No. _____

In the
Supreme Court of the United States

THOMAS J. POWELL; BARRY D. ROMERIL; CHRISTOPHER A. NOVINGER; RAYMOND J. LUCIA; MARGUERITE CASSANDRA TOROIAN; GARY PRYOR; JOSEPH COLLINS; REX SCATES; MICHELLE SILVERSTEIN; REASON FOUNDATION; THE CAPE GAZETTE; AND THE NEW CIVIL LIBERTIES ALLIANCE,

Applicants,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

APPLICATION DIRECTED TO THE HONORABLE ELENA KAGAN FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARGARET A. LITTLE
NEW CIVIL LIBERTIES ALLIANCE
4250 North Fairfax Drive
Suite 300
Arlington, VA 22203
(202) 869-5210

GREGORY G. GARRE
Counsel of Record
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Applicants

January 2, 2026

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Applicants Reason Foundation, Cape Gazette, and the New Civil Liberties Alliance, by and through their undersigned counsel, hereby certify that they have no parent corporation, and no publicly held corporation owns 10% or more of their stock.

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TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Pursuant to 28 U.S.C. § 2101(c) and Rules 13.5, 22, and 30.2 of the Rules of this Court, Applicants Thomas Joseph Powell, Barry D. Romeril, Christopher A. Novinger, Raymond J. Lucia, Marguerite Cassandra Toroian, Gary Pryor, Joseph Collins, Rex Scates, Michelle Silverstein, Reason Foundation, The Cape Gazette, and the New Civil Liberties Alliance (NCLA) respectfully request a 60-day extension of time, to and including March 16, 2026, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. The Ninth Circuit entered its judgment on August 6, 2025, *see* App. A (Op.), and denied rehearing on October 17, 2025. Without an extension, the time for filing a petition for a writ of certiorari will expire on January 15, 2026. This Court has jurisdiction to review the judgment of the Ninth Circuit in this case under 28 U.S.C. § 1254(1).

BACKGROUND

This case concerns the constitutionality of the Securities and Exchange Commission's Gag Rule, 17 C.F.R. § 202.5(e). That rule requires defendants who settle an agency enforcement action—the "vast majority" of all SEC defendants—to agree not to publicly contest any of the SEC's charges against them for all time. Op. 7. The case thus presents important questions about the government's ability to extract waivers of core First Amendment rights through coercive settlements and the First Amendment's protections against prior restraints.

1. The SEC possesses vast regulatory powers over individuals and entities in the securities industry that can have a life-altering and, in some cases, reputation or even life-destroying impact on individuals. Those powers include the power to conduct intrusive investigations, to initiate enforcement actions both through in-house proceedings and in federal court, and to levy massive sanctions against its targets, including cease-and-desist orders, industry bar orders, disgorgement, and even monetary penalties. The SEC's actions can drag on for several years and take such an enormous personal, financial, and reputational toll on its targets that most—despite vigorously asserting their innocence—are forced to capitulate through settlement. *See Cochran v. SEC*, 20 F.4th 194, 230 (5th Cir. 2021) (en banc) (Oldham, J., concurring), *aff'd sub nom. Axon Enter., Inc. v. FTC*, 598 U.S. 175 (2023). The SEC is well aware of this dynamic; "[t]hroughout the *entire* administrative process," the "SEC places substantial pressure on targets" to settle. *Id.* Indeed, because "few can outlast or outspend the federal government," the SEC is able to engage in "'regulatory extortion,'" using the ruinous costs of litigation "as leverage to extract settlement terms [it] could not lawfully obtain any other way." *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 216 & n.4 (2023) (Gorsuch, J., concurring in the judgment) (citation omitted).

The SEC's Gag Rule is the epitome of that coercive practice. First published in 1972, the SEC's Gag Rule codifies the SEC's inflexible "policy"—in both civil and administrative enforcement actions—"not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations

in the complaint." 17 C.F.R. § 202.5(e); *see* 37 Fed. Reg. 25,224, 25,224 (Nov. 29, 1972). The Gag Rule thus effectuates a classic prior restraint on speech: As a condition of settlement, defendants are prohibited—for all time—from ever publicly criticizing (or permitting others to publicly criticize) the SEC in a way that creates the impression that the SEC's charges lack merit in any aspect. Op. 7-8, 28. If a settling defendant breaches that prohibition, the SEC can reopen the case, *id.* at 8—exposing the defendant to potentially devastating penalties, not to mention the additional burdens of litigating against the machinery of the federal government. As articulated by the agency itself, the Gag Rule's only justification was to "avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur." 17 C.F.R. § 202.5(e).

2. Consistent with the Gag Rule's mandate, the SEC has silenced thousands of settling individuals and businesses in perpetuity since the Rule was adopted more than 50 years ago. Among those silenced are individual Applicants who found themselves ensnared in the SEC's administrative machinery and ultimately decided to settle. And as a condition of settlement, each was forced to agree not to publicly call into question the truth of the original complaint against them. Accordingly, these Applicants, who seek to publicly and truthfully criticize the SEC's enforcement actions against them, have refrained from doing so out of fear of SEC reprisal, including additional administrative and contempt proceedings. Additionally, as a direct result of the SEC's Gag Rule, Applicants Reason Foundation

and *Cape Gazette*—two media organizations—have been prevented from receiving and publishing speech from SEC defendants who have been gagged.

Numerous challenges have been brought to the constitutionality of the SEC's Gag Rule, but they have been stymied by various procedural hurdles in case after case, insulating the rule from a true accounting. Courts have rejected, for lack of standing, challenges to the Gag Rule by media organizations seeking to publish speech by SEC defendants. *See Cato Inst. v. SEC*, 4 F.4th 91, 95 (D.C. Cir. 2021). And while Romeril and Novinger tried to challenge the no-deny conditions in their individual settlements, courts rejected those efforts under the Federal Rules of Civil Procedure. *See SEC v. Novinger*, 40 F.4th 297, 307 (5th Cir. 2022); *SEC v. Romeril*, 15 F.4th 166, 172 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 2836 (2022). As two Fifth Circuit judges specifically observed in deflecting a challenge to the rule in another procedural posture, the proper (and at this point only practical) mechanism for challenging the Gag Rule on First Amendment grounds would be to petition the SEC to amend the Rule and to then seek judicial review of any adverse SEC decision. *See Novinger*, 40 F.4th at 308 (Jones, J., joined by Duncan, J., concurring).

