No. 24-1899

IN THE

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, LTD., AND THE NEW CIVIL LIBERTIES ALLIANCE,

Petitioners,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON PETITION FOR REVIEW FROM THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION NO. 4-733

PETITIONERS' OPENING BRIEF

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DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a):

Reason Foundation certifies that it is a 501(c)(3) nonprofit organization organized under the laws of the State of California. It has no parent corporation and no stock, such that no publicly held corporation owns more than ten percent of its stock;

Cape Gazette, Ltd. certifies that it is a limited corporation organized under the laws of the State of Delaware. It has no parent corporation and no stock, such that no publicly held corporation owns more than ten percent of its stock; and

The New Civil Liberties Alliance certifies that it is a 501(c)(3) nonprofit organization organized under the laws of the District of Columbia. It has no parent corporation and no stock, such that no publicly held corporation owns more than ten percent of its stock.

No publicly traded company or corporation has an interest in the outcome of this case or appeal.

Dated: June 17, 2024

/s/ Margaret A. Little
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INTRODUCTION

This petition seeks review of the U.S. Securities and Exchange Commission's denial of a petition to amend its requirement that settlement of all cases must include a lifetime prior restraint on speech. That restraint bars the settling enforcement target from ever even "indirectly" leaving the "impression" that "any allegation in [SEC's] complaint" is "without factual basis." No act of Congress authorizes such a sweeping restriction on freedom of speech and of the press as a condition of settling a government case. Nor could it. The First Amendment of the Constitution provides that "Congress shall make no law … abridging the freedom of speech, or of the press; or the right of the people … to petition the Government for a redress of grievances." U.S. CONST. amend. I.

This Circuit has concluded with clarity that courts lack power to enforce unconstitutional prior restraints and content- and viewpoint-based speech restrictions as conditions on settlements—even when entered on consent. *Davies v. Grossmont Union High Sch. Dist.*, 930 F. 2d 1390, 1399 (9th Cir. 1991) *cert. denied*, 501 U.S. 1252 (1991) (invalidating the portion of a settlement agreement in which a party

waived his right to run for public office); *United States v. Richards*, 385 F. App'x 691, 693 (9th Cir. 2010) (invalidating term of plea agreement forbidding defendant from making public comments about county commissioner). These law-of-the-Circuit precedents are buttressed by the Fourth and Sixth Circuits. *Overbey v. Mayor of Balt.*, 930 F.3d 215, 219 (4th Cir. 2019); *G&V Lounge, Inc., v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1077 (6th Cir. 1994).

The SEC-imposed gag is a quintessential prior restraint—"the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). The notion that a governmental body may wield its power to decide who is to be permitted to comment on the agency's own behavior undermines the core purpose of the First Amendment.

The Gag Rule also violates the due process of law by requiring defendants to waive their constitutional rights if they settle with the agency, including rights to be heard on the terms of the settlement, rights to notice of what speech would violate the gag, and the right to freely exchange their views of the administrative process they endured. The gag violates due process because it shields and encourages SEC regulation by

settlement, allowing SEC to pursue cases not well-founded in established law or rules, while forever silencing the targets of those actions.

The question raised in this appeal has exerted enormous individual, collective, and decades-long impact on Americans' civil liberties and transparency in SEC's regulation, which settles 98% of its cases. The stakes are high. If the denial order is not vacated, this Circuit will be disregarding its own precedents and complicit in hiding nearly all SEC agency enforcement practices from public scrutiny—in perpetuity.

SEC's denial of the rulemaking petition perpetuates SEC's 50-year unconstitutional reign of error. "Acquiescence for no length of time can legalize a clear usurpation of power … frequently yielded to merely because it is claimed." Thomas Cooley, *A Treatise on the Constitutional Limitations*, 71 (1st ed. 1868). "The construction given to the laws, by … the executive government, is necessarily *ex parte*, without the benefit of an opposing argument … [but] the judicial department … is not at liberty to surrender or waive [constitutional rights]." *United States v. Dickson*, 40 U.S. 141, 161–62 (1841) (Story, J.).

The same principle applies to judicial review under the APA. *Judulang v. Holder*, 565 U.S. 42, 61 (2011) (holding that the "vintage" of

agency actions is irrelevant and "longstanding capriciousness receives no special exemption from the APA"); *see also Fisher v. United States*, 425 U.S. 391, 407 (1976) (noting that "illegitimate and unconstitutional practices get their first footing … by silent approaches and slight deviations from legal modes of procedure" which can only be obviated by adherence to the Constitution) (citation omitted).

The founders, who enshrined the right of free speech, a free press, and rights of petition in the First Amendment, would never in their wildest imaginations have envisioned that a mere government agency could silence speech, dictate the content of speech, and compel corrective speech by those who would criticize that agency's actions.

Congress itself could not enact a law extracting silence as a condition of settlement with the government; a mere administrative agency perforce lacks any such authority. The Supreme Court recently unanimously recognized in *Axon Enter., Inc. v. FTC* and *Cochran v. SEC*, 598 U.S. 175 (2023) ("*Axon/Cochran*"), that SEC lacks the competence and expertise to decide constitutional questions. Accordingly, the SEC's self-serving denial of the petition carries no credence in this Court, which is bound by the precedents set forth above. Justice Sotomayor wrote for

a unanimous Court in *NRA v. Vullo* that no government official can "use the power of the State to punish or suppress disfavored expression" and that such "viewpoint discrimination is uniquely harmful to a free and democratic society." 144 S. Ct. 1316, 1326 (2024).

This Court should vacate SEC's denial and order rulemaking consistent with the Constitution and the opinion of the Court.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to the Securities Act of 1933 (Securities Act) and the Securities Exchange Act of 1934 (Exchange Act), which provide that final orders and rules of the Commission are subject to the exclusive jurisdiction of the court of appeals. 15 U.S.C. §§ 77i, 78y. SEC's January 30, 2024 order, ER-55–60, denying Petitioners' petition for rulemaking to amend 17 C.F.R. § 202.5(e), constitutes a final order. *See O'Keeffe's, Inc. v. U.S. CPSC*, 92 F.3d 940, 942 (9th Cir. 1996); *Weight Watchers Int'l, Inc. v. F.T.C.*, 47 F.3d 990, 992 (9th Cir. 1995). Petitioners timely filed their petition for review, Dkt. 1.1, in this Court on March 28, 2024.

Petitioners Thomas Powell, Raymond Lucia, Joseph Collins, Rex Scates, and Reason Foundation reside in the Ninth Circuit. *See* 15 U.S.C. §§ 77i, 78y.

STATUTORY AND REGULATORY AUTHORITIES

All relevant constitutional, statutory, and regulatory authorities are set out in the Addendum filed with this brief.

STATEMENT OF ISSUES PRESENTED

1. Whether the Commission acted contrary to constitutional right by refusing to amend 17 C.F.R. § 202.5(e) because the rule violates First Amendment and due process rights and is against public policy.

2. Whether the Commission acted in excess of statutory authority and without observance of procedure required by law by refusing to amend 17 C.F.R. § 202.5(e), which improperly binds individuals outside of SEC.

3. Whether the Commission acted arbitrarily and capriciously when it failed to provide a reasoned explanation for denying the petition to amend 17 C.F.R. § 202.5(e).

STATEMENT OF THE CASE

A. SEC's Gag Rule, 17 C.F.R. § 202.5(e)

In 1972, the Commission announced its "adoption of a policy with respect to consent decrees in judicial or administrative proceedings" enacted because

> 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.

37 Fed. Reg. 25,224 (Nov. 29, 1972) (reproduced in its entirety at ER-40); *see also* 17 C.F.R. § 202.5(e) (the Gag Rule). SEC asserted that the Gag Rule "relates only to rules of agency organization, procedure and practice" such that 5 U.S.C. § 553's notice and procedures were "unnecessary." *Id.*; ER-7, 40. It made the rule effective immediately. *Id.*

The Commission enforces the Gag Rule through a mandatory, non-negotiable term in its settlement agreements (the Gag Provision). ER-8–9, 46, 61, 63; *see also* ER-57 (SEC noting that "the [Gag] policy is given effect through contractual language"). While the formulation of the Gag

Provision has changed over time, its core restriction on speech has remained. ER-8 (sample SEC consent order). In more recent iterations, SEC has added a compelled speech term to the Gag Provision that requires settling parties not to make statements that they did not admit to the Commission's findings "without also stating that the Respondent does not deny the findings." *See* SEC Drafted "Offer of Settlement" of Thomas J. Powell, ¶ VIII (Sept. 1, 2021) ER-69 (confirming that administrative "offer of settlements" are entirely drafted by SEC). The Gag Provision also purports to compel the speech of third parties by requiring settling parties to police the speech of others, *Id.* And it compels speech. ER-64 (settling parties cannot "permit to be made any public statement" regarding the "no-admit" prong without also clarifying that they do not deny SEC's allegations). The newer iterations of the Gag Provision also distort the public record by requiring settling parties to "withdraw[]" any previously filed papers "to the extent that they deny, directly or indirectly, any finding" in the consent. ER-61. But the Gag Provision does not apply to "testimonial obligations" or the "right to take legal or factual positions in litigation or other legal proceedings" to which SEC is not a party. *Id.* As Commissioner Peirce notes, the "net result" of

the Gag Rule "is that … for the action to stay settled, [a defendant] 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." *Id*.

