

No. 25-1100

IN THE
Supreme Court of the United States

THOMAS J. POWELL, *et al.*,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**BRIEF OF THE CATO INSTITUTE
AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICUS CURIAE*¹

The Cato Institute is a nonpartisan public policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Toward that end, Cato’s Robert A. Levy Center for Constitutional Studies publishes books and studies, conducts conferences, produces the annual Cato Supreme Court Review, and files amicus briefs. This case interests Cato because the right to freedom of speech—and especially the freedom to criticize the actions of the government—is essential to liberty and must be protected against government infringement. Additionally, Cato has prior engagement on this issue and has litigated against the SEC on gag orders after it was restricted from publishing a book on SEC enforcements. *See Cato Inst. v. SEC*, 4 F.4th 91 (D.C. Cir. 2021).

SUMMARY OF THE ARGUMENT

The Securities and Exchange Commission’s (“SEC”) “Gag Rule” is not a routine settlement term. 17 C.F.R. § 202.5(e). It is a lifetime censorship condition imposed at the end of an enforcement gauntlet designed to make resistance economically irrational. The Commission can open an investigation on a low threshold, compel sweeping document production and testimony, and keep the target under pressure for months or years

¹ Under Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part and that no entity or person aside from *amicus* or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Under Supreme Court Rule 37.2, *amicus* affirms that counsel of record for all parties received proper and timely notices of intent to file this brief. The George Washington University takes no position on this case.

while legal fees mount, reputations deteriorate, management is diverted, and business opportunities disappear. By the time the SEC offers settlement, the target is not choosing among equivalent options. It is choosing between continued attrition and an off-ramp. That reality matters. A waiver extracted through such leverage is not the kind of ordinary, voluntary bargain on which the surrender of constitutional rights ordinarily depends.

Each point of an SEC investigation and enforcement action imposes significant harms and burdens on investigated entities and cascades into an ecosystem of coercion to settle. The Commission can easily begin an investigation upon meeting the low bar that the investigation has the *potential* to address conduct that violates federal securities laws. Once an investigation is open, the SEC has sweeping compulsory powers, including the power to subpoena witness testimony and document production at a level more extensive than the typical subpoena power. Complying with these demands can cost tens of millions of dollars, not to mention enormous litigation costs if the SEC brings an administrative action or files a case in an Article III court.

SEC investigations inflict significant intangible harms on investigated entities, too. Those entities' reputations suffer, their leadership must devote much time and energy to accommodating the investigation instead of productive business affairs, they must forego growth opportunities because of financial compliance costs, and talented individuals are incentivized to find other employment. The process and its damages last for a long, uncertain duration, which compounds the effects of the harm.

The burdens incurred by the entity are prolonged by the challenges of getting into court and the unavailability of meaningful remedies. Courts rarely hear pre-enforcement challenges before entities have exhausted review in administrative adjudications, effectively foreclosing targeted entities' ability to vindicate their rights. Even if they are able to get into a federal district court, the targeted entities' access to relief is hindered by legal uncertainty, immense deference to the agency, and the prerequisite that there be final agency enforcement action. Even if the targeted agency succeeds in bringing an action in court and proving its case, the court may still decide not to grant relief. The impact on targeted entities is twofold: They are forced to endure the burdens of the SEC's investigation, and they are forced to capitulate to a settlement offer—the only escape.

First Amendment doctrine calls for intervention now, not later. In the speech context, this Court has long relaxed ordinary prudential limits because the injury lies not only in punishment after the fact, but in the chilling of speech before it occurs. That logic has special force here. The SEC's Gag Rule has silenced enforcement targets for decades, including the very speakers best positioned to expose agency error, overreach, and abuse. And this petition is likely the only realistic vehicle for review. As-applied challenges have proven unavailable, while delay only multiplies the number of speakers chilled into silence. Because the SEC's enforcement machinery turns settlement into compulsion and compulsion into censorship, the Court should grant the petition.

ARGUMENT

“The power to investigate carries with it the power to defame and destroy.”

SEC Canons of Ethics, 17 C.F.R. § 200.66 (2025).

I. SEC Investigation and Enforcement Actions Operate as an Escalating Ecosystem of Coercion that Culminates in a Capitulation-Inducing Settlement Offer.

