationale” for the Gag Rule, and the agency has not even attempted to demonstrate its necessity through a public record or by providing “actual evidence.” App. 48a, 54a-55a.

Simon & Schuster reinforces that conclusion. There, this Court struck down a state law diverting—for five years—any funds earned by convicted criminals who had written books about their crimes. In doing so, this Court made clear that the government may not target even convicted criminals for special limitations on their expressive activities, since First Amendment protections “do[] not vary with the identity of the speaker.” 502 U.S. at 117. If a temporary, five-year limitation on the earnings of convicted criminals like the “Son of Sam” is unconstitutional—one that did not stop them from speaking at all—the same must be doubly true of the Gag Rule’s lifetime ban on the purest form of speech for individuals who merely have been charged with civil regulatory violations that might amount to nothing more than failing to complete an auditing checklist. See *Axon/Cochran*, 598 U.S. 175, 213 (2023) (Gorsuch, J., concurring in the judgment).

In short, the Gag Rule is plainly unconstitutional under the most basic First Amendment principles.

II. The Ninth Circuit’s Decision Nevertheless Blessing The Gag Rule Conflicts With The Decisions Of This Court And Other Circuits

Without denying the Gag Rule’s pernicious impact on speech, the Ninth Circuit upheld the rule based on the general proposition that individuals can waive

constitutional rights. App. 2a, 10a-11a. But that analysis was too simplistic. Of course, individuals can waive rights. But this Court and others have long recognized that there are limits on the government's ability to coerce the "waiver" of constitutional rights. The Gag Rule sharply transgresses those limits.

1. The SEC does not dispute that the Gag Rule would be unconstitutional if it were imposed outside of a settlement agreement, say by statute—nor could it, for the reasons explained above. Instead, the agency and the Ninth Circuit minimized the Gag Rule's "obvious First Amendment ramifications," App. 51a, by reasoning that the Gag Rule is permissible as a voluntary condition of settlement.

That holding cannot be reconciled with this Court's unconstitutional conditions precedents. For more than a century, this Court has recognized that the government may not "require[]" an individual "to give up a constitutional right 'as a condition precedent to the enjoyment of a privilege.'" *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 607 (2013) (quoting *Frost & Frost Trucking Co. v. Railroad Comm'n of Cal.*, 271 U.S. 583, 592-93 (1926)); see, e.g., *Barron v. Burnside*, 121 U.S. 186, 200 (1887).

The unconstitutional conditions doctrine accordingly prohibits the government from "deny[ing] a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). That is true even if "a person has no 'right' to [that] valuable governmental benefit and even though the government may deny him the benefit for any number of reasons." *Id.* Otherwise, the government could wield its increasingly expansive and coercive regulatory

powers to “produce a result which [it] could not command directly” and thereby “penalize[] and inhibit[]” the exercise of “constitutionally protected speech.” *Id.* (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). The unconstitutional conditions doctrine thus “vindicates the Constitution’s enumerated rights by preventing the government” from wielding its discretionary authority to “coerc[e] people into giving them up.” *Koontz*, 570 U.S. at 604.

Plea agreements and civil settlements often involve the surrender of certain rights. A criminal defendant accepting a plea deal, for example, obviously must forfeit his right to a jury trial. But it is unusual, if not unheard of, for the government to force a defendant to give up—for life—his right to deny the government’s allegations against him, or to criticize the prosecution, as the price of a plea deal. The crucial distinction is that permissible waivers of constitutional rights—like a plea deal’s waiver of the right to a jury trial—have an “essential nexus” to the settlement itself. *Koontz*, 570 U.S. at 606. Indeed, unlike the waiver of free speech rights, waiver of the jury trial right is “inevitable” as part of a settlement. *Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973); see Kay L. Levine, Jonathan Remy Nash & Robert A. Schapiro, *The Unconstitutional Conditions Vacuum in Criminal Procedure*, 133 *Yale L.J.* 1401, 1408 (2024) (noting that the “[w]aiver of the rights to a jury trial, to cross-examine witnesses, and to examine physical evidence are implicit in the core bargain required for a defendant to plead guilty”).

This distinction pervades the Court’s unconstitutional conditions cases. When considering federal funding conditions that infringe on an individual’s First Amendment rights, for example, the

Court has drawn a distinction between necessary “conditions that define the federal program and those that reach outside it.” *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 217 (2013) (AOSI). When the government “demand[s]” that funding recipients “adopt—as their own—the [g]overnment’s view on an issue of public concern,” such that an individual cannot publicly “assert a contrary belief,” then the “condition by its very nature affects ‘protected conduct outside the scope of the federally funded program’” and “falls on the unconstitutional side of the line.” *Id.* at 217-18 (citation omitted). Similarly, in the land-use context, the Court has held that municipal permit conditions infringing on constitutional rights must “have an ‘essential nexus’ to the government’s land-use interest.” *Sheetz v. County of El Dorado*, 601 U.S. 267, 275 (2024) (citation omitted). Absent that essential nexus, those conditions “amount to ‘an out-and-out plan of extortion.’” *Id.* (citation omitted); see also *Koontz*, 570 U.S. at 608 (collecting cases).

The Gag Rule “falls on the unconstitutional side of the line.” AOSI, 570 U.S. at 217. The waiver of First Amendment rights it compels has nothing to do with effectuating the settlement, ending an enforcement action, or even furthering any conceivably legitimate government interest. See Aaron Gordon, *Imposing Silence Through Settlement: A First-Amendment Case Study of the New York Attorney General*, 84 Alb. L. Rev. 335, 350 (2021) (right to publicly criticize the SEC’s allegations is “extraneous to [the] civil-settlement process”). It is simply an extra benefit the SEC extorts to insulate the agency from criticism. The agency would be laughed out of court if it sought a speech ban as a sanction for a securities violation.

Yet, through the threat of potentially ruinous liability, the Gag Rule imposes an unconstitutional penalty that the SEC “could not command directly.” *Perry*, 408 U.S. at 597 (citation omitted).

Just two years ago, this Court unanimously held in *National Rifle Ass’n of America v. Vullo* that a government official could not “coerce a private party to punish or suppress disfavored speech on her behalf,” thereby “do[ing] indirectly what she is barred from doing directly.” 602 U.S. 175, 190 (2024). There, this Court saw through officials’ attempt to “wield[] their power ... through private intermediaries,” correctly recognizing it as tantamount to “suppress[ing] speech, directly.” *Id.* at 198. The SEC’s Gag Rule is yet another attempt to evade the First Amendment. If the stratagem in *Vullo* was to utilize an intermediary to suppress speech, here the SEC has not even tried to hide its censorship efforts: the agency demands that defendants give up their First Amendment rights as a condition of avoiding the crippling personal and financial toll of defending an SEC enforcement action to the bitter end.

The unconstitutional conditions doctrine also answers the Ninth Circuit’s repeated assertions that a settlement is “voluntary.” App. 20a-21a. By definition, a “condition” always involves a nominally voluntary agreement. But this Court has made clear that even purportedly “voluntar[y]” agreements can impermissibly interfere with constitutional rights when the government negotiates with inappropriate carrots and sticks. *Koontz*, 570 U.S. at 604-05. The SEC’s program of enforcement-by-settlement is hardly a series of willing exchanges between equal parties. Ninety-eight percent of SEC defendants settle, and it is no surprise why: as Commissioner

Peirce explained, “nearly all defendants” eventually realize that settling is “the only economically viable option”—at which point they enter into negotiations characterized by an “inevitable mismatch” in leverage and the “[e]mploy[ment] [of] superior bargaining power to extract an agreement.” App. 53a-55a. The end result is nothing short of “regulatory extortion,” *Axon/Cochran*, 598 U.S. at 216 n.4 (Gorsuch, J., concurring in the judgment) (citation omitted), that delivers an unconstitutional speech ban the agency could never have otherwise adopted.

Indeed, a private party’s consent—even *when* voluntary—cannot give the government a power that the Constitution denies to it. “The Constitution is a law enacted by the people and therefore is not variable with the consent of any state or private person. No such consent can relieve the federal government of the Constitution’s limits.” Philip Hamburger, *Purchasing Submission: Conditions, Power, and Freedom* 156 (2021); see Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 Va. L. Rev. 479, 480 (2012). Thus, a party could not “agree” to a racially discriminatory provision that violates the Fourteenth Amendment to settle a claim (*e.g.*, you will only do business with those of a particular race). Nor can a party constitutionally “agree” to give away its right to criticize an agency’s actions—forever.

2. The Ninth Circuit glossed over the Gag Rule’s serious First Amendment problems by applying the balancing test from this Court’s splintered decision in *Rumery*. App. 20a-27a. That unjustified extension of *Rumery* alone demands this Court’s review.

In *Rumery*, this Court held that agreements by criminal defendants to release potential Section 1983

civil-rights claims in exchange for reduced or dropped charges are not “*per se*” invalid as a matter of “public policy.” 480 U.S. at 392. While the Court noted that “in some cases these agreements may infringe important interests of the criminal defendant and of society as a whole,” *Rumery* emphasized the “wide variety of factual situations” giving rise to claims waivers and accordingly rejected “a *per se* rule of invalidity.” *Id.* (emphasis added). A blanket rule, *Rumery* held, would “overstate[] the perceived problems” of waivers while “fail[ing] to credit the significant public interests that such agreements can further.” *Id.* The Court thus adopted a case-specific balancing test to be applied by courts in weighing whether “the interest in [a waiver’s] enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement.” *Id.*¹

Rumery’s logic has little application to this case. To begin with, *Rumery* concerned the purported waiver of “a right to sue conferred by a federal statute,” Section 1983. *Id.* at 392 (emphasis added). It did not involve the waiver of a constitutional right, much less a First Amendment right—an order-of-magnitude difference. Moreover, in reaching its determination that a balancing test should govern rights waivers, the Court looked to “traditional common-law principles” that have “resolved other questions about the principles governing § 1983

¹ Four Justices dissented. They believed that “[e]ven an intelligent and informed, but completely innocent, person accused of crime should not be required to choose between a threatened indictment and trial, with their attendant publicity and the omnipresent possibility of wrongful conviction and surrendering the right to a civil remedy against individuals who have violated his or her constitutional rights.” 480 U.S. at 403.

actions.” *Id.* In fact, the Court drew the balancing test itself from contract law. *See id.* at 392 & n.2. But those principles make little sense here, where the SEC seeks to impose an *unconstitutional* condition. The First Amendment’s scope has never been interpreted, or limited, by reference to common law—and certainly not the common law of contracts. And fuzzy balancing tests, like *Rumery*’s, are far removed from the strict scrutiny ordinarily required when the government suppresses First Amendment rights.

The Ninth Circuit’s conclusion that the Gag Rule is constitutional under *Rumery* is also deeply flawed. Both the original 1972 Federal Register announcement of the rule, and the SEC’s 2024 letter denying the petition here, justified the rule as necessary to avoid “creat[ing] the incorrect impression that there was no basis for the Commission’s enforcement action.” App. 37a; *see* 17 C.F.R. § 202.5(e). That is plainly not a legitimate basis for imposing a lifetime gag on speech. *See 303 Creative LLC v. Elenis*, 600 U.S. 570, 586 (2023) (“[T]he First Amendment protects an individual’s right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply ‘misguided’ ... [and] the government may not compel a person to speak its own preferred messages.” (citations omitted)).

The Ninth Circuit instead credited two SEC interests as not “wholly illegitimate”: its “interest in determining how to try its cases and prove its allegations” and its “interest in offering defendants different options for addressing the SEC’s allegations.” App. 22a-23a. But the court never actually balanced these interests against the “public policy harmed by enforcement of the agreement[s].”

Rumery, 480 U.S. at 392. The Ninth Circuit’s attempt to rewrite *Rumery* into something akin to rational-basis review grossly weakens its already shaky framework for waiving constitutional rights.

Prohibiting defendants from denying allegations implicates neither the SEC’s decisions about “how to try its cases” nor the “options” it offers defendants. Instead, as noted, the right to publicly criticize the SEC’s allegations is extraneous to the settlement process. It is therefore unsurprising that no other federal regulatory agency—save the Commodity Futures Trading Commission—has ever adopted a similar rule. See App. 48a n.18 (Peirce, Comm’r, dissenting). And the government’s desire to shield itself from criticism can never justify limiting speech. “[W]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement’ that it was adopted in part to ‘protect the free discussion of governmental affairs.’” *Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 478 (2022) (citation omitted). The Ninth Circuit’s flawed reliance on *Rumery* to override that foundational principle demands review and reversal.²

² Smacking again of rational-basis review, the Ninth Circuit also tried to prop up the Gag Rule by identifying interests *not* advanced by the agency. It is black-letter law that “[g]overnment ‘justifications’ for interfering with First Amendment rights ‘must be genuine, not hypothesized or invented *post hoc* in response to litigation.’” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 n.8 (2022) (internal alteration and citation omitted). That rule applies with even greater force in the rulemaking context. See *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943). But the interests relied on by the Ninth Circuit—the SEC’s purported interest in “determining how to try its cases” and an interest in “offering defendants different options for addressing the SEC’s allegations,” App.

3. The Ninth Circuit’s decision upholding the SEC’s Gag Rule is also at odds with “a growing chorus of circuits [that] have concluded that the Constitution prevents courts from enforcing [a] waiver of First Amendment rights as a condition of settlements.” *Moraes*, 2022 WL 15774011, at *4 (citing cases).

To start, the Ninth Circuit’s decision sharply conflicts with the Fourth Circuit’s decision in *Overbey v. Mayor of Baltimore*, 930 F.3d 215 (4th Cir. 2019). There, the City of Baltimore required non-disparagement clauses in police-misconduct settlements. *Id.* at 220-21. The Fourth Circuit held these clauses per se void and unenforceable, emphasizing that such clauses constitute “a government-defined and government-enforced restriction on government-critical speech,” implicating the citizenry’s First Amendment interest in “uninhibited, robust debate.” *Id.* at 223-24. The court further held that the government’s asserted interest in avoiding “harmful publicity” does not justify this intrusion on the First Amendment. *Id.* at 225-26. Indeed, as the Fourth Circuit recognized, “one of the ‘premise[s]’ of the First Amendment” is a “mistrust of governmental power,” and that mistrust is most warranted when the government tries to purchase “a potential critic’s silence.” *Id.* at 224, 226 (alteration in original) (citation omitted).

