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, THE CAPE GAZETTE, AND 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' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
SUMMARY OF THE ARGUMENT ON REPLY 1
ARGUMENT 4
I. ALL PETITIONERS HAVE STANDING AND ARE PROPERLY BEFORE THIS COURT 4
A. SEC Misconstrues the Law 4
B. SEC Misstates the Relevant Standing Requirements 6
1. Petitioners Are "Aggrieved" Within § 78y(a)(1)'s Meaning 7
2. Petitioners' Injuries Are Traceable to SEC's Gag Rule and Redressable by This Proceeding 8
II. SEC'S GAG RULE AND SEC'S REFUSAL TO AMEND THE RULE ARE CONTRARY TO CONSTITUTIONAL RIGHT 11
A. The Gag Is Not Voluntary 11
B. *Leonard*, *Rumery*, and *Romeril* Do Not Save the Rule 19
C. The Gag Rule Violates the First Amendment 23
1. The Gag Rule Is an Impermissible Prior Restraint and Imposes Content and Viewpoint Restrictions on Speech 23
2. The Gag Rule Compels Speech 28
3. SEC's Gag Violates the Public's Right to Receive Speech and the Freedom of the Press 28
D. The Gag Rule Violates Due Process 29
E. The Gag Rule Is an Unconstitutional Condition 31
III. SEC HAS NO STATUTORY AUTHORITY TO IMPOSE ANY GAG 33
IV. THE GAG RULE EVADED NOTICE-AND-COMMENT PROCEDURES 34
V. SEC HAS OFFERED NO RATIONAL EXPLANATION FOR ITS DENIAL 34
CONCLUSION 36
CERTIFICATE OF COMPLIANCE 38
CERTIFICATE OF SERVICE 39

TABLE OF AUTHORITIES

Cases

Am. Horse Prot. Ass'n, Inc. v. Lyng,
812 F.2d 1 (1987) 35

Axon v. FTC and *SEC v. Cochran*,
598 U.S. 175 (2023) 13

Barker v. Wingo,
407 U.S. 514 (1972) 17, 27

Biden v. Nebraska,
143 S. Ct. 2355 (2023) 6

Bingham v. Holder,
637 F.3d 1040 (9th Cir. 2011) 32

Blackburn v. Snow,
771 F.2d 556 (1st Cir. 1985) 32

Blount v. SEC,
61 F.3d 938 (D.C. Cir. 1995) 7, 8

Brady v. United States,
397 U.S. 742 (1970) 17

Cato Inst. v. SEC,
4 F.4th 91 (D.C. Cir. 2021) 9

City of Austin, v. Reagan Nat'l Advert. of Austin, LLC,
596 U.S. 61 (2022) 27

Crosby v. Bradstreet Co.,
312 F.2d 483 (2d Cir. 1963) 22

D.H. Overmyer Co. v. Frick Co.,
405 U.S. 174 (1972) 18

Davies v. Grossmont Union High Sch. Dist.,
930 F.2d 1390 (9th Cir. 1991) 14, 21

Davies v. Grossmont Union High Sch. Dist.,
501 U.S. 1252 (1991) 14

Democratic Nat'l Comm. v. Republican Nat'l Comm.,
673 F.3d 192 (3d Cir. 2012) 18

Erie Telecomms., Inc. v. City of Erie,
853 F.2d 1084 (3d Cir. 1988) 16

Est. of Saunders v. Comm'r of Internal Revenue,
745 F.3d 953 (9th Cir. 2014) 16

First Nat'l Bank v. Bellotti,
435 U.S. 765 (1978) 29

Fox Television Stations, Inc. v. FCC,
280 F.3d 1027 (D.C. Cir. 2002) 10

FTC v. Standard Oil Co. of Cal.,
449 U.S. 232 (1980) 13

Ga. Republican Party v. SEC,
888 F.3d 1198 (11th Cir. 2018) 6

Idaho Conservation League v. Mumma,
956 F.2d 1508 (9th Cir. 1992) 9

In re George F. Nord Bldg. Corp.,
129 F.2d 173 (7th Cir. 1942) 20

INS v. St. Cyr,
533 U.S. 289 (2001) 18

Iowa v. Tovar,
541 U.S. 77 (2004) 17

Janus v. *AFSCME*,
585 U.S. 878 (2018) 28

Lake James Cmty. Volunteer Fire Dep't, Inc. v. Burke Cnty.,
149 F.3d 277 (4th Cir. 1998) 16, 17

Legal Servs. Corp. v. Velazquez,
531 U.S. 533 (2001) 31

Leonard v. Clark,
12 F.3d 885 (9th Cir. 1993) 16, 19, 20

Malem Med., Ltd. v. Theos Med. Sys., Inc.,
761 F. App'x 762 (9th Cir. 2019) 18

Massachusetts v. EPA,
549 U.S. 497 (2007) 6

McGirt v. Oklahoma,
591 U.S. 894 (2020) 3

Meland v. Weber,
2 F.4th 838 (9th Cir. 2021) 9

Mont. Shooting Sports Ass'n v. Holder,
727 F.3d 975 (9th Cir. 2013) 5

Murthy v. Missouri,
144 S. Ct. 1972 (2024) 6

Nat'l Abortion Fed'n v. Ctr. for Med. Progress,
Nos. 21-15953 & 15955, 2022 WL 3572943 (9th Cir. Aug. 19, 2022) .. 18