When it investigates, the SEC has sweeping power to compel document production and testimony. Compliance, along with the corequisite internal investigations, imposes extreme financial burdens on investigated entities. These entities also suffer significant reputational and operational damage. The investigation and the harms they impose can last for a vast but uncertain amount of time. During this span, any meaningful interim relief is limited and unattractive to the investigated entity.

The SEC is well aware of its potential destructive force, but rather than cautiously exercising its investigatory powers, it “use[s] this as leverage to extract settlement terms [it] could not lawfully obtain any other way.” *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 216 (2023) (Gorsuch, J., concurring). By the time the agency offers settlement, the excessive and unreviewable costs and burdens imposed by its investigatory procedures have cornered any economically motivated defendant into submission. This is “regulatory extortion” at its finest. *Id.* at 216 n.4 (quoting Philip Hamburger, *Purchasing Submission* 223 (2021)). Any First Amendment waiver extracted after the agency’s regulatory vise has tightened, as the SEC’s Gag Rule mandates, is anything but an ordinary, voluntary bargain of the sort required for constitutional waivers.

See *Brady v. United States*, 397 U.S. 742, 749–51 (1970); *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) (“A criminal defendant may knowingly and voluntarily waive . . . protections afforded by the Constitution.”); *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 214 (2013).

A. SEC investigations and enforcement actions intentionally impose onerous burdens on regulated entities so that they have no choice but to settle.

1. The SEC has broad powers of compulsion during investigations and enforcement actions.

When the SEC suspects wrongdoing, it has a tiered process that it undertakes to investigate whether a violation has occurred and, if necessary, to bring an enforcement action. SEC policy sets a low threshold to begin a “matter under inquiry,” an informal process initiated when an SEC associate director or unit chief believes “an [e]nforcement investigation would have the potential to address conduct that violates the federal securities laws.” Div. of Enf’t, Sec. & Exch. Comm’n, *Enforcement Manual* § 2.2.1 (2026). At this stage, the SEC may compel regulated entities to produce certain documents, but its “principal means of gathering” information is through “voluntary” requests for documents, interviews, and other materials. *Id.* § 3.2.3.

A matter under inquiry transitions to a formal investigation, or a formal investigation is independently opened, when the same low threshold is met. But the decision should be “based on additional information” obtained in the matter under inquiry stage, publicly available sources, or independent tips. *Id.* § 2.2.2. In a formal investigation, the SEC’s

compulsory powers are significant. The “officer” in charge of the investigation is statutorily authorized to “administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of documents and other materials” at their will. *Id.* § 2.2.3. The SEC subpoena power is particularly extensive. For example, “[a] subpoenaed entity . . . is required to produce all subpoenaed items . . . not in [its] immediate possession, but that [it] has the effective ability to obtain.” *Id.* § 3.2.7.3. Its subpoenas have also been deemed constructive searches subject to lesser Fourth Amendment restrictions. *See Okla. Press Publ’g Co. v. Walling*, 327 U.S. 186, 202–08 (1946); *United States v. Morton Salt Co.*, 338 U.S. 632, 651–54 (1950).²

For SEC staff to bring an enforcement action after a formal investigation, they must receive authorization from the Commission. Div. of Enf’t, *supra*, § 2.5.2. Available enforcement actions include bringing an administrative action in front of an in-house administrative law judge or filing a case in an Article III court. *See How Investigations Work*, U.S. Sec. & Exch. Comm’n (May 14, 2024), <https://www.sec.gov/about/divisions-offices/division-enforcement/how-investigations-work>. In administrative actions, the SEC has the power to issue subpoenas, 17 C.F.R. § 201.232 (2025); conduct depositions, *id.* § 201.233; make motions on any claim or defense, *id.* § 201.250; and present evidence and argument in hearings, *id.* §§ 201.300–201.360. Administrative law judges have the same compulsory investigation powers as formal

² For analysis of the significant, broad powers agencies like the SEC have to conduct investigations, see generally Aram A. Gavoor & Steven A. Platt, *Administrative Investigations*, 97 Ind. L.J. 421 (2022).

investigation officers, as well as the power to hold conferences and hearings, admit evidence, make findings of fact, and issue a binding decision. *See id.* § 201.111. Either party may appeal an adverse decision by an administrative law judge to the full Commission. *See id.* § 201.411. An adversely affected party can then appeal the Commission’s decision, or its choice not to hear the appeal, to a federal appellate court. 15 U.S.C. § 78y(a)(1). When the SEC files a case in an Article III court, it has the same powers as other plaintiffs, such as to compel discovery, file motions, present evidence, and make arguments.

