

No. 24- \_\_\_\_\_

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**In the United States Court of Appeals for the  
Ninth Circuit**

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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 NEW CIVIL LIBERTIES ALLIANCE,

*Petitioners,*

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

*Respondent.*

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On Petition for Review from the United  
States Securities and Exchange  
Commission No. 4-733

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**PETITION FOR REVIEW**

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## **PETITION FOR REVIEW**

Pursuant to 5 U.S.C. § 706, 15 U.S.C. §§ 77i, 78y, Federal Rule of Appellate Procedure 15(a), and Circuit Rule 15-1, 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 petitions the Court for review of a January 30, 2024 order of the Securities and Exchange Commission (“Order”). The Order is attached as Exhibit A to this petition. Commissioner Hester M. Peirce’s dissent is attached as Exhibit B.

The Commission’s Order denies a petition for rulemaking that the New Civil Liberties Alliance (“NCLA”) filed on October 30, 2018. The Petition asked the Commission to amend 17 C.F.R. § 202.5(e) which sets out the SEC’s no-admit-no-deny policy. The Petition sought to amend the rule to remove certain language—that the Commission implements through binding consent orders required as a condition of settlement—which operates as an impermissible prior restraint on enforcement targets, including Individual Petitioners’ speech and petition rights, as well as the Press Petitioners’ First Amendment

guarantees to Freedom of the Press.<sup>1</sup> The Petition also explained Section 202.5(e)'s additional constitutional and statutory violations.

NCLA's petition was ignored by the SEC for over five years. On December 20, 2023, NCLA submitted a renewed petition for rulemaking, on behalf of itself and Petitioners Romeril, Novinger, and Lucia, urging the SEC to rule on its languishing Petition.<sup>2</sup> On January 30, 2024, SEC denied the Petition and thus declined to amend Rule 202.5(e). *See* Ex. A. SEC Commissioner Hester M. Peirce issued a dissent from SEC's denial to amend Rule 202.5(e). *See* Ex. B.

Petitioners seek review of the Order because it is arbitrary and capricious, an abuse of discretion, and contrary to law in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.* By refusing to engage in rulemaking to eliminate the speech suppressing provisions of the Gag Rule, while simultaneously silencing or threatening to silence the Individual Petitioners, among thousands of others, and stopping

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<sup>1</sup> NCLA, *Rulemaking Petition 4-733* (Oct. 30, 2018), <https://www.sec.gov/files/rules/petitions/2018/petn4-733.pdf>.

<sup>2</sup> NCLA, *Renewed Petition for Rulemaking to Amend the Rule Restricting Speech that is set forth in 17 C.F.R. § 202.5(e) ("The Gag Rule")*, File No. 4-733 (Dec. 20, 2023), <https://www.sec.gov/files/rules/petitions/2024/4-733-letter-013024.pdf>.

Press Petitioners from accessing Individual Petitioners' (and other enforcement targets') speech, the Commission disregards the First Amendment and the APA.

Petitioners respectfully request that the Court hold unlawful, vacate, enjoin, and set aside the Order; direct the Commission to commence rulemaking; and provide such additional relief as may be appropriate.

DATED: March 28, 2024

Respectfully submitted,

/s/ Margaret A. Little

Margaret A. Little

Kara M. Rollins

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, I certify that no parent corporation and no publicly held corporation has a 10% or greater ownership interest in Reason Foundation or The Cape Gazette.

Dated: March 28, 2024

/s/ Margaret A. Little  
Margaret A. Little

## CERTIFICATE OF SERVICE

I certify that on March 28, 2024, the foregoing Petition for Review was electronically filed with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the Court's CM/ECF system. Pursuant to Fed. R. App. P. 15(c) and Circuit Rules 15-1 and 25-5(b).

I also certify that to the best of my knowledge, information, and belief, there are no parties "admitted to participate in the agency proceedings" for purposes of Fed. R. App. P. 15(c)(1) other than the Respondent.

I further certify that service was accomplished upon the following, in compliance with Fed. R. App. 25(c) via first-class mail:

United States Securities and Exchange Commission  
c/o Vanessa A. Countryman  
Secretary  
100 F Street, N.E.  
Washington, D.C. 20549  
(202) 551-5400

Dated: March 28, 2024

/s/ Margaret A. Little  
Margaret A. Little

# EXHIBIT A



UNITED STATES  
**SECURITIES AND EXCHANGE COMMISSION**  
100 F STREET, N.E.  
WASHINGTON, D.C. 20549

OFFICE OF  
THE SECRETARY

January 30, 2024

Margaret A. Little  
New Civil Liberties Alliance  
1125 19th Street NW, Suite 450  
Washington, D.C. 20036

Re: Rulemaking Petition File No. 4-733

Dear Ms. Little:

This letter responds to the petition to amend a rule filed by the New Civil Liberties Alliance (NCLA) pursuant to Commission Rule of Procedure 192(a), 17 C.F.R. 201.192(a). The NCLA asks the Commission to amend Rule 202.5(e), 17 C.F.R. 202.5(e), which addresses the terms on which the Commission will accept settlements of enforcement actions. More specifically, Rule 202.5(e) reflects the Commission's policy that it will not agree to a settlement imposing a sanction, including a consent judgment in federal court, if a defendant can then publicly deny the Commission's allegations. For the reasons explained below, the Commission denies the petition and declines to amend Rule 202.5(e).<sup>1</sup>

### **BACKGROUND**

Congress authorized the Commission to conduct investigations and determine whether violations of the securities laws have occurred, 15 U.S.C. 78u(a), and when it appears that a violation has occurred, the Commission may, in its discretion, bring an enforcement action in federal court, 15 U.S.C. 78u(d)(1). *See also* 17 C.F.R. 200.1. The Commission has exercised this enforcement authority for nearly 90 years. In order for Enforcement staff to file a complaint, the Commission must approve the action by a majority vote of the present Commissioners.