3. In October 2018, NCLA did just that. Op. 8. It petitioned the SEC to amend the Gag Rule so that defendants could settle enforcement actions while reserving the right to publicly question the SEC's allegations. *Id.* In its petition, NCLA emphasized the grave First Amendment problems involved with any government-mandated restraint on speech, especially the prototypical prior restraint

challenged here, but the SEC did not respond to the petition. *Id.* NCLA, joined by Romeril, Lucia, and Novinger, filed a renewed petition in December 2023. *See id.*

In January 2024, the SEC denied the rulemaking petition, over the forceful and eloquent dissent of Commissioner Peirce. *Id.* at 8-9; *see* CA9 Excerpts of Record (ER) 55-68. The SEC principally argued that the Gag Rule was necessary for the SEC to avoid unanswered criticism of its enforcement actions, which would "undermine confidence in the Commission's enforcement program." CA9 ER 58-59. And because "a defendant can waive constitutional rights as part of a civil settlement," the SEC reasoned, the Gag Rule implicates no First Amendment issues. *Id.* at 59-60.

Commissioner Peirce dissented from the denial of the petition. *Id.* at 61-68. In her view, the Gag Rule is "a plain prior restraint on speech" and a "content-specific" regulation that "necessarily raises First Amendment concerns." *Id.* at 63. It represents the SEC's "squelch[ing] contrary voices" and "prevent[ing] the American public from ever hearing criticisms" of the agency. *Id.* at 62, 64. She noted that "troublingly nebulous" settlement language typically leaves defendants unsure what they may permissibly say. *Id.* at 65. And she emphasized that the "time, expense, and difficulty" of defending against the SEC "makes settling the only economically viable option" for many SEC targets, and that the Gag Rule thus is deployed by harnessing "superior bargaining power to extract an agreement." *Id.* at 63-64.

4. Applicants then petitioned for judicial review of the SEC's denial, and the Ninth Circuit denied the petition. As relevant here, the court held that, despite the Gag Rule's underlying constitutional implications, settlement agreements are

"voluntary agreement[s]" in which "First Amendment rights can be waived." Op. 14-15. Following this Court's splintered decision in *Town of Newton v. Rumery*, 480 U.S. 386 (1987), the Ninth Circuit held that the only question is whether the government's "interest in [a waiver's] enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Id.* at 17 (quoting *Rumery*, 480 U.S. at 392). Under that approach, the court determined that the SEC's interest in "proving the allegations supporting its enforcement actions," while not "so compelling," was also not "wholly illegitimate." *Id.* at 24-26. And because the waiver featured a "close nexus" between that interest and the Gag Rule, the court "narrowly reject[ed]" the petition. *Id.* at 24, 27 (citation omitted).

The Ninth Circuit denied rehearing on October 17, 2025. CA9 ECF No. 93.

REASONS FOR GRANTING THE APPLICATION

The SEC's Gag Rule reflects a quintessential violation of the First Amendment: It mandates a content-based prior restraint on speech, forbidding settling defendants from levying certain publicly criticisms of the SEC's enforcement program. The court below did not seriously reason otherwise. Instead, it excused this First Amendment violation because the SEC demands it as part of an ostensibly "voluntary" settlement. That holding raises exceptionally important questions concerning an agency's ability to coerce the waiver of First Amendment rights and individuals' rights to speak, the conditions the government can place upon cessation of its prosecutions, and the public's right to hear criticism of government enforcement. And given the history of the SEC's Gag Rule and the dynamics of settlement negotiation, this case presents the only clean vehicle for the Court to consider the constitutionality of that Rule.

Applicants respectfully request a 60-day extension of time in which to explore and prepare a certiorari petition that addresses these important issues of federal law.

1. This case cleanly presents fundamental First Amendment issues of national importance impacting the lives of numerous individuals concerning a longstanding rule that the SEC has repeatedly refused to reconsider. As this Court recently reiterated, the core of the First Amendment's Free Speech Clause protects against government officials "us[ing] the power of the State to punish or suppress disfavored expression." *National Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 188 (2024). Indeed, the First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Efforts by the government to censor criticism of the government—particularly through "prior restraints" that stop such criticism before it happens—constitute the "most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558-59 (1976).

The Gag Rule is fundamentally incompatible with the First Amendment. Under the Gag Rule, the SEC requires settling defendants to refrain, in perpetuity, from publicly denying the government's allegations—speech that is at its core about governmental conduct—on pain of having consent judgments vacated and enforcement litigation re-opened. As Judges Jones and Duncan have observed, it is "hard to imagine" a "more effective prior restraint" than the "SEC's policy," which

essentially "says 'Hold your tongue, and don't say anything truthful—ever'—or get bankrupted by having to continue litigating with the SEC." *SEC v. Novinger*, 40 F.4th 297, 308 (5th Cir. 2022) (Jones, J., joined by Duncan, J., concurring); *see also, e.g.*, *In re Murphy-Brown, LLC*, 907 F.3d 788, 796-97 (4th Cir. 2018) (Wilkinson, J.) ("Even among First Amendment claims, gag orders warrant a most rigorous form of review because they rest at the intersection of two disfavored forms of expressive limitations: prior restraints and content-based restrictions."). To say the least, there are many reasons an individual may feel compelled to settle with the government that have nothing to do with the validity of the charges against them. The SEC's ban on publicly denying any allegations in connection with a settlement thus imposes a grave cost on individuals who seek to recover their names and reputations—or perhaps even who seek to disclose agency misconduct or overreach in the context of an enforcement action.