2. *SEC investigations and enforcement actions impose severe financial burdens on investigated entities.*

Complying with the SEC’s demands during an investigation—let alone fighting an enforcement action—is an extreme financial burden. It is no wonder why. The numbers speak for themselves, as these investigations can cost entities “tens of millions of dollars.” *Ensuring Effectiveness, Fairness, and Transparency in Securities Law Enforcement: Hearing Before the Subcomm. on Cap. Mkts., Sec., & Inv. of the H. Comm. on Fin. Servs.*, 115th Cong. 6, 12 (2018) (statement of Bradley J. Bondi, Partner, Cahill Gordon & Reindel) [hereinafter *Sec. L. Enf’t Hearing*]; *see also* Jennifer A. Keller, *A Primer on SEC Investigations*, PLUS (Oct. 8, 2024), <https://plusweb.org/news/a-primer-on-sec-investigations-the-only-way-out-is-through/> (“Responding to an SEC investigation . . . will commonly result in mid-seven-figure legal bills, with eight-figure bills not out of the question.”).

This cost is largely thanks to the broadness of SEC requests. A “typical investigation” requires investigated entities to produce “hundreds of thousands if

not . . . millions of pages” of documents, a task that the company must hire lawyers to perform. Thomas Gorman, *The SEC, Subpoenas and Protecting Privilege*, SEC Actions (Nov. 11, 2012), <https://www.secactions.com/the-sec-subpoenas-and-protecting-privilege/>. And that is only the cost of barebones compliance. Generally, the entity will also hire its own lawyers to investigate potential wrongdoing so that the entity understands its potential legal exposure. The cost of these investigations can “quickly exceed \$100 million.” Peter J. Henning, *The Mounting Costs of Internal Investigations*, N.Y. Times (Mar. 5, 2012), <https://archive.nytimes.com/dealbook.nytimes.com/2012/03/05/the-mounting-costs-of-internal-investigations>.

These costs arise early in the investigation and escalate quickly. If investigated entities did not settle, they would face even higher litigation costs in administrative adjudications or an Article III court, especially considering the complex financial and market issues implicated in a typical SEC action.

3. *SEC investigations and enforcement actions cause investigated entities to suffer serious intangible harms.*

One intangible harm of SEC investigation and enforcement is the “inordinate amounts of time and distraction” the investigation imposes on management of investigated entities. Nelson Obus, *Refusing to Buckle to SEC Intimidation*, Wall St. J. (June 24, 2014), <https://www.wsj.com/articles/nelson-obus-refusing-to-buckle-to-sec-intimidation-1403651178>. Investigations can cause the focus of “entire management team[s] to be] almost completely distracted from [their] normal business operations” for months. Terrence Blackburne et al., *The Regulatory Observer Effect: Evidence from SEC Investigations*, 31 Rev. Acct. Stud. 252, 291 (2026).

This inability to spend time and energy on growing a business causes “untold opportunity costs.” Obus, *supra*; see also Hester M. Peirce, Comm’r, Sec. & Exch. Comm’n, *The Why Behind the No: Remarks at the 50th Annual Rocky Mountain Securities Conference* (May 11, 2018), <https://www.sec.gov/newsroom/speeches-statements/peirce-why-behind-no-051118> (“Boards and managers of companies under investigation are distracted from company business, and company funds go to attorneys, rather than to productive uses.”).

Also, the tangible burdens of SEC investigations and enforcement actions force investigated entities to forego significant business opportunities. *Sec. L. Enft Hearing, supra*, at 20–21 (statement of Rep. Brad Sherman, Member, Subcomm. on Cap. Mkts., Sec., & Inv.). Entities investigated by the SEC “invest less in R&D and capital expenditures during the investigation” by 9.2%. Blackburne et al., *supra*, at 283. This significant sacrifice of potential future growth and the distraction of management persist so long as the investigated entity fights the SEC’s claims, even if they eventually prove fruitless.

