

No. 25-1100

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In the  
Supreme Court of the United States

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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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**REPLY BRIEF FOR PETITIONERS**

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## INTRODUCTION

Faced with a certiorari petition exposing the blatant unconstitutionality of its Gag Rule, 17 C.F.R. § 202.5(e), the SEC chose to rescind the Rule rather than answer for it. That action tells the Court everything it needs to know about the certworthiness of the question presented. Agencies do not vacate longstanding rules the moment litigation arrives at this Court (and the Solicitor General assumes the lead), unless the government is gravely concerned about the likelihood of this Court's review and its ability to defend those rules on the merits.

The government is wrong, however, that the SEC's abrupt rescission of the Gag Rule moots this case. Quite the contrary, this is a classic case of "voluntary cessation." Agency rules that can be rescinded overnight can be reinstated overnight. The government provides no meaningful assurance that a future SEC will not revive the Gag Rule. Ten consecutive Administrations—from both parties—embraced the Rule for 50 years before the SEC's sudden change of heart when the case reached this Court. The only thing that can prevent the Gag Rule from springing back to life as suddenly as it was rescinded is a ruling by this Court that an agency may not leverage its enforcement authority to silence critics through mandatory gags coerced as a condition of avoiding the crippling financial and reputational harm of defending an enforcement action.

But the problem is not just that the SEC could easily restore the Gag Rule if the Court denies review, it is the Rule's continuing effects—*now*. Thousands of individuals—including most individual petitioners here—remain subject to consent orders implementing

gags, as well as the threat that those orders could be enforced for any statements they make. Because the government still defends the constitutionality of the gags as a valid waiver of First Amendment rights (at 8-9), individuals remain chilled. A ruling by this Court that the Gag Rule is unconstitutional would render gags unenforceable and unrevivable. Otherwise, thousands will remain gagged.

At the very least, if this Court believes the case is moot, it should follow its standard practice and vacate the Ninth Circuit's erroneous decision. The SEC's self-serving request to keep that decision on the books—after having unilaterally attempted to insulate it from this Court's review—is unjustified.

## ARGUMENT

### **I. The SEC's Voluntary Cessation Does Not Moot This Case**

The SEC's sudden withdrawal of the Gag Rule—after this petition was filed—does not moot this case.

1. This Court has long been wary of “transparent tactic[s] for evading [the Court's] review” through mootness arguments. *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 9 (2023) (Thomas, J., concurring in the judgment). Such arguments “must be viewed with a critical eye,” *Knox v. Service Emps. Int’l Union, Loc. 1000*, 567 U.S. 298, 307 (2012), particularly when they are based on late-breaking changes of heart that come only after a case reaches this Court. Thus, a respondent's “voluntary cessation does not moot a case’ unless it is ‘absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *West Virginia v. EPA*, 597 U.S. 697, 720 (2022) (quoting *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007)).

That is a “formidable burden.” *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 189-90 (2000). And this burden “holds for governmental defendants no less than for private ones.” *FBI v. Fikre*, 601 U.S. 234, 241 (2024).

2. The government has not carried this heavy burden here. The SEC has relied on the Gag Rule for over 50 years and vigorously defended it in court. *See, e.g., SEC v. Novinger*, 40 F.4th 297, 303-04 (5th Cir. 2022); *SEC v. Romeril*, 15 F.4th 166, 171-72 (2d Cir. 2021); *Cato Inst. v. SEC*, 4 F.4th 91, 95 (D.C. Cir. 2021); *SEC v. Citigroup Glob. Mkts. Inc.*, 827 F. Supp. 2d 328, 332-35 (S.D.N.Y. 2011), *vacated on other grounds*, 752 F.3d 285 (2d Cir. 2014). Yet the prospect of this Court’s review “apparently led to an epiphany of sorts,” and the SEC “sprang into action to prevent [this Court] from deciding this case.” *New York State Rifle & Pistol Ass’n v. City of New York*, 590 U.S. 336, 341 (2020) (Alito, J., joined by Gorsuch & Thomas, JJ., dissenting). The voluntary-cessation doctrine applies with special force where, as here, events suggest “arguable manipulation of [the court’s] jurisdiction’ ... ‘in order to avoid litigation.’” *Samma v. DOD*, 136 F.4th 1108, 1113 (D.C. Cir. 2025) (citations omitted).