The Ninth Circuit recognized that the Gag Rule's effects can raise "legitimate First Amendment concerns." Op. 13. But the court minimized those concerns in this context in part because they arise in the context of "voluntary" settlement agreements. *Id.* at 14. That reasoning flouts the unconstitutional conditions doctrine, which "vindicates the Constitution's enumerated rights by preventing the government" from wielding its discretionary authority to manipulate incentives to "coerc[e] people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). So "even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for

any number of reasons," 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). But that is exactly what the Gag Rule accomplishes: In the coercive regulatory environment of SEC enforcement proceedings, the SEC conditions the availability of a particular benefit—a settlement—on the target's "voluntary" agreement to refrain from engaging in certain government-critical speech. Moreover, unique concerns are presented when the government seeks to silence individuals through "agreements" that prevent them from ever challenging the government's conduct or actions. Such systemic suppression of speech across the full gamut of the 98% of SEC cases that settle dangerously insulates the SEC's conduct from public scrutiny in perpetuity.

Faced with that concern, the Ninth Circuit balanced it away by applying the balancing test from this Court's splintered decision in *Town of Newton v. Rumery*, 480 U.S. 386 (1987). Op. 17-22. That unjustified extension of *Rumery* demands this Court's review. In *Rumery*, this Court held that agreements by criminal defendants to release potential Section 1983 civil-rights claims in exchange for reduced or dropped charges are not "*per se*" invalid as a matter of "public policy." 480 U.S. at 392. While the Court noted that "in *some* cases these agreements may infringe important interests of the criminal defendant and of society as a whole," *Rumery* emphasized the "wide variety of factual situations" giving rise to claims waivers and accordingly rejected "a *per se* rule of invalidity." *Id.* (emphasis added). A blanket rule, *Rumery* held, would "overstate[] the perceived problems" of waivers while

"fail[ing] to credit the significant public interests that such agreements can further." *Id.* The Court therefore adopted a case-specific balancing test to be applied by courts in weighing whether "the interest in [a waiver's] enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Id.*

But *Rumery*'s logic has little application in the context of prior restraints, which are "'presumptively unconstitutional'" because they constitute "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n*, 427 U.S. at 558-59 (citation omitted). Unlike in *Rumery*, which contemplated a defendant's assertion of prosecutorial misconduct even though a "great majority of prosecutors will be faithful to their duty," 480 U.S. at 397, there is no suggestion here that "significant public interests" weigh in favor of prior restraints. It makes little sense to transplant a test from a context where most defendants experience no legal infirmity at all to one where the danger is programmatically unconstitutional. Blessing an administrative requirement that settling defendants—the vast majority of *all* SEC defendants—consent to a prior restraint ignores the unique First Amendment interests at stake and would render the prior restraint and unconstitutional-conditions doctrines a nullity. The panel's reliance on *Rumery* to sustain a categorical, agency-mandated *rule* imposing a prior restraint on speech, entered as a judicial decree and applied indefinitely, greatly expands *Rumery* and squarely tees up these questions: Whether *Rumery*'s case-specific waiver analysis applies to content- and viewpoint-based restraints on speech about governmental conduct, whether it can be extended to the agency

context, and whether wholesale, perpetual gags demanded as a condition of settlement are compatible with the First Amendment. This dubious inversion and extension of *Rumery* is inconsistent with this Court's and other circuits' precedents on unconstitutional conditions and government-imposed suppression of speech.

This Court has repeatedly granted review to consider the constitutionality of laws and rules that impact individuals' First Amendment rights. *See, e.g.*, *Free Speech Coal., Inc. v. Paxton*, 606 U.S. 461 (2025); *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024); *Vidal v. Elster*, 602 U.S. 286 (2024); *Iancu v. Brunetti*, 588 U.S. 388 (2019). And members of this Court and other judges have expressed concerns about the nature of the SEC's own enforcement process and demands. *See supra* at 2. Review in this case is especially important given the extreme and anomalous nature of the SEC's Gag Rule and its impact on individuals who are left with no choice but to surrender their core First Amendment protections to settle even charges that they vehemently believe are inaccurate in all or some key respects. There is a long tradition of Americans disputing charges brought against them by their government. Indeed, speaking out to challenge such charges—or to identify government overreach—is among the most important traditions the First Amendment protects. This Court has recognized that the government is "constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 784-85 (1978). "Such power in government to channel the expression of views is unacceptable under the First Amendment … [e]specially where" the government's

attempted "suppression of speech suggests an attempt to give one side of a debatable question an advantage in expressing its views to the people." *Id.* at 785. Here, where it is the government suppressing criticism of itself, these principles hold with special force.

Even convicted felons retain First Amendment protection to speak about their prosecutions. *See Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991). As this Court warned, "in the context of financial regulation, it bears repeating … that the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace. The First Amendment presumptively places this sort of discrimination beyond the power of government." *Id.* at 116 (citations omitted).

Finally, this case is the best—if not the only—vehicle for securing review in this Court of the Gag Rule's constitutionality. In ordinary SEC enforcement, the no-deny condition is treated as a non-negotiable term of settlement, and once the condition is incorporated into a settlement and accompanying judgment, courts have refused to permit defendants to raise First Amendment challenges after the fact. *See, e.g.*, *Novinger*, 40 F.4th at 307; *SEC v. Romeril*, 15 F.4th 166, 172 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 2836 (2022). In other words, in individual cases the Gag Rule itself operates to insulate the rule from judicial review. This case, by contrast, arises from a petition that directly challenges the SEC's refusal to modify or withdraw the Gag Rule itself and thus cleanly presents the First Amendment issues for review. And

given that denial—which followed a five-year delay, *see supra* at 4-5—this is, as a practical matter, the only case that will present the issue in this posture. It is thus no surprises that judges in other cases have pointed to this case as the proper vehicle for challenging the constitutionality of the Gag Rule. *See Novinger*, 40 F.4th at 308 (Jones, J., joined by Duncan, J., concurring) (flagging NCLA's then-pending "petition to review and revoke this SEC policy" as the proper vehicle for "fully consider[ing] this policy").