Reputational harm is another severe consequence of SEC investigation. Such harm is particularly potent for entities that operate in “high-trust” markets where success depends on maintaining client trust. The SEC regulates many high-trust markets, such as financial services. From when a government investigation is revealed until it is resolved, “stocks of target companies tend to fall by an average of 40%” due to “a loss of reputation.” Herb Greenberg, *Why Do Investors Ignore Inquiries?*, *Wall St. J.* (Apr. 12, 2008), <https://www.wsj.com/articles/SB120796261950109637>. Likewise, “proxy advisory firms such as Institutional Shareholder Services tend to use an inflexible approach in the

governance ratings they publish, not taking into account the underlying merits of pending proceedings and negatively swaying votes at shareholder meetings.” William R. Baker III & Joel H. Trotter, *Nothing to Fear From the SEC?*, Wall St. J. (Oct. 28, 2015), <https://www.wsj.com/articles/nothing-to-fear-from-the-sec-1446073083>. Additionally, while under an SEC investigation “firms pay[] 23.3 basis points higher for loans,” and such loans are “more apt to be secured, contain stricter covenants, and require higher upfront fees.” Yangyang Chen et al., *The Cost of Investor Protection*, 101 *Acct. Rev.* 203, 212, 229 (2026). Auditors also charge companies between 49.9–56.2% more for their auditing services when they are under investigation by the SEC. Winifred D. Scott & Willie E. Gist, *How Audit Fees Are Affected by a Client Under SEC Investigation*, 10 *Int’l J. Acct., Auditing & Performance Evaluation* 153, 181 (2014). Clients, shareholders, service providers, and the general public distrust entities subject to SEC investigations and exhibit this distrust in ways that materially affect these entities.

These harms may even create a downstream effect in which talented individuals are disincentivized from working in certain heavily regulated markets due to the threat of coercive investigative action and enforcement proceedings. A recent survey of banks found that “just shy of 25% of the respondent banks have lost directors, have been told ‘no’ by director candidates[,] or have lost members or potential members of their Board Loan Committees from fear of personal liability” in administrative investigations. Am. Ass’n of Bank Dirs., *AABD Survey Results: Measuring Bank Director Fear of Personal Liability* 1 (2014), <https://aabd.org/wp-content/uploads/2014/04/AABD-Survey-Results-Measuring-Bank-Director-Fear-of-Personal-Liability.pdf>. Many times, these were non-professional bankers and leaders

of the community who chose to forgo working for the bank, which was to the detriment of the bank's customers and ultimately the public. Br. of the American Bankers Association et al. as Amici Curiae in Support of Respondents at 3, *SEC v. Jarkey*, 603 U.S. 109 (2024) (No. 22-859). An SEC action may thus result in talented individuals choosing to avoid working for a firm under investigation if they see it as too risky based on the aggregation of harms caused by the investigation.

4. *The costs and harms that SEC investigations and enforcement actions inflict on investigated entities last for a vast, uncertain amount of time.*

Investigations and enforcement actions can last for a significant amount of time before resolution. Matters under inquiry that eventually lead to a formal investigation are open for an average of 73 days, and those that do not lead to an investigation are open for an average of 182 days. Off. of Inspector Gen., U.S. Sec. & Exch. Comm'n, *Enforcement Investigations* 15 (2023), <https://www.sec.gov/files/enforcement-investigation-meas-timeliness-show-some-improvement-enforcement-can-better-comm.pdf>. Even more draining, the average time from when the SEC opens a formal investigation to merely *filing* an enforcement action is almost two years. *Id.* at 7. This delay may be because the total “length of SEC investigations is strongly correlated to the five-year limitations period for fines, penalties, and forfeitures in 28 U.S.C. § 2462.” *Sec. L. Enft Hearing, supra*, at 143 (statement of Andrew Vollmer, Professor, Univ. of Va. Sch. of L.). If that statute of limitations is far from when the SEC opens the investigation, the agency will delay bringing enforcement actions, instead opting to continue its formal