The Commission includes its Gag Provision in consents filed in federal district courts and its in-house adjudications. ER-57. SEC enforces the Gag Provision in judicial proceedings by reserving the right to request a court to vacate the settlement and return the matter to the court's active docket. *Id*. The Gag Provision may also be enforced through criminal contempt "even absent the SEC's consent." *Cato Inst. v. SEC*, 4 F.4th 91, 95 (D.C. Cir. 2021). In administrative proceedings, SEC enforces the gag by reserving the ability to "ask the Commission to reopen the action[.]" *Id*.

SEC's gag has silenced unknown thousands of individuals and businesses in perpetuity since the Rule was adopted over 50 years ago. ER-49, 57 (SEC noting that "federal district courts have entered hundreds of consent judgments" but providing no measure for settlements in administrative adjudications); ER-64 (noting that the

number of gagged individuals is "countless"). However, it is estimated that 98% of SEC actions settle.[1] Thus, with hundreds of proceedings instituted each year, the number of silenced individuals is certain to grow if the Gag Rule remains in its present form. *See* ER-49 (discussing SEC enforcement statistics).

B. NCLA Petitioned to Amend the Gag Rule

On October 30, 2018, NCLA filed a Petition to Amend 17 C.F.R. § 202.5(e) with SEC. ER-3 (the petition was filed pursuant to 5 U.S.C. § 553(e) and 17 C.F.R. § 201.192(a)). Recognizing that "no admit/no deny" agreements "are essential tools of settling civil enforcement proceedings" for all parties, NCLA suggested amending the rule to eliminate only the language that creates an unconstitutional and sweeping prior restraint as a condition of settlement. ER-8, 49. The Petition to Amend included a color-coded version of the proposed amendment to the Gag Rule that

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[1] Luis A. Aguilar, SEC Commissioner, Remarks Before the 20th Annual Securities and Regulatory Enforcement Seminar (Oct. 25, 2013), https://www.sec.gov/news/speech/2013-spch102513laa (last visited Jan. 19, 2024) ("SEC currently settles approximately 98% of its Enforcement cases and, in 2012, we went to trial in only 22 out of the 734 cases we brought.").

appears as Exhibit J at ER-164; *see also* ER-61 (restating the proposed amended rule).

The Petition made numerous arguments for amending the Gag Rule. ***First***, the Gag Rule violates the First Amendment because it is a forbidden prior restraint ER-9–14. The Gag Rule is a content-based and viewpoint-based restriction on speech that mandates the content of speech, serves no compelling government interest, and is not the least restrictive means to achieve SEC's interests. ER-14–19. The Gag Rule unlawfully prohibits truthful speech. ER-19–20. It silences enforcement targets in perpetuity. ER-20. The Rule also unconstitutionally compels speech. ER-20–23. And the Gag Rule is an unconstitutional condition. ER-23–25. ***Second***, the Gag Rule violates due process because it is unconstitutionally vague, ER-25–27 and is void as against public policy due to its many due process deficits. ER-27–28. ***Third***, the Gag Rule violates settling defendants' First Amendment right to petition the government for redress of grievances. ER-28–29. ***Fourth***, the Petition argued that SEC lacked statutory authority to issue the Gag Rule and SEC violated the APA's notice-and-comment requirements. ER-30–32. ***Fifth***, the Gag Rule violates public policy because it suppresses

information that is critical to agency oversight, ER-32–36, implicates the judiciary in violating the Constitution, and advances no legitimate public policy. ER-36–37.

On November 2, 2018, the Commission notified NCLA that it received the Petition to Amend and assigned it a number (File No. 4-733). ER-45. The Commission did not respond to the Petition to Amend for over five years. ER-55.

C. Romeril and Novinger Challenge the Gag in Court Under Rule 60(b)(4)

Because the collateral bar rule prohibits parties who have settled with SEC from violating the court order without seeking relief in the court that entered the prior restraint, *see* Rodney A. Smolla, *Why the SEC Gag Rule Silencing Those Who Settle SEC Investigations Violates the First Amendment*, 29 WIDENER L. REV. 1, 5–6 (2023), NCLA represented Barry Romeril and Christopher Novinger in first seeking Rule 60(b)(4) relief from their gags under the Second Circuit holding in *Crosby v. Bradstreet Co.*, 312 F. 2d 483 (2d Cir. 1963):

> We are concerned with the power of a court of the United States to enjoin publication … Such an injunction, enforceable through the contempt power, constitutes a prior restraint by the United States against the publication of facts which the community has the right to know and which Dun &

> Bradstreet had and has the right to publish. The court was without power to make such an order; that the parties may have agreed to it is immaterial.

Id. at 485.

Those challenges were denied under new readings of the remedies available under Rule 60(b). *See generally SEC v. Romeril*, 15 F. 4th 166 (2d Cir. 2021), *cert. denied sub nom. Romeril v. SEC*, 142 S. Ct. 2836 (2022) and *SEC v. Novinger*, 40 F. 4th 297 (5th Cir. 2022). In construing that Rule 60(b) could not provide relief, two concurring judges on the Fifth Circuit referenced the petition on review here, stating:

> I write to note that nothing in the opinion (or in the district court opinion, for that matter) approves of or acquiesces in the SEC's longstanding policy that conditions settlement of any enforcement action on parties' giving up First Amendment rights. 17 C.F.R. § 202.5(e). If you want to settle, SEC's policy says, "Hold your tongue, and don't say anything truthful—ever"—or get bankrupted by having to continue litigating with the SEC. A more effective prior restraint is hard to imagine. The defendants' brief informed us that a petition to review and revoke this SEC policy was filed nearly four years ago. New Civil Liberties Alliance, Petition to Amend (Oct. 30, 2018) … However, SEC never responded to the petition.

Id. at 308 (Jones and Duncan, JJ., concurring).

Given the nature of First Amendment harms and these rulings, NCLA sought expedited consideration of the Petition to Amend. ER-6, 38.

D. After Five Years of Inaction, NCLA, Joined by Petitioners Romeril, Lucia, and Novinger, Renewed the Petition

After more than five years of the Commission's silence, NCLA, joined by Barry Romeril, Raymond Lucia, and Christopher Novinger, renewed the Petition to Amend. ER-46–53. On December 20, 2023, Petitioners filed a letter with the Commission accusing the Commission of intentionally ignoring the petition to evade judicial scrutiny. ER-51–52. Petitioners discussed recent criticisms of the Gag Rule from several courts across the country. ER-48–49, 50–51 (discussing *SEC v. Novinger*, 40 F.4th 297, 308 (5th Cir. 2022) (Jones and Duncan, JJ., concurring) and *SEC v. Moraes*, No. 22-cv-8343, 2022 WL 15774011 (S.D.N.Y. Oct. 28, 2022)). Petitioners also highlighted Justice Gorsuch's recent critique of coercive settlements by agencies: "Aware" that few enforcement targets can "outlast or outspend the federal government, agencies sometimes use this as leverage to extract settlement terms they could not lawfully obtain any other way." ER-48 (quoting *Axon/Cochran*, 598 U.S. at 216 (Gorsuch, J., concurring)). Petitioners also argued that the Commission's inaction eviscerated their statutory rights under the APA and extinguished their First Amendment right to petition the

government. ER-52–53. They requested that the Agency act on the languishing petition within 90 days.

The Commission confirmed receipt of Petitioners' renewed petition on December 21, 2023. ER-54.

E. SEC Refused to Amend the Gag Rule

On January 30, 2024, the Commission denied the Petition to Amend. ER-55. In refusing to amend the Gag Rule, the Commission stated that "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." ER-58. SEC proffered that "[t]he no-deny policy allows [it] to seek its day in court if a defendant later chooses to deny the factual basis for the enforcement action." ER-58. It also asserted that Petitioners' "constitutional or statutory arguments" were without "merit[.]" ER-58.

The Commission's denial did not specifically address the Petition's First Amendment and due process arguments, except to say that, in SEC's estimation, such rights may be waived. ER-59–60. SEC rejected the Petition's constitutional arguments finding them "not persuasive." ER-59. The Commission took the position 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." ER-59. Relying on the Second Circuit's decision in *Romeril* and its own reading of *Town of Newton v. Rumery*, 480 U.S. 386, 393 (1987), the SEC determined that defendants and respondents can waive their First Amendment and other constitutional rights because there is "no per se rule" against the Gag Rule as enforced through Gag Provisions. ER-60.

Regarding the Petition's statutory arguments—that SEC was without authority to gag anyone and further violated the APA's required procedures for notice-and-comment—the Commission asserted that the Gag Rule is a permitted enforcement power without citation to any authority for that proposition. ER-55. It also argued that the Gag Rule is simply a permissible "informal" policy that it is permitted to promulgate pursuant to the SEC's authority to make housekeeping rules. ER-56. In the SEC's view, because the Gag Rule is an informal policy of "agency procedure and practice," it is not subject to the APA's notice-and-comment requirements. ER-56, n.2

F. Commissioner Peirce Dissents from Denial

Commissioner Hester M. Peirce agreed with Petitioners that it is time to amend, or even drop, the SEC's "unceremonious[ly]" adopted rule.