2. Applicants respectfully request a 60-day extension within which to prepare a petition for writ of certiorari in this case. Undersigned counsel of record did not serve as Applicants' counsel in the Ninth Circuit and was only recently retained to assist in the evaluation and preparation of the certiorari petition. Counsel will be heavily engaged with the press of other matters over the coming months, including an oral argument before the Second Circuit on January 26, 2026, in *In re SVB Financial Group*, No. 25-00567; an oral argument before the Fifth Circuit on February 4, 2026, in *IFG Port v. Lake Charles Harbor*, No. 24-30552; a merits response brief due in the Seventh Circuit on February 9, 2026, in *AbbVie Inc. v. Commissioner of Internal Revenue*, No. 25-2622; a merits reply brief due in this Court on February 19, 2026, in *Keathley v. Buddy Ayers Construction, Inc.*, No. 25-6; an oral argument before the D.C. Circuit on February 26, 2026, in *Friends of the Earth U.S. v. Export-Import Bank of the United States*, No. 25-5387; and an oral argument before this Court expected to be scheduled in February or March in *Keathley v. Buddy Ayers*

Construction, Inc., No. 25-6. In addition, multiple members of the case team have had pre-planned travel over the holidays.

A 60-day extension of time is warranted to permit counsel to research and refine the issues for this Court's review, thereby preparing a petition that addresses the important questions raised by this case in the most direct, efficient, and narrow manner. The additional time also will assist potential *amici curiae* in considering this case. Numerous individuals and organizations have expressed concerns about the SEC's Gag Rule. At the same time, the requested extension will not meaningfully change the timeline for oral argument or decision if certiorari is granted. If certiorari is granted, the case would not be considered on the merits until the October 2026 Term under either the existing or extended schedules.

CONCLUSION

For the foregoing reasons, Applicants respectfully request a 60-day extension of time, to and including March 16, 2026, within which to file a petition for a writ of certiorari in this case.

Respectfully submitted,

MARGARET A. LITTLE
NEW CIVIL LIBERTIES ALLIANCE
4250 North Fairfax Drive
Suite 300
Arlington, VA 22203
(202) 869-5210

GREGORY G. GARRE
Counsel of Record
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Applicants

January 2, 2026

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS JOSEPH POWELL; BARRY D. ROMERIL; CHRISTOPHER A. NOVINGER; RAYMOND J. LUCIA; MARGUERITE CASSANDRA TOROIAN; GARY PRYOR; JOSEPH COLLINS; REX SCATES; MICHELLE SILVERSTEIN; REASON FOUNDATION; CAPE GAZETTE; NEW CIVIL LIBERTIES ALLIANCE, *Petitioners*, v. UNITED STATES SECURITIES AND EXCHANGE COMMISSION, *Respondent*.	No. 24-1899 OPINION

On Petition for Review of an Order of the
Securities and Exchange Commission

Argued and Submitted February 13, 2025
Honolulu, Hawaii

Filed August 6, 2025

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

Opinion by Judge Bress

SUMMARY*

Securities and Exchange Commission

The panel denied a petition for review of the Securities and Exchange Commission's denial of a request to amend SEC Rule 202.5(e), which reflects SEC policy that the agency will not settle a civil enforcement action unless the defendant agrees not to publicly deny the allegations against him.

The panel rejected petitioners' facial-type challenge to Rule 202.5(e) under the First Amendment. The panel clarified that petitioners' challenge before the court is that it violates the First Amendment for civil enforcement defendants to agree on a voluntary basis not to deny the allegations against them in return for the SEC agreeing to settle its securities law charges, with the limited remedy that, if the defendant does later publicly deny the allegations, the SEC may return to court.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Applying the Supreme Court's framework in *Town of Newton v. Rumery*, 480 U.S. 386 (1987), for evaluating a voluntary relinquishment of First Amendment rights, the panel concluded that Rule 202.5(e) is not facially invalid under the First Amendment, even though legitimate First Amendment concerns could well arise in a more particularized, as-applied type of challenge. Accordingly, the panel upheld Rule 202.5(e) against the instant facial-type First Amendment challenge, without prejudice to future challenges on more particularized records.

Finally, the panel rejected petitioners' contention that the SEC's adoption of Rule 202.5(e) violated the Administrative Procedure Act. The panel held that the SEC had statutory authority to enact Rule 202.5(e), notice-and-comment rulemaking was not required, and the SEC provided a rational explanation for its determination not to amend Rule 202.5(e).

COUNSEL

Margaret A. Little (argued), Kara M. Rollins, Markham S. Chenoweth, and Kaitlyn D. Schiraldi, New Civil Liberties Alliance, Arlington, Virginia, for Petitioners.

Archith Ramkumar (argued), Appellate Counsel; Jeffrey A. Berger, Assistant General Counsel; Michael A. Conley, Solicitor; Megan Barbero, General Counsel; Securities & Exchange Commission, Washington, D.C.; for Respondent.

Michael D. Pepson and Cynthia F. Crawford, Americans for Prosperity Foundation, Arlington, Virginia; Joshua A. House, Foundation for Individual Rights and Expression,

Washington, D.C.; for Amici Curiae Americans for Prosperity Foundation, the Foundation for Individual Rights and Expression, and Freedom of the Press Foundation.

Nathan J. Ristuccia, Institute for Free Speech, Washington, D.C., for Amicus Curiae Institute for Free Speech.

Lawrence S. Ebner and Hannah S. Marcley, Atlantic Legal Foundation, Washington, D.C., for Amicus Curiae Atlantic Legal Foundation.

Adam E. Schulman, Hamilton Lincoln Law Institute, Washington, D.C.; Ilya Shapiro and Tim Rosenberger, Manhattan Institute, New York, New York; for Amici Curiae Hamilton Lincoln Law Institute and Manhattan Institute.

Thomas A. Berry, Brent Skorup, and Christopher D. Barnewolt, Cato Institute, Washington, D.C., for Amicus Curiae the Cato Institute.