The SEC (at 8-9) “nowhere suggests that ... it will not” reimpose the same regulatory approach in the future and, notably, it continues to “defend[]’ the legality of such an approach.” *West Virginia*, 597 U.S. at 720 (citation omitted). Its only attempt to satisfy the voluntary-cessation standard is a one-sentence statement (at 7) that the SEC currently has no “intent” to enforce existing gags. Of course, future Administrations may revert to the prior position. *Cf. Heckler v. Cheney*, 470 U.S. 821, 831 (1985). But more important, the question is whether the SEC would

reimpose the Rule, not whether it would enforce past gags. The SEC has nothing to say there.

The purely discretionary manner by which the SEC rescinded the Gag Rule (without notice or comment) reinforces that this case is not moot. As the SEC’s own authority explains, application of the voluntary-cessation exception to regulatory changes “depends on the process used to create the policy.” *Gun Owners of Am., Inc. v. DOJ*, 157 F.4th 834, 838 (6th Cir. 2025). “If the discretion to effect the change lies with one agency or individual, or there are no formal processes required to effect the change,’ then ‘significantly more ... is necessary to show that the voluntary cessation moots the claim.” *Id.* (alteration in original) (citation omitted). Here, the SEC claims that no formal process is required to promulgate or rescind the Gag Rule, *see* Pet. App. 28a-29a—and the SEC abruptly withdrew the Rule behind closed doors.

Moreover, the current SEC is hardly representative of future SECs. It includes only Republican commissioners; the Democratic seats are empty. *See* SEC, *SEC Commissioners* (Mar. 23, 2026), <https://www.sec.gov/about/sec-commissioners>. Nothing prevents a different SEC from reviving the Rule as quickly as the current SEC rescinded it.

3. The Gag Rule’s “continuing effect” also favors review. *Fikre*, 601 U.S. at 241 (citation omitted). In speech cases, uncertainty over whether, or when, a policy may snap back creates the very chill that litigation is brought to eliminate. Here, because the government still defends the Gag Rule’s constitutionality, thousands of individuals subject to existing gags must balance their speech rights against the risk that a future SEC might take a

different view on gags, or that a court may *sua sponte* enforce its order implementing the gag.<sup>1</sup>

The SEC's assertion (at 11) that "the Commission has apparently never reopened proceedings to enforce a no-deny clause" is incorrect. To take just one example, the SEC moved to vacate a settlement after "constru[ing]" a third-party's public statement as a denial on behalf of the defendant; the agency only agreed to withdraw its motion if the defendant recanted. *Abrams Amicus Br.* 16-17 (citation omitted). The SEC also has repeatedly threatened to reopen consents by "demand[ing] a retraction or correction," *id.* at 16-19 (quoting congressional testimony of Robert Kuzami, SEC Dir. of Enft), in response to statements the SEC *interprets* as denials, including "the failure to use a preferred term," *id.* at 19 (citation omitted). Maybe the SEC has a more draconian means of enforcement in mind, but in fact, the SEC *has* sought to enforce gags.

More fundamentally, even if the SEC were right that it has never enforced the gags, that would simply prove that its gags work. As two Fifth Circuit judges have observed, "[a] more effective prior restraint is hard to imagine." *Novinger*, 40 F.4th at 308 (Jones, J., joined by Duncan, J., concurring). The SEC's supposed non-enforcement is thus just as likely a product of the constitutional harm petitioners seek to eliminate (rank censorship) as it is a product of the agency's supposed self-restraint.

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<sup>1</sup> Judicially entered gags are embodied in court orders. Pet. 9. Individuals thus must weigh the risk that a district court could attempt to *sua sponte* "institute criminal contempt proceedings against an SEC defendant who violates a no-deny provision ... even absent the SEC's consent." *Cato*, 4 F.4th at 95.

Finally, the SEC's suggestion (at 11) that the constitutionality of gags can be addressed in future SEC reopening proceedings is also irrelevant and unfounded. Petitioners challenge the mandatory Gag Rule. In any event, "[m]any persons" subject to speech restrictions will forgo the risks and costs of after-the-fact, "case-by-case litigation" and "choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (citation omitted). The SEC has previously opposed as-applied post-judgment proceedings at every turn. That is the reason for this litigation. The government's attempt to moot this case by rescinding the Rule once it finally arrived at this Court's steps should be rejected.

The only way to remove the gags—and prevent the Gag Rule from snapping back—is a ruling from this Court that the Gag Rule is unconstitutional.