Nat'l Council for Adoption v. Blinken,
4 F.4th 106 (D.C. Cir. 2021) 4

Nat'l Family Farm Coal. v. EPA,
966 F.3d 893 (9th Cir. 2020) 4, 5

Ostergren v. Frick,
856 F. App'x 562 (6th Cir. 2021) 24

Overbey v. Mayor of Balt.,
930 F.3d 215 (4th Cir. 2019) 14, 29

Schmidt v. Lessard,
414 U.S. 473 (1974) 31

SEC v. Moraes,
No. 22-cv-8343, 2022 WL 15774011 (S.D.N.Y. Oct. 28, 2022) 25

SEC v. Novinger,
40 F.4th 297 (5th Cir. 2022) 25

SEC v. Romeril,
15 F.4th 166 (2d Cir. 2021) 21

Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.,
502 U.S. 105 (1991) 26

Snepp v. United States,
444 U.S. 507 (1980) 24

Sokol v. Kennedy,
210 F.3d 876 (8th Cir. 2000) 35

State Indus. Prods. Corp. v. Beta Tech. Inc.,
575 F.3d 450 (5th Cir. 2009) 30

Stavrianoudakis v. Fish & Wildlife Serv.,
108 F.4th 1128 (9th Cir. 2024) 31

Town of Newton v. Rumery,
480 U.S. 386 (1987) 21

TransUnion LLC v. Ramirez,
594 U.S. 413 (2021) 6

United States v. ITT Cont'l Baking Co.,
420 U.S. 223 (1975) 33

United States v. Jeronimo,
398 F.3d 1149 (9th Cir. 2005) 15

United States v. Littlefield,
105 F.3d 527 (9th Cir. 1997) 15

United States v. Richards,
385 F. App'x 691 (9th Cir. 2010) 14, 15

William Keeton Enters., Inc. v. A All Am. Strip-O-Rama, Inc.,
74 F.3d 178 (9th Cir. 1996) 30

Statutes

15 U.S.C. § 78u 33

15 U.S.C. § 78w 33

15 U.S.C. § 78y 5, 7

5 U.S.C. § 706 35

Regulations

EPA, *Control of Emissions From New Highway Vehicles and Engines*,
68 Fed. Reg. 52922 (Sept. 8, 2003) 8

Other Authorities

2 *Smolla & Nimmer on Freedom of Speech* (2024) 24

Aaron Gordon,
Imposing Silence Through Settlement,
84 ALB. L. REV. 335 (2021) 22

Philip Hamburger,
PURCHASING SUBMISSION:
CONDITIONS, POWER, AND FREEDOM (2021) 13, 33

Philip Hamburger,
Unconstitutional Conditions: The Irrelevance of Consent,
98 VA. L. REV. 479 (2012) 33

Rodney Smolla,
Why the SEC Gag Rule Silencing Those Who Settle SEC Investigations Violates the First Amendment,
29 WIDENER L. REV. 1 (2023)..... 22, 25, 35, 36

SUMMARY OF THE ARGUMENT ON REPLY

SEC defends its indefensible Gag Rule by hurling as many obstacles in the path of review as possible, whether the authority it cites holds as it says—or not. The lack of legal support for that tactic typifies the agency's casual, even "unceremonious" disregard for Constitutional and legal requirements that bind the government. SEC's Gag Rule was conceived in deceit, self-legislated without statutory authority or notice-and-comment, and it defies core constitutional and legal constraints on the agency's power. SEC's attempt to oust all but one Petitioner is a futile, unnecessary diversion calculated to evade legal review of its outlier, unconstitutional policy.

SEC makes four arguments. *First*, it seeks dismissal of all but one of the Petitioners on unsound legal theories.

Second, it argues that Petitioners have voluntarily waived their constitutional rights. By so doing, it attempts to evade the immutable operative fact that SEC imposes gags on all who would settle with the agency, making it neither voluntary nor consensual. In service of this fiction, SEC misconstrues or simply ignores binding law-of-the-circuit precedents, instead offering up handfuls of cases that have nothing of

substance to offer. Such evasion effectively concedes that its Rule cannot withstand scrutiny on the merits.

Third, it argues that its prior restraint and unconstitutional condition "would withstand scrutiny under the proper balancing test" even though a lifetime gag lacks a "close nexus" to the settled claim, is anything but narrowly tailored, and disserves the public interest.

Fourth, SEC derides Petitioners' challenge as "trot[ting] out a bevy of First Amendment concepts" that this Court must ignore. It views the First Amendment and Due Process as "inapposite," and declares *ipse dixit* that the Supreme Court's unconstitutional conditions doctrine has no application to SEC settlements. But the gags imposed through the Rule are lifetime prior restraints, unconstitutional conditions, content- and viewpoint-discriminating suppressions of speech that also compel government-scripted speech. The Gag Policy is also vague and strips defendants of their due process rights by denying them any opportunity for a hearing on this non-consensual extinguishment of their future free speech rights.

This policy is unique to SEC (and CFTC's later-adopted copycat rule). *Every other agency and the Justice Department itself* manage to

regulate Americans without extorting a lifetime gag as the cost of settlement. SEC managed the same for nearly 40 years. Returning it to that posture does no harm. It both aligns SEC with other law enforcement agencies and contains its operations within legal and constitutional guardrails.

SEC has bound and gagged thousands of persons outside the Commission for five decades. Its attempt to use this massive and prolonged oppression as justification for its continuance displays its final unworthy flourish. As the Supreme Court has determined, "the magnitude of a legal wrong is no reason to perpetuate it." because "Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right." *McGirt v. Oklahoma*, 591 U.S. 894, 934, 937–38 (2020).

ARGUMENT

I. ALL PETITIONERS HAVE STANDING AND ARE PROPERLY BEFORE THIS COURT[1]

A. SEC Misconstrues the Law

SEC attempts to dismiss all but one of the Petitioners by citing Ninth Circuit authority for analyzing both standing and venue on a "petitioner-by-petitioner" basis. SEC.Br.16 (citing *Nat'l Family Farm Coal. v. EPA*, 966 F.3d 893, 930 (9th Cir. 2020) (Nelson, J., concurring)). But SEC inexplicably fails to inform the Court that the majority opinion, which Judge Nelson wrote, holds to the contrary.