Donald M. Falk and Eugene Volokh, Schaerr Jaffe LLP, San Francisco, California; Gene C. Schaerr, Cristina M. Squiers, and Aaron Gordon, Schaerr Jaffe LLP, Washington, D.C.; Tyler S. Badgley and Mariel A. Brookins, United States Chamber Litigation Center, Washington, D.C.; for Amicus Curiae The Chamber of Commerce of the United States of America.

Nicolas Morgan, Investor Choice Advocates Network, Los Angeles, California; Devin Watkins, David McFadden, and Dan Greenberg, Competitive Enterprise Institute, Washington, D.C.; for Amicus Curiae Competitive Enterprise Institute.

Reilly Stephens, Liberty Justice Center, Austin, Texas, for Amicus Curiae Liberty Justice Center.

Joel S. Nolette and Michael J. Showalter, Wiley Rein LLP, Washington, D.C.; David C. Tryon and Alex M. Certo, The Buckeye Institute, Columbus, Ohio; for Amicus Curiae The Buckeye Institute.

Angela L. Brown and Chris Davis, Gray Reed & McGraw LLP, Dallas, Texas, for Amici Curiae Texas Blockchain Council and AI Innovation Association.

Thomas Brejcha and B. Tyler Brooks, Thomas More Society, Chicago, Illinois, for Amicus Curiae Thomas More Society.

OPINION

BRESS, Circuit Judge:

This is a petition for review of the Security and Exchange Commission's denial of a request to amend SEC Rule 202.5(e). *See* 17 C.F.R. § 202.5(e). That Rule reflects SEC policy, in place since 1972, that the agency will not settle a civil enforcement action with a defendant unless the defendant agrees not to publicly deny the allegations against him. If a defendant violates this provision of the settlement agreement, the SEC's remedy is to go back to the court that entered the consent judgment and ask for the case to be reopened. The petitioners claim Rule 202.5(e) violates the First Amendment.

We reject petitioners' challenge, although we do so on necessarily narrow grounds. This petition for review amounts to a facial-type challenge to Rule 202.5(e), and given longstanding precedent permitting the voluntary waiver of constitutional rights, including First Amendment

rights, Rule 202.5(e) on its face is not per se unconstitutional. Petitioners do validly argue that in application, Rule 202.5(e) could impermissibly intrude on First Amendment rights, especially if it prevents civil enforcement defendants from criticizing the SEC. We do not minimize petitioners' concerns. But these concerns are properly addressed in as-applied challenges with defined records, whether during court approval of settlements, in a pre-enforcement posture, or in response to the SEC seeking to reopen a closed enforcement proceeding for an alleged breach of a settlement agreement.

I

The SEC investigates violations of the securities laws and may bring enforcement actions in federal court. 15 U.S.C. § 78u(d)(1). Sometimes, the SEC insists that defendants admit the allegations against them as a condition of settlement. *See, e.g.*, Press Release, SEC, JPMorgan Admits to Widespread Recordkeeping Failures and Agrees to Pay $125 Million Penalty to Resolve SEC Charges (Dec. 17, 2021), https://www.sec.gov/newsroom/press-releases/2021-262; Grubir S. Grewal, Director, SEC Div. of Enf't, Remarks at SEC Speaks 2021 (Oct. 13, 2021), https://tinyurl.run/KderJu; Dina ElBoghdady, *SEC to Require Admissions of Guilt in Some Settlements*, WASH. POST, (June 18, 2013), https://tinyurl.run/E1As8b. In 1972, the SEC announced that it would not settle civil enforcement actions unless defendants, at minimum, agree not to publicly deny the Commission's allegations. Consent Decrees in Judicial or Administrative Proceedings, 37 Fed. Reg. 25,224

(Nov. 29, 1972). Codified at 17 C.F.R. § 202.5(e), the SEC's settlement policy is as follows:

> The Commission has adopted the policy that in any civil lawsuit brought by it or in any administrative proceeding of an accusatory nature pending before it, it is important to avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur. Accordingly, it hereby announces its policy not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings. In this regard, the Commission believes that a refusal to admit the allegations is equivalent to a denial, unless the defendant or respondent states that he neither admits nor denies the allegations.

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

Neither the SEC nor Rule 202.5(e) mandate settlement. But in practice, the vast majority of civil enforcement defendants choose to settle with the SEC. If a defendant wishes to settle, he must acknowledge that his settlement is voluntary and agree to abide by Rule 202.5(e). Once a settlement is negotiated, the defendant signs a consent provision which typically says, among other things, that "Defendant understands and agrees to comply with the terms

of 17 C.F.R. § 202.5(e)." Where the SEC has filed an action in federal court, the settlement is incorporated into a final consent judgment, entered by the court. Compliance with Rule 202.5(e) does not prevent defendants from denying the allegations in other legal proceedings, such as separate civil litigation.

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

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

The SEC did not respond to the petition to amend for over five years. On December 20, 2023, the NCLA filed a renewed petition, adding various individuals as petitioners. On January 30, 2024, the SEC denied the petition to amend, providing a six-page letter ruling explaining why it was maintaining its policy. According to the SEC, Rule 202.5(e) "preserves its ability to seek findings of fact and conclusions of law if a defendant, after agreeing to a settlement, chooses to publicly deny the allegations." In the SEC's view, and

because it "does not try its cases through press releases," the agency is "not required to choose a path whereby it waives its right to try a case while the defendant is free to publicly deny the allegations without any real ability for the Commission to respond in court." The SEC further rejected petitioners' First Amendment objections, explaining that "[t]here is a large body of precedent confirming that a defendant can waive constitutional rights as part of a civil settlement, just as a criminal defendant can waive constitutional rights as part of a plea bargain."

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

After the SEC denied the petition to amend, twelve petitioners challenged the SEC's denial by filing a petition for review in this court. Nine of the petitioners are individuals, eight of whom entered settlements containing the Rule 202.5(e) obligation. The remaining three petitioners are organizations and entities. Petitioners challenge the Rule on its face, claiming that it violates the First Amendment. They also contend that the Rule was adopted in violation of the Administrative Procedure Act (APA).