ER-65. She suggested 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." ER-62.

Commissioner Peirce suggested that there is "scant factual basis" for the Gag Rule. ER-63. Calling the Commission's explanation of why it needed the Gag Rule "largely theoretical," she reasoned that "[e]ven if the concern is real" the Gag Rule was "imprudent" and "not the right way to protect the Commission's reputation." ER-62. She noted that the SEC's Gag Rule "has not been widely adopted by federal agencies," highlighting how other independent agencies, like the Federal Trade Commission, have managed to adopt procedures that protect governmental interests without silencing enforcement targets—even allowing them to deny charges when appropriate. ER-62. She closed this criticism by saying that the SEC "staff's investigative work would likewise stand on its own even if [the Commission] permitted defendant denials." ER-62.

Commissioner Peirce said the Gag Rule "should be reexamined because a regulatory policy that prevents people from speaking against government action necessarily raises First Amendment concerns." ER-

63. In her view, the Rule "is a plain prior restraint on speech" which is "exacerbate[d] … by imposing on the defendant an obligation to restrain speech by others." ER-63. She also noted that "the Commission sidestep[ped] First Amendment concerns" by insisting that a party can "waive" their constitutional rights. ER-63. But, she argues, the Commission's suggestion that "*it* is the party making a sacrifice in settling" ignores the reality that settling "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." ER-63.

Commissioner Peirce also questioned SEC's "casual assumption that defending litigation with the Commission is just like defending against any other plaintiff in a civil action." ER-63. She noted that "it is unremarkable that nearly all defendants in Commission actions settle," given the enormous financial cost, as well as the "more onerous emotional, physical, and relational tolls of litigation." ER-63. That "inevitable mismatch between the Commission and most defendants in its enforcement actions carries through to the settlement process" which

then provides only the "mandatory, non-negotiable" Gag Provision. ER-63. "Employing superior bargaining power to extract an agreement that defendants agree not to denigrate the settlement is a suboptimal solution." ER-64.

As Commissioner Peirce noted, "[t]he public cannot be sure what to believe if the government actively seeks to squelch contrary voices." ER-64. She recognized "[t]he 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." ER-62

She closed her dissent by stating that "[t]he gravity of silencing" people who might criticize the government "weigh[ed] heavily on [her]." ER-64. She then noted how "the Commission's mandatory language is so ambiguous as to only aggravate [her] concerns." ER-64.

G. Petitioners Challenge SEC's Refusal to Amend the Gag Rule

Since Fiscal Year 2017, SEC has filed over 2,760 standalone enforcement actions. ER-49. In each one of those cases, defendants and respondents are impacted by the non-negotiable Gag Rule. *See* ER-61

Individual petitioners here represent a small subset of the "countless" individuals silenced, or under threat of being silenced, by the Commission since it adopted the Gag Rule. ER-64 ("Because no-admit/no-deny settlements are the most common resolution of SEC enforcement actions, the rule at issue affects countless potential speakers."). They are joined by NCLA and two media organizations which are interested in receiving ideas and speech from SEC enforcement targets, including co-Petitioners, and using that information to fulfill the First Amendment's vital role in ensuring access to information about our democracy.

- **Thomas Joseph Powell** is a finance entrepreneur with 36 years of experience in financial markets. Mr. Powell's cooperation with SEC inquiries over four years led to legal expenses surpassing $4 million before being offered a settlement in 2021. He has been silenced by SEC's Gag for almost 3 years.

- **Barry D. Romeril**, now 81 years old, is the former Chief Financial Officer of Xerox. After a prolonged investigation that imposed daunting reputational, occupational, and financial costs, he settled with the SEC in 2003. He has been silenced by the SEC's Gag Rule for 21 years and counting.

- **Christopher A. Novinger** is a businessman and former director of ICAN Investment Group, LLC. After over a year of defending himself, unable to outlast and outspend the agency, Mr. Novinger and ICAN settled with SEC in 2016. He has been gagged for 8 years.

- **Raymond J. Lucia**, now 73 years old, is a financial advisor whom the SEC first charged in an administrative proceeding in 2012. Mr. Lucia successfully appealed SEC's decision against him all the way to the Supreme Court, which determined that the SEC's Administrative Law Judges (ALJs) were Officers of the United States and subject to the Appointments Clause. *See Lucia v. SEC*, 138 S. Ct. 2044 (2018). Despite his win, SEC forced Mr. Lucia back into its biased, still constitutionally deficient administrative process, so he sued in district court. When his case was dismissed, and unable to absorb the collateral costs of making another trip to the Supreme Court, he threw in the towel and settled in 2020. Although he tried mightily to negotiate the Gag Provision out of his settlement, the SEC refused, so the mandatory gag has silenced his truthful criticism for over 4 years. The very issue he raised in the district court—that he should be able to challenge the constitutionality of his

administrative adjudication in federal district court—was resoundingly vindicated in 2023 by a unanimous Supreme Court in *Axon/Cochran*.

- **Marguerite Cassandra Toroian**, is a former registered investment advisor and owner of Bell Rock Financial, as well as a former contributor to CNBC and Fox Business. After a prolonged investigation followed by a federal court action that imposed daunting reputational, occupational, relational and financial costs, she settled with SEC in 2023. She also unsuccessfully tried to negotiate for no gag. Ms. Toroian wishes to speak freely to co-Petitioner *Cape Gazette* about her case, as she did when SEC first filed its complaint, but she cannot because of her gag. She also wishes to publicly discuss her experience as an SEC enforcement target, including with Congress, the Commission, and on her podcast.

- **Gary Pryor**, a mergers and acquisitions financial specialist, signed a Gag Consent after SEC charged multiple companies that he developed or advised, demanding that he personally disgorge every dime invested in each of these entities. Mr. Pryor has been gagged since 2021.

- **Rex Scates** and business partner, **Michelle Silverstein**, are bound by Gag Consents on behalf of Esos Rings, Inc. Mr. Scates and Ms. Silverstein were confronted with an SEC action before an intellectual

property dispute could be appealed and settled with the SEC in exchange for close to $1 million in disgorgement and fines. News media and screenwriters seek to know more about their patent and securities case, which is left to be inaccurately interpreted by others, while restraining them from providing their opinions, experiences, or context in perpetuity.

The above-named Petitioners each wish to publicly discuss their experiences with SEC in ways that would call into question the truth of the original complaint against them but have refrained from doing so out of fear of SEC reprisal, including reopened and/or contempt proceedings.

Four additional Petitioners also seek to vindicate their First Amendment rights:

- **Joseph Collins**, the only plaintiff who has not signed a Gag Consent, has been charged twice with respect to the same conduct by SEC. Then the agency tarnished his name by calling him a "recidivist" despite his clean record devoid of any criminal conviction. Exhibit I, ER-160. Despite the financial burden of fighting SEC, Mr. Collins fears that he will have to sign a "Consent" if he is unable to outlast or outspend the agency.

- **Reason Foundation** is a nonprofit media foundation that regularly publishes on administrative power, including articles and information about SEC's Gag Rule.[2] SEC's Gag Rule prevents Reason Foundation from receiving speech and ideas from those people with the best knowledge of SEC's actions: enforcement targets who have settled with the Commission, thus abridging Reason's exercise of its speech and press rights.

- ***Cape Gazette*** is an independently owned and operated community newspaper published twice weekly in Lewes, Delaware and on its website CapeGazette.com, including an article about this case.[3] As noted above it has twice reported on co-Petitioner Toroian's SEC enforcement case and wishes to interview Ms. Toroian to report her side of the story. SEC's Gag Rule prevents *Cape Gazette* from receiving

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[2] Eugene Volokh, *Federal Judge Criticizes SEC "No-Admit-No-Deny Provisions" in Enforcement Action Settlements*, The Volokh Conspiracy, REASON MAGAZINE (Oct. 28, 2022), https://reason.com/volokh/2022/10/28/federal-judge-criticizes-sec-no-admit-no-deny-provisions-in-enforcement-action-settlements/; Christian Britschgi, *How SEC Gag Orders Silence the Accused*, REASON MAGAZINE (Sept. 2022), https://reason.com/2022/07/21/redacted/.

[3] *Available at* https://www.capegazette.com/article/cape-gazette-joins-suit-against-sec-gag-rule/274721

Toroian's and other SEC enforcement targets' speech, thus abridging *Cape Gazette*'s speech and press rights.

- **NCLA** is a nonpartisan, nonprofit civil rights group devoted to defending constitutional freedoms from violations by the administrative state. NCLA regularly represents clients *pro bono* against SEC in administrative adjudications and the federal courts. NCLA attorneys and other staff regularly write and speak publicly about SEC enforcement actions.[4] SEC's Gag Rule prevents NCLA from receiving speech and ideas from those with the best knowledge of SEC's actions: enforcement targets who have settled with the Commission. The Gag Rule abridges NCLA's exercise of its speech rights.