The Commission does not litigate every action to judgment. Rather, the Commission and a defendant may agree to settle. *SEC v. Citigroup Glob. Mkts.*, 752 F.3d 285, 295 (2d Cir. 2014) (“[The] factors that affect a litigant’s decision whether to compromise a case or litigate it to the end include the value of the particular proposed compromise, the perceived likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial, and the resources that would need to be expended in the attempt.” (cleaned up)). As part of the settlement process, the Commission and a defendant negotiate terms,

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<sup>1</sup> The Commission notes that the discussion in this letter exceeds the “brief statement of the grounds for denial” required by 5 U.S.C. 555(e).



including sanctions. The Commission’s decision to settle reflects considerations including its judgment that obtaining an immediate result by consent serves the public interest. Among other things, if the Commission settles, it cedes its opportunity to prove the allegations that result from its investigative efforts—the Commission yields its day in court.

The Commission generally settles district court actions by seeking entry of consent judgments, which have “attributes both of contracts and of judicial decrees.” *United States v. ITT Cont’l Baking Co.*, 420 U.S. 223, 236 n.10 (1975). They resemble contracts because they “are entered into by parties to a case after careful negotiation has produced agreement on their precise terms.” *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971); *United States v. City of Miami*, 664 F.2d 435, 440 (5th Cir. 1981) (“The entry of a consent decree necessarily implies that the litigants have assented to all of its significant provisions.”) (cleaned up). And they are decrees because they are memorialized in a judgment over which a court retains jurisdiction. *Armour*, 402 U.S. at 681-82. The Commission settles cases by this method rather than entering into out-of-court, non-public settlements followed by a voluntary dismissal.

Usually, when the Commission settles, a defendant signs a consent that describes the terms of the settlement to which the parties agreed and reflects the defendant’s agreement that the defendant is entering into the settlement voluntarily. And then the Commission (sometimes jointly with the defendant) asks the district court to enter a consent judgment that incorporates the terms of the consent and to retain continuing jurisdiction. Just as the Commission must approve the filing of a complaint, it must approve a settlement.

Over fifty years ago, the “Wells Committee” examined the Commission’s enforcement practices. Letter from William J. Casey, Chairman, Mar. 2, 1972, available at [https://www.sechistorical.org/collection/papers/1970/1972\\_0302\\_Casey.pdf](https://www.sechistorical.org/collection/papers/1970/1972_0302_Casey.pdf). The committee produced a report in September 1972, and shortly thereafter, the Commission issued a policy regarding settlements. 37 Fed. Reg. 25224 (Nov. 29, 1972), codified at 17 C.F.R. 202.5(e).<sup>2</sup> The policy is one of several “informal and other procedures” that concern enforcement activities. 17 C.F.R. 202.5. It reflects the Commission’s view that in any civil lawsuit or in any administrative proceeding of an accusatory nature, “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.” 17 C.F.R. 202.5(e).

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<sup>2</sup> Congress bestowed upon the Commission “the power to make such rules and regulations as may be necessary or appropriate to implement the provisions of this title for which [it is] responsible or for the execution of the functions vested in them by this title.” 15 U.S.C. 78w(a); *see also* 15 U.S.C. 77s, 78s, 80a-37, 80b-11. The Commission has exercised this authority to adopt formal rules of procedure, 17 C.F.R. 201.100 *et seq.*, as well as the informal procedures that includes Rule 202.5(e). Rule 202.5(e) is a policy that implements and aids in the execution of the Commission’s enforcement powers under Section 21 of the Exchange Act, 15 U.S.C. 78u, and other enforcement-related provisions. In announcing Rule 202.5(e) in 1972, the Commission did not engage in notice-and-comment rulemaking because the APA does not require such procedures for “general statements of policy, or rules of agency organization, procedure, or practice.” 5 U.S.C. 553(b)(A). Rule 202.5(e) is a rule of agency procedure and practice; it announces the Commission’s practices regarding what settlements it will accept.

Accordingly, the Commission announced a “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 administrative order. *Id.* The Commission further noted that, in its view, “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.” *Id.*

This policy has become known as the “no admit/no deny policy.” In most settlements, the Commission does not require admissions. But the Commission also will not agree to a settlement—it will not forgo its opportunity to present evidence and prove its claims in federal court—unless the defendant agrees not to publicly deny the allegations in the complaint. The policy binds the Enforcement staff, but it does not require defendants to settle; a defendant is always free to eschew settlement and litigate.

In practice, the policy is given effect through contractual language that appears in the consent and the judgment presented to the district court for entry. Generally, the defendant states that, without admitting or denying the allegations of the complaint (except as to jurisdiction, which are admitted), the defendant consents to the entry of a judgment and accepts the agreed-upon sanctions. The defendant further agrees to comply with Rule 202.5(e) and not to make any public statements denying the allegations in the complaint. The consent grants the Commission a limited remedy in the event a defendant breaches the agreement by publicly denying the allegations: the Commission may petition the district court to vacate the final judgment and restore the action to the active docket. *E.g.*, Pet. 4.

Thus, in the event of a denial, the Commission’s recourse is to ask the court to vacate the settlement. The Commission may not avail itself of its contractual remedy if it decides not to dedicate resources to reviving a once-settled case. Moreover, if the Commission seeks this relief, the district court may deny it.<sup>3</sup>

For over 40 years, federal district courts have entered hundreds of consent judgments in which defendants did not have to make admissions but also agreed not to deny the allegations in the complaints against them. In the past decade, however, some have questioned the Commission’s practice of allowing defendants to settle enforcement actions without requiring them to admit the allegations in the complaint. *See SEC v. Citigroup Glob. Mkts.*, 752 F.3d 285, 295 (2d Cir. 2014) (holding that a district court abused its discretion when it refused to enter a “no admit/no deny” consent judgment because the defendant did not admit the allegations in the complaint). And defendants have unsuccessfully challenged no-deny provisions to which they voluntarily agreed by seeking relief years—or even decades—later in which they ask a court to line-edit the consents, eliminating the no-deny provision while retaining all the other agreed terms of the settlement. *See SEC v. Romeril*, 15 F.4th 166 (2d Cir. 2021); *SEC v. Novinger*, 40 F.4th 297 (5th Cir. 2022).