investigation, until the statute is almost expired. Even when investigations do not lead to an enforcement action, they are left open for 630 days on average, and the investigated entities endure compliance costs and burdens throughout. Off. of Inspector Gen., *supra*, at 15–16. The SEC won 90% of such proceedings from 2010 to 2015. *Id.* So the investigated entities are forced to appeal first to the Commission, which may take *years* to even consider the matter, and eventually to an Article III court—another lengthy ordeal. *See, e.g., Jarkesy*, 603 U.S. at 145 (Gorsuch, J., concurring) (noting the Commission took almost six years to review, and ultimately affirm, the administrative law judge’s findings against the petitioner). The process can extend for years, and the SEC leverages this uncertainty to exert bargaining pressure. For many targets, settlement becomes the only realistic off-ramp.

These burdens, while significant in isolation, create an outsized effect in accumulation. The SEC’s process imposes costs and harms early, compounds them over time, and offers no reliable timetable for relief. By the time the SEC proposes a settlement, the target is not choosing between equivalent alternatives. The target is deciding whether to continue absorbing escalating financial, reputational, and operational harms for an uncertain duration—including a fight at the agency level and federal court, which balloons these effects—or to accept the agency’s terms.

B. Courts rarely hear pre-enforcement challenges before entities have exhausted review in administrative adjudications, effectively foreclosing targeted entities' ability to vindicate their rights before their pockets are empty.

Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994), and its progeny have severely limited targeted entities' ability to bring pre-enforcement challenges before impartial judges to vindicate their constitutional rights, causing glaring due process concerns when dovetailed with the immense burdens imposed on targeted entities during an investigation. In the meantime, the unchecked investigatory powers bleed targeted entities until they are at the point of capitulation.

If targeted entities want to present their arguments for the harms they have suffered in front of an Article III judge, they must first hurdle the massive jurisdictional obstacle presented by the *Thunder Basin* Court's jurisdictional test for pre-enforcement challenges. *See id.* at 212–13. This test requires courts to analyze whether Congress intended to preclude judicial review before agency proceedings are exhausted by considering (1) whether the plaintiff can “obtain meaningful judicial review” in the statutory scheme, (2) whether the claim is “wholly collateral” to the statutory scheme, and (3) whether the claim is “outside the agency's expertise.” *Id.* Entities' claims must fall on the right side of this mushy balancing test that “rests on a view that it is sometimes more important to allow agencies to work without the bother of having to answer suits against them than it is to allow individuals their day in court.” *Axon Enter.*, 598 U.S. at 208 (Gorsuch, J., concurring). However, these factors

would likely not enable district courts to review SEC administrative subpoena challenges because subpoenas are an enumerated SEC action taken during its proceeding to enforce the laws the SEC was tasked with enforcing. *See* 15 U.S.C. § 78u. In other words, subpoenas are not collateral to the organic statute and are within the agency’s expertise. And as courts continue to apply *Thunder Basin* in the agency’s favor, the cascading financial burdens imposed by the agency’s investigative power present severe due-process concerns for the entities targeted by the SEC.

C. Even if they can present their case in front of an Article III judge, targeted entities trying to escape the SEC’s investigative grip have limited avenues for achieving meaningful interim relief.

1. Neither the Fourth Amendment nor the APA provide a meaningful escape from invasive administrative subpoenas.

When challenging administrative subpoenas, there are two predominate pathways available to targeted entities seeking judicial relief: the Fourth Amendment and the Administrative Procedure Act (“APA”).³ Gavoor & Platt, *Administrative Investigations, supra*, at 437–38. Neither provides a meaningful opportunity

³ Other constitutional avenues include the Fifth Amendment Self-Incrimination and Due Process Clauses; however, those are even less likely to succeed. Gavoor & Platt, *Administrative Investigations, supra*, at 446. First, the right against self-incrimination does not protect entities against administrative nor third-party subpoenas. *Id.* Second, courts have held that the Due Process Clause does not apply to administrative subpoenas because “an administrative investigation adjudicates no legal rights.” *Id.* at 446–47 (quoting *SEC v. Jerry T. O’Brien, Inc.*, 467 U.S. 735, 742 (1984)).

for relief. Though the Fourth Amendment can act as a constraint on agency subpoena power, judicial review of agency investigatory actions is “strictly limited.” *Id.* at 442 (quoting *U.S. Int’l Trade Comm’n v. ASAT, Inc.*, 411 F.3d 245, 253 (D.C. Cir. 2005)). Accordingly, “[c]ourts generally defer to an agency’s interpretation of the scope of its own investigation.” *CFPB v. Accrediting Council for Indep. Colls. & Schs.*, 854 F.3d 683, 689 (D.C. Cir. 2017). While certain arguments are theoretically available to challengers, the reality is that courts’ deference to agencies often wins out. Gavoor & Platt, *Administrative Investigations, supra*, at 439, 452–54.