SUMMARY OF THE ARGUMENT

While SEC may prefer that its critics not speak, that does not transform a fundamental constitutional question into a matter of

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[4] *See, e.g.*, Russell G. Ryan, *What doesn't the SEC want Volkswagen shareholders to know?*, THE HILL (Apr. 6, 2024, 10:00 AM ET), https://thehill.com/opinion/finance/4577227-what-doesnt-the-sec-want-volkswagen-shareholders-to-know/; Peggy Little & Kara Rollins, *When Your SEC Prosecutor Is Your Judge, Scandals Surely Follow*, BLOOMBERG TAX (Aug. 3, 2022, 4:45 AM EDT), https://news.bloombergtax.com/tax-insights-and-commentary/when-your-sec-prosecutor-is-your-judge-scandals-surely-follow.

discretionary policy. The Gag Rule was an affront to the Constitution the day it was deceitfully promulgated and remains so today. The Commission's refusal to amend the Rule multiplies the constitutional harms the agency has inflicted or will inflict on countless individuals and businesses, including several Petitioners. And it does so while distorting the public record by sending pleadings down the memory hole, evading any criticism of SEC by those most knowledgeable about agency enforcement.

SEC has no special expertise, much less competence, to decide constitutional questions. Its ill-placed reliance on a legally deficient argument that it can impose unconstitutional conditions upon settlement is far too slender a reed upon which to uphold its unlawful rule. This is particularly true when the Rule violates First Amendment rights to receive ideas and a free and open press held by third parties—which neither SEC nor settling defendants can waive.

When the Gag Rule was promulgated, SEC falsely claimed it was a housekeeping provision to evade notice-and-comment. Decades later, SEC substitutes an impermissible *post hoc* rationalization—that the Rule is pursuant to its enforcement authority under the securities law.

That *post hoc* rationalization is fatally flawed because nothing in the enumerated remedies under the Securities or Exchange Acts allows SEC to gag anyone. Further, the Gag Rule, which binds individuals outside of the agency, is a substantive rule and had to be subject to the APA's notice-and-comment procedures.

Absent this Court's intervention, SEC will continue its reign of error. This Court should vacate the Commission's denial of the rulemaking petition and remand with instructions for SEC to engage in rulemaking to amend 17 C.F.R. § 202.5(e), consistent with the holdings of this Court—and the Constitution.

STANDARD OF REVIEW

Generally, 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*, 92 F.3d at 942. "[W]here the proposed [amendment] pertains to a matter of policy within the agency's expertise and discretion, the scope of review should 'perforce be a narrow one[.]'" *WWHT, Inc. v. FCC*, 656 F.2d 807, 817 (D.C. Cir. 1981) (quoting *NRDC v. SEC*, 606 F.2d 1031, 1053 (D.C. Cir. 1979)).

In the ordinary course, an agency's refusal to amend its rule "is to be overturned 'only in the rarest and most compelling of circumstances[.]'" *Am. Horse Prot. Ass'n, Inc. v. Lyng*, 812 F.2d 1, 5 (D.C. Cir. 1987) (quoting *WWHT*, 656 F.2d at 818). Such circumstances arise where "'plain errors of law[] suggest[] that the agency has been blind to the source of its delegated power[.]'" *Id.* (quoting *State Farm Mut. Auto. Ins. Co. v. Dep't of Transp.*, 680 F. 2d 206, 221 (D.C. Cir. 1982), *vacated on other grounds*, 463 U.S. 29 (1983)). Compelling circumstances are also present when the agency "invade[s]" petitioner's "statutory or constitutional rights." *NRDC v. SEC*, 606 F.2d at 1045.

While review under § 706(2)(A) is the predominate type of review employed by courts examining agency decisions not to promulgate or amend a rule, there is nothing in the text of §§ 553(e) or 706 limiting such review to subsection 706 (2)(A) alone. Under the APA, courts are also permitted to "hold unlawful and set aside agency action … found to be contrary to constitutional right … in excess of statutory jurisdiction [or] authority … [or] without observance of procedure required by law." 5 U.S.C. § 706 (2)(B), (C), (D). All three of these grounds are present in this case. On review, the APA requires courts to "decide all relevant questions

of law, [and] interpret constitutional and statutory provisions[.]" 5 U.S.C. § 706. Only courts have the competence and expertise to decide the constitutional and statutory questions here. *Axon/Cochran*, 598 U.S. at 194.

This Court has recognized that challenges to "the substance of an agency decision as exceeding constitutional or statutory authority" may occur outside the statute of limitations if, as here, "by filing a [petition] for review of the adverse application of the decision to the particular challenger." *Wind River Min. Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991); *see also id.* at 714–715 (discussing approaches by various circuits).

ARGUMENT

I. PETITIONERS HAVE STANDING

While § 553(e) permits any "interested person the right to petition," that "grant of a procedural right alone cannot serve as the basis for Article III standing[.]" *Gettman v. DEA*, 290 F.3d 430, 433 (D.C. Cir. 2002). Article III's well-established standing obligations require Petitioners to "show that an injury-in-fact was caused by the challenged conduct and can be redressed by a favorable judicial decision." *San Luis*

Obispo Mothers for Peace v. United States Nuclear Regul. Comm'n, 100 F. 4th 1039, 1054 (9th Cir. 2024). "To have standing, petitioners must sufficiently allege '(i) that [they] suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief.'" *Idaho Conservation League v. Bonneville Power Admin.*, 83 F.4th 1182, 1188 (9th Cir. 2023) (quoting *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021)).

Petitioners bear the burden of establishing that they have standing. *Mothers for Peace*, 100 F. 4th at 1054. But "[o]nly one of the petitioners needs to have standing to permit [the court] to consider the petition for review." *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) (citation omitted). Once a court is satisfied that a petitioner has standing, the court "do[es] not consider the standing of the other [petitioners]." *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981).

Petitioners easily meet this burden. SEC's denial of the Petition to Amend means that the Gag Rule remains in force and continues to abridge their First Amendment rights. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes

irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1972). Individual petitioners have submitted declarations that establish that they wish to speak freely but their speech is chilled by fear of reprisal from SEC, including contempt. *See* Petitioners' Decl. at Exh. A – H at ER-128–59. Petitioner Collins challenges the Gag as an unconstitutional condition on settlement. *See* Collins Dec. at Exh. I at ER-160–64.

A. The Enforcement Target Petitioners Have Standing

In First Amendment cases, "when a challenged [regulation] risks chilling the exercise of First Amendment rights, 'the Supreme Court has dispensed with rigid standing requirements[]' … and recognized 'self-censorship' as 'a harm that can be realized even without an actual prosecution[.]'" *Hum. Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 1000 (9th Cir. 2010) (internal citations omitted). Petitioners satisfy *Lujan*'s "injury-in-fact requirement where [they] allege[] 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a [regulation], and there exists a credible threat of prosecution thereunder.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979) (discussing pre-enforcement challenges)).

SEC's Gag Rule is an unlawful prior restraint that chills the gagged Petitioners' speech. *See infra* Section II.A.1. The non-negotiable, mandatory Gag Provisions included in Petitioners' consent agreements restrain their speech and are the direct result of the Gag Rule, which binds SEC staff and defendants alike requiring a gag in all settlements. SEC's denial letter admits the Gag Provision provides the agency "recourse" of reopened actions when an enforcement target violates the gag. ER-57. As two judges on the Fifth Circuit recognized: "A more effective prior restraint is hard to imagine." *Novinger*, 40 F. 4th at 308 (Jones and Duncan, JJ., concurring). And it is undisputed that SEC acts on that threat. *See* ER-66, n.17 (Peirce dissent).

SEC's threat to reopen, particularly in settled administrative actions like those of Petitioners Powell and Lucia, would disappear if the Gag Rule ended, as staff would no longer have a basis to seek reopening. Without that threat, Petitioners like Powell and Lucia could speak truthfully and freely without fear of reprisal. As for those under a judicial gag, Petitioners Romeril, Toroian, Novinger, Pryor, Scates and Silverstein, a decision in favor here will constitute a change in the law, entitling them to challenge their consent decrees. And for Petitioner

Collins, a favorable decision will prevent SEC from imposing an unconstitutional condition on any future settlement.

B. The Press Petitioners Have Standing

One of the First Amendment's vital purposes is "to protect the free discussion of government affairs." *Mills v. State of Ala.*, 384 U.S. 214, 218 (1966). That purpose necessarily includes discussions about "the manner in which government is operated or should be operated." *Id.* The press was "specifically selected … to play an important role in the discussion of public affairs." *Id.* at 219. "Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping [government] responsible to all the people[.]" *Id.*

Reason Foundation and *Cape Gazette* have a concrete stake in amending the Gag Rule. As the interactions between *Cape Gazette* and Ms. Toroian demonstrate, the Gag Rule "impairs the media's ability to gather news by effectively denying the media access[.]" *Radio & Television News Ass'n of S. California v. U.S. Dist. Ct. for Cent. Dist. of California*, 781 F.2d 1443, 1445 (9th Cir. 1986). *Cape Gazette* interviewed Ms. Toroian when SEC first filed its complaint. *See* Melissa Steele,

Rehoboth financial advisor faces fraud claims, CAPE GAZETTE (Mar. 4, 2022), https://www.capegazette.com/article/rehoboth-financial-advisor-faces-fraud-claims/235871. But, because of the Gag Rule, which is enforced through compulsory provisions in her settlement with SEC, Ms. Toroian cannot talk freely to *Cape Gazette* about her case. *See* Melissa Steele, *Former Rehoboth financial advisor settles SEC lawsuit*, *Cape Gazette* (Dec. 1, 2023), https://www.capegazette.com/article/former-rehoboth-financial-advisor-settles-sec-lawsuit/267972. ("Toroian did not comment on the settlement. Before the final judgment, Toroian signed a consent order that effectively prevents her from discussing the case.").