Nat'l Family Farm involved two separate petitions for review under different statutes. Even under two different review schemes, the majority held that "because one petitioner from each petition has associational standing, we need not decide whether the other [petitioners] have

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[1] Petitioners submit Further Excerpts of Record on reply: Declaration of Mike Alissi for Reason Foundation, FER-3–17; and Declaration of Christopher Rausch for Cape Gazette, FER-18–26. *See Nat'l Council for Adoption v. Blinken*, 4 F.4th 106, 111 (D.C. Cir. 2021) (Plaintiffs may support standing in reply brief when they reasonably assumed their standing was self-evident).

associational standing." 966 F.3d at 911 (citing *Mont. Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 981 (9th Cir. 2013)).

The court also assessed whether venue was proper in the Ninth Circuit for three of six non-resident petitioners and determined that "we need not address that argument" because "[v]enue is proper as to the other three [petitioners]," and thus the court could reach the merits of the petition. *Id.* at 907 n.2. Judge Nelson's concurrence merely suggested that a petitioner-by-petitioner analysis in future cases may be warranted if no single petitioner can demonstrate both standing and venue. *Id.* at 932.

As SEC concedes, petitioner Ray Lucia has satisfied both standing and venue. Further, five of the Petitioners reside or have their principal place of business in this Circuit. Op.Br.6. Under *Nat'l Family Farm*, which did not dismiss any individual petitioner, the analysis stops there.

The Ninth Circuit's approach is consistent with its sister circuits. For example, where three groups filed a single petition under 15 U.S.C. § 78y(a), the Eleventh Circuit held that because the resident party lacked standing, venue was inappropriate for the remaining non-resident parties. *Ga. Republican Party v. SEC*, 888 F.3d 1198, 1205 (11th Cir.

2018). This holding confirms, as this Circuit has recognized, venue is proper so long as one party has both standing and venue.

B. SEC Misstates the Relevant Standing Requirements

The Supreme Court has consistently held that "[o]nly one of the petitioners needs to have standing to permit us to consider the petition for review." *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007); *see also Biden v. Nebraska*, 143 S. Ct. 2355, 2365 (2023) (same). Relying on language from *Murthy v. Missouri*, 144 S. Ct. 1972, 1987–88 (2024) (quoting *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021)), SEC argues that because standing is "not dispensed in gross," the court must assess each Petitioner's standing individually and dismiss Petitioners who did not participate or join in the petition before the SEC. SEC.Br.16–17. Neither case provides authority for dismissal.

TransUnion held that class-action plaintiffs seeking *individual* damages from private defendants must establish individual standing. *See* 594 U.S. at 427. In *Murthy*, the Court found that *none* of the plaintiffs had standing to seek relief from any of the defendants. Whereas here, the Petitioners all seek the same form of relief from the same defendant: vacatur of the Commission's denial of the petition and remand with

instructions for SEC to amend the Gag Rule. This is precisely the fact pattern at play in *Massachusetts v. EPA*, where the Court analyzed only Massachusetts's standing and did *not* instruct the district court to dismiss other petitioners on remand.

1. Petitioners Are "Aggrieved" Within § 78y(a)(1)'s Meaning

SEC misstates the law when it asks the court to dismiss eight Petitioners because they did not "directly participate in the agency proceedings" or "join the petition" and cannot show that they were "persons aggrieved" under 15 U.S.C. § 78y. SEC.Br.17–18 (cleaned up). The relevant standing analysis is not participation in the proceeding. Section 78y(a)(1) says nothing about "participation"; it confers standing on any "person *aggrieved* by a final order of the Commission." *Id.* (a)(1) (emphasis added).

A petitioner need not have participated in any proceeding below to have standing to challenge this Rule. For example, in *Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995), a registered broker-dealer of municipal securities challenged an SEC order approving a rule that restricted municipal securities dealers' political contributions. Citing § 78y(c)(1), SEC argued that the petitioner could not proceed with a challenge under

78y(a)(1) because he had not *himself* "urged" objections to the rule in a proceeding below. SEC.Br.40. Rejecting this argument, the D.C. Circuit held, "we see nothing in either [§ 78y(c)(1)] or [§ 78y(a)(1)] that purports to link the two subsections together as the Board suggests … [the statute] shows no interest in *who* urged the objection, and is presumably aimed only at assuring that the Commission … had a chance to address claims before being challenged on them in court." *Blount*, 61 F.3d at 940.

It does not matter that some Petitioners did not join the initial petition—it only matters that the *arguments* they advance here were raised. Indeed, in *Massachusetts v. EPA*, the Commonwealth of Massachusetts was not party to the initial petition for rulemaking. *See* EPA, *Control of Emissions From New Highway Vehicles and Engines*, 68 Fed. Reg. 52922 (Sept. 8, 2003).

2. Petitioners' Injuries Are Traceable to SEC's Gag Rule and Redressable by This Proceeding

SEC further grasps at a standing dismissal for six Petitioners, contending that they "have failed to show how their injuries are directly traceable to any actual or possible unlawful Government conduct." SEC.Br.20. It denies concrete injury because "the Commission's contractual remedy for breach is not self-executing," so there is "no injury

directly caused by the denial of the rulemaking petition." SEC.Br.21. Moreover, says SEC, because Petitioners only request prospective relief—to amend the Gag Rule going forward—the injury is not redressable. Neither argument has any merit.

The threat gagged Petitioners face if they speak out in violation of their Gags is a cognizable injury. This Court readily found standing in *Meland v. Weber*, 2 F.4th 838, 847 (9th Cir. 2021), because "if SB 826 is declared unconstitutional and the state is enjoined from enforcing it, then [plaintiff] 'would no longer have to worry that he might subject [the company] to [fines].'" (citation omitted).