We have jurisdiction under 15 U.S.C. § 78y(a)(1), which permits "[a] person aggrieved by a final order of the

Commission . . . [to] obtain review of the order in the United States Court of Appeals for the circuit in which he resides" or the D.C. Circuit. Although the SEC claims that many of the petitioners lack standing or fail to meet the jurisdictional prerequisites of § 78y(a)(1), the agency agrees that one petitioner, Raymond Lucia, can maintain this petition. Our independent review confirms the same.

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

II

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

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

Coming at it from the other direction are those who believe that SEC Rule 202.5(e) is too heavy-handed. Motivated by concerns about administrative agency power generally, and the SEC's enforcement powers more specifically, these critics have argued that by preventing civil enforcement defendants from publicly denying the allegations against them as a condition of settlement, Rule 202.5(e) contradicts First Amendment values. *See, e.g.*, Rodney A. Smolla, *Why the SEC Gag Rule Silencing Those Who Settle SEC Investigations Violates the First Amendment*, 29 WIDENER L. REV. 1 (2023); Aaron Gordon, *Imposing Silence Through Settlement: A First-Amendment Case Study of the New York Attorney General*, 84 ALB. L.

REV. 335 (2021); James Valvo, Notice & Comment, *The CFTC and SEC Are Demanding Unconstitutional Speech Bans in Their Settlement Agreements*, YALE J. ON REG. (Dec. 4, 2017); *see also SEC v. Novinger*, 40 F.4th 297, 308 (5th Cir. 2022) (Jones, J., concurring); *SEC v. Moraes*, No. 22-cv-8343, 2022 WL 15774011, at *3–5 (S.D.N.Y. Oct. 28, 2022). The petitioners in this case, supported by various amici, take up this First Amendment mantle.

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

Deciding whether an agency action violates the First Amendment is, of course, very much within our authority. But the challenge before us is a petition for review of the SEC's denial of a request to amend Rule 202.5(e). The petition does not seek relief as to any one civil enforcement defendant based on his or her facts and circumstances, the language of any particular consent judgment, or the threatened actions of the SEC as to that defendant. The petition for review instead maintains that Rule 202.5(e) is per se unconstitutional, that is, unconstitutional across the board. In this sense, the petition is properly analyzed as a facial challenge. For facial challenges in the First Amendment context, we ask "whether 'a substantial number of [the Rule's] applications are unconstitutional, judged in relation to the [Rule's] plainly legitimate sweep.'" *Moody*

v. NetChoice, LLC, 603 U.S. 707, 723 (2024) (quoting *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 615 (2021)); *see also, e.g.*, *NetChoice, LLC v. Bonta*, 113 F.4th 1101, 1115 (9th Cir. 2024).

Petitioners rightly point out that we should be concerned about any effort *by* the government to limit criticism *of* the government, including criticism offered by those whom the SEC claims violated the law. Those that the SEC has charged with securities law violations may have a particularly valuable perspective on government enforcement efforts, or at least one that is entitled to be considered in the marketplace of ideas. If the SEC utilized Rule 202.5(e) to prevent criticism of the agency, its officers, or its enforcement programs, the Rule would likely raise substantial First Amendment concerns in application. But what we have before us is a more discrete and stylized challenge, namely, that it assertedly violates the First Amendment for civil enforcement defendants to agree on a voluntary basis not to deny the allegations against them in return for the SEC agreeing to settle its securities law charges, with the limited remedy that, if the defendant does later publicly deny the allegations, the SEC may return to court with no guarantee that a court will reopen the case.

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

III

A

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

In proper circumstances, rights, including constitutional rights, can be waived. There is a "background presumption that legal rights generally . . . are subject to waiver by voluntary agreement of the parties." *United States v. Mezzanatto*, 513 U.S. 196, 203 (1995). Indeed, "'in the context of a broad array of constitutional and statutory provisions,'" the Supreme Court has "articulated a general rule that presumes the availability of waiver." *New York v. Hill*, 528 U.S. 110, 114 (2000) (quoting *Mezzanatto*, 513 U.S. at 201). And when a party by agreement has "waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected." *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971).

We frequently see these waivers of rights in the criminal context, especially for guilty pleas. A defendant "may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution," including the right to a jury trial, the right to confront one's accusers, and so on. *Mezzanato*, 513 U.S. at 201 (citing *Ricketts v. Adamson*, 483 U.S. 1, 10 (1987); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938)). Criminal suspects may likewise

waive their right to remain silent and their right to counsel, so long as they have been properly informed of those rights. *See, e.g.*, *Davis v. United States*, 512 U.S. 452, 458, 460 (1994). As the Supreme Court has explained, "[a]lthough a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *Corbitt v. New Jersey*, 439 U.S. 212, 218 n.8 (1978) (quoting *McGautha v. California*, 402 U.S. 183, 213 (1971)).

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

Although we do not typically think of it in these terms, a guilty plea effects a certain inevitable infringement of First

Amendment rights, in that a criminal defendant agrees to say something about his guilt in return for a substantial benefit. Guilty pleas can also include provisions precluding the right to appeal—a form of First Amendment petitioning activity. *See, e.g.*, *United States v. Wells*, 29 F.4th 580, 585 (9th Cir. 2022). And pleading guilty to a crime can result in even further First Amendment infringements, considering that a guilty plea can lead to imprisonment, and in prison First Amendment rights are reduced. *See, e.g.*, *Shaw v. Murphy*, 532 U.S. 223, 229 (2001); *Turner v. Safley*, 482 U.S. 78, 89–91 (1987).

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

Our court and other circuits have held that a waiver of First Amendment rights should be analyzed under the Supreme Court's decision in *Town of Newton v. Rumery*, 480 U.S. 386 (1987). *See Leonard*, 12 F.3d at 890; *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1396–97 (9th Cir. 1991); *Lake James*, 149 F.3d at 280; *Erie Telecomms.*, 853 F.2d at 1099.