SEC has effectively denied each of the Press Petitioners media access to SEC defendants/respondents and the ability to carry out their constitutionally designed role in the discussion of public affairs. *See Overbey v. Mayor of Baltimore*, 930 F.3d 215, 230 (4th Cir. 2019) (News organization has standing to assert a First Amendment claim where a city's policy of demanding gags in police brutality settlements interfered with newsgathering from willing plaintiffs). That impairment is a direct result of SEC's Gag Rule. Ordering SEC to engage in rulemaking to

amend the Gag Rule would free speech of countless individuals and allow the press to fulfill its critical function.

C. NCLA Has Standing

"Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976). The right to receive ideas, via speech or other expression, impacts the recipient's own First Amendment rights as "the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom." *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (emphasis in original). *See* Smolla, *supra* p. 12, at 16-19 discussing "the right to receive information."

NCLA has a protected right to receive the speech of those individuals and businesses SEC has silenced. It also has the desire to report on and publish that speech. Indeed, publications by NCLA and its

staff are often critical of SEC.[5] NCLA's First Amendment rights have been abridged by SEC's Gag Rule, which limits it from receiving information that is critical of the government from those with firsthand knowledge—SEC enforcement targets fearing reprisal. The Gag Rule chills settling parties' speech and forecloses the ability of NCLA to receive their ideas and use that information meaningfully.

II. SEC'S GAG RULE AND THE COMMISSION'S REFUSAL TO AMEND THE RULE ARE CONTRARY TO CONSTITUTIONAL RIGHT

It is telling that SEC entirely sidestepped the constitutional issues raised in the Petition. ER-63. While agencies typically have discretion in their enforcement decisions, *see*, *e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 837 (1985), and over their internal procedures and processes, *see*, *e.g.*, *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 143 (1940), agencies have no discretion to ignore the limitations placed on them by the Constitution, *see Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543 (1978) ("constitutional constraints or extremely compelling circumstances" limit an agency's ability to "fashion" its internal procedures and processes). Constitutional claims, like the ones here, lie

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[5] *See*, *supra* n.4.

"outside the Commission's competence and expertise." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 (2010). That is because the Commission may know a good deal about financial policy, but it knows nothing special about the First Amendment or due process rights. *Cf. Axon/Cochran*, 598 U.S. 175, 194 (cleaned up) (citations omitted) (constitutional questions entirely "outside of agency … competence and expertise").

SEC attempts to couch its Gag Rule as a matter of discretionary enforcement policy. *See* ER-58 (noting that the Gag Rule "is a proper exercise of the Commission's authority to decide how it will pursue its enforcement mission and settle cases"). Not so! Nothing in the securities laws gives SEC power to gag anyone, much less in perpetuity. While SEC may, as a matter of policy, prefer its critics to be silenced, the agency is not free to violate the Constitution. *See Vermont Yankee*, 435 U.S. at 543. SEC is not a constitutional expert and any determination about the constitutionality of the policy must be left to the courts in the first instance. While SEC makes much of the ability of a party to waive its constitutional rights, *see* ER-59–60, it provides no authority for a gag, and completely ignores the reciprocal nature of the First Amendment and

rights of third parties, including Petitioners, to receive ideas and speech. Likewise, SEC ignores how its Rule violates the freedom of the press.

Despite prior challenges to individual Gag Provisions, the courts have declined for procedural reasons to reach the constitutional questions at the core of the Petition. Those judges who have considered the Petition's constitutional concerns have consistently determined that the Gag Rule is a prior restraint, and at a minimum violates the spirit of the First Amendment. *Novinger*, 40 F.4th at 308 (Jones and Duncan, JJ., concurring); *Moraes*, 2022 WL 15774011 at *3–5.

"The APA mandates that a court 'shall … hold unlawful and set aside agency action … found to be … contrary to constitutional right, power, privilege, or immunity.'" *Sierra Club v. Trump*, 929 F.3d 670, 698 (9th Cir. 2019) (quoting 5 U.S.C. § 706(2)(B)) (alteration in original). The Commission acted contrary to constitutional right by refusing to amend 17 C.F.R. § 202.5(e).

A. The Gag Rule Violates the First Amendment

The First Amendment's free speech clause runs in three directions—citizens have a right to speak freely, a right to receive information, and a right to be free from compulsion. The Gag Rule

violates all three aspects of free speech: a trifecta of unconstitutionality. Coupled with its abridgement of freedom of the press and the right to petition the government, the Rule's near-total evisceration of First Amendment liberties warrants this Court's intervention.

1. The Gag Rule Is an Impermissible Prior Restraint on Speech

As originally enacted, the First Amendment provided "principally although not exclusively, immunity from previous restraints or censorship" and the prime reason that the First Amendment was adopted was to provide "immunity from previous restraints." *Near v. Minnesota*, 283 U.S. 697, 716 (1931). *See id.* at 713–19. SEC's Gag Rule and the prior restraints it has spawned, "inflict precisely the kind of societal harm the Founders adopted the First Amendment to protect against." *Moraes*, 2022 WL 15774011, at *4.

Prior restraints on speech and publication "are the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n*, 427 U.S. at 559. "A prior restraint … has an immediate and irreversible sanction," while "a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it," and it is therefore presumptively impermissible. *Id.* at 559 (citing A. Bickel, The Morality

of Consent 61 (1975)). An injunction against future expression issued because of prior acts is incompatible with the First Amendment. *Gayety Theatres, Inc. v. City of Miami*, 719 F.2d 1550, 1551– 52 (11th Cir. 1983). Thus, any "prior restraint on expression comes to Court with a 'heavy presumption' against its constitutional validity." *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (quoting *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 181 (1968)).

Two "evils … will not be tolerated" in governmental prior restraints. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990), *overruled on other grounds by City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004). First, no system of prior restraint may place "'unbridled discretion in the hands of a government official or agency.'" *Id.* at 225–26 (quoting *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988)). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics … or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

SEC asserts unbridled discretion to determine if a statement has violated the Gag. *See* ER-59. But as Commissioner Peirce observed, "the Commission's mandatory language is so ambiguous as to only aggravate [her] concerns:" "What is an 'indirect' denial? … What is an action that 'create[s] the impression' that the complaint lacks factual basis?" ER-64 (alteration in original).

Second, prior restraints that "fail[] to place limits on the time within which the decisionmaker must issue the license" are "impermissible." *FW/PBS, Inc.*, 493 U.S. at 226 (citing *Freedman v. Maryland*, 380 U.S. 51, 59 (1965)); *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 316 (1980). The Gag Rule's restraint of future speech never expires.

The Rule, as enforced through the Gag Provision, denies the public the opportunity to scrutinize the government's enforcement practices. SEC's Gag Rule is indefensible because it "is used by an agency of the federal government to shield itself from public view." *Id.* (citing *SEC v. Vitesse Semiconductor Corp.*, 771 F. Supp. 2d 304, 308 (S.D.N.Y. 2011)). As has long been observed:

> The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression

> of embarrassing information . . . . Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health.

New York Times Co. v. U.S., 403 U.S. 713, 723–24 (1971) (Douglas, J., concurring). "[F]ar from shoring up the Commission's integrity, the reliance on these no-denial conditions undermines it." ER-64.

2. The Gag Rule Is a Content- and Viewpoint-Based Restriction on Speech

The Gag Rule regulates the content and viewpoint of speech by mandating that enforcement targets never contest SEC's view of the complaint, threatening penalties if a defendant creates even an impression of a denial. Such restrictions are "presumptively invalid" and subject to the highest level of judicial scrutiny. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992) (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991)). The Constitution "forbid[s] the State to exercise viewpoint discrimination" which is "an egregious" and "blatant" "violation of the First Amendment." *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 829 (1995). "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the

speaker is the rationale for the restriction." *Id.* "The SEC Gag Rule is not just any prior restraint, but a prior restraint on steroids, doubly tainted by its brazen embrace of content and viewpoint discrimination." Smolla, *supra* p. 12, at 7; *id.* at 3–12.

"At the heart of the First Amendment's Free Speech Clause is the recognition that viewpoint discrimination is uniquely harmful to a free and democratic society" *Vullo*, 144 S. Ct. at 1326, warranting elevated "judicial scrutiny" any time a "content-based burden" is placed "on protected expression." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011); *see also In re Murphy-Brown, LLC*, 907 F.3d 788, 796–97 (4th Cir. 2018) ("[G]ag orders warrant a most rigorous form of review because they rest at the intersection of disfavored forms of expressive limitations: prior restraints and content-based restrictions."). The Gag Rule applies across the board to all who settle imposing "'the most serious and the least tolerable infringement'" on a defendant or respondent's freedom of speech and the press. *United States v. Quattrone*, 402 F.3d 304, 309 (2d Cir. 2005) (quoting *Neb. Press Ass'n*, 427 U.S. at 559).