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<sup>3</sup> When the Commission accepts offers to settle administrative adjudications, it does so pursuant to Rule 202.5(e) and respondents voluntarily agree not to publicly deny the allegations in the order instituting proceedings, and further agree that if they breach that agreement, Enforcement staff can ask the Commission to reopen the action against them.

The NCLA's petition asks the Commission to amend Rule 202.5(e) to provide that a defendant can consent to a judgment in which the defendant admits, denies, or neither admits nor denies the allegations in the complaint. While couched as a "modest" change, Pet. 6, the proposed amendment would, in effect, eliminate the policy because it would allow defendants to consent to a judgment while denying the allegations with no recourse for the Commission to return to active litigation.

### DISCUSSION

After careful consideration, the Commission declines to amend Rule 202.5(e). Rule 202.5(e) is a proper exercise of the Commission's authority to decide how it will pursue its enforcement mission and settle cases. The no-deny policy allows the Commission to seek its day in court if a defendant later chooses to deny the factual basis for the enforcement action. None of the constitutional or statutory arguments presented by the petition has merit, and several contravene established precedent regarding waiver of rights.

The Commission's 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. When the Commission settles, it cedes its ability to prove its allegations. A breach of the no-deny provision provides the Commission with the opportunity to ask a district court to return the case to the active docket. The court, in its discretion, may grant the request, reverting the parties to their positions before the entry of the consent judgment. This remedy for breach is not self-executing, and the Commission would have to decide, based on the facts and circumstances, whether to invoke that remedy following a public denial that violates the consent judgment.

This relief is thus closely tied to the purpose of the settlement—voluntarily resolving a matter without further litigation. It is reasonable for the Commission to agree to settle only if the defendant agrees that, upon a public denial, the Commission can seek to challenge that denial in court. The Commission 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 petition suggested that the Commission, in the face of a public denial after the Commission has waived its right to try its case, can "issue its own statement" and "the public can sort out the truth in the free marketplace of ideas." Pet. 30. But the Commission does not try its cases through press releases. The no-deny provision ensures that if a defendant reneges on a settlement and publicly denies the allegations, the Commission has the opportunity to ask a court to permit it to test that denial, controlled by the rules of procedure and evidence.

Moreover, if a defendant settles without admissions and then later denies the allegations, that turnabout can negatively impact the public interest. The filing of a complaint memorializes the results of an investigation and reflects a determination by the Commission that the evidence reveals a violation of the securities laws. In settlements without admissions, a defendant who later denies the allegations in the complaint can create the incorrect impression that there was no basis for the Commission's enforcement action. Because such a denial would come only after the Commission had relinquished the

opportunity to prove its case in court with evidence, it could undermine confidence in the Commission’s enforcement program.

When the Commission brings an action, the Commission and the defendant can elect to settle on terms to which both agree. Alternatively, if either party disagrees with terms that the other party views as necessary, they can decline to settle, and the Commission must bear its burdens of proof and persuasion in court. The petition seeks to alter this calculus by foreclosing the Commission from agreeing to settle—and thereby forgoing its ability to prove its case in court—only if the defendant also agrees not to publicly deny the allegations later on. The Commission may make a reasonable determination to require, as a condition of settlement that, if a settling defendant makes a public denial, the Commission can seek a return to the judicial forum to challenge assertions that the Commission’s enforcement action lacked a foundation in fact or law.

The petition’s constitutional arguments are not persuasive. There 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. As the Second Circuit held when it confirmed the constitutionality of the no-deny policy, “[i]n the course of resolving legal proceedings, parties can, of course, waive their rights, including such basic rights as the right to trial and the right to confront witnesses.” *SEC v. Romeril*, 15 F.4th 166, 172 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 2836 (2022).

*Romeril* followed the Supreme Court’s decision in *Town of Newton v. Rumery*, 480 U.S. 386, 393 (1987), where the court held that there is no “per se rule of invalidity” for waivers of constitutional rights. The Court did not analyze the settlement containing a waiver in prior-restraint terms, which would effectively impose something close to a per se rule against settlements. Rather, the Court established a balancing test for deciding whether *to enforce* waivers—which presumes that rights *can* be waived—and then upheld the enforcement of a waiver under the facts presented in that case. *Id.*<sup>4</sup>

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<sup>4</sup> *Rumery* and *Romeril* are part of a well-established line of precedent. *INS v. St. Cyr*, 533 U.S. 289, 321-22 (2001) (“In exchange for some perceived benefit, defendants waive several of their constitutional rights including the right to a trial.”); *Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 703 (1982) (“Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.”); *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 184-87 (1972) (holding that due process rights can be waived); *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971) (“Because the defendant has, by the decree, waived his right to litigate the issuer raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected.”); *Barker v. Wingo*, 407 U.S. 514, 529, 536 (1972) (waiver of speedy trial rights); *Brady v. United States*, 397 U.S. 742, 748 (1970) (allowing plea bargains to waive a defendant’s trial rights and the right against self-incrimination); *Illinois v. Allen*, 397 U.S. 337, 342-343 (1970) (right to be present at trial); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (rights to counsel and against compulsory self-incrimination); *Fay v. Noia*, 372 U.S. 391, 439 (1963) (habeas corpus); *Rogers v. United States*, 340 U.S. 367, 371 (1951) (right against compulsory self-incrimination); *Pee Dee Health Care, P.A. v. Sanford*, 509 F.3d 204, 212 (4th Cir. 2007) (nothing in federal law prohibits constitutional waivers); *Lake James Cmty. Volunteer Fire Dep’t v. Burke Cnty.*, 149 F.3d 277, 280 (4th Cir. 1998) (“[S]imply because a contract includes the waiver of a constitutional right does not render the contract *per se* unenforceable.”); *Leonard v. Clark*, 12 F.3d 885, 889-90 (9th Cir. 1993), *as amended* (Mar. 8, 1994); *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310, 1315 (8th Cir. 1991); *United States v. Int’l Bhd. of Teamsters*, 931

“[T]he First Amendment is no exception.” *Romeril*, 15 F.4th at 172. In *Romeril*, the Second Circuit followed *Rumery* and explained that “parties can waive their First Amendment rights in consent decrees and other settlements of judicial proceedings.” *Id.* Courts have presumed that waivers in the civil context must have the same safeguards as the criminal context—they must be “knowing, voluntary, and intelligent,” *D.H. Overmyer*, 405 U.S. at 185—and when defendants in Commission actions sign consents, they represent that they are entering into the settlement voluntarily. *See Novinger*, 40 F.4th at 302-03 (noting defendants’ stipulation that they entered into consent judgments with no-deny provisions “voluntarily”). Thus, settling defendants make a “highly rational judgment” that the advantages of settlement exceeded any costs of waiver. *Rumery*, 480 U.S. at 394.