## **II. The SEC's Actions Only Confirm That This Case Merits Review**

While the centerpiece of the SEC's response is its effort to evade review, the agency's half-hearted protestations (at 8-11) that plenary review is not otherwise warranted also fail. Indeed, when it comes to certworthiness, the government's attempt to keep this case out of this Court gives away the game.

1. The SEC does not seriously deny that the question whether an agency can constitutionally squelch critical speech through coercive settlement conditions is exceptionally important. Pet. 29-34. The sixteen amicus briefs urging review underscore the point and expose the pernicious problems with the Gag Rule. Mandatory gags coupled with crippling

enforcement mechanisms are a powerful means of effecting government censorship, depriving the public of “an independent view of how one of the nation’s most powerful regulatory agencies exercises its authority.” FIRE Amicus Br. 13-14; *see* Former SEC Att’ys Amicus Br. 13-17; Chamber Amicus Br. 21-26.

2. The SEC’s effort to deny (at 9-11) the circuit conflict fails. As explained (*see* Pet. 27-28), the Ninth Circuit’s decision below departed from a “growing chorus of circuits [that] have concluded that the Constitution prevents courts from enforcing the waiver of First Amendment rights as a condition of settlements.” *SEC v. Moraes*, No. 22-cv-8343, 2022 WL 15774011, at \*4 (S.D.N.Y. Oct. 28, 2022).

The SEC’s attempt (at 10) to distinguish *Overbey v. Mayor of Baltimore*, 930 F.3d 215 (4th Cir. 2019), and *G&V Lounge, Inc. v. Michigan Liquor Control Commission*, 23 F.3d 1071 (6th Cir. 1994), on narrow factual grounds is unpersuasive. Both cases squarely rejected government attempts to condition a benefit—including, in *Overbey*, a settlement agreement—on a surrender of constitutional rights. *See Overbey*, 930 F.3d at 223-25 (holding gag in settlement agreement constituted “a government-defined and government-enforced restriction on government-critical speech” that violated the First Amendment); *G&V Lounge*, 23 F.3d at 1077 (same for liquor permit). By contrast, the Ninth Circuit below held that “First Amendment rights can be waived” in settlements. Pet. App. 12a. That conflict warrants review. *See* Chamber Amicus Br. 12 (discussing conflict); Abrams Amicus Br. 6-12; IJ Amicus Br. 16; Goldwater Amicus Br. 21.

The SEC also points out (at 9-10) that the Second and Fifth Circuits have rejected challenges to the Gag Rule. But that just illustrates the conflict. In any

event, those courts principally rejected those challenges on procedural grounds related to the unique posture of those cases. Pet. 32-33. Moreover, two Fifth Circuit judges pointed to this petition as the proper vehicle for reviewing what they aptly characterized as a blatant “prior restraint.” *Novinger*, 40 F.4th at 308 (Jones, J., joined by Duncan, J., concurring). As those Judges explained, the Gag Rule in effect says, “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.” *Id.* Whether or not the Ninth Circuit is an outlier, a stark circuit conflict still exists and further underlines why this Court should grant review.

3. On the merits, the SEC says (at 8-9) the Gag Rule aligns with this Court’s precedents. But it is what the SEC does not say that is most notable. The SEC does not meaningfully contest that the Gag Rule constitutes a “plain prior restraint on speech.” Pet. App. 50a (Peirce, Comm’r, dissenting); *see Novinger*, 40 F.4th at 308 (Jones, J., concurring); *Moraes*, 2022 WL 15774011, at \*4; Pet. 15-16. The SEC does not contest that the Rule is a content- and viewpoint-based speech restriction, nor even acknowledge directly relevant decisions like *National Rifle Association of America v. Vullo*, 602 U.S. 175 (2024), and *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991). Pet. 16-18, 22. And the SEC does not contest that such restrictions are ordinarily “presumptively invalid’ and subject to strict scrutiny,” much less try to explain how strict scrutiny possibly could be met here. *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 358 (2009) (citation omitted); *see* Pet. 19-20.