The Gag Rule at issue in this case is directly analogous to the non-disparagement clause that the Fourth Circuit held unconstitutionally void in *Overbey*. But the SEC’s Gag Rule goes much farther. The City of Baltimore demanded a non-

23a—are nowhere to be found in the agency’s own defense of its actions under review. See 17 C.F.R. § 202.5(e); App. 36a-41a.

disparagement clause as the price of a lucrative damages settlement of the *plaintiff's* own claim. The SEC demands adherence to its Gag Rule as the price for relieving defendants of the ruinous financial and reputational costs of an enforcement action *the SEC* initiated. The First Amendment challenge in this case is even stronger than the one in *Overbey*.

Other circuits have reached similar conclusions when it comes to the waiver of First Amendment rights. In *G&V Lounge, Inc. v. Michigan Liquor Control Commission*, for example, the Sixth Circuit held that a government contract was unenforceable where the “receipt of a benefit” (a liquor permit) was “condition[ed]” upon waiver of the “right to free expression.” 23 F.3d 1071, 1077 (6th Cir. 1994). As the court explained, the government’s attempt “to condition [the] receipt of a benefit upon Plaintiff’s waiver of its right to free expression” was contrary to *Perry* and other precedents of this Court. *Id.* The free expression protected in *G&V Lounge* was topless dancing; here, it is a citizen’s ability to criticize his own government, perhaps the most fundamental First Amendment interest of all. The stark conflict between the decision below and the decisions of other circuits itself warrants certiorari.

4. For all these reasons, the Ninth Circuit erred in concluding that the Gag Rule is “not per se unconstitutional.” App. 2a. There is no legitimate circumstance where an agency, particularly an agency with both powerful enforcement authority and a settlement record to prove it, can condition a settlement on a defendant’s silence—forever. Indeed, the Ninth Circuit did not identify even a *single* legitimate application of the Rule. At the very least, “a substantial number of [the Gag Rule’s] applications

are unconstitutional, judged in relation to the [rule’s] plainly legitimate sweep.” *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024) (citation omitted). This is an easy case for facial invalidity because the Gag Rule—a rule enacted to promote the “public interest” by silencing an agency’s critics—has *no* legitimate sweep whatsoever, nor did the panel articulate even one.

III. The Question Presented Is Exceptionally Important And Warrants Review Now

The question presented is cleanly presented, exceptionally important, and warrants review here.

1. The constitutionality of a systematic governmental rule designed to “censor disfavored speech” on matters of public concern is undoubtedly an issue of “vital importance.” *TikTok Inc. v. Garland*, 604 U.S. 56, 82 (2025) (Gorsuch, J., concurring in the judgment). Indeed, this Court has stressed that the freedom of “speech concerning public affairs is ... the essence of self-government” and accordingly “occupies the highest rung of the hierarchy of First Amendment values.” *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (citations omitted). These interests are especially important when it comes to exposing agency overreach. Agencies have amassed extraordinary power over Americans in virtually all walks of life. Ensuring that citizens can speak up, and cry out, over agency misconduct is increasingly critical to government accountability.³

³ See, e.g., Liam Vaughn, *The SEC Pinned Its Hack on a Few Hapless Day Traders. The Full Story is Far More Troubling*, Bloomberg (June 6, 2025) (noting that information from gagged defendants “challenge[d] the very foundation of the SEC’s case”).

The SEC is among the most powerful agencies, with sweeping enforcement powers. As members of this Court have recognized, the SEC has mastered the art of forcing defendants to cut their losses, rather than fight SEC charges at the expense of personal ruin. Its Gag Rule has imposed extraordinary, and extraordinarily pernicious, harm on individuals. Because of the Gag Rule, no settling defendants can speak about the allegations or their experiences with the SEC—ever. Between 2017 and 2023, the SEC settled with—and gagged—an estimated 2,700 individuals and businesses. *See* CA9 E.R. 49. And this is just a fraction of the still-operative gags that the rule has imposed during its 50-year existence.

Equally alarming, the agency's power to coerce settlements, coupled with its ability to silence defendants under the Gag Rule, has eliminated one of the most potent checks on SEC wrongdoing: the stories of Americans subject to its power. Because nearly every defendant settles—and then can never contest the allegations under the Gag Rule—the agency may allege its own views with abandon, knowing that no court will ever pass on the accuracy of those charges. But while the SEC may never face any consequences, the defendants do: the agency's press releases repeating unproven—but highly inflammatory—allegations of fraud have lifelong consequences, especially when left unanswered by individuals gagged by the SEC. That cloud hangs over thousands of individuals for whom the government has never met its burden of proof. And unless essentially *every* factual allegation and *every* charge in *every* complaint represents the full and completely accurate truth, the SEC's overwhelmingly

high settlement rate implies there are at least some innocent individuals who have been gagged.

Beyond the simple human toll on defendants, the cumulative effect of this censorship is also to distort public debate about the SEC and its enforcement practices—an important topic closely affecting an industry of huge economic importance—and thereby to stunt needed reforms. The First Amendment protects not only the right to speak, but also the “right to ‘receive information and ideas.’” *Murthy v. Missouri*, 603 U.S. 43, 75 (2024) (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972)). By muzzling those who are “the members of [the] community most likely to have informed and definite opinions” on the SEC’s practices, the Gag Rule deprives the public of essential information about how its government operates. *Pickering v. Board of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 572 (1968). And because the Gag Rule stops dissent before it can be voiced, we do not know what criticism has been left unsaid.

This case is a perfect example: Petitioner The Cape Gazette seeks to report on the SEC’s actions, but the Gag Rule has thwarted its efforts. Potential interview subjects like Petitioner Cassandra Toroian—who wishes to speak with the Gazette about her experiences with the SEC to make the case for reform of “the process of settlement, and how to improve enforcement proceedings”—has been muzzled by the Gag Rule, and so does not dare publicly disagree with the agency. CA9 E.R. 146-47.

This Court has repeatedly granted review to consider the constitutionality of laws and rules that impact individuals’ First Amendment rights. See, e.g., *Free Speech Coal., Inc. v. Paxton*, 606 U.S. 461 (2025); *Moody*, 603 U.S. 707; *Vidal v. Elster*, 602 U.S.

286 (2024); *Iancu v. Brunetti*, 588 U.S. 388 (2019). And members of this Court and other judges have expressed concerns about the nature of the SEC’s own enforcement process and demands. *See, e.g., SEC v. Jarkesy*, 603 U.S. 109, 142-45 (2024) (Gorsuch, J., joined by Thomas, J., concurring); *Axon/Cochran*, 598 U.S. at 213-14, 216 n.4 (Gorsuch, J., concurring in the judgment); *Lucia v. SEC*, 585 U.S. 237, 251 & n.5 (2018); *Cochran v. SEC*, 20 F.4th 194, 228-30 (5th Cir. 2021) (en banc) (Oldham, J., joined by Smith, Willett, Duncan, Engelhardt, & Wilson, JJ., concurring), *aff’d sub nom., Axon/Cochran*, 598 U.S. 175. Indeed, concerns about the SEC’s overreach through “assertion[s] of power ... without law” date back to the agency’s beginning. *SEC v. Chenery Corp.*, 332 U.S. 194, 216 (1947) (Jackson, J., dissenting).

The SEC’s Gag Rule has no place in America. As Judge Rakoff put it, “an agency of the United States is saying, in effect, ‘[a]lthough we claim that these defendants have done terrible things, they refuse to admit it and we do not propose to prove it, but will simply resort to gagging their right to deny it.’ The disservice to the public inherent in such a practice is palpable.” *SEC v. Vitesse Semiconductor Corp.*, 771 F. Supp. 2d 304, 309 (S.D.N.Y. 2011). Review in this case is especially important given the extreme and anomalous nature of the SEC’s Gag Rule and its impact on individuals who must surrender their core First Amendment protections to settle charges—even charges they vehemently believe to be inaccurate.

2. This case is the only practical, and perhaps the only possible, vehicle to review the Gag Rule.

In SEC enforcement cases, the Gag Rule’s no-denial condition is a non-negotiable term of settlement, but once the condition is incorporated into a settlement

and accompanying judgment, courts have refused to permit defendants to raise First Amendment challenges after the fact. *See, e.g., Novinger*, 40 F.4th at 307; *SEC v. Romeril*, 15 F.4th 166, 172 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 2836 (2022). Such as-applied challenges therefore are a dead end.

This case, by contrast, arises from a petition that directly challenges the SEC's refusal to modify or withdraw the Gag Rule and thus cleanly presents the First Amendment issues for review. Especially given that the agency's denial followed a five-year delay, this is realistically the only case that will present this issue in this posture anytime soon. Indeed, judges in other cases have pointed to this case as the proper vehicle for challenging the constitutionality of the Gag Rule. *See Novinger*, 40 F.4th at 308 (Jones, J., joined by Duncan, J., concurring) (pointing to Petitioners' then-pending "petition to review and revoke this SEC policy" and suggesting it was the proper vehicle for "fully consider[ing] this policy").

The SEC's Gag Rule has suppressed far too much speech, for far too long, on the far-too-important issue of agency overreach. It should not survive another day. Yet if the Court denies review here, there will be no practical avenue for individuals—who are compelled to surrender in SEC enforcement actions simply because of the financial and soul-crushing toll imposed by such actions—to vindicate the important First Amendment rights trampled by the SEC's Gag Rule. Likewise, for the same reasons, it is unlikely that a circuit conflict over the constitutionality of the Gag Rule itself will develop, as opposed to the constitutionality of such non-disparagement clauses generally. *Supra* at 10-11. Defendants' efforts to challenge the Gag Rule on an individualized basis

have been serially thwarted. This case accordingly presents a singular opportunity—and perhaps the last, best opportunity—for the Court to resolve this critical issue. The Court should seize it.

* * * * *

Freedom of speech means the freedom “to hold officials accountable to the people.” *Citizens United v. FEC*, 558 U.S. 310, 339 (2010). As the Framers understood, such freedom is “essential to effective democracy.” *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). The SEC’s Gag Rule is anathema to those principles, and to the Republic they have fostered. This Court’s review is needed to put an end to the Gag Rule here and now.

CONCLUSION

The petition for a writ of certiorari should be granted.

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March 16, 2026

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[149 F.4th 1029]

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**Thomas Joseph POWELL; Barry D. Romeril;
Christopher A. Novinger; Raymond J. Lucia;
Marguerite Cassandra Toroian; Gary Pryor;
Joseph Collins; Rex Scates; Michelle
Silverstein; Reason Foundation; Cape Gazette;
New Civil Liberties Alliance, Petitioners,**

v.

**UNITED STATES SECURITIES AND
EXCHANGE COMMISSION, Respondent.**

No. 24-1899

Argued and Submitted February 13, 2025

Honolulu, Hawaii

Filed August 6, 2025

Before: Sidney R. Thomas, Daniel A. Bress, and
Ana de Alba, Circuit Judges.

OPINION

BRESS, Circuit Judge:

This is a petition for review of the Security and Exchange Commission's denial of a request to amend SEC Rule 202.5(e). *See* 17 C.F.R. § 202.5(e). That Rule reflects SEC policy, in place since 1972, that the agency will not settle a civil enforcement action with a defendant unless the defendant agrees not to publicly deny the allegations against him. If a defendant violates this provision of the settlement

agreement, the SEC's remedy is to go back to the court that entered the consent judgment and ask for the case to be reopened. The petitioners claim Rule 202.5(e) violates the First Amendment.

We reject petitioners' challenge, although we do so on necessarily narrow grounds. This petition for review amounts to a facial-type challenge to Rule 202.5(e), and given longstanding precedent permitting the voluntary waiver of constitutional rights, including First Amendment rights, Rule 202.5(e) on its face is not per se unconstitutional. Petitioners do validly argue that in application, Rule 202.5(e) could impermissibly intrude on First Amendment rights, especially if it prevents civil enforcement defendants from criticizing the SEC. We do not minimize petitioners' concerns. But these concerns are properly addressed in as-applied challenges with defined records, whether during court approval of settlements, in a pre-enforcement posture, or in response to the SEC seeking to reopen a closed enforcement proceeding for an alleged breach of a settlement agreement.

I

The SEC investigates violations of the securities laws and may bring enforcement actions in federal court. 15 U.S.C. § 78u(d)(1). Sometimes, the SEC insists that defendants admit the allegations against them as a condition of settlement. *See, e.g.*, Press Release, SEC, JPMorgan Admits to Widespread Recordkeeping Failures and Agrees to Pay \$125 Million Penalty to Resolve SEC Charges (Dec. 17, 2021), <https://www.sec.gov/newsroom/press-releases/2021-262>; Grubir S. Grewal, Director, SEC Div. of Enft, Remarks at SEC Speaks 2021 (Oct. 13, 2021),

<https://tinyurl.run/KderJu>; Dina ElBoghdady, *SEC to Require Admissions of Guilt in Some Settlements*, Wash. Post, (June 18, 2013), <https://tinyurl.run/E1As8b>. In 1972, the SEC announced that it would not settle civil enforcement actions unless defendants, at minimum, agree not to publicly deny the Commission's allegations. Consent Decrees in Judicial or Administrative Proceedings, 37 Fed. Reg. 25,224 (Nov. 29, 1972). Codified at 17 C.F.R. § 202.5(e), the SEC's settlement policy is as follows:

The Commission has adopted the policy that in any civil lawsuit brought by it or in any administrative proceeding of an accusatory nature pending before it, 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. Accordingly, it hereby announces 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. In this regard, the Commission believes that a refusal to admit the allegations is equivalent to a denial, unless the defendant or respondent states that he neither admits nor denies the allegations.