Targeted entities similarly lack effective relief under the APA. An entity can challenge the SEC’s decision to initiate an investigation and subsequently issued subpoenas by arguing that they must be set aside under 5 U.S.C. § 706(2)(A).⁴ *See* Gavoor & Platt, *Administrative Investigations, supra*, at 439, 452–54. However, these challenges are likely to fail because this provision only allows challenges to “final” agency actions. *Id.* at 453–54. While the Court has found that agency decisions to initiate an investigation are not final agency action, the Court has not considered subpoenas. *Id.* (citing *FTC v. Standard Oil Co.*, 449 U.S. 232, 239–45 (1980)). Even if SEC administrative subpoenas constituted final agency action, they may be immune from § 706(2)(A) review as prosecutorial decisions authorized by the organic statute. *See id.* at 454; *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); 15 U.S.C. § 78u. But pressing on this uncertainty in the law

⁴ SEC subpoenas may also be challenged under APA § 555(c) and (d), by arguing that they are not “authorized by law,” but this argument is rarely brought and rarely successful. *See* Gavoor & Platt, *Administrative Investigations, supra*, at 439, 452–54.

would be highly risky for an already financially burdened entity, forcing it to consider the SEC's settlement offer.

Further, the targeted entity cannot challenge an administrative subpoena during the pendency of the investigation; it must wait until the agency has completed its investigation. *FTC v. Texaco, Inc.*, 555 F.2d 862, 879 (D.C. Cir. 1977). Thus, the targeted entity must incur the costs and burdens of the entire investigation if it wants to challenge any element of it. Additionally, for third-party subpoenas, it is likely that the targeted entity lacks standing to challenge the subpoena, assuming it even knows of the subpoena's existence. Gavoor & Platt, *Administrative Investigations, supra*, at 443. Even if a court finds that the administrative subpoena is improper, the court usually merely orders the agency to reissue the subpoena with more specific terms or parameters. *Id.* This limited result may prove futile to the entity that is forced to comply with the amended subpoenas, all while its attorneys' billable timer keeps ticking.

2. *Seeking relief by challenging the investigation's duration is futile because the APA's broad language is often skewed in favor of the agency.*

Months or even years of investigation may force fatigued entities to consider challenging the SEC's delay in deciding whether they will proceed with an enforcement action. 5 U.S.C. § 706(1) enables this challenge⁵ by allowing reviewing courts to "compel

⁵ Regulated agencies may also file claims under the Mandamus Act, 28 U.S.C. § 1361, but achieving relief through mandamus claims is rare because of the extremely high bar for success

agency action . . . unreasonably delayed.” *Id.* § 704; *see also* Aram A. Gavoor & Steven A. Platt, *Agency Delay and the Courts*, 77 Admin. L. Rev. 761, 793–801 (2025). However, meaningful relief under § 706(1) is often prevented by courts’ broad and inconsistent interpretations of the APA.

The vague, malleable framework for deciding when agency action is “unreasonably delayed” is an unclear benchmark that favors agencies like the SEC. Gavoor & Platt, *Agency Delay, supra*, at 829. To evaluate whether agency delay is unreasonable, courts consider the six-part list created by the D.C. Circuit in *Telecommunications Research & Action Center v. FCC* (“*TRAC*”). 750 F.2d 70, 80 (D.C. Cir. 1984).