The SEC likewise says nothing about the unconstitutional conditions doctrine. *See* Pet. 19-23. It asserts (at 8-9) that First Amendment rights can be waived. But that is a strawman. This case arises because the SEC requires a defendant to agree to a gag as its price for terminating extraordinarily coercive enforcement proceedings via settlement—an environment that reeks of “regulatory extortion.” *Axon Enter., Inc. v. FTC* and *SEC v. Cochran*, 598 U.S. 175, 216 n.4 (2023) (Gorsuch, J., concurring in the judgment) (citation omitted). SEC enforcement targets face years-long investigations, crippling legal costs, and often litigation before the SEC’s in-house court, where it wins 90% of cases. Cato Amicus Br. 9-12; *see* Abrams Amicus Br. 6; IJ Amicus Br. 5-12.<sup>2</sup>

As this Court just stressed, “the Government may not effectively deny constitutional rights by making it too costly to exercise them.” *FCC v. AT&T, Inc.*, No. 25-406, slip op. 12 (June 4, 2026). Forcing individuals to agree to give up their right to criticize an agency to gain back their economic and reputational freedom is the epitome of an unconstitutional condition—one this Court should repudiate here.

### **III. At A Minimum, The Ninth Circuit’s Decision Should Be Vacated**

The Court should grant review. But if this Court finds that the case is moot, it should vacate the decision below under *United States v. Munsingwear*,

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<sup>2</sup> In any event, because the First Amendment is a limit on governmental authority, a party cannot give the government a power that the Constitution denies to it. *See* Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 Va. L. Rev. 479, 480 (2012) (“[C]onsent is irrelevant for conditions that go beyond the government’s power.”); Pet. 23.

*Inc.*, 340 U.S. 36 (1950). The Ninth Circuit’s decision adopts an expansive, and dangerous, conception of when agencies can coerce waivers of First Amendment rights and improperly extends this Court’s splintered decision in *Town of Newton v. Rumery*, 480 U.S. 386 (1987), beyond Section 1983. Pet. 5, 13-14. That flawed decision should not survive if the SEC succeeds in insulating it from review here.

This Court’s “*Munsingwear* practice is well settled.” *Laufer*, 601 U.S. at 5. “When ‘a civil case from a court in the federal system ... has become moot while on its way here,’ this Court’s ‘established practice’ is ‘to reverse or vacate the judgment below and remand with a direction to dismiss.’” *Azar v. Garza*, 584 U.S. 726, 729 (2018) (alteration in original) (quoting *Munsingwear*, 340 U.S. at 39). While this “practice is rooted in equity,” “[o]ne clear example where ‘vacatur is in order’ is ‘when mootness occurs through the unilateral action of the party who prevailed in the lower court.’” *Id.* (internal alterations omitted) (quoting *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 71-72 (1997)); *see id.* at 729-30 (collecting authorities). The SEC’s own mootness cases recognize this principle. *See, e.g., Gun Owners*, 157 F.4th at 841 (applying *Munsingwear* following withdrawal of challenged agency action).

The SEC’s contrary position (at 11)—that *Munsingwear* vacatur is appropriate only if the underlying petition is worthy of certiorari—makes little sense. As the petition and sixteen amici explain, this case is certworthy. And on its own terms, the argument contravenes the entire purpose of *Munsingwear*: to avoid assigning “any legal consequences”—including potential res judicata effects, not to mention precedential effects—to a

lower-court decision that has become unreviewable as moot due to the unilateral action of the prevailing party. 340 U.S. at 41. It is therefore unsurprising that this Court routinely vacates lower-court decisions under *Munsingwear* at the certiorari stage without mentioning the merits or the case's certworthiness. See, e.g., *Tennessee v. Kennedy*, No. 25-162, 2026 WL 135717 (U.S. Jan. 20, 2026); *Speech First, Inc. v. Sands*, 144 S. Ct. 675 (2024); *Biden v. Feds for Med. Freedom*, 144 S. Ct. 480 (2023).

Perhaps for that reason, the SEC's principal authority (at 11) is not a judicial decision but instead a previous BIO simply stating the government's own preferred view of when *Munsingwear* vacatur is appropriate. But, tellingly, none of the examples given in that brief involve situations in which the government itself tried to moot a case after the filing of a petition for certiorari. And this Court has repeatedly vacated under *Munsingwear* in response to this argument. See *Beers v. Barr*, 140 S. Ct. 2758 (2020); *LG Elecs., Inc. v. InterDigital Commc'ns, LLC*, 572 U.S. 1056 (2014). This Court should reject the SEC's self-serving claim that it has the power to unilaterally moot a case and thereby prevent both plenary review and *Munsingwear* vacatur.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

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