The SEC refers to this as the “no-deny provision” or the “no-admit, no-deny policy.” The petitioners call it the “gag rule.” We will refer to it as Rule 202.5(e), or “the Rule.”

Neither the SEC nor Rule 202.5(e) mandate settlement. But in practice, the vast majority of civil enforcement defendants choose to settle with the

SEC. If a defendant wishes to settle, he must acknowledge that his settlement is voluntary and agree to abide by Rule 202.5(e). Once a settlement is negotiated, the defendant signs a consent provision which typically says, among other things, that “Defendant understands and agrees to comply with the terms of 17 C.F.R. § 202.5(e).” Where the SEC has filed an action in federal court, the settlement is incorporated into a final consent judgment, entered by the court. Compliance with Rule 202.5(e) does not prevent defendants from denying the allegations in other legal proceedings, such as separate civil litigation.

When settling with the SEC, defendants agree to waive various rights. Many consent judgments provide, consistent with Rule 202.5(e), that the defendant neither admits nor denies the SEC’s allegations. If a defendant breaches the Rule 202.5(e) component of the consent judgment, the SEC’s remedy is to petition the issuing court to vacate the final judgment and restore the case to its active docket. But the court may also deny this requested relief.

On October 30, 2018, the New Civil Liberties Alliance (NCLA) filed a petition requesting that the SEC amend Rule 202.5(e). Citing First Amendment concerns, the NCLA suggested that the SEC eliminate the language preventing a defendant from denying the SEC’s allegations against him. This proposed change, as the SEC later described it, would “allow defendants to consent to a judgment while denying the allegations[,] with no recourse for the Commission to return to active litigation.”

The SEC did not respond to the petition to amend for over five years. On December 20, 2023, the NCLA

filed a renewed petition, adding various individuals as petitioners. On January 30, 2024, the SEC denied the petition to amend, providing a six-page letter ruling explaining why it was maintaining its policy. According to the SEC, Rule 202.5(e) “preserves its ability to seek findings of fact and conclusions of law if a defendant, after agreeing to a settlement, chooses to publicly deny the allegations.” In the SEC’s view, and because it “does not try its cases through press releases,” the agency is “not required to choose a path whereby it waives its right to try a case while the defendant is free to publicly deny the allegations without any real ability for the Commission to respond in court.” The SEC further rejected petitioners’ First Amendment objections, explaining that “[t]here is a large body of precedent confirming that a defendant can waive constitutional rights as part of a civil settlement, just as a criminal defendant can waive constitutional rights as part of a plea bargain.”

SEC Commissioner Hester Peirce dissented from the Commission’s denial of the petition to amend Rule 202.5(e). She concluded that “[t]he policy of denying defendants the right to criticize publicly a settlement after it is signed is unnecessary, undermines regulatory integrity, and raises First Amendment concerns.” In Commissioner Peirce’s view, there is “scant factual basis” for the SEC needing Rule 202.5(e), and if the SEC has concerns about defendants speaking out, this policy is “not the right way to protect the Commission’s reputation.”

After the SEC denied the petition to amend, twelve petitioners challenged the SEC’s denial by filing a petition for review in this court. Nine of the petitioners are individuals, eight of whom entered

settlements containing the Rule 202.5(e) obligation. The remaining three petitioners are organizations and entities. Petitioners challenge the Rule on its face, claiming that it violates the First Amendment. They also contend that the Rule was adopted in violation of the Administrative Procedure Act (APA).

We have jurisdiction under 15 U.S.C. § 78y(a)(1), which permits “[a] person aggrieved by a final order of the Commission . . . [to] obtain review of the order in the United States Court of Appeals for the circuit in which he resides” or the D.C. Circuit. Although the SEC claims that many of the petitioners lack standing or fail to meet the jurisdictional prerequisites of § 78y(a)(1), the agency agrees that one petitioner, Raymond Lucia, can maintain this petition. Our independent review confirms the same.

The SEC charged Lucia with securities law violations in 2012, and he agreed to a settlement that requires him to abide by Rule 202.5(e). Lucia resides in the Ninth Circuit, and he joined the NCLA when it renewed its petition to amend. Under all these circumstances, Lucia was “aggrieved by” the SEC’s denial of the request to amend Rule 202.5(e). 15 U.S.C. § 78y(a)(1). Because “[o]nly one of the petitioners needs to have standing to permit us to consider the petition for review,” *Massachusetts v. EPA*, 549 U.S. 497, 518, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007), and Lucia fits that bill, we proceed to the merits. *Cf. Nat’l Family Farm Coal. v. EPA*, 966 F.3d 893, 907 n.2 (9th Cir. 2020) (“[R]egardless whether venue is improper as to three of the six . . . Petitioners, we can address the merits of the . . . petition.”).

II

SEC Rule 202.5(e) has been in place for over five decades, much of that time seemingly without great fanfare. The record gives no indication that the SEC regularly returns to court to reopen judgments for claimed violations of Rule 202.5(e). The SEC also represented at oral argument that it is unaware of a court ever finding a defendant in contempt for violating a Rule 202.5(e) provision in a settlement agreement. Even so, in more recent years, Rule 202.5(e) has been the subject of criticism. The criticism is not necessarily uniform.

Some have suggested that Rule 202.5(e) goes too easy on civil enforcement defendants, in that it allows defendants to neither admit nor deny the SEC's allegations. Civil enforcement defendants presumably prefer "neither admit nor deny" over "admit," to prevent their settlements with the SEC from creating admissions that could later be used against them in private securities litigation. Yet some critics of Rule 202.5(e) would prefer the SEC to more frequently require admissions of wrongdoing as a condition of settlement, in the interest of greater securities law enforcement and public accountability. *See, e.g., SEC v. Citigroup Glob. Markets Inc.*, 827 F. Supp. 2d 328, 332–35 (S.D.N.Y. 2011) (concluding that a consent decree that did not require the defendant to admit the SEC's allegations was "neither fair, nor reasonable, nor adequate, nor in the public interest"), *vacated and remanded*, 752 F.3d 285 (2d Cir. 2014); James B. Stewart, *S.E.C. Has a Message for Firms Not Used to Admitting Guilt*, N.Y. TIMES, (June 21, 2013), <https://tinyurl.run/3p3JHF>; Grewal, *Remarks at SEC Speaks 2021*.

Coming at it from the other direction are those who believe that SEC Rule 202.5(e) is too heavy-handed. Motivated by concerns about administrative agency power generally, and the SEC's enforcement powers more specifically, these critics have argued that by preventing civil enforcement defendants from publicly denying the allegations against them as a condition of settlement, Rule 202.5(e) contradicts First Amendment values. *See, e.g.*, Rodney A. Smolla, *Why the SEC Gag Rule Silencing Those Who Settle SEC Investigations Violates the First Amendment*, 29 WIDENER L. REV. 1 (2023); Aaron Gordon, *Imposing Silence Through Settlement: A First-Amendment Case Study of the New York Attorney General*, 84 ALB. L. REV. 335 (2021); James Valvo, Notice & Comment, *The CFTC and SEC Are Demanding Unconstitutional Speech Bans in Their Settlement Agreements*, YALE J. ON REG. (Dec. 4, 2017); *see also SEC v. Novinger*, 40 F.4th 297, 308 (5th Cir. 2022) (Jones, J., concurring); *SEC v. Moraes*, No. 22-cv-8343, 2022 WL 15774011, at *3–5 (S.D.N.Y. Oct. 28, 2022). The petitioners in this case, supported by various amici, take up this First Amendment mantle.

But as is often true when a problem of many dimensions is presented to a court, we are hemmed in by certain constraints inherent in judicial decision-making, including those arising from the type of challenge brought before us. It is not our role to second-guess the SEC's policy decisions or enforcement priorities. SEC Commissioner Peirce and others have challenged the wisdom of Rule 202.5(e), but the wisdom of regulatory policy lies outside our authority. Nor is it within our authority to decide what rules would most promote public confidence in the SEC.

Deciding whether an agency action violates the First Amendment is, of course, very much within our authority. But the challenge before us is a petition for review of the SEC’s denial of a request to amend Rule 202.5(e). The petition does not seek relief as to any one civil enforcement defendant based on his or her facts and circumstances, the language of any particular consent judgment, or the threatened actions of the SEC as to that defendant. The petition for review instead maintains that Rule 202.5(e) is per se unconstitutional, that is, unconstitutional across the board. In this sense, the petition is properly analyzed as a facial challenge. For facial challenges in the First Amendment context, we ask “whether ‘a substantial number of [the Rule’s] applications are unconstitutional, judged in relation to the [Rule’s] plainly legitimate sweep.’” *Moody v. NetChoice, LLC*, 603 U.S. 707, 723, 144 S.Ct. 2383, 219 L.Ed.2d 1075 (2024) (quoting *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 615, 141 S.Ct. 2373, 210 L.Ed.2d 716 (2021)); see also, e.g., *NetChoice, LLC v. Bonta*, 113 F.4th 1101, 1115 (9th Cir. 2024).

Petitioners rightly point out that we should be concerned about any effort *by* the government to limit criticism *of* the government, including criticism offered by those whom the SEC claims violated the law. Those that the SEC has charged with securities law violations may have a particularly valuable perspective on government enforcement efforts, or at least one that is entitled to be considered in the marketplace of ideas. If the SEC utilized Rule 202.5(e) to prevent criticism of the agency, its officers, or its enforcement programs, the Rule would likely raise substantial First Amendment concerns in application. But what we have before us is a more

discrete and stylized challenge, namely, that it assertedly violates the First Amendment for civil enforcement defendants to agree on a voluntary basis not to deny the allegations against them in return for the SEC agreeing to settle its securities law charges, with the limited remedy that, if the defendant does later publicly deny the allegations, the SEC may return to court with no guarantee that a court will reopen the case.

The law has long regarded the voluntary relinquishment of constitutional rights as permissible, so long as appropriate safeguards are attached. And when we apply the Supreme Court's and our court's framework for the voluntary waiver of rights, we conclude that Rule 202.5(e) is not facially invalid under the First Amendment, even though legitimate First Amendment concerns could well arise in a more particularized type of challenge.

III

A

The starting point for our analysis is that Rule 202.5(e) cannot be abstracted from the circumstances that bring the Rule into effect, namely, a defendant's voluntary decision to settle with the SEC and his voluntary agreement to abide by the Rule's requirements. Rule 202.5(e) is not simply a speech-restricting rule, but a rule that defendants voluntarily accede to in return for substantial benefits.

In proper circumstances, rights, including constitutional rights, can be waived. There is a "background presumption that legal rights generally . . . are subject to waiver by voluntary agreement of the parties." *United States v. Mezzanatto*, 513 U.S.

196, 203, 115 S.Ct. 797, 130 L.Ed.2d 697 (1995). Indeed, “in the context of a broad array of constitutional and statutory provisions,” the Supreme Court has “articulated a general rule that presumes the availability of waiver.” *New York v. Hill*, 528 U.S. 110, 114, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000) (quoting *Mezzanatto*, 513 U.S. at 201, 115 S.Ct. 797). And when a party by agreement has “waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected.” *United States v. Armour & Co.*, 402 U.S. 673, 682, 91 S.Ct. 1752, 29 L.Ed.2d 256 (1971).

We frequently see these waivers of rights in the criminal context, especially for guilty pleas. A defendant “may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution,” including the right to a jury trial, the right to confront one’s accusers, and so on. *Mezzanatto*, 513 U.S. at 201, 115 S.Ct. 797 (citing *Ricketts v. Adamson*, 483 U.S. 1, 10, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1987); *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *Johnson v. Zerbst*, 304 U.S. 458, 465, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)). Criminal suspects may likewise waive their right to remain silent and their right to counsel, so long as they have been properly informed of those rights. *See, e.g., Davis v. United States*, 512 U.S. 452, 458, 460, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). As the Supreme Court has explained, “[a]lthough a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.” *Corbitt v. New Jersey*, 439 U.S. 212, 218 n.8, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978)

(quoting *McGautha v. California*, 402 U.S. 183, 213, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971)).

Although there are limitations on the waiver of First Amendment rights—just as there are limitations and protections associated with the waiver of other rights—First Amendment rights can be waived. “The Supreme Court has held that First Amendment rights may be waived upon clear and convincing evidence that the waiver is knowing, voluntary[,] and intelligent.” *Leonard v. Clark*, 12 F.3d 885, 889 (9th Cir. 1993) (citing *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185, 187, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972)); *see also, e.g., SEC v. Romeril*, 15 F.4th 166, 172 (2d Cir. 2021) (“[P]arties can waive their First Amendment rights in consent decrees and other settlements of judicial proceedings.”); *Lake James Cmty. Volunteer Fire Dep’t v. Burke Cnty., N.C.*, 149 F.3d 277, 280 (4th Cir. 1998); *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310, 1315 (8th Cir. 1991); *Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084, 1099 (3d Cir. 1988) (“[W]e know of no doctrine . . . providing a *per se* rule that constitutional claims, even [F]irst [A]mendment claims, may not be waived.”); *Kausal v. George F. Nord Bldg. Corp. (In re George F. Nord Bldg. Corp.)*, 129 F.2d 173, 176 (7th Cir. 1942).

Although we do not typically think of it in these terms, a guilty plea effects a certain inevitable infringement of First Amendment rights, in that a criminal defendant agrees to say something about his guilt in return for a substantial benefit. Guilty pleas can also include provisions precluding the right to appeal—a form of First Amendment petitioning activity. *See, e.g., United States v. Wells*, 29 F.4th 580, 585 (9th Cir. 2022). And pleading guilty to a

crime can result in even further First Amendment infringements, considering that a guilty plea can lead to imprisonment, and in prison First Amendment rights are reduced. *See, e.g., Shaw v. Murphy*, 532 U.S. 223, 229, 121 S.Ct. 1475, 149 L.Ed.2d 420 (2001); *Turner v. Safley*, 482 U.S. 78, 89–91, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987).

