

No. 25-1100

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In The  
**Supreme Court of the United States**

THOMAS J. POWELL, ET AL.,  
*Petitioners,*

v.

SECURITIES AND EXCHANGE COMMISSION,  
*Respondent.*

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

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**BRIEF OF THE INSTITUTE FOR  
JUSTICE AS *AMICUS CURIAE* SUPPORTING  
PETITIONERS THOMAS J. POWELL, ET AL.**

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**INTERESTS OF THE *AMICUS CURIAE*<sup>1</sup>**

The Institute for Justice (IJ) is the national law firm for liberty. For over three decades, IJ has litigated on behalf of everyday Americans to secure their constitutional rights, including First Amendment rights. In 2019, IJ challenged the gag rule that is central to this Petition on behalf of a publisher that wished to publish a book written by an author who was unable to publish without violating it. The gag rule requires people under SEC investigation, as a settlement condition, to relinquish their free speech rights by agreeing to take any criticism of the investigation to their graves. *Cato Inst. v. SEC*, 4 F.4th 91 (D.C. Cir. 2021). IJ’s challenge—unfortunately and incorrectly—was dismissed on standing grounds by the D.C. Circuit.

In this *amicus* brief, IJ maintains the same position it argued at the D.C. Circuit: The First Amendment prevents the government from leveraging its awesome investigatory power to pressure people into not exercising their free speech rights. Yet for over a half-century, the SEC has coerced thousands of people all the same. It has done so by conditioning the end of its civil enforcement actions on its targets agreeing not to exercise their free speech rights in a

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amicus curiae* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amicus curiae* also attests that counsel of record received timely notice of the intent to file the brief under Rule 37.2.

way the SEC dislikes. In doing so, the SEC has suppressed—and thereby controlled—the speech of nearly every American who has found herself under SEC investigation. There is no real precedent for this large-scale, long-term suppression of speech. Indeed, both this Court and lower courts have repeatedly voided conditions on speech that were not nearly as sweeping, intrusive, and long-lasting as the one here.

The Ninth Circuit’s decision in *Powell v. SEC*, 149 F.4th 1029 (9th Cir. 2025) upholding the gag rule departs from this Court’s rulings on similar speech conditions, as well as the rulings of two circuit courts. Its decision matters because it furthers a split of authority that threatens the ability of Americans, including IJ clients, to exercise their free speech rights. This split means that ordinary citizens nationwide find themselves at the mercy of governments that may use their nearly limitless litigation resources “to extract settlement terms they could not lawfully obtain any other way,” including terms that coerce Americans into surrendering their constitutional rights. *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 216 (2023) (Gorsuch, J., concurring in the judgment). That this rule has been enforced against so many Americans and for so long is a national scandal. For these reasons, and to ensure a uniform rule for settlement agreements, this Court should grant the Petition.

### **SUMMARY OF THE ARGUMENT**

This Court should grant Petitioners’ petition because it presents the important question of whether the SEC’s gag rule is contrary to the Free Speech Clause of the First Amendment. As many judges and

distinguished legal commentators have recognized, the SEC has no legitimate interest in squelching the First Amendment rights of the people it investigates. Yet for over 50 years, the SEC has successfully imposed an unconstitutional condition on thousands of such people: To settle civil cases, these individuals must take any public criticism of the SEC to their graves or risk a renewed investigation. The result is that unlike everyone else in this country, these people—including those who are victims of prosecutorial misconduct and whose testimonies should be a matter of public record—cannot freely express their opinions about the agency. If they do, they risk costly and possibly devastating litigation. This condition is not only unamerican but unconstitutional.