SEC next argues no standing because any potential adverse action against Petitioners would not be "self-executing." SEC.Br.21. This is not true. Petitioners established in their Opening Brief, "[t]he Gag Provision may also be enforced through criminal contempt 'even absent the SEC's consent.'" Op.Br.9 (quoting *Cato Inst. v. SEC*, 4 F.4th 91, 95 (D.C. Cir. 2021)). SEC did not argue otherwise in its response, nor could it. Further, a threat of injury suffices. *See Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1517 (9th Cir. 1992).

A favorable decision by the Ninth Circuit would redress Petitioners' injuries. *See Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1039 (D.C. Cir. 2002) (TV network and cable companies had standing to challenge FCC's denial of petition to repeal rules because Court of Appeals could vacate the rule, where FCC was unlikely to amend the rule on remand).

The very text of the "consent" orders recites Rule 202.5(e) as the authority for the gag—hence traceability. *See*, *e.g.*, ER-125. All Petitioners were or are harmed by SEC's non-negotiable condition. ER-128–63. Nor does SEC say otherwise. It admits that it will not settle without a Gag. Petitioners' standing analysis, as supported by detailed Declarations, more than satisfies standing requirements. Op.Br.19–25, 29–36. SEC challenges no declared fact nor any aspect of Petitioners' standing briefing. Forcing Petitioners to rebut these insupportable threshold arguments disserves the Court, unduly burdens Petitioners, and reveals SEC's desperation to evade merits review.

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

A. The Gag Is Not Voluntary

All Petitioners who are bound by a judicially entered gag submitted Declarations with the Opening Brief stating that the "Consent" they had signed which contained the Gag Provision was "SEC-drafted and SEC-required." It required them to waive notice and an opportunity to be heard on the terms of the document or entry of the Final Judgment and further required them to "withdraw[] any papers filed in this action to the extent they deny any allegation in the complaint." *See* ER-128–63. SEC's conditions waiving due process, a hearing and Rule 65(d) protection were also non-negotiable. *Id*. Petitioner Toroian "attempted to negotiate the Gag Provision language and the provisions that required me to waive notice and an opportunity to be heard … but was told such provisions were non-negotiable." ER-146.

Petitioners Lucia and Powell, respondents in SEC administrative proceedings, have averred they "[were] required to sign an SEC-drafted and SEC-required 'Offer of Settlement' that is written to appear that this is my offer of settlement, even though the document was written in its entirety by SEC and presented to me as a non-negotiable document

required for me to sign as a condition of my settlement." ER-129, 141. Like Ms. Toroian, Mr. Lucia "attempted to negotiate the Gag Provision language and the provisions that required me to waive notice and an opportunity to be heard out of the Agreement but was told such provisions were non-negotiable." ER-142. Mr. Powell also "refused the settlement verbiage and specifically the gag order numerous times, but the SEC denied my requests and exerted time pressure, indicating that if I did not sign, they would take further enforcement action. The gag order, in conjunction with the false statement that I was not coerced, creates tremendous angst." ER-130. Each Declaration also states that the SEC Press Releases have caused them great reputational, personal, and financial harm because only the government's version of the case is in the public record. *See* ER-128–63.

Despite these Declarations establishing that the Gag Provision is forced upon settling parties as a non-negotiable condition of settlement, SEC represents to this Court that these are "voluntary." It cannot maintain that fiction on this factual record.

Even though SEC drafts *all of the paperwork to make this look voluntary*, SEC accuses *Amicus Curiae* U.S. Chamber of Commerce of

having "manufactured coercion argument" that "undermine[s] the entire concept of settlements." *See* SEC.Br.45–46.[2] But SEC's argument is hyperbolic. This case challenges only SEC's outlier Rule.

SEC rebuts *amici*'s consensus view by saying such coercion is just "part of the social burden of living under government." SEC.Br.46 (citing *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980)). Yet, besides CFTC, *no other agency nor DOJ extorts gags*. SEC's argument collapses under its own illogic.

Justice Gorsuch called out the dangers of agencies wielding asymmetric power to regulate outside their authority: "Aware, too, that few 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." *Axon v. FTC* and *SEC v. Cochran*, 598 U.S. 175, 216 (2023) (Gorsuch, J., concurring). Scholars rightly call this "regulatory extortion." Philip Hamburger, PURCHASING SUBMISSION: CONDITIONS, POWER, AND FREEDOM 223 (2021). Gagging Americans with government-

[2] *Amicus* U.S. Chamber is not alone. All *amici* agree the required gag is coercive.

written documents that dissemble about the conditions under which those Gags were exacted cannot be justified as "part of the social burden."

Davies v. Grossmont Union High Sch. Dist., 930 F.2d 1390, 1397 (9th Cir. 1991), *cert. denied*, 501 U.S. 1252 (1991), provides the rule of decision here. *Davies* held that "even under the [*Town of Newton v. Rumery*, 480 U.S. 386 (1987)] test" a settlement provision prohibiting an individual from ever seeking or accepting "any office or position with the [school] District in any capacity" was "unenforceable." *Id.* at 1394, 1397. That court deemed the interest in enforcing the settlement provision to be outweighed by the constitutional infringement. *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 particular 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 v. Mayor of Balt.*, 930 F.3d 215, 222–23 (4th Cir. 2019). SEC fails to set forth any convincing argument that a lifetime gag has a rationale, much less a tight fit or is the least restrictive means.