"But it gets worse. The SEC Gag Rule 'goes beyond mere content, to actual viewpoint, discrimination.'" Smolla, *supra* p. 12, at 8. It forbids

speech that even "create[s] an impression" questioning any allegation of the government's Complaint and requiring withdrawals of denials. 17 C.F.R. § 202.5(e). The "upshot" of the Rule is that "so long as a defendant says what SEC wants to hear (or says nothing at all), he does not violate the No-Admit-No-Deny Provision. This is quintessential viewpoint discrimination." *Moraes*, 2022 WL 15774011, at *5.

A further upshot of the rule is that the only public record with respect to 98% of SEC's enforcement actions *is the agency file and its government-favoring press releases*. SEC press releases are notorious for their inflammatory and reputation-destroying rhetoric issued long before there has been any adjudication to support the agency's unproven allegations.[6] This, and the 98% settlement record, means that the public knows only the worst about SEC targets, and SEC will have the only and *final* word about their public reputations and alleged guilt.

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[6] *See* Russell G. Ryan, *Get the SEC Out of the PR Business; Crowing about prosecutions is inappropriate when the agency is the one deciding guilt or innocence* WALL ST. J., Nov. 30, 2014 ("SEC press releases also blur the distinction between allegation and fact. … [they] claim that an SEC investigation has already "found" wrongdoing though facts are supposed to be found only after a subsequent hearing"")

The Gag also incentivizes over-charging, charging on new and novel theories of liability, and a process of dubious regulation by enforcement. Regulation by enforcement action—rather than statutory authority—is a recognized aspect of administrative agency abuse of power and has particularly pernicious reach in the context of settled enforcement actions:

> The practice of attempting to stretch the law is a particular concern when it occurs in *settled* enforcement actions. Often, given the time and costs of enforcement investigations, it is easier for a private party just to settle than to litigate a matter. The private party likely is motivated by its own circumstances, rather than concern about whether the SEC is creating new legal precedent. However, the decision made by that party about whether to accede to … SEC's proposed order can have far-reaching effects. Settlements—whether appropriately or not—become precedent for future enforcement actions and are cited within and outside the Commission as a purported basis for the state of the law. Quite simply, a settlement negotiated by someone desperate to end an investigation that is disrupting or destroying her life should not form the basis on which the law applicable to others is based.

SEC Commissioner Hester M. Peirce, *The Why Behind the No: Remarks at the 50th Annual Rocky Mountain Securities Conference* (May 11, 2018), https://www.sec.gov/news/speech/peirce-why-behind-no-051118. When SEC pushes beyond the bounds of its lawful authority and secures a settlement of a claim for which there was no fair notice of illegality,

gagging the besieged target means that this form of regulation will have no check, no sunlight will expose it, and it will fester in the dark. The Gag thus favors the expansive, but lawless, content and viewpoint of SEC's liability narrative.

3. The Gag Provisions Compel Speech

Petitioners' Gag Provisions require at part (ii) that they "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*" (emphasis added). *See, e.g.,* Consent of Defendant Michelle Silverstein ¶ 12. That "script" is a raw assertion by SEC of power to compel future speech by those with whom it settles. But the First Amendment prohibits the government from compelling persons to express beliefs they do not hold. "[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

Government-compelled speech is subject to strict scrutiny. *Riley v. Nat'l Fed. of Blind*, 487 U.S. 781, 796–97 (1988). "Mandating speech that

a speaker would not otherwise make necessarily alters the content of the speech." *Id.* at 795. And *Janus v. AFSCME*, 138 S.Ct. 2448, 2456 (2018), held that public employees could not be compelled to subsidize speech on matters with which they disagreed. Likewise, *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*"), forbade government-scripted compelled speech.

The defendants' consent decrees require them to call into question *their own integrity* by requiring them to utter words that infer their own guilt as to *all* aspects of a complaint in a settled matter, a form of state-forced self-condemnation. The First and Fifth Amendment interests at stake are thus even more intrusive to individual liberty than those presented in *Janus* or *NIFLA*.

In *National Association of Manufacturers v. SEC*, 800 F.3d 518, 522 (D.C. Cir. 2015), the court held impermissible an SEC-mandated publication that minerals used by companies were not conflict-free: "It requires an issuer to tell consumers that its products are ethically tainted … [b]y compelling an issuer to confess blood on its hands, the statute interferes with that exercise of the freedom of speech under the First

Amendment." 800 F.3d at 530 (holding both Congress's *statute* and SEC's rule requiring disclosure of "conflict minerals" unconstitutional) .

Government efforts to compel citizens to utter speech with which they disagree deeply offends the fundamental "principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Agency for Int'l Dev. v. All. For Open Soc'y, Int'l, Inc.*, 570 U.S. 205, 213 (2013) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994)). Such efforts are routinely struck down. *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996). This court must accordingly vacate the order because the Rule compels speech.

4. The First Amendment Protects the Public's Right to Receive Ideas and the Press

SEC's denial ignores a core aspect of the First Amendment: that it "protects both the speaker and the recipient of information." *Doe ex rel. Doe v. Governor of New Jersey*, 783 F.3d 150, 155 (3d Cir. 2015). "Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (footnote

omitted). Thus, where "there is a right to [speak], there is a reciprocal right to receive the [speech], and it may be asserted by" Petitioners. *Id.* at 757.

The right to receive ideas "is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution." *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982). The right "follows ineluctably from the *sender's* First Amendment right to send them[.]" *Id.* (emphasis in original). "More importantly, the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom." *Id.* (emphasis in original).

The Supreme Court recognizes the "listener's stake," for example, in the context of prior restraints on government employees: "Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions." *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion) (citing *Pickering v. Bd. of Ed. of Tp. High School Dist. 205*, 391 U.S. 563, 572 (1968)); *see also United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 470 (1995).

Another of the First Amendment's vital purposes is "to protect the free discussion of governmental affairs." *Mills*, 384 U.S. at 218. "Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping [government] responsible to all the people[.]" *Id.* at 219. Indeed, this is the core purpose of the First Amendment:

> A government agency's desire to shelter itself from critique or embarrassment is entitled to no credit in the First Amendment calculus.[] Discussion of the decisions of government occupies the very highest rung of the First Amendment ladder. … If discussion of the actions of government is at the core of First Amendment protection, *criticism* of government is at the core of that core.

Smolla, *supra* p. 12, at 10 (footnote omitted) (italics in original).

The press has a legally protected "right to gather news." *Overbey*, 930 F.3d at 227. The Gag Rule "impairs the media's ability to gather news by effectively denying the media access[.]" *Radio & Television News Ass'n of S. California v. U.S. Dist. Ct. for Cent. Dist. of California*, 781 F.2d 1443, 1445 (9th Cir. 1986).

Because the 98% of defendants who settle with SEC are likewise among the most knowledgeable about its enforcement practices, "it is essential

that they be able to speak out freely on such questions." *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cty.*, 391 U.S. 563, 572 (1968).

Judge Jed Rakoff, in *SEC v. Vitesse Semiconductor Corp.*, 771. F. Supp. 2d 304, 308–09 (S.D.N.Y. 2011), took a hard look at SEC's "standard" "Consents" and concluded:

> The result is a stew of confusion and hypocrisy unworthy of such a proud agency as the S.E.C. The defendant is free to proclaim that he has never remotely admitted the terrible wrongs alleged by the S.E.C.; but, by gosh, he had better be careful not to deny them either … here 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." The disservice to the public inherent in such a practice is palpable.

Id. at 309.

As Commissioner Peirce observed "[t]he public cannot be sure what to believe if the government actively seeks to squelch contrary voices." ER-64. By systematically silencing all defendants, such gag provisions insulate SEC wrongdoing, over-aggressive prosecutions, and flawed enforcement policies or practices from exposure. Such a restriction "operates to insulate … [government laws] from constitutional scrutiny and … other legal challenges, a condition implicating central First

Amendment concerns." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001).

For just this reason, the Fourth Circuit invalidated the City of Baltimore's unconstitutional practice of requiring gag orders when settling a police brutality case. *Overbey*, 930 F.3d 215. That court's trenchant analysis recognized that enforcing her waiver was "outweighed by strong policy interests that are rooted in the First Amendment." *Id.* at 223. Among those interests is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open …" *Id.* at 223–24 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

B. The Gag Rule Violates Due Process

The Gag Rule is unconstitutionally vague, requiring a settling defendant to navigate at his peril what he can say about his own prosecution. ER-25–27, 64–65 (referring to the Rule as "ambiguous"). The Supreme Court has recognized that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at [the law's] meaning and differ as to its application violates the first essential of due process of law."

Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) (citing *Int'l Harvester Co. v. Kentucky*, 234 U.S. 216, 221 (1914)). "[L]aws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (citing *Connally*, 269 U.S. at 391). "When speech is involved," it is particularly important "to ensure that ambiguity does not chill protected speech." *Id.* at 253–54. But SEC's Gag Rule has no limiting principle. Its phrasing (forbidding a defendant from even creating "an impression that a decree is being entered … when the conduct alleged did not … occur") confers unlimited discretion on SEC to decide what future speech is or is not permissible. 17 C.F.R. § 202.5(e).