This *amicus* brief provides three reasons why this Court should grant the Petition and reverse the Ninth Circuit's decision in *Powell* affirming the validity of the SEC gag rule. First, the unconstitutional conditions doctrine forbids the government from coercing people, even temporarily, into surrendering their constitutional rights. The SEC rule violates that doctrine by imposing, as a condition of settlement, a lifetime ban on people exercising their free speech rights in a way the government disfavors. Second, while this Court in *Town of Newton v. Rumery* allowed criminal defendants to waive certain statutory and constitutional rights in settlement agreements, such as the right to sue, it did not sanction the waiver of all other rights. 480 U.S. 386 (1987). Moreover, a plain reading of *Rumery* shows that the Ninth Circuit erred in holding it applied to the waiver of free speech rights required by the gag rule. Third, by allowing settlement

agreements that are conditioned on the waiver of free speech rights, the Ninth Circuit's ruling has placed that court out of step with the approach of other federal circuits. By reversing, this Court would invalidate the SEC's rule and prevent similar government practices in the future.

In short, this Petition presents a unique and important opportunity for this Court to enforce well-established principles against a sweeping and high-unprecedented limitation on First Amendment rights. This Court should grant the Petition, reverse the Ninth Circuit, and restore the free speech rights of thousands of Americans.

## ARGUMENT

The Ninth Circuit's decision upholding the SEC's gag rule should be reversed. Part I, below, argues that the government cannot require, as a condition for settling an investigation, that a person never speak ill of the government for the rest of her life. Part II explains that the Ninth Circuit's treatment of *Rumery* is unmoored from its foundations. Part III demonstrates that the Ninth Circuit is increasingly an outlier when it comes to enforcing settlement agreements that suppress free speech rights.

**I. The SEC cannot condition the end of its investigations on Americans relinquishing their free speech rights, especially the right to criticize the government, for the rest of their lives.**

“It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution.” *Harman v. Forsse-nius*, 380 U.S. 528, 540 (1965). It does not matter if the state does so directly—by “strip[ping] the citizen of rights guaranteed by the federal Constitution”—or indirectly—by conditioning the “surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold.” *Frost v. R.R. Comm’n*, 271 U.S. 583, 593–94 (1926). In both cases, the State is subject to what Chief Justice Marshall called the “general rule, that what cannot be done directly from defect of power, cannot be done indirectly.” *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 50 (1825).

The principle that the government may not induce or pressure a person into surrendering a constitutional right is often called the unconstitutional conditions doctrine. The doctrine ensures that the Constitution’s “guaranties” may not be “manipulated out of existence,” *Frost*, 271 U.S. at 594, including when the government “pressur[es] someone into forfeiting a constitutional right” in exchange for a valuable government benefit. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013). The doctrine “vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up.” *Id.* at 604.

This Court has repeatedly applied the doctrine to a wide range of constitutional rights. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 338–43, 360 (1972) (right to vote); *Slochower v. Bd. of Higher Educ.*, 350 U.S. 551, 557 (1956) (right against self-incrimination); *Zobel v. Williams*, 457 U.S. 55, 58–61, 65 (1982) (right to travel); *Frost*, 271 U.S. at 592–93 (right to use public highways); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (rights to resort to federal courts and engage in interstate commerce.). It has also consistently applied the doctrine to free speech rights, explaining that the Government “may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.” *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 214 (2013) (citations omitted).

It is no surprise, then, that the SEC’s gag rule implicates that doctrine. The gag rule requires a speaker to suppress his free speech rights—in perpetuity—as a condition of the benefit. If the speaker agrees to settle, he is forever barred from (1) “denying,” directly or indirectly, any allegation in the complaint or creating the impression that the complaint is without factual basis and (2) saying he does not admit the allegations without also saying he does not deny the allegations. 17 C.F.R. § 202.5(e). At the same time, the SEC is free to say whatever *it* wants about the speaker—it is only the speaker who is prohibited from even hinting that he was anything other than satisfied with being the target of a government investigation. But if the speaker ever decides he no longer wants to follow the government’s script—that is, if he chooses to exercise

his constitutional right to criticize the government—he risks a renewed investigation, lengthy and expensive litigation, and even imprisonment. *SEC v. Moraes*, 2022 WL 15774011, at \*2 (S.D.N.Y. Oct. 28, 2022).<sup>2</sup>