We encounter waivers of the right to speak outside of the criminal context, as well. Government employees can agree to restrictions on their First Amendment rights as a condition of employment. *See, e.g., Snepp v. United States*, 444 U.S. 507, 509 & n.3, 100 S.Ct. 763, 62 L.Ed.2d 704 (1980) (per curiam) (explaining that although “Snepp relies primarily on the claim that his agreement is unenforceable as a prior restraint on protected speech,” “[w]hen Snepp accepted employment with the CIA, he voluntarily signed the agreement that expressly obligated him to submit any proposed publication for prior review”). Judicially enforceable non-disclosure and non-disparagement agreements are commonplace. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 665, 672, 111 S.Ct. 2513, 115 L.Ed.2d 586 (1991); *Wright v. Eugene & Agnes E. Meyer Found.*, 68 F.4th 612, 621–22 (D.C. Cir. 2023); *Infogroup, Inc. v. DatabaseLLC*, 956 F.3d 1063, 1068 (8th Cir. 2020). And public sector employees who are not union members can agree to pay fees to a public sector union, thereby “waiving their First Amendment rights.” *Janus v. American Fed’n of State, Cnty., & Mun. Emps. Council 31*, 585 U.S. 878, 930, 138 S.Ct. 2448, 201 L.Ed.2d 924 (2018). No doubt there are other examples.

Our court and other circuits have held that a waiver of First Amendment rights should be analyzed under the Supreme Court’s decision in *Town of*

Newton v. Rumery, 480 U.S. 386, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987). See *Leonard*, 12 F.3d at 890; *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1396–97 (9th Cir. 1991); *Lake James*, 149 F.3d at 280; *Erie Telecomms.*, 853 F.2d at 1099.

In *Rumery*, the Supreme Court upheld an agreement in which a defendant released his right to bring a civil rights action under 42 U.S.C. § 1983 in exchange for the prosecutor dismissing pending criminal charges against him. 480 U.S. at 389, 398, 107 S.Ct. 1187. Observing that “it is well settled that plea bargaining does not violate the Constitution even though a guilty plea waives important constitutional rights,” *Rumery* declined to establish “a *per se* rule of invalidity” for all waiver agreements. *Id.* at 393, 395, 107 S.Ct. 1187. In “many cases,” the Supreme Court explained, a defendant’s “choice to enter” into a waiver agreement “will reflect a highly rational judgment that the certain benefits” of ending the litigation exceed the benefits of what he is giving up. *Id.* at 394, 107 S.Ct. 1187. And that a waiver of rights could be “coercive” in some cases did not “justify invalidating *all* such agreements.” *Id.* at 393, 107 S.Ct. 1187; see also *id.* (“We see no reason to believe that release-dismissal agreements pose a more coercive choice than other situations we have accepted.”).

Accordingly, *Rumery* held that in this context, “a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement.” *Id.* at 392, 107 S.Ct. 1187; see also *id.* at 392, 107 S.Ct. 1187 n.2 (“The threshold question is whether compelling a defendant to decide whether to waive constitutional rights impairs to an appreciable

extent any of the policies behind the rights involved.”) (brackets omitted) (quoting *McGautha*, 402 U.S. at 213, 91 S.Ct. 1454). In Rumery’s case, he “voluntarily entered the agreement,” and “enforcement of this agreement would not adversely affect the relevant public interests.” *Id.* at 398, 107 S.Ct. 1187. The Supreme Court thus recognized that the waiver of rights can be permissible, even when they force parties to make “difficult choices.” *Id.* at 393, 107 S.Ct. 1187.

We have applied *Rumery* in two key First Amendment cases: *Leonard v. Clark*, 12 F.3d 885 (9th Cir. 1993), and *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390 (9th Cir. 1991). In *Leonard*, we upheld a provision in a collective bargaining agreement, referred to as Article V, that required a public employee union to bear the costs of any new economic or benefit improvement endorsed or sponsored by the Union that caused “increased payroll costs” to the municipality. 12 F.3d at 886. The contractual language was originally proposed by the Union and then included in successive collective bargaining agreements. *Id.*

We first determined that the Union’s waiver of “the full and unrestricted exercise of its First Amendment rights” in the collective bargaining agreement was “knowing, voluntary[,] and intelligent.” *Id.* at 889–90. Although the Union informed the city during contract negotiations that Article V was unconstitutional, this objection did not make “the Union’s execution of the agreement any less voluntary.” *Id.* at 890. Indeed, we explained, “[i]f the Union felt that First Amendment rights were burdened by Article V, it should not have bargained them away and signed the agreement.” *Id.*

Because *Rumery* nominally involved the waiver of a “statutory remedy,” *Davies*, discussed below, had earlier left open the possibility that “a stricter rule” may be appropriate in cases involving waivers of constitutional rights, 930 F.2d at 1397 (emphasis omitted). But *Leonard* applied the *Rumery* framework and expressly “decline[d] to adopt a stricter standard” in the constitutional context. 12 F.3d at 891 n.8. Under a *Rumery* analysis, we identified in *Leonard* two policies supporting enforcement of the waiver at issue: the “public interest in the stability and finality of collective bargaining agreements,” and the “public interest in the finality of a compensation package between a city and a group of its employees.” *Id.* at 891. But we also recognized the “public interest in the Union’s unfettered ability to present its views to the state legislature.” *Id.*

In upholding the waiver of presumed First Amendment rights, we found it significant that Article V of the collective bargaining agreement did “not ban *all* Union speech” and was “narrowly tailored to achieve the City’s goal of budgetary predictability.” *Id.* There was also a sufficient nexus between the “dispute resolved in the” collective bargaining agreement and the restriction placed on the Union’s First Amendment rights. *Id.* at 891 n.10. And “[e]ven in those areas affected by Article V,” the Union could “endorse benefit-increasing legislation if it fe[lt] that the benefits to be gained by passage of the bill [we]re more valuable than the salary foregone.” *Id.* at 892. Accordingly, “[b]ecause Article V [wa]s a relatively narrow limitation on the Union’s political speech,” we could not “find that the public policy in favor of the Union’s completely unfettered freedom of expression

outweigh[ed] the public interests in the finality of collective bargaining and the predictability of municipal budgets.” *Id.* The Union’s constitutional arguments were relevant to our analysis, but they could not by themselves invalidate the waiver, because “[i]f constitutional arguments always outweighed ones grounded in other sources of law, then we could never enforce individuals’ waivers of their constitutional rights, an outcome that would fly in the face of a long line of Supreme Court precedent.” *Id.* at 892 n.12.

We applied the same *Rumery* methodology in *Davies*, although there we concluded that the waiver was invalid. 930 F.2d at 1392. *Davies* and his spouse, a teacher, sued the school district over a dispute relating to the spouse’s employment. The parties settled. In exchange for monetary compensation, *Davies* and his spouse agreed not to seek employment or office within the district. *Id.* *Davies* later won an election for a seat on the district’s board, and the district sought to enforce the settlement agreement, which would result in *Davies*’s removal from public office. *Id.* at 1392–93. The district court granted the school district’s motion to enforce the settlement and ordered *Davies* to resign his office immediately. *Id.* at 1393.

Applying the *Rumery* framework, we held that “the public policy favoring enforcement” of the contractual provision preventing *Davies* from running for office was “outweighed by the public policy served by its non-enforcement.” *Id.* at 1392. The interest in non-enforcement was “of the highest order,” “involv[ing] the most important political right in a democratic system of government: the right of the people to elect representatives of their own

choosing to public office.” *Id.* at 1397. This interest was “of critical importance” because the contractual provision not only prevented Davies from running for office but also “result[ed] in a limitation on the fundamental right to vote of every resident” in the district. *Id.* at 1398. The school district’s interests in enforcement of the provision, meanwhile, were insufficient. Besides the general interest in settling litigation that would be present in every case, the district claimed that Davies’s presence on the board would be detrimental to the district, a “startling” and “pernicious” rationale that reflected “a serious abuse of the power of incumbency.” *Id.* at 1398–99.

The contractual provision preventing Davies from running for office was further impermissible because it lacked a sufficient connection to the underlying employment dispute that was the subject of the earlier settlement. We explained that “[b]efore the government can require a citizen to surrender a constitutional right as part of a settlement or other contract, it must have a legitimate reason for including the waiver in the particular agreement.” *Id.* at 1399. And “[a] legitimate reason will almost always include a close nexus—a tight fit—between the specific interest the government seeks to advance in the dispute underlying the litigation involved and the specific right waived.” *Id.* In Davies’s case, “the nexus between the individual right waived and the dispute that was resolved by the settlement agreement [was] not a close one” because “[t]he underlying dispute had little connection with Dr. Davies’ potential future service on the Board.” *Id.*

Cases from other circuits have also relied on *Rumery* when analyzing waivers of First Amendment rights. In *SEC v. Romeril*, 15 F.4th 166 (2d Cir. 2021),

cert. denied sub nom. Romeril v. SEC, — U.S. —, 142 S. Ct. 2836, 213 L.Ed.2d 1065 (2022), the Second Circuit cited *Rumery* in rejecting a challenge to the same SEC Rule at issue here. In *Romeril*, one of the same petitioners in this case sought relief from his consent decree under Federal Rule of Civil Procedure 60(b)(4). *Id.* at 170. The Second Circuit held that Romeril’s consent judgment “d[id] not violate the First Amendment because Romeril waived his right to publicly deny the allegations of the complaint.” *Id.* at 172. Observing that “parties can waive their First Amendment rights in consent decrees and other settlements of judicial proceedings,” the Second Circuit saw no issue with Romeril’s agreement: “A defendant who is insistent on retaining the right to publicly deny the allegations against him has the right to litigate and defend against the charges. Romeril elected not to litigate.” *Id.*

Because SEC Rule 202.5(e) involves the waiver of rights by agreement, *Rumery* and the above precedents provide the proper legal framework for evaluating this petition for review. For that reason, we disagree with petitioners that Rule 202.5(e) should be analyzed as a traditional prior restraint or content-based restriction on speech, because every waiver of First Amendment rights can in some sense be described as a content-based prior restraint. We likewise disagree with petitioners that we can apply other First Amendment doctrines, like the compelled speech doctrine, without regard to the fact that the speech restriction here arises from a voluntary agreement. Although the nature of the agreed-upon speech restriction is central to the *Rumery* analysis, precedent directs that the *Rumery* framework is the

proper one for evaluating a voluntary relinquishment of First Amendment rights.

B

Under the *Rumery* framework and our precedents, the specific challenge before us fails, although as we noted above, our decision is necessarily limited in nature.

To the extent the petitioners claim that *Rumery* cannot apply because defendants do not voluntarily agree to Rule 202.5(e), we disagree, at least as to the facial-type challenge presented to us. There is no basis to conclude that as to all or a substantial number of SEC defendants, their agreement to abide by Rule 202.5(e) is not “voluntary, knowing[,] and intelligent.” *Davies*, 930 F.2d at 1394. Though the plaintiffs assert that the SEC possesses outsized power, frequently settles its cases, and makes defendants’ agreement to Rule 202.5(e) non-negotiable, the record also reflects that defendants in SEC enforcement actions are often sophisticated players who are represented by counsel. And ultimately, the defendants in these cases chose to settle with the SEC rather than litigate further. See *Leonard*, 12 F.3d at 890 (“If the Union felt that First Amendment rights were burdened by Article V, it should not have bargained them away and signed the agreement.”).

We do not foreclose an individual defendant in any particular case from later claiming that his agreement to the terms of Rule 202.5(e) was involuntary or unknowing. But we also cannot say that generalized concerns about the SEC’s powers or enforcement tactics justify a blanket conclusion that these agreements are always or very often improperly

coercive. *See Rumery*, 480 U.S. at 393, 107 S.Ct. 1187 (concluding that the “possibility” that “some release-dismissal agreements may not be the product of an informed and voluntary decision” given the “risk, publicity, and expense of a criminal trial” did not “justify invalidating *all* such agreements”).

Nor is Rule 202.5(e) facially invalid under the *Rumery* framework. Per Rule 202.5(e), a defendant who settles with the SEC may not publicly deny the SEC’s allegations, and, if he does, the SEC may seek to reopen his case in order to proceed to litigation. The Rule in its purest form allows the SEC to return things to how they were before the settlement, potentially allowing the SEC to pursue its claims in court. It is as if the civil enforcement action remains subject to reopening at the defendant’s election. Rule 202.5(e) essentially tells defendants that if they come to disagree with their original decision not to publicly deny the SEC’s allegations, they may later have to defend against them. In this sense, there is a “close nexus” between “the specific interest the government seeks to advance in the dispute underlying the litigation involved”—proving the allegations supporting its enforcement actions—and “the specific right waived”—the defendant agreeing not to deny those same allegations. *Davies*, 930 F.2d at 1399. This is a far cry from a case like *Davies*, in which the restriction on Davies’s ability to run for public office “had little connection” to the underlying settlement agreement. *Id.*

Indeed, the situation in the case before us is not so dissimilar from *Rumery* itself. In *Rumery*, “the criminal charges that had been filed against Rumery and Rumery’s civil suit against the prosecutor involved the same incident.” *Id.* (italics omitted). “In

fact,” as we later described it, “they were opposite sides of the coin.” *Id.* “The two actions reflected the opposing parties’ differing versions of what actually occurred,” and “a full compromise of the dispute between the parties necessitated resolving both matters.” *Id.*

Analogous in this respect to *Rumery*, any defendant who wishes to publicly deny the SEC’s allegations wants to tell a different version of the story than the one reflected in his voluntarily entered settlement agreement. But instead of restricting an offsetting suit, as in *Rumery*, Rule 202.5(e) uses a different mechanism. It gives the defendant a choice: agree to “a full compromise of the dispute,” *id.*, by declining to deny the SEC’s version of what occurred, or speak out against the SEC’s allegations and permit the SEC to attempt to litigate the facts in the same (reopened) case. This further confirms the closeness of the nexus between the government’s interest and the right waived.