When a defendant settles with the Commission, the parties reach a mutually acceptable resolution. *Armour*, 402 U.S. at 681; *Citigroup*, 752 F.3d at 295; *SEC v. Clifton*, 700 F.2d 744, 748 (D.C. Cir. 1983). The Commission is not bestowing a benefit on the defendant, but rather is acting in the public interest to minimize litigation risk, maximize limited resources, and accelerate the resolution of the case. *Citigroup*, 752 F.3d at 295-96. All settlements involve undertakings and waivers of constitutional rights, and courts have held that there is no per se rule against such agreements. *Rumery*, 480 U.S. at 393; *Romeril*, 15 F.4th at 172. There is no support for the notion that the parties cannot agree that if the defendant wishes to publicly deny after the Commission yields its opportunity to litigate its allegations, the Commission will have the ability to seek a return to the courtroom where the denials can be tested under the rules of evidence and procedure.

For the foregoing reasons, the Commission denies the petition to amend Rule 202.5(e).

By the Commission,

Vanessa A. Countryman  
Secretary

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F.2d 177, 187–88 (2d Cir. 1991); *Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084, 1096 (3d Cir. 1988); *In re George F. Nord Bldg. Corp.*, 129 F.2d 173, 176 (7th Cir. 1942) (holding that a party to a consent decree “is in no position to claim that such decree restricts his freedom of speech” because the party “has waived his right and given his consent to its limitations”).

# EXHIBIT B

## Statement

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# Unsettling Silence: Dissent from Denial of Request for Rulemaking to Amend 17 C.F.R. § 202.5(e)



Commissioner Hester M. Peirce

Jan. 30, 2024

I dissent from the Commission’s denial of a petition to amend Rule 202.5(e), our so-called gag rule.<sup>[1]</sup> This *de facto* rule follows from the Commission’s enforcement of its policy, adopted in 1972, that it will not “permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings.”<sup>[2]</sup> In that same policy, the Commission articulated its belief “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.”<sup>[3]</sup> These two strands—the refusal to settle with persons who deny the allegations and the belief that refusing to admit is a denial—converge in the requirement that to settle with the Commission, a person must either (1) admit the allegations underlying the Commission’s enforcement action or (2) state that she neither admits nor denies the allegations.

To compel compliance with the no-deny prong of the policy, the Commission requires settling defendants to agree that they “will not take any action or make or permit to be made any public statement denying, directly or indirectly, any allegation in the complaint or creating the impression that the complaint is without factual basis” and also “will not make or permit to be made any public statement to the effect that Defendant does not admit the allegations of the complaint, or that this Consent contains no admission of the allegations, without also stating that Defendant does not deny the allegations.”<sup>[4]</sup> The Commission further requires the settling defendant to “withdraw[] any papers filed in this action to the extent that they deny any allegations in the complaint.”<sup>[5]</sup> Finally, the Commission’s mandatory language states that “[i]f Defendant breaches this agreement, the Commission may petition the Court to vacate the Final Judgment and restore this action to its active docket.”<sup>[6]</sup> The net result is that the settling defendant, for the action to stay settled, must agree both to rescind her past in-court statements contesting the truth of the Commission’s allegations and promise never again to contest the truth of the Commission’s allegations herself, or even permit others to contest the allegations.

In October 2018, the New Civil Liberties Alliance (NCLA) asked us to revise Rule 202.5(c) to read 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, a defendant or respondent may consent to a judgment or order in which he admits, denies, or states that he neither admits nor denies the allegations in the complaint or order for proceedings.<sup>[7]</sup>

I agree with the petitioner that this issue warrants a spot on our rulemaking agenda. One thing I love about this country is that Americans can and often do criticize their government. Without fearing reprisal, a person can condemn specific government actions, broad government policies, or the officials who carry out those actions and make those policies. This freedom to speak against the government and government officials is essential in a free society committed to the preeminence of the people. Of course, some criticisms of government policies, practices, or personnel may be baseless, but the American public, not government censors, should be the arbiters of validity. Our prohibition on denials prevents the American public from ever hearing criticisms that might otherwise be lodged against the government, let alone assessing their credibility. The 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.

## I.

When the Commission adopted the policy in 1972, it included a brief statement explaining why it needed the policy: “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.”<sup>[8]</sup> This concern seems largely theoretical. Even if the concern is real, the imprudent policy adopted in November 1972 is not the right way to protect the Commission’s reputation.

