No. 25-1100

In the Supreme Court of the United States

THOMAS JOSEPH POWELL, ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a rescinded Securities and Exchange Commission policy that barred the Commission from accepting settlements of enforcement proceedings with parties who denied the Commission's allegations was facially unconstitutional under the First Amendment.

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OPINION BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on August 6, 2025. A petition for rehearing was denied on October 17, 2025 (Pet. App. 59a). On January 7, 2026, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including March 16, 2026, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Securities and Exchange Commission (SEC or Commission) is authorized to investigate, and initiate civil enforcement actions concerning, possible violations of the securities laws. See 15 U.S.C. 78u. In exercising

that authority, the Commission often agrees to resolve civil enforcement actions through settlements, including consent judgments entered in federal court. Consent judgments are "compromises in which the parties give up something they might have won in litigation and waive their rights to litigation." *United States* v. *ITT Cont'l Baking Co.*, 420 U.S. 223, 235 (1975). A consent judgment "embodies an agreement of the parties and thus in some respects is contractual in nature," but it is also "enforceable as * * * a judicial decree." *Texas* v. *New Mexico*, 602 U.S. 943, 953 (2024) (citation omitted). The SEC also sometimes agrees to settlements that resolve agency adjudications pursuant to a Commission order that reflects the terms of the agreement.

In 1972, the SEC adopted a policy, sometimes called the "no-deny" rule, regarding the circumstances in which it would agree to settle claims of securities violations. 37 Fed. Reg. 25,224 (Nov. 29, 1972) (17 C.F.R. 202.5(e)). The rule stated that the Commission would 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." 17 C.F.R. 202.5(e). For purposes of the rule, "a refusal to admit the allegations [wa]s equivalent to a denial, unless the defendant or respondent state[d] that he neither admit[ted] nor denie[d] the allegations." *Ibid.*

Rule 202.5(e) did not require settlements; a defendant could deny the allegations of the complaint and force the Commission to prove its case in court or in administrative proceedings. Nor did the policy require settling defendants to admit wrongdoing. Instead, it provided that if they refused to do so, they must also agree not to deny the allegations against them. Otherwise, the Commission would not settle—that is, it would not forgo its opportunity to prove its claims.

Once the SEC and a defendant agreed on the terms of a settlement, the defendant signed a consent provision in which he "acknowledge[d] that his settlement [wa]s voluntary and agree[d] to abide by Rule 202.5(e)." Pet. App. 4a. As part of a settlement in federal district court, a defendant waived "the entry of findings of fact and conclusions of law" and waived "the right, if any, to a jury trial and to appeal from the entry" of judgment. *E.g.*, D. Ct. Doc. 33-1, at 3, *SEC* v. *Novinger*, No. 15-cv-358 (N.D. Tex. June 3, 2016). The settlement would then be incorporated into a final consent judgment (or an order resolving an administrative proceeding). See, *e.g.*, *ibid.*

If a defendant in a civil enforcement action breached the no-deny provision, the Commission had a limited remedy: to "petition the issuing court to vacate the final judgment and restore the case to its active docket." Pet. App. 4a; see *id.* at 34a. That remedy was not self-executing. The SEC had to make a determination, based on the circumstances, to seek to reopen a case. See *id.* at 36a. Even then, the court in its discretion might have "den[ied] this requested relief." *Id.* at 4a; see *id.* at 36a. "The record gives no indication that the SEC regularly return[ed] to court to reopen judgments for claimed violations of Rule 202.5(e)." *Id.* at 7a. To the Commission's knowledge, no court has "ever f[ound] a defendant in contempt for violating a Rule 202.5(e) provision in a settlement agreement." *Ibid.**

2. In 2018, the New Civil Liberties Alliance (NCLA) filed a petition for rulemaking. That petition requested that the SEC repeal or amend Rule 202.5(e) to allow the

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* The parallel procedure in an administrative adjudication was that, if a breach of a no-deny provision occurred, SEC enforcement staff could ask the Commission to reopen the proceeding.

Commission to settle with defendants who deny the allegations against them, "with no recourse for the Commission to return to active litigation." Pet. App. 4a; see 5 U.S.C. 553(e); C.A. E.R. 37-38, 53. NCLA contended that the existing rule raised First Amendment concerns. Pet. App. 4a. After NCLA filed a renewed petition joined by several individual petitioners, the SEC denied the petition. *Id.* at 30a-41a.