We also cannot say that the SEC’s interest in Rule 202.5(e) is wholly illegitimate, to the point that the Rule should be struck down entirely on a petition for review. The SEC’s interests are not so much weaker than the asserted interests we found sufficient in *Leonard*. *See* 12 F.3d at 891. And they do not compare to the “utterly unpersuasive” and “pernicious” anti-democratic justifications that we rejected in *Davies*. *See* 930 F.2d at 1398. The SEC explains that if it is to forego its decision to present evidence in court, the agency should have the opportunity to pursue that path if a defendant later decides to deny the SEC’s allegations publicly. Accordingly, and because it does not “try its cases through press releases,” the SEC maintains that its

policy “preserves its ability to seek findings of fact and conclusions of law if a defendant, after agreeing to a settlement, chooses to publicly deny the allegations.”

The SEC has some interest in determining how to try its cases and prove its allegations, and in deciding upon settlement terms that are most consistent with its preferred enforcement strategy. The SEC also has a related interest in offering defendants different options for addressing the SEC’s allegations. The absence of a policy like Rule 202.5(e) could lead the SEC to requiring more outright admissions or settling fewer cases, which may not necessarily be in the interest of civil enforcement defendants. *See Rumery*, 480 U.S. at 394, 107 S.Ct. 1187 (explaining that defendants’ choice to waive rights in a settlement agreement can “reflect a highly rational judgment” about the benefits of avoiding prosecution); *Romeril*, 15 F.4th at 172. Provided that any limitation on speech remains within proper bounds, and given the background ability to waive First Amendment rights at least to some extent, the SEC has an interest in giving defendants the option to agree to a speech restriction as part of a broader settlement agreement.

However, to the extent the SEC’s letter addressing NCLA’s request to amend Rule 202.5(e) advances the broader rationale that it is necessary to silence defendants in order to promote public confidence in the SEC’s work, this rationale would be improper. “[W]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement’ that it was adopted in part to ‘protect the free discussion of governmental affairs.’” *Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 478, 142 S.Ct. 1253, 212 L.Ed.2d 303 (2022) (quoting *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct.

1434, 16 L.Ed.2d 484 (1966)). A defendant who denies the SEC's allegations may well undermine confidence in the SEC's enforcement programs. But undermining confidence in the government is an inevitable result of our robust First Amendment protections for speech critical of the government. The SEC's valid interest in Rule 202.5(e) is thus more mechanical: that if a defendant wants to deny the allegations, the SEC wants to be able to prove those allegations in a particular forum, i.e., in court, with the benefits and protections of the judicial process.

At the same time, the SEC's interests are not so compelling that they would justify a broad restriction on speech, either. In this case, and critical to our *Rumery* analysis, is the fact that, on its face, SEC Rule 202.5(e) "is a relatively narrow limitation" on defendants' speech. *Leonard*, 12 F.3d at 891. By its terms, Rule 202.5(e) creates consequences for defendants only when they publicly deny the SEC's allegations. The Rule on its face sweeps no further than speech denying the allegations. And, critically, the consequence for violating the Rule is not speech suppression or the automatic undoing of the settlement agreement, but only that the SEC may seek to reopen the civil enforcement proceedings—which would in turn require a court to agree to that request, including over and above any First Amendment objections that the defendant could interpose at that time. *See Rumery*, 480 U.S. at 401, 107 S.Ct. 1187 (O'Connor, J., concurring in part and concurring in the judgment) (noting that "judicial supervision" creates "an important check against abuse" of voluntary agreements to waive rights). "Even in those areas affected by" Rule 202.5(e), defendants can later decide to deny the allegations

against them “if [they] feel[] that the benefits to be gained . . . are more valuable than the [settlement] foregone,” or, that is, potentially foregone, because a court must still agree to the SEC’s request to reopen. *Leonard*, 12 F.3d at 892.

Although the SEC’s asserted interest in Rule 202.5(e) is limited, the face of the Rule only imposes a limited speech restriction. And the remedy for a violation of Rule 202.5(e) is also limited, requiring court sign-off that, if granted, merely puts the parties back in the position they were in before the settlement. The result is that a defendant who agrees to a Rule 202.5(e) settlement faces the prospect of reopened proceedings, but he may conclude that agreeing to the SEC’s allegations or litigating instead of settling are inferior options. We do not think the First Amendment forecloses the SEC from giving defendants the optionality reflected in Rule 202.5(e). On this basis, we narrowly reject petitioners’ facial-type challenge.

We caution, however, that further restrictions on defendants’ speech would require a different analysis under *Rumery*. The SEC assures us 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.” Defendants who have settled with the SEC should therefore understand that they have full latitude in this regard, including when it comes to criticizing the SEC. At the same time, we question how easy the SEC’s line will be to police in practice, should the SEC ever seek to enforce Rule 202.5(e). Our decision today resolves only whether an agreement allowing the SEC to seek to

reopen proceedings upon a defendant's bare denial of allegations violates the First Amendment. And on that understanding of Rule 202.5(e), the Rule is not unconstitutionally vague, either. *See FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253, 132 S.Ct. 2307, 183 L.Ed.2d 234 (2012) (explaining that laws "must give fair notice of conduct that is forbidden or required"). But any broader rule would present different issues.

In this regard, we note evidence in the record of settlement agreements that could be read to sweep more broadly than Rule 202.5(e) itself. For example, we are informed that defendants agree not to make "any public statement denying, *directly or indirectly*, any allegation in the complaint or *creating the impression* that the complaint is without factual basis." (Emphasis added). Defendants also agree not to "permit" such statements to be made, an obligation that could be understood to extend to the speech of others.

No specific settlement agreement is before us in this petition for review. But insofar as the SEC's settlement agreements impose greater obligations than the face of Rule 202.5(e) itself, today's decision—which concerns the denial of a petition to amend Rule 202.5(e) itself—does not resolve whether such a settlement agreement could survive a *Rumery* or vagueness challenge. Courts considering such settlements may take up these questions in appropriate cases, whether when entering consent judgments or entertaining requests for relief from them. If defendants raise such challenges, courts should carefully consider them, mindful of the important values associated with permitting criticism of the government. Nor do we decide if it would be

constitutional for the facial restrictions in Rule 202.5(e) to apply in perpetuity. It stands to reason that under a *Rumery* analysis, the government's interest may wane as time passes. Issues such as this will need to be addressed in individual cases.

For these reasons, we uphold Rule 202.5(e) against the instant facial-type First Amendment challenge, without prejudice to future challenges on more particularized records.

IV

We lastly consider petitioners' contention that the SEC's adoption of Rule 202.5(e) violates the APA. An agency's denial of a petition to amend a rule may be vacated if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *O'Keefe's, Inc. v. U.S. Consumer Prod. Safety Comm'n*, 92 F.3d 940, 942 (9th Cir. 1996). Petitioners raise three arguments on this score. Each is unpersuasive.

First, we reject petitioners' argument that the SEC lacked statutory authority to enact Rule 202.5(e). Petitioners claim that the SEC's initial claimed sources of authority—"section 19 of the Securities Act of 1933, section 23(a) of the Securities Exchange Act of 1934, section 20 of the [now-repealed] Public Utility Holding Company Act of 1935, section 38 of the Investment Company Act of 1940 and section 211 of the Investment Adviser's Act of 1940," 37 Fed. Reg. 25,224 (Nov. 29, 1972)—only empower the agency to make internal housekeeping rules. According to petitioners, these statutes provide no authority for a rule that binds third parties that come before the agency.

But there is no dispute that the SEC has “discretionary authority to settle on a particular set of terms” with defendants, *SEC v. Citigroup Global Markets, Inc.*, 752 F.3d 285, 295 (2d Cir. 2014), and the Commission could have informed each defendant individually about the settlement terms the agency would be willing to accept. Petitioners do not cite any authority suggesting that the SEC cannot publicly announce its policy more formally, and, in fact, petitioners’ request to the SEC was premised on the idea that the SEC can have rules regarding settlements, with petitioners urging the SEC to amend its rule.

In addition, when denying the petition, the SEC explained that Rule 202.5(e) “implements and aids in the execution of the Commission’s enforcement powers under [15 U.S.C. § 78u] and other enforcement-related provisions.” In other words, the SEC premises its ability to request certain terms of settlement on its powers to enforce the securities laws through enforcement actions. We understand the SEC’s latest explanation of the basis for the Rule as simply a further elaboration of its original grounds from 1972. And the SEC’s enforcement powers provide sufficient authority for the Rule. *See* 15 U.S.C. § 78w(a) (authorizing the SEC “to make such rules and regulations as may be necessary or appropriate . . . for the execution of the functions vested in them” under the Securities Exchange Act of 1934).

Second, petitioners argue that Rule 202.5(e) fails because it was not adopted through notice-and-comment rulemaking. But under the APA, notice-and-comment rulemaking is not required for “interpretative rules, general statements of policy, or

rules of agency organization, procedure, or practice.” 5 U.S.C. § 553(b)(A). Rule 202.5(e) simply announces the Commission’s settlement policy, and it is only enforced if a defendant signs a consent agreement that contains a no-deny provision. The Rule is best viewed as one of policy, procedure, or practice, which is exempt from the notice-and-comment requirements.

Finally, petitioners argue that the SEC failed to provide a rational explanation for its determination not to amend Rule 202.5(e). But judicial review of an agency’s “refus[al] to exercise its discretion to promulgate proposed regulations” is “‘extremely limited’ and ‘highly deferential.’” *Compassion Over Killing v. FDA*, 849 F.3d 849, 854 (9th Cir. 2017) (quoting *Massachusetts*, 549 U.S. at 527–28, 127 S.Ct. 1438). In this case, the SEC’s explanation for not amending its Rule survives our deferential review. Although petitioners disagree with it, the SEC’s six-page letter adequately explains the SEC’s reasoning.

* * *

For the foregoing reasons, the petition for review is **DENIED**.\

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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
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OFFICE OF
THE SECRETARY

January 30, 2024

Margaret A. Little
New Civil Liberties Alliance
1125 19th Street NW, Suite 450
Washington, D.C. 20036

Re: Rulemaking Petition File No. 4-733

Dear Ms. Little:

This letter responds to the petition to amend a rule filed by the New Civil Liberties Alliance (NCLA) pursuant to Commission Rule of Procedure 192(a), 17 C.F.R. 201.192(a). The NCLA asks the Commission to amend Rule 202.5(e), 17 C.F.R. 202.5(e), which addresses the terms on which the Commission will accept settlements of enforcement actions. More specifically, Rule 202.5(e) reflects the Commission's policy that it will not agree to a settlement imposing a sanction, including a consent judgment in federal court, if a defendant can then publicly deny the Commission's allegations. For the reasons explained below, the Commission denies the petition and declines to amend Rule 202.5(e).¹

¹ The Commission notes that the discussion in this letter exceeds the "brief statement of the grounds for denial" required by 5 U.S.C. 555(e).

BACKGROUND

Congress authorized the Commission to conduct investigations and determine whether violations of the securities laws have occurred, 15 U.S.C. 78u(a), and when it appears that a violation has occurred, the Commission may, in its discretion, bring an enforcement action in federal court, 15 U.S.C. 78u(d)(1). *See also* 17 C.F.R. 200.1. The Commission has exercised this enforcement authority for nearly 90 years. In order for Enforcement staff to file a complaint, the Commission must approve the action by a majority vote of the present Commissioners.

The Commission does not litigate every action to judgment. Rather, the Commission and a defendant may agree to settle. *SEC v. Citigroup Glob. Mkts.*, 752 F.3d 285, 295 (2d Cir. 2014) (“[The] factors that affect a litigant’s decision whether to compromise a case or litigate it to the end include the value of the particular proposed compromise, the perceived likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial, and the resources that would need to be expended in the attempt.” (cleaned up)). As part of the settlement process, the Commission and a defendant negotiate terms, including sanctions. The Commission’s decision to settle reflects considerations including its judgment that obtaining an immediate result by consent serves the public interest. Among other things, if the Commission settles, it cedes its opportunity to prove the allegations that result from its investigative efforts—the Commission yields its day in court.

The Commission generally settles district court actions by seeking entry of consent judgments, which

have “attributes both of contracts and of judicial decrees.” *United States v. ITT Cont’l Baking Co.*, 420 U.S. 223, 236 n.10 (1975). They resemble contracts because they “are entered into by parties to a case after careful negotiation has produced agreement on their precise terms.” *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971); *United States v. City of Miami*, 664 F.2d 435, 440 (5th Cir. 1981) (“The entry of a consent decree necessarily implies that the litigants have assented to all of its significant provisions.”) (cleaned up). And they are decrees because they are memorialized in a judgment over which a court retains jurisdiction. *Armour*, 402 U.S. at 681-82. The Commission settles cases by this method rather than entering into out-of-court, non-public settlements followed by a voluntary dismissal.

Usually, when the Commission settles, a defendant signs a consent that describes the terms of the settlement to which the parties agreed and reflects the defendant’s agreement that the defendant is entering into the settlement voluntarily. And then the Commission (sometimes jointly with the defendant) asks the district court to enter a consent judgment that incorporates the terms of the consent and to retain continuing jurisdiction. Just as the Commission must approve the filing of a complaint, it must approve a settlement.