“It is too late in the day to doubt” that the Constitution bars the government from coercing a person in this manner. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). A century’s worth of caselaw holds that the government may not “deny 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) (emphasis added); *Frost*, 271 U.S. at 593. This remains true even if “a person has no ‘right’ to [that] valuable governmental benefit,” *id.*, including a settlement agreement. *Cf. Powell*, 149 F. 4th at 1038 (describing the gag rule as “not simply a speech–restricting rule, but a rule that defendants voluntarily accede to in return for substantial benefits.”); *Moraes*, 2022 WL 15774011, at \*3 (opining that “the unconstitutional conditions doctrine specifically bars the government from selectively withholding benefits” to induce a settlement with the SEC). Although nobody is entitled to this benefit—as with other benefits—the government cannot condition its provision on the waiver of First Amendment rights.

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<sup>2</sup> See Final Judgment as to Defendant Fernando Motta Moraes at 9, *SEC v. Moraes*, No. 22-cv-08343 (S.D.N.Y. Oct. 28, 2022), ECF No. 13 (Consent of Defendant Fernando Motta Moraes, ¶ 11) (“If Defendant breaches this agreement, the Commission may petition the Court to vacate the Final Judgment and restore this action to its active docket.”).

Given this Court’s caselaw, the Ninth Circuit’s decision upholding the gag rule does not stand up to scrutiny. Its primary justification for the rule is that it imposes a condition akin to those commonly seen in plea bargains. In its view, agreeing to waive one’s right to criticize the government is like entering a guilty plea because they both cause “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.” *Powell*, 149 F.4th at 1039. To illustrate this point, the court points to guilty pleas that “preclud[e] the right to appeal—a form of First Amendment petitioning activity.” *Id.* But foregoing an appeal and agreeing never to speak ill of the government are not remotely the same. That is, while a guilty plea may “inevitabl[y]” prompt the waiver of certain related rights, such as the right to appeal, a guilty plea seldom—if ever—leads to the unavoidable surrender of other, unrelated constitutional protections, like the right to criticize the government. *Id.* See *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 226 (4th Cir. 2019) (holding that when “the very purpose” of a condition is “insulating public officials from unpleasant attacks,” it violates the First Amendment).

Moreover, in the odd case where the government *can* condition a settlement on the waiver of a constitutional right, it must first demonstrate “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.” *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1399 (9th Cir. 1991); *Koontz*, 570 U.S.

at 595 (holding there must be an “essential nexus”). Here, however, there is no nexus; the waiver does not arise as an “inevitable” consequence of the underlying investigation. *Powell*, 149 F.4th at 1039. Instead, it comes from an independent source: the SEC’s desire to control the speech of every person with whom it enters a settlement, lest he later speak ill of his experience with the SEC. See Commissioner Hester M. Peirce, *Unsettling Silence: Dissent from Denial of Request for Rulemaking to Amend 17 C.F.R. § 202.5(e)*, (Jan. 30, 2024), <https://www.sec.gov/newsroom/speeches-statements/peirce-nand-013024> (opining that “the imprudent policy adopted in November 1972 is not the right way to protect the Commission’s reputation.”)<sup>3</sup> But as shown above, the government cannot condition a settlement on a party waiving its free speech rights so it can “avoid harmful publicity.” *Overbey*, 930 F.3d at 226. The Ninth Circuit erred in holding otherwise.

The Ninth Circuit was also wrong to ignore that the SEC gag rule’s lifetime ban on speech suppresses far more speech than more typical unconstitutional conditions. Consider this Court’s ruling in *Rosenberger v. Rector & Visitors of University of Virginia*.