The Commission devoted significant resources to evaluating its enforcement program in 1972.<sup>[9]</sup> In January 1972, Chairman William Casey created a three-member committee to “examine the SEC’s enforcement policy and practices, engage in frequent dialogue with the members of the Commission and with our staff, seek and sift the suggestions of the bar and make recommendations to the Commission for worthwhile improvements to our time-honored ways.”<sup>[10]</sup> The June 1, 1972 Report of the Advisory Committee on Enforcement Policies and Practices—now commonly referred to as the Wells Report—included a lengthy discussion about the settlement of Commission enforcement actions, and made several recommendations related to the settlement process.<sup>[11]</sup> The Commission had decades of experience settling cases, through both settlements on a no-admit/no-deny basis and settlements allowing defendants to deny wrongdoing.<sup>[12]</sup> With respect to some of these settlements, defendants issued flat denials of wrongdoing.<sup>[13]</sup> But neither the Wells Report nor Chairman Casey’s lengthy ruminations on it discuss problems arising from settling defendants later denying the factual basis of the Commission’s case.<sup>[14]</sup> Given the broad remit of the Committee and its public comment process,<sup>[15]</sup> if problematic denials were common, the Committee and Commission would have heard about them.<sup>[16]</sup> In the intervening years, when defendants have made denials contrary to the policy,<sup>[17]</sup> such denials do not seem to have undermined the Commission’s enforcement program. The absence of a public record specific to the adoption of the policy, the conclusory explanation of its necessity, and the absence of actual evidence of a problem weigh in favor of reexamining the policy.

The requirement that defendants must either admit or at least promise not to deny the government’s allegations of wrongdoing as a condition of settlement has not been widely adopted by federal agencies.<sup>[18]</sup> Some agencies even explicitly allow settling defendants to deny the allegations of wrongdoing.<sup>[19]</sup> As the Federal Trade Commission noted when approving one such settlement in 2012, it was confident in the work of its staff:

it is the evidentiary record developed by FTC staff during the course of its investigation, not any ensuing settlement agreement, that forms the basis for the action by Commission. A respondent’s denial of liability in a consent agreement does not diminish staff’s extensive investigation or the ability of the Commission to find a reasonable basis to finalize a settlement or to enforce an order that results from settlement negotiations.<sup>[20]</sup>

The FTC’s Consent Order Procedures explicitly allow settlement agreements to “state that the signing thereof is for settlement purposes only and does not constitute an admission by any party that the law has been violated as alleged in the complaint.”<sup>[21]</sup> Our staff’s investigative work likewise would stand on its own even if we permitted defendant denials.



## II.

Even apart from the scant factual basis for the Commission's given reason for needing the no-deny policy, it should be reexamined because a regulatory policy that prevents people from speaking against government action necessarily raises First Amendment concerns. Prohibiting a person from taking "any action to make . . . any public statement that the complaint is without factual basis" is a plain prior restraint on speech.<sup>[22]</sup> Prohibiting that same person from "permit[ting] to be made any public statement that the complaint is without factual basis" only exacerbates the problem by imposing on the defendant an obligation to restrain speech by others. Moreover, this content-specific and permanent restraint on speech effectively shields the Commission's allegations from criticism: as long as you live, you are bound not only to say nothing that the Commission believes "directly or indirectly" denies the complaint's allegations, but you also must never say anything that even "create[s] the impression" of a denial.<sup>[23]</sup> Given the obvious First Amendment ramifications of the no-deny policy, it is unsurprising that a court recently characterized the Commission's use of the no-denial provision as "at a minimum . . . inconsistent with the spirit of the First Amendment and our Nation's time-honored tradition of protecting free expression."<sup>[24]</sup> The court continued by observing that:

[H]ere, the Provision is used by an agency of the federal government to shield itself from public view. This may inflict precisely the kind of societal harm the Founders adopted the First Amendment to protect against . . . . The upshot: so long as a defendant says what the SEC wants to hear (or says nothing at all), he does not violate the No-Admit-No-Deny Provision. This is quintessential viewpoint discrimination.<sup>[25]</sup>

In its letter denying the NCLA's rulemaking petition, the Commission sidesteps First Amendment concerns. The Commission explains that "a defendant can waive constitutional rights as part of a civil settlement."<sup>[26]</sup> In the Commission's telling, "[a]s part of the settlement process, the Commission and a defendant negotiate terms," and "if either party disagrees with terms that the other party views as necessary, [it] can decline to settle, and the Commission must bear its burdens of proof and persuasion in court."<sup>[27]</sup> The Commission even suggests that *it* is the party making a sacrifice in settling instead of litigating because it is "thereby forgoing its ability to prove its case in court."<sup>[28]</sup> Never mind that forgoing its day in court yields great benefits for the Commission. When it settles, the Commission does not need to prove the allegations in court—which is expensive, time-consuming, and difficult—and it gets a benefit it could never obtain through litigation—the permanent silence of the defendant.<sup>[29]</sup>

The Commission's questionable claim that it is the party making significant concessions is not the most concerning aspect of the Commission's reasoning. That distinction goes to its casual assumption that defending litigation with the Commission is just like defending against any other plaintiff in a civil action. One suspects that defendants in Commission enforcement actions might view the matter differently. For most individuals, and even for many well-resourced corporate defendants, the time, expense, and difficulty of litigating against the federal government makes settling the only economically viable option to resolve Commission enforcement actions. Commission investigations preceding the settlement negotiations are themselves long and costly. Retaining counsel to respond to the Commission's document requests and subpoenas, to represent witnesses during sworn testimony, and to prepare and submit a response to a Wells notice (which allows defendants to respond to charges the staff is planning to recommend to the Commission) consumes enormous financial resources. Add to that monetary cost, the intangible yet often even more onerous emotional, physical, and relational tolls of litigation, and it is unremarkable that nearly all defendants in Commission actions settle.

The inevitable mismatch between the Commission and most defendants in its enforcement actions carries through to the settlement process.<sup>[30]</sup> Even when the disparities in bargaining power between the Commission and the defendant are less pronounced, the no-deny clause is a mandatory, non-negotiable term. The Commission admits as much in its denial letter: "[t]he policy binds the Enforcement staff" and the Commission "will not agree to a settlement . . . unless the defendant agrees not to publicly deny the allegations in the complaint."<sup>[31]</sup> As one judge recently put it, the mandatory nature of the no-deny policy presents defendants with no real choice; it demands: "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."<sup>[32]</sup>

The demand by the government that a defendant waive a fundamental constitutional right as a condition of settlement ought to be supported by a compelling rationale. Yet, as discussed above, the Commission's rationale of record—that the no-deny policy is necessary 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”—lacks firm footing. It would look bad if the SEC's settlements were shown to be baseless, unfairly negotiated, or legally flawed. The most logical solution to that concern, however, is to make sure that settlements are rooted in fact, are fairly negotiated, and are legally sound. Employing superior bargaining power to extract an agreement that defendants agree not to denigrate the settlement is a suboptimal solution.