The Gag Rule, as enforced through the mandatory Gag Provision, also requires defendants to waive their notice and opportunity to be heard and the mandatory procedural protections of Rule 65(d)(1). *See*, *e.g.*, ER-88–89, 91 (incorporating the consent and Complaint by reference, and then requiring waiver of any Rule65(d) challenge). These pernicious premeditated provisions may explain why the unconstitutional Gag Rule has escaped judicial oversight for so long.

C. The Gag Rule Is an Unconstitutional Condition

The Gag Rule was unlawful at the time of promulgation because the constitutional injury is in the ask. The Gag Rule is a textbook example of abuse of power described as "regulatory extortion." Philip Hamburger, PURCHASING SUBMISSION: CONDITIONS, POWER, AND FREEDOM 223 (2021); D. Ginsburg & J. Wright, ANTITRUST SETTLEMENT; THE CULTURE OF CONSENT, IN 1 W. KOVACIC: AN ANTITRUST TRIBUTE 177 ("Consent decrees create potential for an enforcement agency to extract from parties under investigation commitments well beyond what the agency could obtain in litigation.").

The Commission sidesteps the Petition's First Amendment concerns by defending the Gag on its flawed view that enforcement targets "consent" to the Gag Provision. ER-59–60. As discussed above, the gag is mandatory, and SEC has never argued otherwise. But even if it were negotiable—it is not— "consent is irrelevant for conditions that go beyond the government's power." Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479, 480 (2012).

A useful way to think about the Gag is to ask whether Congress could enact a statute conditioning settlement of government prosecutions

on "consents" to never criticize the government's case. All filed denials must be immediately withdrawn and sent down the memory hole of erased history inconsistent with this flex of government power. Settling parties are told by the government what they must say and what they cannot say about their prosecution. The Supreme Court has already held that such a sanction cannot be imposed even on someone convicted of treason or serial murder. *See Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

And if there were any remaining doubt, in the only instance known to Petitioners where Congress enacted a gag, it was summarily held unconstitutional. *McBryde v. Comm. to Rev. Cir. Council Conduct*, 83 F. Supp. 2d 135, 140 (D.D.C. 1999), *judgment aff'd in part, vacated in part, McBryde v. Comm. to Review Circuit Council Conduct*, 264 F.3d 52 (D.C. Cir. 2001) (confidentiality provision of judicial discipline statute "operates as an impermissible prior restraint[;]" disciplined judge "must enjoy the opportunity to speak openly and freely about [the] proceedings" against him).

Of the hundreds of federal agencies, only two outliers—SEC and the Commodity Futures Trading Commission—have adopted such a rule.

The Department of Justice itself imposes no such requirement. Nor could it. "[When a] condition confines speech more severely than the government could do directly, then it is clear that the condition is *abridging* the freedom of speech." Hamburger, PURCHASING SUBMISSION, *supra* p. 54, at 169 (emphasis in original).

The very demand that those who wish to settle with SEC must abandon their constitutional rights is itself unconstitutional. The problem is in the ask and neither "consent" nor waiver affords a cure. The government may not condition anyone's ability to receive a benefit on the surrender of their constitutional rights. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("if the government could deny a benefit to a person because of his constitutionally protected speech … his exercise of [that] freedom[] would … be … inhibited"); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001); *accord Koontz v. St. John's River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) (quoting *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983)). The Supreme Court has long held that the government may not make its decision to refrain from its exercise of power "dependent upon the surrender … of a privilege secured … by the Constitution and laws of the United States." *Barron v. Burnside*, 121 U.S.

186, 200 (1887). Indeed, the Court declared in 1963 it was by then "too late in the day to doubt that the libert[y] of … expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). *Speiser v. Randall*, 357 U.S. 513, 519 (1958), *accord Crosby*, 312 F.2d 483.

Nor does it make a difference that SEC could have refused to settle. *See* ER-57. All unconstitutional conditions cases involve an optional governmental action of some sort. As *Koontz* states, the Supreme Court has "repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional rights." 570 U.S. at 608. Thus, even if SEC would have been within its rights in refusing to settle, that greater authority does not imply a "lesser" power to condition settlement upon the forfeiture of constitutional rights.

Nor does SEC's logic on waiver hold water. ER-59-60. Even if enforcement targets could waive their First Amendment rights, they cannot waive the reciprocal right of an individual or the press to receive their speech.

SEC overreads *Town of Newton v. Rumery*, 480 U.S. 386. This Court has observed that the waiver of a constitutional right is distinct from *Rumery*'s surrender of a statutory remedy in two ways:

> First, because constitutional rights are generally more fundamental than statutory rights, a stricter rule than the one embodied by the *Rumery* balancing test may be appropriate in such cases. Second, foregoing a remedy of money damages for a past injury that cannot be undone may not implicate the public interest to the same extent as does the surrender of the right itself.

Davies, 930 F.2d at 1397. Assuming without deciding whether the stricter standard applied, the *Davies* court held that "even under the *Rumery* test" a settlement provision prohibiting an individual from ever seeking or accepting "any office of position with the [school] District in any capacity" was "unenforceable." *Id.* at 1394, 1397 (second quotation cleaned up) (citation in second quotation omitted). That is because the interest in enforcing the settlement provision was outweighed by the public policy harmed by the provision. *Id.* at 1396.

> Before 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 agreement. 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. at 1399; *see also Overbey*, 930 F.3d at 222 ("We hold that the non-disparagement clause in [the] settlement agreement amounts to a waiver of her First Amendment rights and that strong public interests rooted in the First Amendment make it unenforceable and void."); *Richards*, 385 F. App'x at 693–94 (striking a portion of defendant's condition of probation that "restrict[ed] the right of the defendant to make any public comment regarding [the county commissioner] or any of her family members").

SEC's position also does not withstand reasoned analysis because the cases it cites all deal with constitutional rights that are inextricably bundled with settlement of a case or, in the case of *Rumery*, part and parcel of the dispute being settled. ER-59. Thus, constitutional rights such as right to trial, right to jury, right to appeal, and right to confront witnesses can be waived because there is a logically "tight fit" of these rights, and obviously waiver of them is logically necessary to settlement. *See Davies*, 930 F. 2d at 1399. There is no "close nexus" here, only the Commission's attempt to save face in all its settlements with this across-the-board gag on future speech that systematically serves the illegitimate purpose of evading public scrutiny.

Doubtless there are individuals or corporations desperate enough to sign on to almost any terms required by the government that they do so simply to avoid further economic and reputational damage or worse by those in power. *See* Nelson Obus, Opinion, *Refusing to Buckle to SEC Intimidation*, WALL ST. J. (June 24, 2014) (describing 12-year legal battle of small company costing $12 million to defend against SEC charges). Such power to bankrupt enforcement targets should be of equal concern to courts, for all petitioners before them, no matter their perceived wealth. A party's wealth, or lack thereof, does not license the government to "extract settlement terms they could not lawfully obtain any other way." *Axon/Cochran*, 598 U.S. at 216 (Gorsuch J., concurring in judgment). At stake is not only the freedom of speech but also one of the highest of constitutional principles, that a private party's consent—even if truly voluntary—cannot give the federal government a power that the Constitution denies to it. "The Constitution is a law enacted by the people and therefore is not variable with the consent of any state or private person. No such consent can relieve the federal government of the Constitution's limits." Hamburger, PURCHASING SUBMISSION, *supra* p. 54, at 156.

III. THE GAG RULE IS NOT AUTHORIZED BY STATUTE AND WAS ADOPTED DISREGARDING NOTICE-AND-COMMENT PROCEDURES

It is a fundamental feature of our tripartite system of government that "[a]dministrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided." *NFIB v. OSHA*, 595 U.S. 109, 117 (2022). No agency has any inherent power to make law. Article I, § 1 of the U.S. Constitution vests "[a]ll legislative powers" in Congress, and "the lawmaking function belongs to Congress … and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996). This is a constitutional barrier to the exercise of legislative power by an agency. Further, "an agency literally has no power to act … unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Thus, even if SEC could constitutionally promulgate the Gag Rule, it cannot purport to bind anyone without congressional authorization, which is utterly lacking here. And even if such authorization existed—it does not—SEC was bound to follow the APA's notice-and-comment procedures.

A. SEC Lacked Statutory Authority to Issue the Gag Rule

When the Gag Rule was promulgated, SEC claimed it was issued "[p]ursuant to … 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." ER-40; *see also* ER-42–43. Those regulatory sections—each of which only empowers the agency to make internal housekeeping rules for its own administration—provide no authority whatsoever for the Commission to impose its Gag Rule that binds third parties brought before them who decide to settle judicial or administrative proceedings. None of the statutes under which SEC purported to act gave it authority to issue the Gag Rule.