Over fifty years ago, the “Wells Committee” examined the Commission’s enforcement practices. Letter from William J. Casey, Chairman, Mar. 2, 1972, available at https://www.sechistorical.org/collection/papers/1970/1972_0302_Casey.pdf. The committee produced a report in September 1972, and shortly thereafter, the Commission issued a policy regarding settlements. 37 Fed. Reg. 25224 (Nov. 29,

1972), codified at 17 C.F.R. 202.5(e).² The policy is one of several “informal and other procedures” that concern enforcement activities. 17 C.F.R. 202.5. It reflects the Commission’s view that in any civil lawsuit or in any administrative proceeding of an accusatory nature, “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.” 17 C.F.R. 202.5(e). Accordingly, the Commission announced a “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 administrative order. *Id.* The Commission further noted that, in its view, “a refusal to admit the allegations is equivalent to a denial, unless the defendant or respondent states that he neither admits nor denies the allegations.” *Id.*

² Congress bestowed upon the Commission “the power to make such rules and regulations as may be necessary or appropriate to implement the provisions of this title for which [it is] responsible or for the execution of the functions vested in them by this title.” 15 U.S.C. 78w(a); *see also* 15 U.S.C. 77s, 78s, 80a-37, 80b-11. The Commission has exercised this authority to adopt formal rules of procedure, 17 C.F.R. 201.100 *et seq.*, as well as the informal procedures that includes Rule 202.5(e). Rule 202.5(e) is a policy that implements and aids in the execution of the Commission’s enforcement powers under Section 21 of the Exchange Act, 15 U.S.C. 78u, and other enforcement-related provisions. In announcing Rule 202.5(e) in 1972, the Commission did not engage in notice-and-comment rulemaking because the APA does not require such procedures for “general statements of policy, or rules of agency organization, procedure, or practice.” 5 U.S.C. 553(b)(A). Rule 202.5(e) is a rule of agency procedure and practice; it announces the Commission’s practices regarding what settlements it will accept.

This policy has become known as the “no admit/no deny policy.” In most settlements, the Commission does not require admissions. But the Commission also will not agree to a settlement—it will not forgo its opportunity to present evidence and prove its claims in federal court—unless the defendant agrees not to publicly deny the allegations in the complaint. The policy binds the Enforcement staff, but it does not require defendants to settle; a defendant is always free to eschew settlement and litigate.

In practice, the policy is given effect through contractual language that appears in the consent and the judgment presented to the district court for entry. Generally, the defendant states that, without admitting or denying the allegations of the complaint (except as to jurisdiction, which are admitted), the defendant consents to the entry of a judgment and accepts the agreed-upon sanctions. The defendant further agrees to comply with Rule 202.5(e) and not to make any public statements denying the allegations in the complaint. The consent grants the Commission a limited remedy in the event a defendant breaches the agreement by publicly denying the allegations: the Commission may petition the district court to vacate the final judgment and restore the action to the active docket. *E.g.*, Pet. 4.

Thus, in the event of a denial, the Commission’s recourse is to ask the court to vacate the settlement. The Commission may not avail itself of its contractual remedy if it decides not to dedicate resources to reviving a once-settled case. Moreover, if the

Commission seeks this relief, the district court may deny it.³

For over 40 years, federal district courts have entered hundreds of consent judgments in which defendants did not have to make admissions but also agreed not to deny the allegations in the complaints against them. In the past decade, however, some have questioned the Commission’s practice of allowing defendants to settle enforcement actions without requiring them to admit the allegations in the complaint. *See SEC v. Citigroup Glob. Mkts.*, 752 F.3d 285, 295 (2d Cir. 2014) (holding that a district court abused its discretion when it refused to enter a “no admit/no deny” consent judgment because the defendant did not admit the allegations in the complaint). And defendants have unsuccessfully challenged no-deny provisions to which they voluntarily agreed by seeking relief years—or even decades—later in which they ask a court to line-edit the consents, eliminating the no-deny provision while retaining all the other agreed terms of the settlement. *See SEC v. Romeril*, 15 F.4th 166 (2d Cir. 2021); *SEC v. Novinger*, 40 F.4th 297 (5th Cir. 2022).

The NCLA’s petition asks the Commission to amend Rule 202.5(e) to provide that a defendant can consent to a judgment in which the defendant admits, denies, or neither admits nor denies the allegations in the complaint. While couched as a “modest” change,

³ When the Commission accepts offers to settle administrative adjudications, it does so pursuant to Rule 202.5(e) and respondents voluntarily agree not to publicly deny the allegations in the order instituting proceedings, and further agree that if they breach that agreement, Enforcement staff can ask the Commission to reopen the action against them.

Pet. 6, the proposed amendment would, in effect, eliminate the policy because it would allow defendants to consent to a judgment while denying the allegations with no recourse for the Commission to return to active litigation.

DISCUSSION

After careful consideration, the Commission declines to amend Rule 202.5(e). Rule 202.5(e) is a proper exercise of the Commission's authority to decide how it will pursue its enforcement mission and settle cases. The no-deny policy allows the Commission to seek its day in court if a defendant later chooses to deny the factual basis for the enforcement action. None of the constitutional or statutory arguments presented by the petition has merit, and several contravene established precedent regarding waiver of rights.

The Commission's policy preserves its ability to seek findings of fact and conclusions of law if a defendant, after agreeing to a settlement, chooses to publicly deny the allegations. When the Commission settles, it cedes its ability to prove its allegations. A breach of the no-deny provision provides the Commission with the opportunity to ask a district court to return the case to the active docket. The court, in its discretion, may grant the request, reverting the parties to their positions before the entry of the consent judgment. This remedy for breach is not self-executing, and the Commission would have to decide, based on the facts and circumstances, whether to invoke that remedy following a public denial that violates the consent judgment.

This relief is thus closely tied to the purpose of the settlement—voluntarily resolving a matter without further litigation. It is reasonable for the Commission to agree to settle only if the defendant agrees that, upon a public denial, the Commission can seek to challenge that denial in court. The Commission is not required to choose a path whereby it waives its right to try a case while the defendant is free to publicly deny the allegations without any real ability for the Commission to respond in court. The petition suggested that the Commission, in the face of a public denial after the Commission has waived its right to try its case, can “issue its own statement” and “the public can sort out the truth in the free marketplace of ideas.” Pet. 30. But the Commission does not try its cases through press releases. The no-deny provision ensures that if a defendant reneges on a settlement and publicly denies the allegations, the Commission has the opportunity to ask a court to permit it to test that denial, controlled by the rules of procedure and evidence.

Moreover, if a defendant settles without admissions and then later denies the allegations, that turnabout can negatively impact the public interest. The filing of a complaint memorializes the results of an investigation and reflects a determination by the Commission that the evidence reveals a violation of the securities laws. In settlements without admissions, a defendant who later denies the allegations in the complaint can create the incorrect impression that there was no basis for the Commission’s enforcement action. Because such a denial would come only after the Commission had relinquished the opportunity to prove its case in court

with evidence, it could undermine confidence in the Commission's enforcement program.

When the Commission brings an action, the Commission and the defendant can elect to settle on terms to which both agree. Alternatively, if either party disagrees with terms that the other party views as necessary, they can decline to settle, and the Commission must bear its burdens of proof and persuasion in court. The petition seeks to alter this calculus by foreclosing the Commission from agreeing to settle—and thereby forgoing its ability to prove its case in court—only if the defendant also agrees not to publicly deny the allegations later on. The Commission may make a reasonable determination to require, as a condition of settlement that, if a settling defendant makes a public denial, the Commission can seek a return to the judicial forum to challenge assertions that the Commission's enforcement action lacked a foundation in fact or law.

The petition's constitutional arguments are not persuasive. There is a large body of precedent confirming that a defendant can waive constitutional rights as part of a civil settlement, just as a criminal defendant can waive constitutional rights as part of a plea bargain. As the Second Circuit held when it confirmed the constitutionality of the no-deny policy, “[i]n the course of resolving legal proceedings, parties can, of course, waive their rights, including such basic rights as the right to trial and the right to confront witnesses.” *SEC v. Romeril*, 15 F.4th 166, 172 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 2836 (2022).

Romeril followed the Supreme Court's decision in *Town of Newton v. Rumery*, 480 U.S. 386, 393 (1987), where the court held that there is no “per se rule of invalidity” for waivers of constitutional rights. The

Court did not analyze the settlement containing a waiver in prior-restraint terms, which would effectively impose something close to a *per se* rule against settlements. Rather, the Court established a balancing test for deciding whether *to enforce* waivers—which presumes that rights *can* be waived—and then upheld the enforcement of a waiver under the facts presented in that case. *Id.*⁴

⁴ *Rumery* and *Romeril* are part of a well-established line of precedent. *INS v. St. Cyr*, 533 U.S. 289, 321-22 (2001) (“In exchange for some perceived benefit, defendants waive several of their constitutional rights including the right to a trial.”); *Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 703 (1982) (“Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.”); *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 184-87 (1972) (holding that due process rights can be waived); *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971) (“Because the defendant has, by the decree, waived his right to litigate the issuer raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected.”); *Barker v. Wingo*, 407 U.S. 514, 529, 536 (1972) (waiver of speedy trial rights); *Brady v. United States*, 397 U.S. 742, 748 (1970) (allowing plea bargains to waive a defendant’s trial rights and the right against self-incrimination); *Illinois v. Allen*, 397 U.S. 337, 342-343 (1970) (right to be present at trial); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (rights to counsel and against compulsory self-incrimination); *Fay v. Noia*, 372 U.S. 391, 439 (1963) (habeas corpus); *Rogers v. United States*, 340 U.S. 367, 371 (1951) (right against compulsory self-incrimination); *Pee Dee Health Care, P.A. v. Sanford*, 509 F.3d 204, 212 (4th Cir. 2007) (nothing in federal law prohibits constitutional waivers); *Lake James Cmty. Volunteer Fire Dep’t v. Burke Cnty.*, 149 F.3d 277, 280 (4th Cir. 1998) (“[S]imply because a contract includes the waiver of a constitutional right does not render the contract *per se* unenforceable.”); *Leonard v. Clark*, 12 F.3d 885, 889-90 (9th Cir. 1993), *as amended* (Mar. 8, 1994); *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310, 1315 (8th Cir. 1991); *United States v. Int’l Bhd. of*

“[T]he First Amendment is no exception.” *Romeril*, 15 F.4th at 172. In *Romeril*, the Second Circuit followed *Rumery* and explained that “parties can waive their First Amendment rights in consent decrees and other settlements of judicial proceedings.” *Id.* Courts have presumed that waivers in the civil context must have the same safeguards as the criminal context—they must be “knowing, voluntary, and intelligent,” *D.H. Overmyer*, 405 U.S. at 185—and when defendants in Commission actions sign consents, they represent that they are entering into the settlement voluntarily. See *Novinger*, 40 F.4th at 302-03 (noting defendants’ stipulation that they entered into consent judgments with no-deny provisions “voluntarily”). Thus, settling defendants make a “highly rational judgment” that the advantages of settlement exceeded any costs of waiver. *Rumery*, 480 U.S. at 394.

When a defendant settles with the Commission, the parties reach a mutually acceptable resolution. *Armour*, 402 U.S. at 681; *Citigroup*, 752 F.3d at 295; *SEC v. Clifton*, 700 F.2d 744, 748 (D.C. Cir. 1983). The Commission is not bestowing a benefit on the defendant, but rather is acting in the public interest to minimize litigation risk, maximize limited resources, and accelerate the resolution of the case. *Citigroup*, 752 F.3d at 295-96. All settlements involve undertakings and waivers of constitutional rights,

Teamsters, 931 F.2d 177, 187–88 (2d Cir. 1991); *Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084, 1096 (3d Cir. 1988); *In re George F. Nord Bldg. Corp.*, 129 F.2d 173, 176 (7th Cir. 1942) (holding that a party to a consent decree “is in no position to claim that such decree restricts his freedom of speech” because the party “has waived his right and given his consent to its limitations”).

41a

and courts have held that there is no per se rule against such agreements. *Rumery*, 480 U.S. at 393; *Romeril*, 15 F.4th at 172. There is no support for the notion that the parties cannot agree that if the defendant wishes to publicly deny after the Commission yields its opportunity to litigate its allegations, the Commission will have the ability to seek a return to the courtroom where the denials can be tested under the rules of evidence and procedure.

For the foregoing reasons, the Commission denies the petition to amend Rule 202.5(e).

By the Commission,

Vanessa A. Countryman
Secretary

Statement

Unsettling Silence: Dissent from Denial of Request for Rulemaking to Amend 17 C.F.R. § 202.5(e)

[photo omitted] Commissioner Hester M. Peirce

Jan. 30, 2024

I dissent from the Commission’s denial of a petition to amend Rule 202.5(e), our so-called gag rule.¹ This *de facto* rule follows from the Commission’s enforcement of its policy, adopted in 1972, that it will not “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.”² In that same policy, the Commission articulated its belief “that a refusal to admit the allegations is equivalent to a denial, unless the defendant or respondent states that he neither admits nor denies the allegations.”³ These two strands—the refusal to settle with persons who deny the allegations and the belief that refusing to admit is a denial—converge in the requirement that to settle with the Commission, a person must either (1) admit the allegations underlying the Commission’s

¹ Letter from Vanessa Countryman to Margaret A. Little, New Civil Liberties Alliance (Jan. 30, 2024) (“Denial Letter”) (available at <https://www.sec.gov/files/rules/petitions/2024/4-733-letter-013024.pdf>).

² 17 C.F.R. § 202.5(e); see also Consent Decrees in Judicial or Administrative Proceedings, Rel. No. 33-5337, 37 Fed. Reg. 25224 (Nov. 29, 1972).

³ *Id.*

enforcement action or (2) state that she neither admits nor denies the allegations.

To compel compliance with the no-deny prong of the policy, the Commission requires settling defendants to agree that they “will not take any action or make or permit to be made any public statement denying, directly or indirectly, any allegation in the complaint or creating the impression that the complaint is without factual basis” and also “will not make or permit to be made any public statement to the effect that Defendant does not admit the allegations of the complaint, or that this Consent contains no admission of the allegations, without also stating that Defendant does not deny the allegations.”⁴ The Commission further requires the settling defendant to “withdraw[] any papers filed in this action to the extent that they deny any allegations in the complaint.”⁵ Finally, the Commission’s mandatory language states that “[i]f Defendant breaches this agreement, the Commission may petition the Court to

⁴ Final Judgment as to Defendant Fernando Motta Moraes at 9, *SEC v. Moraes*, No. 22-Civ.-08343 (S.D.N.Y. Oct. 28, 2022), ECF No. 13 (Consent of Defendant Fernando Motta Moraes, ¶ 11). The Commission employs substantively identical language in the Offers of Settlements leading to settled Orders Instituting Proceedings. *See, e.g.*, FTE Networks, Form 8-K, Ex. 10.1 (Offer of Settlement of FTE Networks, Inc., Part VI), filed Sept. 11, 2014 (available at sec.gov/Archives/edgar/data/1122063/000114420414055309/v388919_ex10-1.htm).