In the end, far from shoring up the Commission's integrity, the reliance on these no-denial conditions undermines it. More than a decade ago, a court aptly explained the problematic perceptions that flow from the Commission's practice of settling without admissions and prohibiting denials:

[H]ere an agency of the United States is saying, in effect, “Although we claim that these defendants have done terrible things, they refuse to admit it and we do not propose to prove it, but will simply resort to gagging their right to deny it.”<sup>[33]</sup>

Why should the public put much weight on allegations so flimsy that they need the protection of a contractual obligation not to deny them? Stated differently, “What is the SEC so afraid of? Any criticism, apparently—or, rather, anything that may even ‘create the impression’ of criticism—of that government agency.”<sup>[34]</sup> The public cannot be sure what to believe if the government actively seeks to squelch contrary voices. As the FTC has observed, a government regulator that is confident in its investigative work, procedural practices, and legal analysis does not need to demand silence on the part of settling defendants.<sup>[35]</sup> Other commentators have pointed out that “[d]efendants who have been through an agency's enforcement process are often the most informed and in the best position to raise red flags about that process,” so, by silencing them, “the agencies insulate themselves from criticism and the public scrutiny that accountability demands.”<sup>[36]</sup> Allowing people to talk freely about their experiences with the Commission would aid us in carrying out our mission.<sup>[37]</sup>

### III.

Because no-admit/no-deny settlements are the most common resolution of SEC enforcement actions, the rule at issue affects countless potential speakers. Given that all of these silenced speakers have been on the wrong end of an enforcement action, we can assume that some might have negative things—whether accurate or not—to say about the government. The gravity of silencing this subset of people weighs heavily on me.

Defenders of our policy might take comfort in the scope of the policy—after all, you can say bad things about the agency, just not about your settlement. To the contrary, the Commission's mandatory language is so ambiguous as to only aggravate my concerns. Defendants must agree that they will not “indirectly” deny “any allegation in the complaint.” What is an “indirect” denial? Defendants must also agree not to “take any action” that “create[s] the impression that the complaint is without factual basis.” What is an action that “create[s] the impression” that the complaint lacks a factual basis? A defendant looking at this language is not going to have any idea where it ends. Could she say that “The Commission's enforcement process is a joke. Nobody should trust it to produce just results.”? What if she stands outside the Commission's headquarters with a pile of salt, a copy of the complaint, and a sign that states “Take these together.” What if she places on a billboard the message “SEC = Seriously Erroneous Complaints”? In either case, has she “create[d] the impression that the complaint is without factual basis”? Can a defendant tell a post-settlement joke: “How many SEC Commissioners does it take to screw in a lightbulb? Zero, because they prefer to let the truth languish in the dark.”? What if she publishes a book with additional facts that were not included in the complaint, and those facts cast the entire case in an entirely different light? Has she then “create[d] the impression” that the complaint lacked a factual basis?

The Commission's requirement that a defendant agree not to “permit” denials of the allegations in the complaint is equally problematic. This language suggests that defendants have an affirmative obligation to stop other people from saying things that might cast doubt on the complaint's allegations. Must a settling defendant stop her

husband from posting on social media his disagreement with the charges in his wife's settlement with the Commission? Must a defendant require subsequent employers to link to the settlement in the otherwise flattering profiles they post on their websites? Probably not, but the mandatory language nevertheless is troublingly nebulous. To obtain Commission authorization to file an enforcement action in district court, the Division of Enforcement is required to submit to the Commission an action memorandum that "provides a comprehensive explanation of the . . . factual and legal foundation" for the recommended civil action.<sup>[38]</sup> The Enforcement Manual, however, does not require that the Division include with the action memorandum a copy of the district court complaint.

The petitioner is correct that reconsideration of the rule is a pressing matter that belongs on the Commission's current notice-and-comment rulemaking agenda. Or, if my colleagues have concluded that our agenda is too packed with other projects, perhaps we can just drop the no-deny rule in the same unceremonious way we adopted it.

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[1] Letter from Vanessa Countryman to Margaret A. Little, New Civil Liberties Alliance (Jan. 30, 2024) ("Denial Letter") (available at <https://www.sec.gov/files/rules/petitions/2024/4-733-letter-013024.pdf>).

[2] 17 C.F.R. § 202.5(e); see also Consent Decrees in Judicial or Administrative Proceedings, Rel. No. 33-5337, 37 Fed. Reg. 25224 (Nov. 29, 1972).

[3] *Id.*

[4] Final Judgment as to Defendant Fernando Motta Moraes at 9, *SEC v. Moraes*, No. 22-Civ.-08343 (S.D.N.Y. Oct. 28, 2022), ECF No. 13 (Consent of Defendant Fernando Motta Moraes, ¶ 11). The Commission employs substantively identical language in the Offers of Settlements leading to settled Orders Instituting Proceedings. See, e.g., FTE Networks, Form 8-K, Ex. 10.1 (Offer of Settlement of FTE Networks, Inc., Part VI), filed Sept. 11, 2014 (available at [sec.gov/Archives/edgar/data/1122063/000114420414055309/v388919\\_ex10-1.htm](sec.gov/Archives/edgar/data/1122063/000114420414055309/v388919_ex10-1.htm)).

[5] Final Judgment at 9, *supra* n.4. The Commission's mandatory language has two narrow carve-outs: "Nothing in this paragraph affects Defendant's: (i) testimonial obligations; or (ii) right to take legal or factual positions in litigation or other legal proceedings in which the Commission is not a party." *Id.* at 10.

[6] *Id.* at 9-10.

[7] File No. 4-733, New Civil Liberties Alliance Petition to Amend at Ex. A., submitted Oct. 30, 2018 (available at <https://www.sec.gov/files/rules/petitions/2018/petn4-733.pdf>).