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<sup>3</sup> Indeed, it appears that there is only one other agency—the Commodity Futures Trading Commission—that has a similar rule, which further shows that the waiver does not arise inevitably from the underlying litigation but from the SEC’s desire to be free from criticism. Commissioner Hester M. Peirce, *Unsettling Silence: Dissent from Denial of Request for Rulemaking to Amend 17 C.F.R. § 202.5(e)*, (Jan. 30, 2024), <https://www.sec.gov/newsroom/speeches-statements/peirce-nand-013024>

515 U.S. 819 (1995). There, the University of Virginia paid for the printing costs of a variety of student publications, but it had a rule that forbade paying the costs of a newspaper that provided a religious perspective. *Id.* at 827. Under the rule, so long as student groups agreed to “silence the expression of selected viewpoints,” the university would continue to subsidize their expression of any other message. *Id.* at 835. This Court voided the rule, holding that “both in its terms and in its application,” it constituted “a denial of . . . free speech guaranteed by the First Amendment.” *Id.* at 837.

The reasoning in *Rosenberger* was straightforward. By targeting certain kinds of speech, the rule “effect[ed] a sweeping restriction on student thought and student inquiry” and thereby implicated “[v]ital First Amendment speech principles.” *Id.* at 835–36. Those principles include the “axiom[s]” that “the government may not regulate speech based on its substantive content or the message it conveys” and it “must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” *Id.* at 828–29. The university rule violated those axioms by singling out certain speakers and denying them a valuable government privilege unless they agreed to speak in a way approved of by the university.

The gag rule implicates—and therefore infringes—those same “vital” principles. It violates the first principle by controlling the “substantive content” of speech, requiring anyone who speaks about the government to stick to a predetermined script. *Id.* It flouts the second principle by regulating the speaker’s

perspective, even if that viewpoint is expressed indirectly, simply because the government disagrees with it. 17 C.F.R. § 202.5(e). Yet the gag rule imposes far greater burdens on speakers. First, the student group in *Rosenberger* remained free to speak to the campus community about its views so long as it did not use university money to do so. The speakers here, by contrast, enjoy no such freedom. Second, whatever speech restriction the group endured lasted only as long as its members attended the university, and no longer. Here, the restriction lasts a lifetime. Finally, the consequences of violating the rule are far more severe—the student group in *Rosenberger* was never put to the choice of silence or speak and get “bankrupted by having to continue litigating.” *SEC v. Novinger*, 40 F.4th 297, 308 (5th Cir. 2022) (Jones, J., concurring).

In sum, the gag rule goes well beyond any legitimate enforcement powers the SEC may possess. In exercising its authority, the SEC may impose serious consequences, such as by fining a person for violating the law. 17 C.F.R. § 202.5. But it cannot use its vast powers to condition a settlement on the suppression of the free speech rights of those it investigates simply because it fears their exercise would be critical of the government. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 549 (2001). Nor can it use its powers to restrict the scope of, and participants in, the public debate about the government’s actions. *Cf. Citizens United v. FEC*, 558 U.S. 310, 356 (2010) (holding that the government may not “command where a person may get his or her information or what distrusted source he or she may not hear . . .”). The SEC was wrong to

assume it possessed the “authority” to determine the terms of the debate about its practices, *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 392 (1992), and the Ninth Circuit was equally wrong to uphold that assumption.

**II. This Court’s decision in *Town of Newton v. Rumery* does not permit the government to condition the end of an investigation on a person waiving her right to criticize the government, and the Ninth Circuit was wrong to hold otherwise.**

As explained above, the unconstitutional conditions doctrine prohibits laws that offer a person “a valuable privilege” in exchange for the “surrender of a right,” *Frost*, 271 U.S. at 593, including the right to speech. *Perry*, 408 U.S. at 597. The SEC gag rule violates this doctrine by requiring individuals to relinquish their right to speech to end a government investigation. Nevertheless, the Ninth Circuit upheld the rule, relying mainly on *Town of Newton v. Rumery*, 480 U.S. 386 (1987), a case that does not even mention the word “speech.” That was error.