Petitioners are also strongly supported by *United States v. Richards*, 385 F. App'x 691, 693–94 (9th Cir. 2010), striking a portion of

a condition of probation imposed by the district court that "restrict[ed] the right of the defendant to make any public comment regarding [the county commissioner] or any of her family members." The *Richards* Court had to decide the "threshold issue … whether the defendant waived his right of appeal consistent with the written plea agreement and his subsequent acknowledgments that he understood that he had waived his right of appeal." *Id.* at 693. Citing this Circuit's recognition in *United States v. Littlefield*, 105 F.3d 527, 528 (9th Cir. 1997), quoting *United States v. Jeronimo*, 398 F.3d 1149, 1153 (9th Cir. 2005), that a "defendant can appeal his or her sentence notwithstanding a waiver of the right to appeal where the sentence imposed violates the law," *Richards* held:

> the restriction imposed upon the defendant, with respect to public comments … violates the defendant's First Amendment rights. The recent decision of our colleagues in *Rodriguez v. Maricopa County Community College District*, 605 F.3d 703 (9th Cir. 2010), reflects our continuing commitment to the protections of the First Amendment[.] … Against the background of *Rodriguez*, the condition of probation restricting the defendant's First Amendment rights … fails.

Id. at 693.

The terms of Petitioners' settlements likewise violate the law and were anything but voluntary. SEC consigns its rebuttal of *Richards* to a

mere footnote. SEC.Br.51.n.8. But its argument is waived. *Cf. Est. of Saunders v. Comm'r of Internal Revenue*, 745 F.3d 953, 962 (9th Cir. 2014). Further, the lack of consent, stressed in SEC's footnote, only reinforces Petitioners' case since each Petitioner only signed because they had to and three—Lucia, Toroian, and Powell—did everything possible to remove the gag.

The out-of-circuit cases proffered by SEC do nothing to diminish the force of *Davies* and *Richards*. *Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084, 1097 (3d Cir. 1988) simply applies the *Davies* "close nexus" analysis resolving all disputes specific to and raised in the underlying litigation.[3] Likewise, *Lake James Community Volunteer Fire Department, Inc. v. Burke County*, 149 F.3d 277, 281–82 (4th Cir. 1998), carries no water for SEC because it involved a government-as-contractor (not enforcer) term, carefully limited in time, with a close nexus to the specific dispute and restoring public interest. Also, in *Lake James*, the party contractually waiving its rights "did not give away anything that it had

[3] This Court has rejected previous invitations to apply the Third Circuit's *Erie Telecommunications* approach. *See Leonard v. Clark*, 12 F.3d 885, 890 (9th Cir. 1993), *as amended* (Mar. 8, 1994).

prior to entering into the … contract." 149 F.3d at 281. By contrast, Petitioners have lost a constitutionally protected right they enjoyed beforehand: the right to publicly criticize SEC's allegations, a loss they bear in perpetuity.

SEC also cites without analysis *Iowa v. Tovar*, 541 U.S. 77 (2004), to argue that constitutional rights can be waived when settling litigation. Yet, *Tovar* holds that a "[w]aiver of the right to counsel, … [and] constitutional rights … generally" must be "knowing, voluntary, and intelligent," especially at the critical stage where a plea results in entry of judgment. *Id.* at 81 (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)). As relevant here, this means that the state could not take away Tovar's Sixth Amendment right to counsel as a *condition* of entry of his plea. While he knowingly waived that right, *that waiver was in no respect demanded by the government*.[4] And, contrary to SEC's assertion that rights of appeal may be waived, *Richards* and *Littlefield*, show that

[4] SEC's waiver cases generally involve ceding of rights that are necessarily part-and-parcel of any settlement, including rights to trial or jury trial, speedy trial, and appeals—all necessary to the mechanics of settlement. *See*, *e.g.*, *Brady v. United States*, 397 U.S. 742, 748 (1970); In *Barker v. Wingo*, 407 U.S. 514, 529, 536 (1972), defendant did not want a speedy trial.

defendants can appeal notwithstanding waiver if the sentence violates the law.

Indeed, *INS v. St. Cyr*, 533 U.S. 289, 321–22 (2001), undermines SEC's case for perpetuating the Rule. The Supreme Court held that a large class of resident aliens, who had entered pleas before habeas jurisdiction and eligibility for waiver of deportation were withdrawn by *Congress*, retained those legal protections in effect at the time their pleas were entered. The same insistence on due process is required here, even when a court ruling affects many cases.

D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 184–87 (1972), is inapplicable because it involves waiver of rights between private parties. *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 673 F.3d 192, 206–07 (3d Cir. 2012) (same); *accord Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, Nos. 21-15953 & 15955, 2022 WL 3572943, at *1 (9th Cir. Aug. 19, 2022); *Malem Med., Ltd. v. Theos Med. Sys., Inc.*, 761 F. App'x 762, 764–65 (9th Cir. 2019).

B. *Leonard*, *Rumery*, and *Romeril* Do Not Save the Rule

SEC's response relies heavily on this Court's decision in *Leonard*. But *Leonard* has nothing to say at all about this case. Repetition is no substitute for analysis.

First, *Leonard* involved a challenge to a collective-bargaining agreement providing that if the union successfully advocated for state legislation that increased the city's payroll burden, the city's additional costs would be chargeable against its salary agreement with the union, a clause that had been *proposed by the union*—not demanded by the government—and included in "every labor agreement" thereafter. *Id.* at 886, 890. The district court held the union had "waived the unrestricted exercise of any First Amendment rights arguably at stake" by its proposal of the provision and voluntary agreement to it thereafter. *Id.* at 887. In affirming that the union had "waived the full and unrestricted exercise of what it contends are its First Amendment rights," *Id.*, this Court "expressly decline[d] to reach the underlying question of whether [the provision] actually implicates the Union's First Amendment rights at all." *Id.* at 889.

Second, applying *Davies*, the court found a "close nexus" between the putative right surrendered by the union and the contractual benefit it conferred. "The Union itself originally proposed the language of the agreement; … [the provision] is not a condition imposed by City ordinance; it is a contractual term that resulted from the give-and-take of negotiations between parties of relatively equal bargaining strength." *Id.* at 890. This Court further found that individual firefighters retained all their First Amendment rights, and thus lacked standing.