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

Accordingly, *Rumery* held that in this context, "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Id.* at 392; *see also id.* at 392 n.2 ("The threshold question is whether compelling a defendant to decide whether to waive constitutional rights impairs to an appreciable extent any of the policies behind the rights involved.") (brackets omitted) (quoting

McGautha, 402 U.S. at 213). In Rumery's case, he "voluntarily entered the agreement," and "enforcement of this agreement would not adversely affect the relevant public interests." *Id.* at 398. The Supreme Court thus recognized that the waiver of rights can be permissible, even when they force parties to make "difficult choices." *Id.* at 393.

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

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

Because *Rumery* nominally involved the waiver of a "statutory remedy," *Davies*, discussed below, had earlier left open the possibility that "a stricter rule" may be appropriate in cases involving waivers of constitutional

rights, 930 F.2d at 1397 (emphasis omitted). But *Leonard* applied the *Rumery* framework and expressly "decline[d] to adopt a stricter standard" in the constitutional context. 12 F.3d at 891 n.8. Under a *Rumery* analysis, we identified in *Leonard* two policies supporting enforcement of the waiver at issue: the "public interest in the stability and finality of collective bargaining agreements," and the "public interest in the finality of a compensation package between a city and a group of its employees." *Id.* at 891. But we also recognized the "public interest in the Union's unfettered ability to present its views to the state legislature." *Id.*

In upholding the waiver of presumed First Amendment rights, we found it significant that Article V of the collective bargaining agreement did "not ban *all* Union speech" and was "narrowly tailored to achieve the City's goal of budgetary predictability." *Id.* There was also a sufficient nexus between the "dispute resolved in the" collective bargaining agreement and the restriction placed on the Union's First Amendment rights. *Id.* at 891 n.10. And "[e]ven in those areas affected by Article V," the Union could "endorse benefit-increasing legislation if it fe[lt] that the benefits to be gained by passage of the bill [we]re more valuable than the salary foregone." *Id.* at 892. Accordingly, "[b]ecause Article V [wa]s a relatively narrow limitation on the Union's political speech," we could not "find that the public policy in favor of the Union's completely unfettered freedom of expression outweigh[ed] the public interests in the finality of collective bargaining and the predictability of municipal budgets." *Id.* The Union's constitutional arguments were relevant to our analysis, but they could not by themselves invalidate the waiver, because "[i]f constitutional arguments always outweighed ones grounded in other sources of law, then we could never enforce

individuals' waivers of their constitutional rights, an outcome that would fly in the face of a long line of Supreme Court precedent." *Id.* at 892 n.12.

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

Applying the *Rumery* framework, we held that "the public policy favoring enforcement" of the contractual provision preventing Davies from running for office was "outweighed by the public policy served by its non-enforcement." *Id.* at 1392. The interest in non-enforcement was "of the highest order," "involv[ing] the most important political right in a democratic system of government: the right of the people to elect representatives of their own choosing to public office." *Id.* at 1397. This interest was "of critical importance" because the contractual provision not only prevented Davies from running for office but also "result[ed] in a limitation on the fundamental right to vote of every resident" in the district. *Id.* at 1398. The school district's interests in enforcement of the provision, meanwhile, were insufficient. Besides the general interest in settling litigation that would be present in every case, the district claimed that Davies's presence on the board would

be detrimental to the district, a "startling" and "pernicious" rationale that reflected "a serious abuse of the power of incumbency." *Id.* at 1398–99.

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

Cases from other circuits have also relied on *Rumery* when analyzing waivers of First Amendment rights. In *SEC v. Romeril*, 15 F.4th 166 (2d Cir. 2021), *cert. denied sub nom. Romeril v. SEC*, 142 S. Ct. 2836 (2022), the Second Circuit cited *Rumery* in rejecting a challenge to the same SEC Rule at issue here. In *Romeril*, one of the same petitioners in this case sought relief from his consent decree under Federal Rule of Civil Procedure 60(b)(4). *Id.* at 170. The Second Circuit held that Romeril's consent judgment "d[id] not violate the First Amendment because Romeril waived his right to publicly deny the allegations of the complaint." *Id.* at 172. Observing that "parties can waive their First Amendment rights in consent decrees and other

settlements of judicial proceedings," the Second Circuit saw no issue with Romeril's agreement: "A defendant who is insistent on retaining the right to publicly deny the allegations against him has the right to litigate and defend against the charges. Romeril elected not to litigate." *Id.*

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

B

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

To the extent the petitioners claim that *Rumery* cannot apply because defendants do not voluntarily agree to Rule 202.5(e), we disagree, at least as to the facial-type challenge presented to us. There is no basis to conclude that as to all or a substantial number of SEC defendants, their agreement to abide by Rule 202.5(e) is not "voluntary, knowing[,] and intelligent." *Davies*, 930 F.2d at 1394. Though the plaintiffs

assert that the SEC possesses outsized power, frequently settles its cases, and makes defendants' agreement to Rule 202.5(e) non-negotiable, the record also reflects that defendants in SEC enforcement actions are often sophisticated players who are represented by counsel. And ultimately, the defendants in these cases chose to settle with the SEC rather than litigate further. *See Leonard*, 12 F.3d at 890 ("If the Union felt that First Amendment rights were burdened by Article V, it should not have bargained them away and signed the agreement.").

We do not foreclose an individual defendant in any particular case from later claiming that his agreement to the terms of Rule 202.5(e) was involuntary or unknowing. But we also cannot say that generalized concerns about the SEC's powers or enforcement tactics justify a blanket conclusion that these agreements are always or very often improperly coercive. *See Rumery*, 480 U.S. at 393 (concluding that the "possibility" that "some release-dismissal agreements may not be the product of an informed and voluntary decision" given the "risk, publicity, and expense of a criminal trial" did not "justify invalidating *all* such agreements").