[8] Consent Decrees in Judicial or Administrative Proceedings, Rel. No. 33-5337, 37 Fed. Reg. 25224 (Nov. 29, 1972). The Commission's explanation for the policy was part of the rule it adopted in 1972 and remains part of the rule today.

[9] The Commission's Division of Enforcement came into existence in August 7, 1972 as part of an administrative reorganization. 38th Annual Report of the Securities and Exchange Commission, at 133 (available at <https://www.sec.gov/files/1972.pdf>).

[10] William J. Casey, Chairman, Sec. & Exch. Comm'n, The Securities Bar and the Securities Laws, Address to the New York State Bar Association, at 5 (Jan. 27, 1972) (available at <https://www.sec.gov/news/speech/1972/012772casey.pdf>).

[11] Wells Report, at v-vi and 34-43. The Wells Report is available through the Securities and Exchange Commission Historical Society's website. See [https://www.sechistorical.org/museum/galleries/enf/enf03a\\_wells-commission.php](https://www.sechistorical.org/museum/galleries/enf/enf03a_wells-commission.php).

[12] See, e.g., *First National City Bank and Merrill Lynch, Pierce, Fenner and Smith, Inc.*, Lit. Rel. No. 4534, 1970 WL 104562 (Feb. 6, 1970) (announcing settled district court action where “Defendants state that they deny that there is any validity in the claims asserted by the Commission in the complaint or any illegality or impropriety in any of defendants’ past acts or practices”); *W. Allen Raleigh*, Rel. No. 34-7483, 1964 WL 66599 (Dec. 9, 1964) (no-admit/no-deny); *Keystone Securities Corp.*, Rel. No. 34-7095, 1963 WL 63774 (July 8, 1963) (no-admit/no-deny); *Tanya Kaye*, Rel. No. 6033, 1959 WL 59455 (Aug. 5, 1959) (no-admit/no-deny); *SEC v. Interstate Syndications, Inc.*, (N.D. Ga. C75-5 A), Lit. Rel. No. 6692, 1945 WL 26488 (Jan. 28, 1945) (no-admit/no-deny); *Illinois-Indiana Oil Basin Corp.*, Rel. No. 33-2280, 1940 WL 6989 (June 12, 1940) (no-admit/no-deny).

[13] Terry Robards, *Bank and Broker Accused by S.E.C.: National City and Merrill Lynch Agree to Put End to Investment Unit*, N.Y. Times, Feb. 7, 1970 (“[First National City Bank] issued a statement that said in part: ‘We believe the commission’s claims have no validity and we have denied them. However, in order to avoid lengthy litigation, we have agreed to terminate the S.I.A.S. and to offer customers an alternative service that we believe meets the investor needs.’ . . . Merrill Lynch also issued a statement, asserting that it ‘sees no merit in the arguments advanced by the S.E.C.’ . . . ‘It is clear that in making its arguments, the S.E.C. is in fact attempting to make new law.’”).

[14] William J. Casey, Chairman, Sec. & Exch. Comm’n, *Ruminations and Action on Enforcement*, Address at the New York Law Journal Enforcement Conference (Sept. 29, 1972) (available at <https://www.sec.gov/news/speech/1972/092972casey.pdf>).

[15] Chairman Casey issued a public request for comment to the committee on March 2, 1972. See [https://www.sechistorical.org/collection/papers/1970/1972\\_0302\\_Casey.pdf](https://www.sechistorical.org/collection/papers/1970/1972_0302_Casey.pdf).

[16] In more recent years, one authority contended that “by 1972, it had become obvious that as soon as courts had signed off on [no-admit/no-deny] settlements, the defendants would start public campaigns denying that they had ever done what the S.E.C. had accused them of doing,” but it did so without citation or attribution. *SEC v. Vitesse Semiconductor Corp.*, 771 F.Supp.2d 304, 308 (S.D.N.Y. 2011). Other discussions have repeated this assertion, but have not supplemented it with concrete examples. See, e.g., David Rosenfeld, *Admissions in SEC Enforcement Cases: The Revolution that Wasn’t*, 103 Iowa L. Rev. 113, 118-19 (2017); Matthew G. Neumann, *Neither Admit nor Deny: Recent Changes to the Securities and Exchange Commission’s Longstanding Settlement Policy*, 40 J. Corp. L. 793, 797-98 (2015); Priyah Kaul, *Admit or Deny: A Call for Reform of the SEC’s “Neither-Admit-Nor-Deny” Policy*, 48 U. Mich. J.L. Reform 535, 537-38 (2015).

[17] See, e.g., Floyd Norris, *Morgan Stanley Draws SEC’s Ire*, N.Y. Times, May 2, 2003, at Section A., Col. 1, Business/Financial Desk p. 1; *Figure in SEC Insider Case Withdraws a Statement*, Wall St. J., July 13, 1988, at 10, col. 3. It is possible that some defendants would seek to distance themselves from the allegations in a settlement for nefarious purposes. For example, a serial fraudster might settle and then tell investors that the allegations are untrue and that she settled only to be able to focus on providing investors with the next great investment. The solution to this legitimate concern—one that does not implicate a defendant’s constitutional rights—may be to demand admissions when such a future offense is probable. Subsequent denials would not be prohibited, but they would be read against the backdrop of the admissions in the settlement.

[18] I am aware of only one other federal agency—the Commodity Futures Trading Commission—that has issued a similar policy statement. 17 C.F.R. Part 10, App. A. The CFTC went through the notice and comment process to adopt its policy. CFTC: Proposed Rules: Rules of Practice; Proposed Amendments, 63 Fed. Reg. 16453, 16459 (April 3, 1998); CFTC: Rules and Regulations: Rules of Practice; Final Rules, 63 Fed. Reg. 55784, 55790, 55796 (Oct. 19, 1998); CFTC: Rules and Regulations: Rules of Practice: Correction, 64 Fed. Reg. 30902 (June 9, 1999). Two other agencies appear to have somewhat similar rules, but do not appear to have accompanying policy statements. See 40 C.F.R. § 22.18(b)(2) [Environmental Protection Agency] and 45 C.F.R. § 672.11(b)(2) [National Science Foundation].