In choosing to maintain the no-deny policy, the SEC explained that the rule ensured "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." Pet. App. 37a. The Commission disagreed with the petition's constitutional arguments, citing the "large body of precedent confirming that a defendant can waive constitutional rights as part of a civil settlement." *Id.* at 38a. The SEC observed in that regard that, in *Town of Newton* v. *Rumery*, 480 U.S. 386 (1987), this Court had rejected a "'per se rule of invalidity' for waivers of constitutional rights" in settlements. Pet. App. 38a (quoting *Rumery*, 480 U.S. at 392). Commissioner Hester M. Peirce dissented from the denial of the petition. *Id.* at 42a-58a.

3. The parties who had filed the renewed rulemaking petition, along with several additional parties, petitioned for review of the SEC's order in the Ninth Circuit. Pet. App. 5a; see 15 U.S.C. 78y(a)(1) (providing that a "person aggrieved by a final order of the Commission * * * may obtain review of the order" in the circuit where "he resides or has his principal place of business," or in the D.C. Circuit). The court of appeals denied the petition for review. Pet. App. 1a-29a.

a. The court of appeals first observed that petitioners had challenged Rule 202.5(e) on its face, rather than

"seek[ing] 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." Pet. App. 9a. The court explained that the question before it therefore was "whether a substantial number of [the Rule's] applications are unconstitutional, judged in relation to the [Rule's] plainly legitimate sweep." *Ibid.* (quoting *Moody* v. *NetChoice, LLC*, 603 U.S. 707, 723 (2024)) (brackets in original; internal quotation marks omitted).

The court of appeals held that the rule was not facially unconstitutional. The court surveyed precedents of this Court and the courts of appeals holding that parties may waive constitutional rights, including First Amendment rights. See Pet. App. 10a-20a. The court accordingly declined to analyze Rule 202.5(e) "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." *Id.* at 19a. Applying this Court's decision in *Rumery*, *supra*, the court concluded that 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." Pet. App. 21a (quoting *Davies* v. *Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1399 (9th Cir.), cert. denied, 501 U.S. 1252 (1991)). While acknowledging that certain applications of Rule 202.5(e) could raise First Amendment concerns—which could be "addressed in as-applied challenges with defined records"—the court rejected petitioners' contention that "the Rule should be struck down entirely on a petition for review." *Id.* at 2a, 22a; see *id.* at 25a-27a. The court of appeals further

held that the rule was supported by statutory authority and was neither procedurally defective nor inadequately explained. See *id.* at 27a-29a.

b. The court of appeals denied rehearing, with no judge requesting a vote for en banc consideration. Pet. App. 59a.

4. On May 18, 2026, "[a]fter further consideration of the existing policy," the SEC rescinded Rule 202.5(e). *Rescission of Policy Regarding Denials in Settlements of Enforcement Actions*, 91 Fed. Reg. 29,892, 29,894 (May 21, 2026). The Commission found that "the negative effect on the public interest" from denials by settling defendants "may be minimal," and that the rule "itself may create the incorrect impression that the Commission is trying to shield itself from criticism, even though the main thrust of the policy was to allow the Commission, in the wake of a denial, to ask for the ability to test its allegations and legal theories." *Ibid.* The SEC noted, among other things, that it had apparently never enforced the rule by reopening an enforcement proceeding, and that rescinding the rule would give the agency more flexibility in settling cases. See *id.* at 29,894-29,895. "In light of the rescission of Rule 202.5(e)," the Commission stated that it "will not enforce existing no-deny provisions in settlements that have already been entered." *Id.* at 29,895. The agency also determined that the rescission was exempt from notice-and-comment requirements under the Administrative Procedure Act (APA), and from the APA's general requirement "that an agency publish an adopted substantive rule in the Federal Register 30 days before it becomes effective." *Ibid.* (footnote omitted); see 5 U.S.C. 553(b) and (d).