But the failure of the *TRAC* court to give substance and comparable weight to these broadly stated factors has led to highly unpredictable rulings, usually against the plaintiff. Gavoor & Platt, *Agency Delay, supra*, at 801–05, 819. In effect, *TRAC* created the option for judicial relief but equipped courts with a massive amount of discretion in deciding whether to provide such relief. In practice, the application of these factors stacks the odds against challengers. *Id.* at 805. Even if these courts find unreasonable delay, which they rarely do, some courts have held that they cannot compel the outcome of the ordered action. *Id.* at 812; *see also South Carolina v. United States*, 907 F.3d 742, 756 (4th Cir. 2018) (explaining courts cannot compel an outcome). Other courts have disagreed, seemingly finding that “shall compel” in § 706(1) is discretionary. Gavoor & Platt, *Agency Delay, supra*, at 809 (citing *Cobell v. Norton*, 240 F.3d 1081, 1096 & n.1 (D.C. Cir.

established by the Court. Aram A. Gavoor & Steven A. Platt, *Agency Delay and the Courts*, 77 Admin. L. Rev. 761, 807 (2025).

2001); *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1176–78 (9th Cir. 2002)). Thus, even if targeted entities successfully demonstrate that the duration of the SEC’s investigation constitutes unreasonable delay under the APA, they may not be able to obtain interim relief from the burdens borne because of the violation.

There is no meaningful, judicial relief from the time burden of months-long, if not years-long, investigations and thus no alleviation from the SEC’s investigatory coercion. Trapped in an escalating ecosystem of coercion, nearly every subject of an SEC enforcement action is forced to take the first off-ramp they encounter: a settlement. But this off-ramp comes at a weighty price, as these entities *must* also give up their right to speak against the SEC.

II. The Special Nature of the Free-Speech Right Requires Prophylactic Judicial Intervention to Protect Expression Chilled by the Gag Rule.

The First Amendment’s protection for free speech makes clear that “[i]n this Nation, no official—‘high or petty’—may command our tongues or silence our voices.” *Chiles v. Salazar*, No. 24-539, slip op. at 8 (U.S. Mar. 31, 2026) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). The forceful nature of this command reflects the unique role speech plays in our democratic society and has consistently guided the Court to be especially amenable to free-speech challenges that, under similar circumstances in other contexts, would typically implicate Article III prudential concerns. Underpinning each of these jurisprudential nuances is the need to provide “breathing room” under the First Amendment to avoid chilling protected speech. *United States v. Hansen*, 599 U.S. 762, 769 (2023).

The Ninth Circuit held that the concerns raised in this case “are properly addressed in as-applied challenges with defined records,” *Powell v. SEC*, 149 F.4th 1029, 1034 (9th Cir. 2025), but this holding ignores basic tenets of First Amendment doctrine. In particular, the Court has consistently found that free-speech controversies favor facial challenges and ripen earlier.

A. The bar for a facial challenge is lower when a regulation targets speech.

To succeed on a facial challenge, one typically must show that the challenged regulation “lacks a ‘plainly legitimate sweep.’” *Moody v. NetChoice, LLC*, 603 U.S. 707, 744 (2024) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)). But this bar for free-speech challenges is lower, requiring only that the restriction “prohibits a substantial amount of protected speech’ relative to its ‘plainly legitimate sweep.’” *Hansen*, 599 U.S. at 769 (quoting *United States v. Williams*, 553 U.S. 285, 292 (2008)). Because the Gag Rule is unconstitutional in virtually all its applications, *see* Pet. Cert. 28–29, petitioners’ challenge satisfies either test but certainly the latter. Two doctrines relevant here are especially illustrative of the reason for this relaxed standard: overbreadth and vagueness.

Under the “unusual” doctrine of overbreadth, *Hansen*, 599 U.S. at 769, the Court allows a defendant to challenge an overly broad speech restriction *in toto*, even if the statute is constitutional as applied to the defendant. *See Gooding v. Wilson*, 405 U.S. 518, 521 (1972). The overbreadth, however, “must not only be real, but substantial as well.” *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Allowing for greater opportunity to bring a facial challenge in this situation

is “necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.” *Gooding*, 405 U.S. at 521. Therefore, the Court must address a regulation as a whole in the case that presents itself, even if that case is not suitable for a facial challenge under typical doctrine.