[19] See Consent Order, *United States v. Countrywide Financial Corp.*, 11-cv-10540 (C.D. Cal. Dec. 28, 2011), ECF No.4, at 4 (“Defendants Deny all the allegations and claims of a pattern or practice of discrimination in violation of the FHA and the ECOA as set forth in the United States’ Complaint.”) (available at <https://www.justice.gov/sites/default/files/crt/legacy/2012/01/27/countrywidesettle.pdf>); Agreement Containing Consent Order, *Facebook, Inc.*, FTC File No. 092 3184 (“Proposed Respondent expressly denies the allegations set forth in the complaint, except for the jurisdictional facts.”) (available at <https://www.ftc.gov/sites/default/files/documents/cases/2011/11/111129facebookagree.pdf>).

[20] Statement of the [Federal Trade] Commission, *Facebook, Inc.*, Docket No. C-4365 (Aug. 10, 2012) (available at [https://www.ftc.gov/system/files/documents/public\\_statements/293551/120810facebookstatement.pdf](https://www.ftc.gov/system/files/documents/public_statements/293551/120810facebookstatement.pdf)).

[21] 16 C.F.R. § 2.32.

[22] *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 556 (1976) (The First Amendment “afford[s] special protection against orders that prohibit the publication or broadcast of particular information or commentary—orders that impose a ‘previous’ or ‘prior’ restraint on speech.”); see also *SEC v. Novinger*, 40 F.4th 297, 308 (5th Cir. 2022) (Jones, J. concurring) (stating about the Commission’s no-deny policy that “[a] more effective prior restraint is hard to imagine”).

[23] See, e.g., Brief of Constitutional Law & First Amendment Scholars as Amici Curiae in Support of Petitioner at 3, *Romeril v. SEC*, No. 21-1284 (S.Ct.) (“[T]he SEC Gag Rule is not just any prior restraint, but a prior restraint on ‘steroids,’ fatally infected by content and viewpoint discrimination. The SEC Gag Rule is content-based and viewpoint-based on its face. Moreover, it is animated by the government’s self-serving desire to shield itself from criticism, implicating powerful First Amendment norms against viewpoint discrimination.”) (available at [https://www.supremecourt.gov/DocketPDF/21/21-1284/221659/20220422092456314\\_42285%20pdf%20Ebner%20combined.pdf](https://www.supremecourt.gov/DocketPDF/21/21-1284/221659/20220422092456314_42285%20pdf%20Ebner%20combined.pdf)).

[24] *SEC v. Moraes*, 2022 WL 15774011, \*3 (S.D.N.Y. Oct. 28, 2022).

[25] *Id.* at \*4, 5.

[26] Denial Letter pg. 5.

[27] *Id.* pg. 1, 5.

[28] *Id.* pg. 5

[29] The Commission’s insistence on shielding the allegations from criticism “belies the truth of a mainstay of settlement negotiation—that frequently both sides understand that the government cannot carry its burden as to every allegation. And it is particularly pernicious in light of a sobering truth—hardly any individual, and even most corporate entities—cannot afford protracted litigation. SEC should not be allowed to bargain for something that is wholly outside of what it could receive in a prosecution, even if it won every facet of its case, since win or lose, the accused could speak post-prosecution.” Brief for Amicus Curiae Due Process Institute in Support of Petitioner at 15 (citation omitted), *Romeril v. SEC*, No. 21-1284 (S.Ct.) (available at [https://www.supremecourt.gov/DocketPDF/21/21-1284/221721/20220422143248434\\_21-1284%20Amicus%20Brief%20of%20Due%20Process%20Institute.pdf](https://www.supremecourt.gov/DocketPDF/21/21-1284/221721/20220422143248434_21-1284%20Amicus%20Brief%20of%20Due%20Process%20Institute.pdf)).

[30] *Report on the Task Force on SEC Settlements*, 41 Bus. Law 1083, 1093-94 (1991) (observing that defendants have high incentive to settle due to the financial and personal costs of litigation, and that “[t]he divergence of the parties’ marginal propensity towards settlement creates uneven bargaining power, with the Commission holding the upper hand”).

[31] Denial Letter pg. 3.

[32] *Novinger*, 40 F.4th at 308 (Jones, J., concurring).

[33] *Vitesse*, 771 F. Supp. 2d at 309.

[34] *Moraes*, 2022 WL 15774011 at \*5.

[35] *Supra* n.20 and accompanying text.

[36] See, e.g., James Valvo, *The CFTC and SEC are Demanding Unconstitutional Speech Bans in their Settlement Agreements*, Notice & Comment: Yale Journal of Regulation (Dec. 4, 2017) (available at [https://www.yalejreg.com/nc/the-cftc-and-sec-are-demanding-unconstitutional-speech-bans-in-their-settlement-agreements-by-james-valvo/#\\_ftn1](https://www.yalejreg.com/nc/the-cftc-and-sec-are-demanding-unconstitutional-speech-bans-in-their-settlement-agreements-by-james-valvo/#_ftn1)).

[37] See, e.g., Brief of Mark Cuban, Phillip Goldstein, Elon Musk, Nelson Obus, and Investor Choice Advocates Network as Amicus Curiae in Support of Petitioner at 7, *Romeril v. SEC*, No. 21-1284 (S.Ct.) (“The SEC should welcome scrutiny of its allegations, particularly unproven allegations in settled cases, to ensure that justice is done and any shortcomings in its cases are publicly aired.”) (available at [https://www.supremecourt.gov/DocketPDF/21/21-1284/221678/20220422123803543\\_No.%2021-1284%20Amicus%20Brief.pdf](https://www.supremecourt.gov/DocketPDF/21/21-1284/221678/20220422123803543_No.%2021-1284%20Amicus%20Brief.pdf)).

[38] SEC Division of Enforcement: Enforcement Manual ¶ 2.5.1 The Action Memo Process (Nov. 28, 2017) (available at <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>).