In short, *Leonard* shows only that where a policy is *not* an across-the-board government-imposed suppression of speech, but a bargained-for union-proposed concession, *Davies*'s close-nexus test can be satisfied. *Id.* at 891 n.10. It is highly doubtful that the First Amendment was implicated at all.[5] *Leonard* is inapplicable here because Petitioners' declarations establish that no aspect of SEC's "Consent" orders could be bargained away. Likewise inapposite is *In re George F. Nord Bldg. Corp.*, 129 F.2d 173, 176 (7th Cir. 1942) (limitations on speech with creditors in

[5] That anomaly arose because the district court held that a First Amendment right could be waived by the union, without determining whether plaintiffs even stated such a claim. *Leonard*, 12 F.3d at 889.

a bankruptcy consent decree were not imposed by the government but were specifically and voluntarily agreed to by bankrupt company).

Rumery, 480 U.S. 386, is equally unhelpful to SEC. There, the Supreme Court upheld an agreement where a criminal defendant waived his right to bring a *statutory* civil rights action in exchange for the dismissal of charges. The Court acknowledged that "in some cases these agreements may infringe" defendant's rights but rejected "a *per se* rule" of invalidity. *Id.* at 392. As this Court later explained, because "the interests the government sought to advance … were closely related[,] … [b]oth the criminal charges … and *Rumery*'s civil suit … involved the same incident, … a full compromise of the dispute between the parties necessitated resolving both matters." *Davies*, 930 F.2d at 1399.

Here, the systematic suppression of speech rights has no direct relationship to SEC's enforcement duties. It can make no credible argument that a perpetual surrender of the free speech rights of all who wish to settle with the agency is necessary to resolving the specific charges of all persons they prosecute.

The Second Circuit's flawed decision in *SEC v. Romeril*, 15 F.4th 166 (2d Cir. 2021), does not save the Rule. First, though *Romeril* declined

to follow *Crosby v. Bradstreet Co.*, 312 F.2d 483 (2d Cir. 1963), that binding precedent is still good law. *Crosby* held that a provision in a consent order that is a prior restraint on truthful speech violates the First Amendment and "that the parties may have agreed to it is immaterial." *Id.* at 485.

Second, *Romeril* has been thoroughly discredited by leading First Amendment scholar, Rodney Smolla:

> The SEC Gag Rule partakes in both content-based and viewpoint-based discrimination. It is animated by the SEC's proffered interest in avoiding critique of its own actions, an interest fundamentally at odds with First Amendment principles and doctrines.

Rodney Smolla, *Why the SEC Gag Rule Silencing Those Who Settle SEC Investigations Violates the First Amendment*, 29 WIDENER L. REV. 1 (2023). Smolla is not alone in criticizing *Romeril*. *See* Aaron Gordon, *Imposing Silence Through Settlement*, 84 ALB. L. REV. 335, 341 (2021) (*Romeril* "was analytically flawed and ultimately wrong").

Finally, SEC offers no answer that even if an individual right could be waived, Petitioners here cannot waive the Press Petitioners' freedom of the press and listeners' rights. None of SEC's "waiver" cases permit a

party to litigation to waive the constitutional protections of non-parties to the litigation.

Thus, this Court's holdings in *Davies* and *Richards* provide the correct rule of decision.

C. The Gag Rule Violates the First Amendment

SEC asserts without citation that the "bevy" of First Amendment doctrines "apply to laws and regulations but not to voluntary waivers in settlements." SEC.Br.34. First, neither *Davies* nor *Richards* invalidated a statute or regulation. Moreover, a regulation is under review in this proceeding.

1. The Gag Rule Is an Impermissible Prior Restraint and Imposes Content and Viewpoint Restrictions on Speech

SEC argues that *Davies* and *Overbey* didn't engage in prior restraint analysis, so Petitioners must "explain" why this Court should. SEC.Br.34. But *Davies* wasn't a speech case. It invalidated a contractual prohibition on running for office. *Overbey* arose in the procedural posture of the City of Baltimore seeking return of half of its monetary settlement, and Overbey's suit to compel the City to pay her the remaining money. Overbey had already spoken in violation of her agreement so "restraint" was not at issue.

SEC's odd claim that "waiver" is the only doctrine the Court can consider next veers off into two irrelevant cases. The first enforced a Non-Disclosure-Agreement against a prospective tax assessor who had agreed to not disclose proprietary self-study materials, *Ostergren v. Frick*, 856 F. App'x 562, 569 (6th Cir. 2021). The second, *Snepp v. United States*, 444 U.S. 507 (1980), upheld provisions in a CIA agent's employment contract that prohibited post-employment publication about CIA activities without allowing the CIA to first screen for classified information. The *Snepp* court explained that "even in the absence of an express agreement[,] the CIA could have … impos[ed] reasonable restrictions ...[because] [t]he Government has a compelling interest in protecting" information critical to national security. *Id.* at 510 n.3 (citations omitted). *See* 2 *Smolla & Nimmer on Freedom of Speech* (2024) § 15:7 (prior restraints in context of national security). Neither the government's interests in confidential study materials, nor in national security, are implicated when Petitioners merely wish to speak about the SEC's allegations against them. Just as the Gag Rule fails *Rumery*'s balancing test, it also flunks the test for prior restraints, which must advance a

compelling government interest by the least restrictive means. *See* Op.Br.11.58–59, ER-14–19.

Those judges who have considered the Petition's constitutional concerns have consistently determined that the Gag Rule is a prior restraint and violates the spirit of the First Amendment. *SEC v. Novinger*, 40 F.4th 297, 308 (5th Cir. 2022) ("[a] more effective prior restraint is hard to imagine.") (Jones, Duncan, JJ., concurring). *SEC v. Moraes*, No. 22-cv-8343, 2022 WL 15774011 at *3–5 (S.D.N.Y. Oct. 28, 2022). Commissioner Peirce agreed: the Gag Rule "is a plain prior restraint on speech." ER-63.