⁵ Final Judgment at 9, *supra* n.4. The Commission’s mandatory language has two narrow carve-outs: “Nothing in this paragraph affects Defendant’s: (i) testimonial obligations; or (ii) right to take legal or factual positions in litigation or other legal proceedings in which the Commission is not a party.” *Id.* at 10.

vacate the Final Judgment and restore this action to its active docket.”⁶ The net result is that the settling defendant, for the action to stay settled, must agree both to rescind her past in-court statements contesting the truth of the Commission’s allegations and promise never again to contest the truth of the Commission’s allegations herself, or even permit others to contest the allegations.

In October 2018, the New Civil Liberties Alliance (NCLA) asked us to revise Rule 202.5(c) to read as follows:

The Commission has adopted the policy that in any civil lawsuit brought by it or in any administrative proceeding of an accusatory nature pending before it, a defendant or respondent may consent to a judgment or order in which he admits, denies, or states that he neither admits nor denies the allegations in the complaint or order for proceedings.⁷

I agree with the petitioner that this issue warrants a spot on our rulemaking agenda. One thing I love about this country is that Americans can and often do criticize their government. Without fearing reprisal, a person can condemn specific government actions, broad government policies, or the officials who carry out those actions and make those policies. This freedom to speak against the government and government officials is essential in a free society committed to the preeminence of the people. Of course, some criticisms of government policies,

⁶ *Id.* at 9-10.

⁷ File No. 4-733, New Civil Liberties Alliance Petition to Amend at Ex. A., submitted Oct. 30, 2018 (available at <https://www.sec.gov/files/rules/petitions/2018/petn4-733.pdf>).

practices, or personnel may be baseless, but the American public, not government censors, should be the arbiters of validity. Our prohibition on denials prevents the American public from ever hearing criticisms that might otherwise be lodged against the government, let alone assessing their credibility. The policy of denying defendants the right to criticize publicly a settlement after it is signed is unnecessary, undermines regulatory integrity, and raises First Amendment concerns.

I.

When the Commission adopted the policy in 1972, it included a brief statement explaining why it needed the policy: “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.”⁸ This concern seems largely theoretical. Even if the concern is real, the imprudent policy adopted in November 1972 is not the right way to protect the Commission’s reputation.

The Commission devoted significant resources to evaluating its enforcement program in 1972.⁹ In January 1972, Chairman William Casey created a three-member committee to “examine the SEC’s enforcement policy and practices, engage in frequent

⁸ Consent Decrees in Judicial or Administrative Proceedings, Rel. No. 33-5337, 37 Fed. Reg. 25224 (Nov. 29, 1972). The Commission’s explanation for the policy was part of the rule it adopted in 1972 and remains part of the rule today.

⁹ The Commission’s Division of Enforcement came into existence in August 7, 1972 as part of an administrative reorganization. 38th Annual Report of the Securities and Exchange Commission, at 133 (available at <https://www.sec.gov/files/1972.pdf>).

dialogue with the members of the Commission and with our staff, seek and sift the suggestions of the bar and make recommendations to the Commission for worthwhile improvements to our time-honored ways.”¹⁰ The June 1, 1972 Report of the Advisory Committee on Enforcement Policies and Practices—now commonly referred to as the Wells Report—included a lengthy discussion about the settlement of Commission enforcement actions, and made several recommendations related to the settlement process.¹¹ The Commission had decades of experience settling cases, through both settlements on a no-admit/no-deny basis and settlements allowing defendants to deny wrongdoing.¹² With respect to some of these

¹⁰ William J. Casey, Chairman, Sec. & Exch. Comm’n, *The Securities Bar and the Securities Laws*, Address to the New York State Bar Association, at 5 (Jan. 27, 1972) (available at <https://www.sec.gov/news/speech/1972/012772casey.pdf>).

¹¹ Wells Report, at v-vi and 34-43. The Wells Report is available through the Securities and Exchange Commission Historical Society’s website. See https://www.sechistorical.org/museum/galleries/enf/enf03a_wells-commission.php.

¹² See, e.g., *First National City Bank and Merrill Lynch, Pierce, Fenner and Smith, Inc.*, Lit. Rel. No. 4534, 1970 WL 104562 (Feb. 6, 1970) (announcing settled district court action where “Defendants state that they deny that there is any validity in the claims asserted by the Commission in the complaint or any illegality or impropriety in any of defendants’ past acts or practices”); *W. Allen Raleigh*, Rel. No. 34-7483, 1964 WL 66599 (Dec. 9, 1964) (no-admit/no-deny); *Keystone Securities Corp.*, Rel. No. 34-7095, 1963 WL 63774 (July 8, 1963) (no-admit/no-deny); Tanya Kaye, Rel. No. 6033, 1959 WL 59455 (Aug. 5, 1959) (no-admit/no-deny); *SEC v. Interstate Syndications, Inc.*, (N.D. Ga. C75-5 A), Lit. Rel. No. 6692, 1945 WL 26488 (Jan. 28, 1945) (no-admit/no-deny); *Illinois-Indiana Oil Basin Corp.*, Rel. No. 33-2280, 1940 WL 6989 (June 12, 1940) (no-admit/no-deny).

settlements, defendants issued flat denials of wrongdoing.¹³ But neither the Wells Report nor Chairman Casey's lengthy ruminations on it discuss problems arising from settling defendants later denying the factual basis of the Commission's case.¹⁴ Given the broad remit of the Committee and its public comment process,¹⁵ if problematic denials were common, the Committee and Commission would have heard about them.¹⁶ In the intervening years, when

¹³ Terry Robards, *Bank and Broker Accused by S.E.C.: National City and Merrill Lynch Agree to Put End to Investment Unit*, N.Y. Times, Feb. 7, 1970 (“[First National City Bank] issued a statement that said in part: ‘We believe the commission’s claims have no validity and we have denied them. However, in order to avoid lengthy litigation, we have agreed to terminate the S.I.A.S. and to offer customers an alternative service that we believe meets the investor needs.’ . . . Merrill Lynch also issued a statement, asserting that it ‘sees no merit in the arguments advanced by the S.E.C.’ . . . ‘It is clear that in making its arguments, the S.E.C. is in fact attempting to make new law.’”).

¹⁴ William J. Casey, Chairman, Sec. & Exch. Comm’n, *Ruminations and Action on Enforcement*, Address at the New York Law Journal Enforcement Conference (Sept. 29, 1972) (available at <https://www.sec.gov/news/speech/1972/092972casey.pdf>).

¹⁵ Chairman Casey issued a public request for comment to the committee on March 2, 1972. See https://www.sechistorical.org/collection/papers/1970/1972_0302_Casey.pdf.

¹⁶ In more recent years, one authority contended that “by 1972, it had become obvious that as soon as courts had signed off on [no-admit/no-deny] settlements, the defendants would start public campaigns denying that they had ever done what the S.E.C. had accused them of doing,” but it did so without citation or attribution. *SEC v. Vitesse Semiconductor Corp.*, 771 F.Supp.2d 304, 308 (S.D.N.Y. 2011). Other discussions have repeated this assertion, but have not supplemented it with concrete examples. See, e.g., David Rosenfeld, *Admissions in*

defendants have made denials contrary to the policy,¹⁷ such denials do not seem to have undermined the Commission's enforcement program. The absence of a public record specific to the adoption of the policy, the conclusory explanation of its necessity, and the absence of actual evidence of a problem weigh in favor of reexamining the policy.

The requirement that defendants must either admit or at least promise not to deny the government's allegations of wrongdoing as a condition of settlement has not been widely adopted by federal agencies.¹⁸

SEC Enforcement Cases: The Revolution that Wasn't, 103 Iowa L. Rev. 113, 118-19 (2017); Matthew G. Neumann, *Neither Admit nor Deny: Recent Changes to the Securities and Exchange Commission's Longstanding Settlement Policy*, 40 J. Corp. L. 793, 797-98 (2015); Priyah Kaul, *Admit or Deny: A Call for Reform of the SEC's "Neither-Admit-Nor-Deny" Policy*, 48 U. Mich. J.L. Reform 535, 537-38 (2015).

¹⁷ See, e.g., Floyd Norris, *Morgan Stanley Draws SEC's Ire*, N.Y. Times, May 2, 2003, at Section A., Col. 1, Business/Financial Desk p. 1; *Figure in SEC Insider Case Withdraws a Statement*, Wall St. J., July 13, 1988, at 10, col. 3. It is possible that some defendants would seek to distance themselves from the allegations in a settlement for nefarious purposes. For example, a serial fraudster might settle and then tell investors that the allegations are untrue and that she settled only to be able to focus on providing investors with the next great investment. The solution to this legitimate concern—one that does not implicate a defendant's constitutional rights—may be to demand admissions when such a future offense is probable. Subsequent denials would not be prohibited, but they would be read against the backdrop of the admissions in the settlement.

¹⁸ I am aware of only one other federal agency—the Commodity Futures Trading Commission—that has issued a similar policy statement. 17 C.F.R. Part 10, App. A. The CFTC went through the notice and comment process to adopt its policy. CFTC: Proposed Rules: Rules of Practice; Proposed

Some agencies even explicitly allow settling defendants to deny the allegations of wrongdoing.¹⁹ As the Federal Trade Commission noted when approving one such settlement in 2012, it was confident in the work of its staff:

it is the evidentiary record developed by FTC staff during the course of its investigation, not any ensuing settlement agreement, that forms the basis for the action by Commission. A respondent's denial of liability in a consent agreement does not diminish staff's extensive investigation or the ability of the Commission to find a reasonable basis to finalize a

Amendments, 63 Fed. Reg. 16453, 16459 (April 3, 1998); CFTC: Rules and Regulations: Rules of Practice; Final Rules, 63 Fed. Reg. 55784, 55790, 55796 (Oct. 19, 1998); CFTC: Rules and Regulations: Rules of Practice: Correction, 64 Fed. Reg. 30902 (June 9, 1999). Two other agencies appear to have somewhat similar rules, but do not appear to have accompanying policy statements. See 40 C.F.R. § 22.18(b)(2) [Environmental Protection Agency] and 45 C.F.R. § 672.11(b)(2) [National Science Foundation].

¹⁹ See Consent Order, *United States v. Countrywide Financial Corp.*, 11-cv-10540 (C.D. Cal. Dec. 28, 2011), ECF No.4, at 4 (“Defendants Deny all the allegations and claims of a pattern or practice of discrimination in violation of the FHA and the ECOA as set forth in the United States’ Complaint.”) (available at <https://www.justice.gov/sites/default/files/crt/legacy/2012/01/27/countrywidesettle.pdf>); Agreement Containing Consent Order, *Facebook, Inc.*, FTC File No. 092 3184 (“Proposed Respondent expressly denies the allegations set forth in the complaint, except for the jurisdictional facts.”) (available at <https://www.ftc.gov/sites/default/files/documents/cases/2011/11/111129facebookagree.pdf>).

settlement or to enforce an order that results from settlement negotiations.²⁰

The FTC’s Consent Order Procedures explicitly allow settlement agreements to “state that the signing thereof is for settlement purposes only and does not constitute an admission by any party that the law has been violated as alleged in the complaint.”²¹ Our staff’s investigative work likewise would stand on its own even if we permitted defendant denials.

II.

Even apart from the scant factual basis for the Commission’s given reason for needing the no-deny policy, it should be reexamined because a regulatory policy that prevents people from speaking against government action necessarily raises First Amendment concerns. Prohibiting a person from taking “any action to make . . . any public statement that the complaint is without factual basis” is a plain prior restraint on speech.²² Prohibiting that same person from “permit[ting] to be made any public statement that the complaint is without factual basis”

²⁰ Statement of the [Federal Trade] Commission, *Facebook, Inc.*, Docket No. C-4365 (Aug. 10, 2012) (available at https://www.ftc.gov/system/files/documents/public_statements/293551/120810facebookstatement.pdf)

²¹ 16 C.F.R. § 2.32.

²² *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 556 (1976) (The First Amendment “afford[s] special protection against orders that prohibit the publication or broadcast of particular information or commentary—orders that impose a ‘previous’ or ‘prior’ restraint on speech.”); *see also SEC v. Novinger*, 40 F.4th 297, 308 (5th Cir. 2022) (Jones, J. concurring) (stating about the Commission’s no-deny policy that “[a] more effective prior restraint is hard to imagine”).

only exacerbates the problem by imposing on the defendant an obligation to restrain speech by others. Moreover, this content-specific and permanent restraint on speech effectively shields the Commission's allegations from criticism: as long as you live, you are bound not only to say nothing that the Commission believes "directly or indirectly" denies the complaint's allegations, but you also must never say anything that even "create[s] the impression" of a denial.²³ Given the obvious First Amendment ramifications of the no-deny policy, it is unsurprising that a court recently characterized the Commission's use of the no-denial provision as "at a minimum . . . inconsistent with the spirit of the First Amendment and our Nation's time-honored tradition of protecting free expression."²⁴ The court continued by observing that:

[H]ere, the Provision is used by an agency of the federal government to shield itself from public view. This may inflict precisely the kind of societal harm the Founders adopted the First Amendment to protect

²³ See, e.g., Brief of Constitutional Law & First Amendment Scholars as Amici Curiae in Support of Petitioner at 3, *Romeril v. SEC*, No. 21-1284 (S.Ct.) ("[T]he SEC Gag Rule is not just any prior restraint, but a prior restraint on 'steroids,' fatally infected by content and viewpoint discrimination. The SEC Gag Rule is content-based and viewpoint-based on its face. Moreover, it is animated by the government's self-serving desire to shield itself from criticism, implicating powerful First Amendment norms against viewpoint discrimination.") (available at https://www.supremecourt.gov/DocketPDF/21/21-1284/221659/20220422092456314_42285%20pdf%20Ebner%20combined.pdf).