To start, *Rumery* centers on the narrow circumstances under which a person may validly waive certain statutory and constitutional rights. 480 U.S. at 392. Importantly, *Rumery* did not involve *any* First Amendment right, let alone the free speech right. Instead, it concerned the validity of certain settlements arising from criminal investigations, specifically “release-dismissal agreements.” In *Rumery*, the specific settlement memorialized a prosecutor’s agreement to

drop criminal charges in exchange for the accused waiving her statutorily created right to bring a Section 1983 action (the criminal charges and the civil action arose from the same incident). In its opinion, this Court held that although some “agreements may infringe important interests of the criminal defendant and of society as a whole . . . the mere possibility of harms to these interests” does “not justify invalidating *all* such agreements.” *Id.* at 392–93 (emphasis in original). Accordingly, given “the wide variety of factual situations that can result in release-dismissal agreements,” this Court was reluctant to introduce a “*per se* rule” to govern them all. *Id.*

As to the specific waiver at issue in *Rumery*, this Court was careful in explaining its reasoning for upholding it. This Court observed that waiving the “right to sue conferred by a federal statute” is comparable to other circumstances where it is permissible for criminal defendants to “effectively waive constitutional rights.” *Id.* For example, when a party pleads guilty, he may also choose to “waive[] important constitutional rights”—specifically, his rights to counsel and to a trial by a judge or jury. In such cases involving the “criminal process,” this Court explained, “the Constitution does not . . . always forbid requiring him to choose.” *Id.* at 393–94 (citation omitted).

The SEC rule is unlike the waiver in *Rumery* in two important ways. First, the SEC waiver does not involve the same rights at issue as in *Rumery*. Instead, it concerns the right to speech. And the *only* reason it involves the right to speech is because the SEC is concerned that once an investigation ends, it can no longer control the narrative about its actions.

See *SEC v. Vitesse Semiconductor Corp.*, 771 F. Supp. 2d 304, 309 (S.D.N.Y. 2011) (explaining the rule’s history); 17 C.F.R. § 202.5(e) (barring the speaker from saying, even indirectly, that the charges against him were unjust). But the First Amendment forbids the government from using its power to “disfavor certain subjects or viewpoints,” including those that paint the government in a bad light. *Citizens United*, 558 U.S. at 340. Americans have a First Amendment right to enjoy “uninhibited, robust, and wide-open” debate on “public issues,” and the government cannot enforce a non-disparagement agreement to “remove speech critical of the government” from that debate. *Overbey*, 930 F.3d at 224–25 (citation omitted).

Second, to the extent that a party may waive her free speech rights in a manner consistent with *Rumery*, she cannot do so in a situation where one party comes to the table pointing a proverbial “gun to the head” of the opposing party. Indeed, this Court has recognized the importance of this dynamic when it comes to other constitutional rights. In *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972), for example, this Court considered the constitutionality of a contract between two corporations for the manufacture and installation of a refrigerator system. The contract required one of the parties, the installer, to waive notice and a hearing prior to entry of a judgment if the other party, a warehousing corporation, defaulted on its payments. After the warehousing corporation failed to make timely payments, the installer caused judgment to be entered without prior notice. The warehousing corporation then challenged the provision on due process grounds. In rejecting the

challenge, this Court held that “this is not a case” where the one party used its “unequal bargaining power” to force the provision on the other. *Id.* at 186. Instead, the provision came about not from a “great disparity in bargaining power,” *id.* at 188, but from “negotiations carried on by corporate parties with the advice of competent counsel.” *Id.* at 183.