Leading First Amendment scholar Rodney Smolla concludes: "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. 22, at 7. "The government has no such authority to license one side of debate to fight freestyle, while requiring the other to follow Marquis of Queensbury rules." *Id.* at 9 (quotations omitted).

SEC repeats the same odd assertions when addressing Petitioners' content and viewpoint claims, arguing "Petitioner's reliance on cases

involving regulations—not waivers … is misplaced." SEC.Br.37. But Petitioners seek vacatur of SEC's decision not to modify its *rule*.

SEC's insistence that Petitioners are precluded from any argument not addressed in *Leonard* or *Davies* beggars belief. Neither of those cases involved a government regulation, *Leonard* never even reached the First Amendment question and *Davies* involved a future right to run for office. Neither involved content- or viewpoint-restrictive government restraints. Petitioners are not limited to the arguments presented in such factually different cases, nor should this Court be hoodwinked that the "lens" through which it must decide this case is so narrow. SEC.Br.34, 37.

SEC's attempt to distinguish *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991), similarly falls flat. Noting that that case recognized that "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden [on] … the content of their speech," 502 U.S. at 115, SEC declares that this "rationale … has no applicability to this case, because a voluntary decision to waive First Amendment rights is far afield from a statute penalizing speech." SEC.Br.35–36. Set aside that the gag is not a

"voluntary decision." SEC's Gag Rule penalizes settling defendants' speech precisely based on its agency-favoring content and viewpoint.[6]

SEC's Gag means that the only and last word any member of the public, including the press, can learn about its prosecutions of Petitioners are the agency's press releases. Petitioners' Declarations set out in full the devastating effect of SEC's constriction of the public narrative to SEC's favored viewpoint. *See*, *e.g.*, ER-130, 138, 154.

No case holds that if constitutional rights may ever be waived that the government can always demand their surrender. And in cases too numerous to mention, the Supreme Court holds otherwise. *See*, *e.g.*, *Barker*, 407 U.S. at 529. Courts "should 'indulge every reasonable presumption against waiver'" of constitutional rights and "should 'not presume acquiescence in the loss of fundamental rights.'" *Id.* at 525–26. Here, where their surrender is made mandatory and non-negotiable by a lawless agency Rule, this Court must vacate the denial to amend the Rule.

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[6] SEC's Gag citation to the Supreme Court's ruling approving content-neutral sign regulations in *City of Austin, v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 76 (2022), SEC.Br.36, is a non sequitur.

2. The Gag Rule Compels Speech

SEC's response to Petitioners' "compelled" speech argument—that the gag requires Petitioners who truthfully say they "did not admit" must also publicly recite "but I also do not deny" SEC's allegations—is that they are not required to speak at all and can just remain silent. Petitioners rest on their Opening Brief as to why this compelled speech is unlawful, violates the Fifth Amendment and is even more offensive than that prohibited in *Janus* v. *AFSCME*, 585 U.S. 878 (2018).

3. SEC's Gag Violates the Public's Right to Receive Speech and the Freedom of the Press

SEC incorrectly claims that the public's right to hear, the listener's interest, and the interest of the press were not raised in the original petition, and so are waived. SEC.Br.40. Not so! The original petition laid out a robust discussion of these points ER-15–17, 32–36, as did the renewed petition letter. ER-50–51.

SEC's citation from *Murthy*, that a litigant must show that "the listener has a concrete, specific connection to the speaker[,]" SEC.Br.40, could hardly be more conclusively laid out than by *Cape Gazette*'s article attempting to interview Cassandra Toroian specifically cited in Petitioner's Opening Brief 24–25. *See also* FER-19–20. SEC's contention

that there are no willing speakers is belied by this very proceeding and its declarations. ER-128–63.

Commissioner Peirce observed, "[t]he public cannot be sure what to believe if the government actively seeks to squelch contrary voices." ER-64. The Supreme Court held in *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978) that the First Amendment "prohibit[s] government from limiting the stock of information from which members of the public may draw."

This Court's *Davies* and *Richards* decisions and *Overbey* affirm the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." 930 F.3d at 223–24. Most *amicus* briefs filed in this case explain why shielding agency action from public scrutiny dangerously insulates government power and defeats SEC's own supposed commitment to transparency. *See*, *e.g.*, *Briefs Amici Curiae*, AFPF pp. 12–15, 21–28, ALF 4–9, CEI/ICAN 1, 15–17, HLLI, 8–9, IFS 13–15, Thomas More 9–12, and U.S. Chamber 26–35.

D. The Gag Rule Violates Due Process

The Gag Rule's vagueness requires a settling defendant to navigate at his peril what he can say about his own prosecution. SEC responds to

say that vagueness "typically applies to statutes or other legislative prohibitions, not agreed upon settlements[,]" and accuses Petitioners of "not cit[ing] a single case scrutinizing consent judgments for vagueness." SEC.Br.46. We repeat. The text of the *rule* being challenged is vague. *See also Briefs Amicus Curiae*, ALF p. 3, HLLI p. 9–10.

SEC argues that its required waiver of any Rule 65(d) challenge only applies to another part of the Consent Order. That argument is not supported by the text of the document. *See, e.g.*, ER-117–18. Further, SEC's argument that Fed. R. Civ. P. 65(d) only applies to injunctions is wrong. Rule 65(d) applies to consent orders as well as injunctions in this and other circuits. *William Keeton Enters., Inc. v. A All Am. Strip-O-Rama, Inc.*, 74 F.3d 178, 182 (9th Cir. 1996); *State Indus. Prods. Corp. v. Beta Tech. Inc.*, 575 F.3d 450 (5th Cir. 2009).

The SEC-drafted boilerplate requiring waiver of any Rule 65(d) challenge is particularly disturbing because courts consider compliance with Rule 65(d)'s specificity requirements as mandatory. They "are no mere technical requirements. The rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a

decree too vague to be understood." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974). SEC consents, drafted with forethought, violate the Federal Rules and keep gag orders away from judicial eyes. That same goal is also achieved by "lifting" the gag in testimonial proceedings. ER-19–20.