²⁴ *SEC v. Moraes*, 2022 WL 15774011, *3 (S.D.N.Y. Oct. 28, 2022).

against The upshot: so long as a defendant says what the SEC wants to hear (or says nothing at all), he does not violate the No-Admit-No-Deny Provision. This is quintessential viewpoint discrimination.²⁵

In its letter denying the NCLA's rulemaking petition, the Commission sidesteps First Amendment concerns. The Commission explains that "a defendant can waive constitutional rights as part of a civil settlement."²⁶ In the Commission's telling, "[a]s part of the settlement process, the Commission and a defendant negotiate terms," and "if either party disagrees with terms that the other party views as necessary, [it] can decline to settle, and the Commission must bear its burdens of proof and persuasion in court."²⁷ The Commission even suggests that *it* is the party making a sacrifice in settling instead of litigating because it is "thereby forgoing its ability to prove its case in court."²⁸ Never mind that forgoing its day in court yields great benefits for the Commission. When it settles, the Commission does not need to prove the allegations in court—which is expensive, time-consuming, and difficult—and it gets a benefit it could never obtain through litigation—the permanent silence of the defendant.²⁹

²⁵ *Id.* at *4, 5.

²⁶ Denial Letter pg. 5.

²⁷ *Id.* pg. 1,5.

²⁸ *Id.* pg. 5

²⁹ The Commission's insistence on shielding the allegations from criticism "belies the truth of a mainstay of settlement negotiation—that frequently both sides understand that the government cannot carry its burden as to every allegation. And

The Commission's questionable claim that it is the party making significant concessions is not the most concerning aspect of the Commission's reasoning. That distinction goes to its casual assumption that defending litigation with the Commission is just like defending against any other plaintiff in a civil action. One suspects that defendants in Commission enforcement actions might view the matter differently. For most individuals, and even for many well-resourced corporate defendants, the time, expense, and difficulty of litigating against the federal government makes settling the only economically viable option to resolve Commission enforcement actions. Commission investigations preceding the settlement negotiations are themselves long and costly. Retaining counsel to respond to the Commission's document requests and subpoenas, to represent witnesses during sworn testimony, and to prepare and submit a response to a Wells notice (which allows defendants to respond to charges the staff is planning to recommend to the Commission) consumes enormous financial resources. Add to that monetary cost, the intangible yet often even more onerous emotional, physical, and relational tolls of

it is particularly pernicious in light of a sobering truth—hardly any individual, and even most corporate entities—cannot afford protracted litigation. SEC should not be allowed to bargain for something that is wholly outside of what it could receive in a prosecution, even if it won every facet of its case, since win or lose, the accused could speak post-prosecution.” Brief for Amicus Curiae Due Process Institute in Support of Petitioner at 15 (citation omitted), *Romeril v. SEC*, No. 21-1284 (S.Ct.) (available at https://www.supremecourt.gov/DocketPDF/21/21-1284/221721/20220422143248434_21-1284%20Amicus%20Brief%20of%20Due%20Process%20Institute.pdf).

litigation, and it is unremarkable that nearly all defendants in Commission actions settle.

The inevitable mismatch between the Commission and most defendants in its enforcement actions carries through to the settlement process.³⁰ Even when the disparities in bargaining power between the Commission and the defendant are less pronounced, the no-deny clause is a mandatory, non-negotiable term. The Commission admits as much in its denial letter: “[t]he policy binds the Enforcement staff” and the Commission “will not agree to a settlement . . . unless the defendant agrees not to publicly deny the allegations in the complaint.”³¹ As one judge recently put it, the mandatory nature of the no-deny policy presents defendants with no real choice; it demands: “If you want to settle, . . . ‘Hold your tongue, and don’t say anything truthful—ever’—or get bankrupted by having to continue litigating with the SEC.”³²

The demand by the government that a defendant waive a fundamental constitutional right as a condition of settlement ought to be supported by a compelling rationale. Yet, as discussed above, the Commission’s rationale of record—that the no-deny policy is necessary to “avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed, when the conduct

³⁰ *Report on the Task Force on SEC Settlements*, 41 Bus. Law 1083, 1093-94 (1991) (observing that defendants have high incentive to settle due to the financial and personal costs of litigation, and that “[t]he divergence of the parties’ marginal propensity towards settlement creates uneven bargaining power, with the Commission holding the upper hand”).

³¹ Denial Letter pg. 3.

³² *Novinger*, 40 F.4th at 308 (Jones, J., concurring).

alleged did not, in fact occur”—lacks firm footing. It would look bad if the SEC’s settlements were shown to be baseless, unfairly negotiated, or legally flawed. The most logical solution to that concern, however, is to make sure that settlements are rooted in fact, are fairly negotiated, and are legally sound. Employing superior bargaining power to extract an agreement that defendants agree not to denigrate the settlement is a suboptimal solution.

In the end, far from shoring up the Commission’s integrity, the reliance on these no-denial conditions undermines it. More than a decade ago, a court aptly explained the problematic perceptions that flow from the Commission’s practice of settling without admissions and prohibiting denials:

[H]ere an agency of the United States is saying, in effect, “Although we claim that these defendants have done terrible things, they refuse to admit it and we do not propose to prove it, but will simply resort to gagging their right to deny it.”³³

Why should the public put much weight on allegations so flimsy that they need the protection of a contractual obligation not to deny them? Stated differently, “What is the SEC so afraid of? Any criticism, apparently—or, rather, anything that may even ‘create the impression’ of criticism—of that government agency.”³⁴ The public cannot be sure what to believe if the government actively seeks to squelch contrary voices. As the FTC has observed, a government regulator that is confident in its

³³ *Vitesse*, 771 F. Supp. 2d at 309.

³⁴ *Moraes*, 2022 WL 15774011 at *5.

investigative work, procedural practices, and legal analysis does not need to demand silence on the part of settling defendants.³⁵ Other commentators have pointed out that “[d]efendants who have been through an agency’s enforcement process are often the most informed and in the best position to raise red flags about that process,” so, by silencing them, “the agencies insulate themselves from criticism and the public scrutiny that accountability demands.”³⁶ Allowing people to talk freely about their experiences with the Commission would aid us in carrying out our mission.³⁷

III.

Because no-admit/no-deny settlements are the most common resolution of SEC enforcement actions, the rule at issue affects countless potential speakers. Given that all of these silenced speakers have been on the wrong end of an enforcement action, we can assume that some might have negative

³⁵ *Supra* n.20 and accompanying text.

³⁶ *See, e.g.,* James Valvo, *The CFTC and SEC are Demanding Unconstitutional Speech Bans in their Settlement Agreements*, Notice & Comment: Yale Journal of Regulation (Dec. 4, 2017) (available at https://www.yalejreg.com/nc/the-cftc-and-sec-are-demanding-unconstitutional-speech-bans-in-their-settlement-agreements-by-james-valvo/#_ftn1).

³⁷ *See, e.g.,* Brief of Mark Cuban, Phillip Goldstein, Elon Musk, Nelson Obus, and Investor Choice Advocates Network as Amicus Curiae in Support of Petitioner at 7, *Romeril v. SEC*, No. 21-1284 (S.Ct.) (“The SEC should welcome scrutiny of its allegations, particularly unproven allegations in settled cases, to ensure that justice is done and any shortcomings in its cases are publicly aired.”) (available at https://www.supremecourt.gov/DocketPDF/21/21-1284/221678/20220422123803543_No.%2021-1284%20Amicus%20Brief.pdf).

things—whether accurate or not—to say about the government. The gravity of silencing this subset of people weighs heavily on me.

Defenders of our policy might take comfort in the scope of the policy—after all, you can say bad things about the agency, just not about your settlement. To the contrary, the Commission’s mandatory language is so ambiguous as to only aggravate my concerns. Defendants must agree that they will not “indirectly” deny “any allegation in the complaint.” What is an “indirect” denial? Defendants must also agree not to “take any action” that “create[s] the impression that the complaint is without factual basis.” What is an action that “create[s] the impression” that the complaint lacks a factual basis? A defendant looking at this language is not going to have any idea where it ends. Could she say that “The Commission’s enforcement process is a joke. Nobody should trust it to produce just results.”? What if she stands outside the Commission’s headquarters with a pile of salt, a copy of the complaint, and a sign that states “Take these together.” What if she places on a billboard the message “SEC = Seriously Erroneous Complaints”? In either case, has she “create[d] the impression that the complaint is without factual basis”? Can a defendant tell a post-settlement joke: “How many SEC Commissioners does it take to screw in a lightbulb? Zero, because they prefer to let the truth languish in the dark.”? What if she publishes a book with additional facts that were not included in the complaint, and those facts cast the entire case in an entirely different light? Has she then “create[d] the impression” that the complaint lacked a factual basis?

The Commission's requirement that a defendant agree not to "permit" denials of the allegations in the complaint is equally problematic. This language suggests that defendants have an affirmative obligation to stop other people from saying things that might cast doubt on the complaint's allegations. Must a settling defendant stop her husband from posting on social media his disagreement with the charges in his wife's settlement with the Commission? Must a defendant require subsequent employers to link to the settlement in the otherwise flattering profiles they post on their websites? Probably not, but the mandatory language nevertheless is troublingly nebulous. To obtain Commission authorization to file an enforcement action in district court, the Division of Enforcement is required to submit to the Commission an action memorandum that "provides a comprehensive explanation of the . . . factual and legal foundation" for the recommended civil action.³⁸ The Enforcement Manual, however, does not require that the Division include with the action memorandum a copy of the district court complaint.

The petitioner is correct that reconsideration of the rule is a pressing matter that belongs on the Commission's current notice-and-comment rulemaking agenda. Or, if my colleagues have concluded that our agenda is too packed with other projects, perhaps we can just drop the no-deny rule in the same unceremonious way we adopted it.

³⁸ SEC Division of Enforcement: Enforcement Manual ¶ 2.5.1 The Action Memo Process (Nov. 28, 2017) (available at <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>).

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS JOSEPH POWELL; et al., Petitioners, v. UNITED STATES SECURITIES AND EXCHANGE COMMISSION, Respondent.	No. 24-1899 Agency No. Securities and Exchange Commission ORDER
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Before: S.R. THOMAS, BRESS, and DE ALBA,
Circuit Judges.

All judges unanimously voted to deny the petition for panel rehearing. Judge Bress and Judge de Alba voted to deny the petition for rehearing en banc, and Judge S.R. Thomas so recommended. The petition was circulated to the judges of the Court, and no judge requested a vote for en banc consideration. Fed. R. App. P. 40. The petition for panel rehearing and rehearing en banc, Dkt. 79, is **DENIED**.

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

17 C.F.R. § 202.5**§ 202.5. Enforcement activities**

(a) Where, from complaints received from members of the public, communications from Federal or State agencies, examination of filings made with the Commission, or otherwise, it appears that there may be violation of the acts administered by the Commission or the rules or regulations thereunder, a preliminary investigation is generally made. In such preliminary investigation no process is issued or testimony compelled. The Commission may, in its discretion, make such formal investigations and authorize the use of process as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of the federal securities laws or the rules of a self-regulatory organization of which the person is a member or participant. Unless otherwise ordered by the Commission, the investigation or examination is non-public and the reports thereon are for staff and Commission use only.

(b) After investigation or otherwise the Commission may in its discretion take one or more of the following actions: Institution of administrative proceedings looking to the imposition of remedial sanctions, initiation of injunctive proceedings in the courts, and, in the case of a willful violation, reference of the matter to the Department of Justice for criminal prosecution. The Commission may also, on some occasions, refer the matter to, or grant requests for access to its files made by, domestic and foreign governmental authorities or foreign securities authorities, self-regulatory organizations such as

stock exchanges or the National Association of Securities Dealers, Inc., and other persons or entities.

(c) Persons who become involved in preliminary or formal investigations may, on their own initiative, submit a written statement to the Commission setting forth their interests and position in regard to the subject matter of the investigation. Upon request, the staff, in its discretion, may advise such persons of the general nature of the investigation, including the indicated violations as they pertain to them, and the amount of time that may be available for preparing and submitting a statement prior to the presentation of a staff recommendation to the Commission for the commencement of an administrative or injunction proceeding. Submissions by interested persons should be forwarded to the appropriate Division Director or Regional Director with a copy to the staff members conducting the investigation and should be clearly referenced to the specific investigation to which they relate. In the event a recommendation for the commencement of an enforcement proceeding is presented by the staff, any submissions by interested persons will be forwarded to the Commission in conjunction with the staff memorandum.

(d) In instances where the staff has concluded its investigation of a particular matter and has determined that it will not recommend the commencement of an enforcement proceeding against a person, the staff, in its discretion, may advise the party that its formal investigation has been terminated. Such advice if given must in no way be construed as indicating that the party has been exonerated or that no action may ultimately result from the staff's investigation of the particular matter.

(e) The Commission has adopted the policy that in any civil lawsuit brought by it or in any administrative proceeding of an accusatory nature pending before it, 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. Accordingly, it hereby announces 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. In this regard, the Commission believes that a refusal to admit the allegations is equivalent to a denial, unless the defendant or respondent states that he neither admits nor denies the allegations.

(f) In the course of the Commission's investigations, civil lawsuits, and administrative proceedings, the staff, with appropriate authorization, may discuss with persons involved the disposition of such matters by consent, by settlement, or in some other manner. It is the policy of the Commission, however, that the disposition of any such matter may not, expressly or impliedly, extend to any criminal charges that have been, or may be, brought against any such person or any recommendation with respect thereto. Accordingly, any person involved in an enforcement matter before the Commission who consents, or agrees to consent, to any judgment or order does so solely for the purpose of resolving the claims against him in that investigative, civil, or administrative matter and not for the purpose of resolving any criminal charges that have been, or might be, brought against him. This policy reflects the fact that neither the Commission nor its staff has the authority or responsibility for

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instituting, conducting, settling, or otherwise disposing of criminal proceedings. That authority and responsibility are vested in the Attorney General and representatives of the Department of Justice.