ARGUMENT

Petitioners ask (Pet. 15-26) this Court to review their First Amendment challenge to the SEC's "no-deny" rule, 17 C.F.R. 202.5(e). The Commission has rescinded that rule, however, so this case is moot and, at a minimum, lacks prospective importance. The decision below also does not conflict with any decision of this Court or another court of appeals. This Court has previously denied a petition for a writ of certiorari raising the same issue and asserting the same circuit conflict. *Romeril* v. *SEC*, 142 S. Ct. 2836 (2022) (No. 21-1284). The same course is warranted here.

1. "Sometimes, events in the world overtake those in the courtroom, and a complaining party manages to secure outside of litigation all the relief he might have won in it." *FBI* v. *Fikre*, 601 U.S. 234, 240 (2024). This is such a case. In the court of appeals, petitioners sought review of the SEC's denial of their petition for rulemaking, in which petitioners had asked the Commission to "amend or repeal" Rule 202.5(e) and thereby enable settlement of SEC enforcement proceedings with defendants who deny the allegations against them. C.A. E.R. 53; see *id.* at 37-38. The Commission has now done just that, rescinding the rule and disclaiming any intent to enforce no-deny provisions in existing settlement agreements. See p. 6, *supra*.

The SEC's rescission of Rule 202.5(e) renders this case moot. See *Fikre*, 601 U.S. at 240. To be sure, a party cannot "'automatically moot a case' by the simple expedient of suspending its challenged conduct after it is sued." *Id.* at 241 (quoting *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013)). But such cessation does moot a case if the relevant practice "cannot reasonably be expected to recur." *Ibid.* (citation and internal quotation

marks omitted). And even during the period that Rule 202.5(e) was in effect—for more than 50 years, across various administrations—it appears that the Commission never reopened proceedings to enforce no-deny provisions in its settlement agreements. See pp. 3, 6, *supra*; Pet. App. 7a.

There is accordingly "no reasonable expectation," *Fikre*, 601 U.S. at 241 (citation omitted), and it is "entirely 'speculative,'" *Already*, 568 U.S. at 92 (citation omitted), that the SEC would reissue the rule in the future, let alone attempt to enforce a no-deny provision. See, *e.g.*, *Gun Owners of Am., Inc.* v. *United States Dep't of Justice*, 157 F.4th 834, 838 (6th Cir. 2025) (holding that a challenge to a federal "public-safety advisory" was moot when the agency had withdrawn the advisory and had "disavowed any attempt to enforce it"); *Initiative & Referendum Inst.* v. *United States Postal Serv.*, 685 F.3d 1066, 1074 (D.C. Cir. 2012) (holding that a challenge to a rescinded postal regulation was moot when there was "no evidence" that the agency intended to reissue it), cert. denied, 569 U.S. 918 (2013). Even if this case were not moot in an Article III sense, moreover, the revocation of Rule 202.5(e) would deprive the question presented of any meaningful prospective importance.

2. Even if the Commission had not rescinded the challenged rule, this case would not satisfy the Court's usual criteria for granting a writ of certiorari.

a. The decision below does not conflict with any decision of this Court. Petitioners contend (Pet. 15-16, 19) that Rule 202.5(e) was a facially unconstitutional "prior restraint" and a "content- and viewpoint-based restriction on speech," as well as a violation of the "unconstitutional conditions doctrine." As the court of appeals suggested in declining to analyze Rule 202.5(e)'s constitutionality in those doctrinal terms, petitioners' claim reduces to

the view that First Amendment rights can never (or seldom) be waived in an agreement with the government. See Pet. App. 19a ("[E]very waiver of First Amendment rights can in some sense be described as a content-based prior restraint."). But this Court has rejected "a *per se* rule of invalidity" for waivers of rights, including constitutional rights, in settlements of litigation and other agreements with the government. *Town of Newton* v. *Rumery*, 480 U.S. 386, 392 (1987); see *id.* at 392-394 & n.2 (discussing criminal defendants' waivers of constitutional rights in plea agreements). First Amendment rights are no exception. See Pet. App. 13a (citing, *e.g.*, *Snepp* v. *United States*, 444 U.S. 507, 509 & n.3 (1980) (per curiam)).