E. The Gag Rule Is an Unconstitutional Condition

SEC misconstrues the unconstitutional conditions doctrine by saying that it applies only to government benefits. The doctrine is not so limited. Indeed, the first case cited to the Commission below was *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001), where the Supreme Court held that Congress could not condition aid to public defenders to prohibit them from giving advice or making arguments about the lawfulness or constitutionality of welfare laws. *Velazquez* ruled that Congress is not permitted to restrict the expression of attorneys in courts, as this would be an unconstitutional "distort[ion of] the legal system." *Id.* at 543–44. Likewise, SEC cannot condition a citizen's ability to settle with the government upon the surrender of his First Amendment rights with respect to that government prosecution.

This Circuit recently held in *Stavrianoudakis v. Fish & Wildlife Serv.*, 108 F.4th 1128, 1136–39 (9th Cir. 2024), that conditioning a

falconry license on surrender of future Fourth Amendment rights was an unconstitutional condition and found pre-enforcement standing and ripeness even if inspection had not occurred.) *Accord Blackburn v. Snow*, 771 F.2d 556, 568 (1st Cir. 1985) (rejecting prison regulation requiring visitors to choose between a strip search or forgoing entry). None of these cases involve benefits.

SEC also assails Petitioners' contention that "the problem is in the ask." SEC.Br.43 (citing *Bingham v. Holder*, 637 F.3d 1040, 1046 (9th Cir. 2011)). But *Bingham* does not help SEC because the "benefit" of settling SEC charges is wholly unrelated to expression of First Amendment rights. In *Bingham*, the court determined that petitioner's "right to enter the United States was not conditioned on a waiver of constitutional rights" as he could "seek entry by way of a tourist visa." 637 F.3d at 1046. It also determined that "[t]he condition of waiving the ability to contest removal is closely related to the benefit of entering the United States[.]" *Id.*

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 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. 13, at 156. SEC's waiver arguments also fail because "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); *Brief Amicus Curiae*, Thomas More pp. 14–16.

III. SEC HAS NO STATUTORY AUTHORITY TO IMPOSE ANY GAG

SEC attempts to find authority for its Gag Rule in 15 U.S.C. § 78u(a), (d)(1) and in 15 U.S.C. § 78w(a)(1). SEC.Br.4–5. Neither this *post hoc* rationalization, nor SEC's authority to make housekeeping rules saves the Rule. Op.Br.26–27, 62.

Indeed, the very first case it cites defines consent judgments as "compromises in which the parties *give up something they might have won in litigation* and waive their rights to litigation." *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 235 (1975) (emphasis added). SEC could never have won a gag in litigation. Perforce, it lacks power to

condition settlement on the surrender of future free speech rights neither necessary nor appropriate to settlement. Op.Br.63–64. SEC has never once argued that it has the power to win a gag at trial. Such a non-negotiable demand is always contrary to constitutional right and has never been among the remedies it is authorized to obtain.

IV. THE GAG RULE EVADED NOTICE-AND-COMMENT PROCEDURES

SEC does not dispute that it published the Gag Rule without notice and comment. It argues that this is not a legislative rule, and in any event, Petitioners had to challenge it in 1972 within 60 days of its promulgation. That is absurd. SEC cannot claim the benefit of the 60-day rule when it dispensed with notice and comment altogether. Further, SEC cannot claim this is a housekeeping rule because it clearly binds Americans. Indeed, *amici* enumerate several examples of SEC threats to and required government-scripted speech by those who would dare defy the gag, *Brief Amicus Curiae*, AFPF pp. 12–15, and how that distorts the public discourse. *Id*. 21–28.

V. SEC HAS OFFERED NO RATIONAL EXPLANATION FOR ITS DENIAL

This case in one of those rare and compelling cases to amend an unconstitutional agency Rule and warrants this Court's intervention.

Am. Horse Prot. Ass'n, Inc. v. Lyng, 812 F.2d 1, 5 (1987). 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" under 5 U.S.C. § 706(2)(A).

The Commission has neither "competence nor expertise" to decide questions of constitutional law. Op.Br.31–32, 68–70. Nor is SEC free to ignore the Constitution or duly promulgated statutes, like the APA. *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 glaring constitutional and statutory defects, SEC's stated rationale for the Rule—its discomfort with criticism—fails to provide a rational explanation for the Gag Rule.

SEC's admitted justification at the time of promulgation was to avoid criticism. Smolla, *supra* p. 22, at 9. To this it now adds that the Rule helps it "manage risk." SEC.Br.51.

None of these *post hoc* justifications have a "close nexus" under *Davies*, nor, more essentially, the narrowly tailored/compelling government interest SEC must establish under the strict scrutiny

required of a prior restraint or content- or viewpoint-restrictions on speech. Smolla, *supra* p. 22, at 6–7.

It is also "questionable" that SEC "is the party making significant concessions[.]" ER-63. Petitioners also give up any chance of exoneration if they cannot outlast and outspend this powerful agency. The Commission 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. *Id.* Thus, SEC's denial is not entitled to deference but must instead be reviewed with "exacting judicial scrutiny" because of its absence of constitutional and statutory authority to regulate speech in this fashion. *See Brief Amicus Curiae*, Buckeye Institute pp. 15–18.

CONCLUSION

This Court should vacate the SEC's denial to amend the Gag Rule and remand with instructions for SEC to engage in rulemaking to amend 17 C.F.R. § 202.5(e).

Respectfully submitted,

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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 6980 words.

Dated: October 7, 2024

/s/ Margaret A. Little
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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2024, I electronically filed the foregoing Petitioners' Reply 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.

Dated: October 7, 2024

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