That is not the case here. The parties do not remotely possess similar bargaining power and no one could reasonably believe that a defendant in an SEC investigation is similarly situated to the government. In this case, there is only one party that can come to the negotiation and tell the other that its terms are: “Stay silent forever, or we will continue to bring the might of the U.S. government against you.” As Judges Jones and Duncan correctly explained, it is “hard to imagine” a “more effective prior restraint” than the SEC’s gag rule. *Novinger*, 40 F.4th at 308 (concurring opinion). *See also Axon*, 598 U.S. at 216 (Gorsuch, J., concurring in the judgment) (“Aware, too, that few can outlast or outspend the federal government, agencies sometimes use this as leverage to extract settlement terms they could not lawfully obtain any other way”).

In short, the Ninth Circuit attempt to build on *Rumery*’s narrow foundation fails. *Rumery* does not readily lend itself to free speech rights, and to the extent it does, it only applies when a private party and the government are closely matched in bargaining strength—not when the government is poised to ruin the other party through years of expensive litigation (or worse).

**III. The Ninth Circuit is increasingly an outlier when it comes to enforcing settlement agreements that condition the end of an investigation on the waiver of free speech rights.**

The Ninth Circuit’s decision in *Powell* to allow a party to waive her First Amendment rights in a settlement agreement makes it increasingly an outlier among the circuits. In recent years, “a growing chorus of circuits 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. This Court should join that “growing chorus” and bring all the circuits into harmony.<sup>4</sup>

A recent Fourth Circuit decision invalidating a settlement agreement strikes the right note. In *Overbey*, the City of Baltimore required all police-misconduct settlement agreements to include a non-disparagement clause. 930 F.3d at 220–21. The Fourth Circuit held that the clauses were *per se* void for a simple reason: they constituted “a government-defined and government-enforced restriction on government-critical speech.” *Id.* at 223–24. Relevant here, the court stressed that the government’s supposed interest in avoiding “harmful publicity” did not warrant restricting the free speech rights of the other parties to the agreement. *Id.* at 225–26. After all, “one of the ‘premise[s]’ of the First Amendment” is a “mistrust of

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<sup>4</sup> The Second Circuit sides with the Ninth Circuit. *SEC v. Romeril*, 15 F.4th 166 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 2836 (2022).

governmental power,” and that mistrust is most warranted when the government tries to purchase “a potential critic’s silence.” *Id.* at 224, 226 (citation omitted). That reasoning directly maps onto the gag rule silencing criticism of the SEC. “Enforcing a waiver of First Amendment rights for the very purpose of insulating public officials from unpleasant attacks would plainly undermine” the “core First Amendment principle” that “vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials” are protected speech. *Id.* at 226 (citation omitted). So too here.

The Sixth Circuit arrived at a similar conclusion in *G&V Lounge, Inc. v. Michigan Liquor Control Commission*. 23 F.3d 1071 (6th Cir. 1994). There, the court held that a contract between the government and a private party was unenforceable because the “receipt of a benefit” (a liquor permit) was “condition[ed]” upon waiver of the “right to free expression, contrary to the principles set forth in *Perry*” (no exotic dancing). *Id.* at 1077. The lower court’s ruling, which held otherwise, “flatly contradict[ed] well established Supreme Court precedent . . . that a state actor cannot constitutionally condition the receipt of a benefit . . . on an agreement to refrain from exercising one’s constitutional rights, *especially* one’s right to free expression.” *Id.* (emphasis added). Like the liquor permit, the SEC gag rule also conditions the receipt of a benefit on an agreement that the recipient will not exercise her First Amendment rights in a way that the government dislikes. As such, it is equally “unenforceable.” *Id.*

In sum, when it comes to waiving First Amendment rights in a settlement, the Fourth and Sixth Circuits have the better of the argument. It should not be “normal” for the government to condition settlements on defendants “indefinitely silencing” protected First Amendment speech. *Moraes*, 2022 WL 15774011, at \*1. The Ninth Circuit was wrong to come to the contrary conclusion in *Powell* and this Court should reverse.

### CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

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