b. Nor does the Ninth Circuit's decision implicate a circuit conflict. In the only court of appeals decision addressing on the merits a First Amendment challenge to a consent judgment implementing Rule 202.5(e), the Second Circuit rejected the challenge, consistent with the decision below. See *SEC* v. *Romeril*, 15 F.4th 166, 172-173 (2021), cert. denied, 142 S. Ct. 2836 (2022). In denying the defendant's request for relief from judgment under Federal Rule of Civil Procedure 60(b)(4), the *Romeril* court concluded that the judgment in the original proceeding did "not violate the First Amendment because Romeril waived his right to publicly deny the allegations of the complaint." 15 F.4th at 172. The court explained that "[a] defendant in a civil enforcement action is not obliged to enter into a consent decree"; that Romeril had "the right to litigate and defend against the charges" but had "elected not to litigate"; and that "parties can waive their First Amendment rights in consent decrees and other settlements of judicial proceedings." *Ibid.*; cf. *SEC* v. *Novinger*, 40 F.4th 297, 304-307 (5th Cir. 2022) (affirming the denial of Rule

60(b) relief from no-deny provisions without reaching the merits of the First Amendment claim); *Cato Inst.* v. *SEC*, 4 F.4th 91, 96 (D.C. Cir. 2021) (per curiam) (holding that a think tank lacked standing to challenge Rule 202.5(e) under the First Amendment).

Contrary to petitioners' submission (Pet. 27-28), the court of appeals' decision does not conflict with *G & V Lounge, Inc.* v. *Michigan Liquor Control Commission*, 23 F.3d 1071 (6th Cir. 1994), or *Overbey* v. *Mayor of Baltimore*, 930 F.3d 215 (4th Cir. 2019). See Br. in Opp. at 21-22, *Romeril*, *supra* (No. 21-1284). In *G & V Lounge*, the Sixth Circuit held that a city had violated the First Amendment by conditioning approval of a liquor license on the applicant's agreement not to permit topless dancing in the establishment. 23 F.3d at 1077-1078. That case did not involve a settlement agreement. While *Overbey* did involve one, that agreement's "non-disparagement" clause was significantly different from the no-deny provisions at issue here. Among other things, the clause was broader in scope (prohibiting discussion with the media of "'any opinions, facts or allegations in any way connected to' [the] case") and was unilaterally enforceable by the government without judicial oversight and through monetary damages. 930 F.3d at 220 (citation omitted); see *id.* at 219, 224; cf. pp. 2-3, *supra*. Indeed, the *Overbey* court relied on the same Ninth Circuit precedent that the court of appeals relied on and distinguished in this case. See 930 F.3d at 223, 225 (citing *Davies* v. *Grossmont Union High Sch. Dist.*, 930 F.2d 1390, cert. denied, 501 U.S. 1252 (1991)); Pet. App. 14a-18a, 20a-21a (same). The enforceability of a waiver of rights depends on the features of the particular agreement at issue, see *Rumery*, 480 U.S. at 397-398; *id.* at 399 (O'Connor, J., concurring in part and concurring in the judgment), and no court of appeals has held that

waivers like those contemplated by Rule 202.5(e) violate the First Amendment.

c. The decision below therefore does not conflict with any decision of this Court or another court of appeals. And the question presented was of limited practical importance even before the SEC revoked Rule 202.5(e). As noted above, the Commission has apparently never reopened proceedings to enforce a no-deny clause. And even that potential means of enforcement left room for as-applied First Amendment challenges to no-deny clauses. Pet. App. 1a-2a, 10a, 21a. For those reasons, this Court's review would not have been warranted even if Rule 202.5(e) remained in effect.

Assuming that this case is now moot, there is consequently no basis for vacatur of the judgment below under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). "[W]hen a case becomes moot after the court of appeals enters its judgment but before this Court acts on a petition for a writ of certiorari, *Munsingwear* vacatur is appropriate only if the question presented would have merited this Court's review absent the intervening mootness." Br. in Opp. at 6, *Neese* v. *Kennedy*, 146 S. Ct. 104 (2025) (No. 24-1221); see *Camreta* v. *Greene*, 563 U.S. 692, 712 (2011) (noting that *Munsingwear* vacatur "ensures that 'those who have been prevented from obtaining the *review to which they are entitled* are not treated as if there had been a review'") (quoting *Munsingwear*, 340 U.S. at 39) (emphasis added; brackets and ellipsis omitted). Because petitioner's First Amendment challenge would not have warranted this Court's review even if Rule 202.5(e) were still in effect, the SEC's rescission of that rule has not deprived petitioners of any merits review they would otherwise have received.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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