In refusing to amend the Rule, SEC offers a different theory of statutory authority to support the Gag Rule: that the Commission's general enforcement authority is sufficient to support the Rule. ER-55. SEC's *post hoc* rationalization that § 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" is not permissible. ER-56 n.2. "It is a 'foundational principle of administrative law' that judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action[.]'" *Dep't of Homeland Sec. v. Regents of the Univ.*

of California, 591 U.S. 1, 20 (2020) (quoting *Michigan v. EPA*, 576 U.S. 743, 758 (2015)). When an "agency has chosen to 'rest on [its original action] while elaborating on its prior reasoning,' … the bar on post hoc rationalization operates to ensure that the agency's supplemental explanation is anchored to 'the grounds that the agency invoked when it took the action[.]'" *Biden v. Texas*, 597 U.S. 785, 810–11 (2022) (quoting *Regents*, 591 U.S. at 21 and *Michigan*, 576 U.S. at 758). Here SEC rested on its original action, the 1972 promulgation of the Gag Rule. So, any supplemental explanation like relying on 15 U.S.C. § 78u and other enforcement-related provisions is barred.

Even if it were permissible, SEC's post hoc rationalization fails for another reason: it is incompatible with the remedies available under the Securities and Exchange Acts. SEC is permitted to bring an action in federal district court to enjoin violations of the Securities and Exchange Acts. *See* 15 U.S.C. §§ 77t(b), 78u(d). An injunction sought pursuant to § 77t(b) can only "enjoin such acts or practices" that "constitute or will constitute a violation of the [Securities Act or the rules promulgated thereunder]." Likewise, an injunction sought pursuant to § 78u(d) can only "enjoin such acts or practices" that "constitute a violation of the

[Exchange Act or the rules promulgated thereunder]." Truthful speech is not a violation of any law, let alone a violation of the Securities Act or the Exchange Act. Thus, even if parties decided not to settle and cases proceeded to a trial where liability was established, SEC could not have sought an injunction restricting a defendant's truthful speech.

Such a "rule" also violates due process of law. When the government attaches a penalty for doing what the law plainly allows every American to do—speak truthfully—the Supreme Court has recognized that such a prohibition constitutes a due process violation of the most fundamental kind. *North Carolina v. Pearce*, 395 U.S. 711, 723–26 (1969), *overruled on other grounds by Alabama v. Smith*, 400 U.S. 794, 795 (1989).

The APA requires courts to "hold unlawful and set aside agency action … found to be … in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]" 5 U.S.C. § 706(2)(C). Congress has not given SEC any authority to impose additional restrictions on the constitutional rights of persons it prosecutes, either in court or administratively. Moreover, such congressional authorization would itself be unconstitutional: "In the realm of protected speech, the

legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 784–85 (1978).

B. SEC Circumvented the APA Notice-and-Comment Process

Under the APA, when agencies seek to promulgate "substantive" or "legislative" rules that "create rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress" *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1087 (9th Cir. 2003) (internal citations omitted) they must observe formal notice-and-comment processes. It is undisputed that SEC published this rule as "effective immediately," announcing it had no duty to notify the public of the new and mandatory waiver of First Amendment rights in perpetuity it would require of settling parties. Commissioner Peirce's dissent rightly calls SEC's arrant disregard of APA requirements "unceremonious." ER-63.

The Supreme Court recognizes that under the APA, "Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a

pronouncement of such force." *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001). "APA notice and comment" is one such formal procedure, "designed to assure due deliberation." *Id.* (quoting *Smiley v. Citibank (South Dakota) N.A.*, 517 U.S. 735, 741 (1996)).

Whether a rule is legislative or interpretative is a matter of function, not nomenclature. This Circuit reviews *de novo* the determination that an agency's rule is interpretive and not legislative as a matter of law. *Erringer v. Thompson*, 371 F.3d 625, 629 (9th Cir. 2004). Thus, an agency's bald assertion that a rule, like the Gag Rule, is an interpretative rule is afforded no deference. *Cf. Hemp Indus. Ass'n*, 333 F.3d at 1088 ("The fact that an agency claims that its rule does not bind tribunals outside the agency, however, does not end the inquiry into whether the rule is legislative.").

Under the Ninth Circuit's "three-part test for determining whether a rule has 'the force of law,'" *Erringer*, 371 F.3d at 630, courts determine whether "(1) when, in the absence of the rule, there would not be an adequate legislative basis for enforcement action; (2) when the agency has explicitly invoked its general legislative authority; or (3) when the rule effectively amends a prior legislative rule." *Id.* When "there is no

legislative basis for enforcement action on third parties without the rule, then the rule necessarily creates new rights and imposes new obligations." *Hemp Indus. Ass'n*, 333 F.3d at 1088.

While SEC argues the Gag Rule is "interpretive," ER-56 n.2, this unheard-of prior restraint is obviously legislative and meets the first part of the *Erringer* test. There is no legislative basis for the Rule, *see supra* Section III.A., and the Rule imposes new obligations on enforcement targets by unceremoniously stripping them of their First Amendment rights in perpetuity. Absent the Commission's Rule, they would, like all other Americans throughout its history who settled with the government, possess unabridged First Amendment rights.

The APA requires courts to "hold unlawful and set aside agency action … found to be … without observance of procedure required by law[.]" 5 U.S.C. § 706(2)(D). The Gag Rule "is a procedurally invalid legislative rule, not an interpretive rule." *Hemp Indus. Ass'n*, 333 F.3d 1082 at 1091.

IV. SEC'S REFUSAL TO AMEND THE GAG RULE SHOULD BE VACATED BECAUSE IT OFFERED NO RATIONAL EXPLANATION FOR ITS DECISION

This case is one of the "rarest and most compelling of circumstances"—an attempt to amend an unconstitutional agency Rule that has silenced untold numbers of individuals. *Am. Horse Prot. Ass'n, Inc.*, 812 F.2d at 5. Thus, even if this Court declines to review SEC's refusal to amend the Gag Rule under 5 U.S.C. § 706(2)(B)–(D), the agency's denial is still reviewable because it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A).

Such review has typically been narrow, but the reasons for that limited review are not present here. As discussed above, the Commission is not an expert in constitutional law. *See supra* pp. 31–32. Nor is SEC free to ignore the Constitution or duly promulgated statutes, like the APA. *See*, *e.g.*, *supra* Section III.B.; *see also Sokol v. Kennedy*, 210 F.3d 876, 880 (8th Cir. 2000) ("A statute is the command of the sovereign. The [SEC] must follow it."). Considering the Gag Rule's significant constitutional and statutory failings, SEC has failed to provide a rational explanation supporting the Gag Rule.

SEC makes two primary arguments in support of its order denying the Petition to Amend: (1) that the Gag Rule "is a proper exercise of the Commission's authority to decide how it will pursue its enforcement mission and settle cases[,]" ER-58; and, (2) the Commission's view that "[t]here is a large body of precedent confirming that a defendant can waive constitutional rights as part of a civil settlement[.]" ER-59.

The first statement is conclusory and amounts to little more than the Commission's preference for silencing enforcement targets. As Commissioner Peirce highlighted, there is "scant factual basis" for the Gag Rule. ER-63. It is also "questionable" that SEC "is the party making significant concessions[.]" ER-63. The Commission completely ignores that it stands to gain more than just a defendant's "permanent silence" (and the criticism that may otherwise occur). SEC does not have to prove its case but gets the benefit of its allegations. ER-63. Furthermore, SEC ignores that defendants unable to continue a costly defense must equally "sacrifice" any opportunity for full exoneration. SEC's determination lacks a "reasoned explanation." *Env't Health Tr. v. FCC*, 9 F.4th 893, 904 (D.C. Cir. 2021).

The second statement—that waiver is permissible—is conclusory and not supported by law. It is also wrong for the reasons explained above. *See supra* pp. 31–32 (discussing how SEC has no constitutional expertise; 51–55 (discussing that rights waived must have a close nexus to the logic of settlement). Moreover, SEC ignores the principle that an enforcement target cannot waive the public or the press's right to receive information. *See supra* Section II.A.3. *See* William F. Johnson, *SEC 'Neither-Understands/Nor-Cares' About Realities of Settlement Gag Rule*, N.Y.L.J. March 6, 2024 (Dissecting SEC's denial rationales as failing to engage on the merits and offering justification that is "both overbroad and unsubstantiated—it also misses the point. The SEC should care about getting it right.")[7]

SEC's legally unsupported waiver theory is accordingly not a reasoned explanation for its decision to deny the Petition to Amend. Finally, Petitioner Collins has waived no constitutional rights in his challenge.

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[7] *Available at* https://www.law.com/newyorklawjournal/2024/03/06/sec-neither-understandsnor-cares-about-realities-of-settlement-gag-rule/?slreturn=20240517165342

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court vacate the Commission's denial of the rulemaking petition, and remand with instructions for SEC to engage in rulemaking to amend 17 C.F.R. § 202.5(e) to remove the language imposing the gag from the rule within 90 days of its opinion on the legal challenges raised in this Petition.

Respectfully submitted, this 17th day of June, 2024, by:

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STATEMENT OF RELATED CASES

Petitioners are not aware of any related cases pursuant to Circuit Rule 28-2.6.

Dated: June 17, 2024

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CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rules of Appellate Procedure 32(a)(4) and Circuit Rule 32-1 that the attached brief is set in Century Schoolbook font, double-spaced, has a typeface of 14 points, and, according to the word count feature of the word processing system used to prepare the brief (Microsoft Word for Microsoft 365), contains 13,980 words.

Dated: June 17, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2024, I electronically filed the foregoing Petitioners' Opening Brief with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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