Nor is Rule 202.5(e) facially invalid under the *Rumery* framework. Per Rule 202.5(e), a defendant who settles with the SEC may not publicly deny the SEC's allegations, and, if he does, the SEC may seek to reopen his case in order to proceed to litigation. The Rule in its purest form allows the SEC to return things to how they were before the settlement, potentially allowing the SEC to pursue its claims in court. It is as if the civil enforcement action remains subject to reopening at the defendant's election. Rule 202.5(e) essentially tells defendants that if they come to disagree with their original decision not to publicly deny the SEC's

allegations, they may later have to defend against them. In this sense, there is a "close nexus" between "the specific interest the government seeks to advance in the dispute underlying the litigation involved"—proving the allegations supporting its enforcement actions—and "the specific right waived"—the defendant agreeing not to deny those same allegations. *Davies*, 930 F.2d at 1399. This is a far cry from a case like *Davies*, in which the restriction on Davies's ability to run for public office "had little connection" to the underlying settlement agreement. *Id.*

Indeed, the situation in the case before us is not so dissimilar from *Rumery* itself. In *Rumery*, "the criminal charges that had been filed against Rumery and Rumery's civil suit against the prosecutor involved the same incident." *Id.* (italics omitted). "In fact," as we later described it, "they were opposite sides of the coin." *Id.* "The two actions reflected the opposing parties' differing versions of what actually occurred," and "a full compromise of the dispute between the parties necessitated resolving both matters." *Id.*

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

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

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

giving defendants the option to agree to a speech restriction as part of a broader settlement agreement.

However, to the extent the SEC's letter addressing NCLA's request to amend Rule 202.5(e) advances the broader rationale that it is necessary to silence defendants in order to promote public confidence in the SEC's work, this rationale would be improper. "'[W]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement' that it was adopted in part to 'protect the free discussion of governmental affairs.'" *Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 478 (2022) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). A defendant who denies the SEC's allegations may well undermine confidence in the SEC's enforcement programs. But undermining confidence in the government is an inevitable result of our robust First Amendment protections for speech critical of the government. The SEC's valid interest in Rule 202.5(e) is thus more mechanical: that if a defendant wants to deny the allegations, the SEC wants to be able to prove those allegations in a particular forum, i.e., in court, with the benefits and protections of the judicial process.

At the same time, the SEC's interests are not so compelling that they would justify a broad restriction on speech, either. In this case, and critical to our *Rumery* analysis, is the fact that, on its face, SEC Rule 202.5(e) "is a relatively narrow limitation" on defendants' speech. *Leonard*, 12 F.3d at 891. By its terms, Rule 202.5(e) creates consequences for defendants only when they publicly deny the SEC's allegations. The Rule on its face sweeps no further than speech denying the allegations. And, critically, the consequence for violating the Rule is not speech suppression or the automatic undoing of the settlement

agreement, but only that the SEC may seek to reopen the civil enforcement proceedings—which would in turn require a court to agree to that request, including over and above any First Amendment objections that the defendant could interpose at that time. *See Rumery*, 480 U.S. at 401 (O'Connor, J., concurring in part and concurring in the judgment) (noting that "judicial supervision" creates "an important check against abuse" of voluntary agreements to waive rights). "Even in those areas affected by" Rule 202.5(e), defendants can later decide to deny the allegations against them "if [they] feel[] that the benefits to be gained . . . are more valuable than the [settlement] foregone," or, that is, potentially foregone, because a court must still agree to the SEC's request to reopen. *Leonard*, 12 F.3d at 892.

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

We caution, however, that further restrictions on defendants' speech would require a different analysis under *Rumery*. The SEC assures us in its briefing that "[d]efendants who enter into settlements with the Commission remain free to speak about the Commission, enforcement actions, and a host of other topics so long as

they do not publicly deny the Commission's allegations." Defendants who have settled with the SEC should therefore understand that they have full latitude in this regard, including when it comes to criticizing the SEC. At the same time, we question how easy the SEC's line will be to police in practice, should the SEC ever seek to enforce Rule 202.5(e). Our decision today resolves only whether an agreement allowing the SEC to seek to reopen proceedings upon a defendant's bare denial of allegations violates the First Amendment. And on that understanding of Rule 202.5(e), the Rule is not unconstitutionally vague, either. *See FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (explaining that laws "must give fair notice of conduct that is forbidden or required"). But any broader rule would present different issues.

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

No specific settlement agreement is before us in this petition for review. But insofar as the SEC's settlement agreements impose greater obligations than the face of Rule 202.5(e) itself, today's decision—which concerns the denial of a petition to amend Rule 202.5(e) itself—does not resolve whether such a settlement agreement could survive a *Rumery* or vagueness challenge. Courts considering such settlements may take up these questions in appropriate cases,

whether when entering consent judgments or entertaining requests for relief from them. If defendants raise such challenges, courts should carefully consider them, mindful of the important values associated with permitting criticism of the government. Nor do we decide if it would be constitutional for the facial restrictions in Rule 202.5(e) to apply in perpetuity. It stands to reason that under a *Rumery* analysis, the government's interest may wane as time passes. Issues such as this will need to be addressed in individual cases.

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

IV

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

First, we reject petitioners' argument that the SEC lacked statutory authority to enact Rule 202.5(e). Petitioners claim that the SEC's initial claimed sources of authority—"section 19 of the Securities Act of 1933, section 23(a) of the Securities Exchange Act of 1934, section 20 of the [now-repealed] Public Utility Holding Company Act of 1935, section 38 of the Investment Company Act of 1940 and section 211 of the Investment Adviser's Act of 1940," 37 Fed. Reg. 25,224 (Nov. 29, 1972)—only empower the

agency to make internal housekeeping rules. According to petitioners, these statutes provide no authority for a rule that binds third parties that come before the agency.

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

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

Second, petitioners argue that Rule 202.5(e) fails because it was not adopted through notice-and-comment rulemaking. But under the APA, notice-and-comment

rulemaking is not required for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A). Rule 202.5(e) simply announces the Commission's settlement policy, and it is only enforced if a defendant signs a consent agreement that contains a no-deny provision. The Rule is best viewed as one of policy, procedure, or practice, which is exempt from the notice-and-comment requirements.

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

* * *

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