The underlying principle of the overbreadth doctrine—that far-reaching speech regulations can prevent their own judicial review by chilling would-be litigants through the threat of sanction—should motivate the Court to grant the petition here. Even if the SEC’s Gag Rule could be applied consistently with the First Amendment to some defendants in some instances, the immense pressure to settle causes nearly every SEC defendant in nearly every case to agree to the Gag Rule, sweeping far too broadly and requiring prophylactic intervention. Regardless of the strength of its case, the SEC gives its enforcement action subjects a Hobson’s choice: self-censor or bear the strenuous burden of continued litigation with the agency, as discussed above. It’s no wonder seemingly every SEC defendant has chosen the former. *See Powell*, 149 F.4th at 1034 (“The SEC . . . is unaware of a court ever finding a defendant in contempt for violating [the Rule].”).

The Court has also made clear that it approaches vagueness challenges differently in the First Amendment context. A restriction is vague when it fails “to give fair notice of what acts will be punished.” *Winters v. New York*, 333 U.S. 507, 509 (1948). While vagueness is often invoked as a procedural due process violation, the First Amendment carries its own prohibition

against vagueness. *See id.* at 510. In fact, the Court has suggested that the First Amendment has an even lower tolerance of vagueness than due process. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997) (“Regardless of whether the [restriction] is so vague that it violates the Fifth Amendment, the many ambiguities concerning the scope of its coverage render it problematic for purposes of the First Amendment.”).

Under the First Amendment, the Court is “concerned with the vagueness of [a] statute ‘on its face’ because such vagueness may in itself deter constitutionally protected and socially desirable conduct.” *United States v. Nat’l Dairy Prods. Corp.*, 372 U.S. 29, 36 (1963). Such “[u]ncertain meanings inevitably lead citizens to ‘steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.’” *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)).

These First Amendment vagueness concerns highlight the need for the Court to grant the petition here. The SEC’s Gag Rule requires defendants “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’” nor “‘permit’ such statements to be made.” *Powell*, 149 F.4th at 1045. The Gag Rule raises vagueness concerns because it fails to define what it means to indirectly deny an allegation, create the impression of a denial, or permit another to deny an allegation. These ill-defined terms have forced parties that settle to self-censor their protected speech for decades to avoid the harsh consequences of violating the Gag Rule. This vagueness has also prevented media organizations from gathering stories to publish material critical of the SEC out of enforcement-action subjects’ fear not to

“permit” others to make statements that may violate the Gag Rule. *See* Pet. Cert. 31. Unsure of what the Gag Rule intends to proscribe, the SEC’s enforcement-action subjects must continue to steer far clear of the Rule unless the Court acts to clarify the breathing space needed to allow these parties to exercise their right to speak freely.

B. Free speech challenges are ripe far earlier.

To avoid “entangling themselves in abstract disagreements” and “premature adjudication,” courts consider “the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148–49 (1967), *abrogated on other grounds, Califano v. Sanders*, 430 U.S. 99 (1977). The Court’s First Amendment jurisprudence shows that free-speech challenges favor early intervention.

The prior restraint doctrine itself is evidence of the Court’s application of unique ripeness assumptions to favor early intervention in the context of Free Speech. Attempts to prevent speech before it occurs, rather than punish speech after the fact, are “especially condemned” under the First Amendment. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952). This is because “[i]t is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.” *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). That threat “chills potential speech before it happens,” making it unlikely to see a fully ripe case in the traditional sense. *United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 468 (1995). For this reason, the typical interest in having a concrete contestation between parties is outweighed by the

social risk of government-induced self-censorship. The Court is therefore rightly permissive in granting pre-enforcement review of prior restraints when there is a credible threat of sanction for violation. *See, e.g., Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159–61 (2014).

As argued in the Petition, “[t]he Gag Rule is a textbook prior restraint.” Pet. Cert. 15, and each day the Court waits, more and more people are chilled from speaking out against the SEC because of the very existence of the Gag Rule.

First Amendment jurisprudence squarely illustrates the need for early and immediate judicial intervention when free speech is threatened. Many of the Court’s typical prudential concerns are outweighed by the social costs of chilling speech. Failure to act has already incentivized the CFTC to also adopt a similar rule, *see* 17 C.F.R. pt. 10, app. A., and can continue to incentivize other agencies engaged in civil enforcement too. If the Court fails to intervene now, it might not have the chance again.

CONCLUSION

This Court should grant the Petition for Certiorari.

Respectfully submitted,

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