Case. 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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REHEARING AND/OR REHEARING *EN BANC*

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Cato Institute is a nonprofit entity operating under § 501(c)(3) of the Internal Revenue Code. *Amicus* is not a subsidiary or affiliate of any publicly owned corporation and does not issue shares of stock. No publicly held corporation has a direct financial interest in the outcome of this litigation due to the *amicus's* participation.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation, founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Toward that end, Cato's Robert A. Levy Center for Constitutional Studies publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

This case interests Cato because the right to freedom of speech—and especially the freedom to criticize the actions of the government—is essential to liberty and must be protected against government infringement.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Under Securities and Exchange Commission ("SEC") regulations, the SEC will not enter into a settlement agreement with a defendant unless that person forfeits the right to publicly deny the allegations against them. 17 C.F.R. § 202.5(e) ("the Rule"); *see also Powell v. SEC*, 149 F.4th 1029, 1034 (9th Cir. 2025). This remarkable assertion of agency power was promulgated without ordinary notice-and-comment procedures. *Powell*, 149 F.4th at 1046. The Rule was challenged on

[1] Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in whole or in part. No person or entity other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Pursuant to Ninth Circuit Local Rule 29-2(a), all parties have been notified and have consented to the filing of this brief.

First Amendment and procedural grounds before a Ninth Circuit panel. *Powell*, 149 F.4th at 1029.

Despite acknowledging serious First Amendment concerns with the Rule, the panel concluded that it was not "per se unconstitutional" and therefore survived a facial challenge. *Powell,* 149 F.4th at 1034. But the panel erred in failing to consider whether the SEC had authority to promulgate the Rule in the first place. The SEC is authorized "to make such rules and regulations as may be necessary or appropriate . . . for the execution of the functions vested in them" by the Securities Exchange Act of 1934. 15 U.S.C. § 78w(a) ("the Statute"). An unbounded reading of the Statute raises significant constitutional concerns. Therefore, the panel should have applied the canon of constitutional avoidance via a clear statement rule.

The Court should grant the petition for rehearing *en banc* to provide an opportunity for the Court to evaluate the SEC's statutory authority at the outset. Even a latent constitutional concern should have prompted the panel to apply the avoidance canon. The uniquely heightened concerns surrounding the First Amendment make it especially appropriate for the Court to require a clear statement from Congress. The Court should therefore not read the Statute to empower the SEC to gag post-settlement speech.

ARGUMENT

I. The Panel Should Have Applied the Avoidance Canon to Conclude That the SEC Lacked Statutory Authority to Issue the Rule.

The panel failed to apply the canon of constitutional avoidance to the Securities Exchange Act. Under the avoidance canon, "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916); *see also Perttu v. Richards*, 605 U.S. 460, 468 (2025) (applying the avoidance canon to the Prison Litigation Reform Act to avoid an unsettled Seventh Amendment claim). The avoidance canon is rooted in respect for Congress, which is assumed to "legislate[] in the light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). Holding a statute unconstitutional is "the gravest and most delicate duty that [courts are] called on to perform." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring). Accordingly, statutes should be "read in light of the Constitution's demands." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001).

A. Courts Have Applied the Avoidance Canon to Less Certain "Doubts" Than the Rule.

1. The Avoidance Canon Applies to Unsettled and Uncertain Constitutional Questions.

The avoidance canon allows a court to sidestep unsettled constitutional questions "if there is some other ground upon which to dispose of the case." *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984). Coincidentally, the Supreme Court took this path in a First Amendment challenge to SEC enforcement activities in *Lowe v. SEC*, 472 U.S. 181 (1985). *Lowe* concerned an investment adviser whose license to offer personal investment advice was revoked by the SEC, but who continued to publish a general investment newsletter, prompting the SEC to seek a permanent injunction against his publication for violating the Investment Advisers Act. *Id.* at 183–85. The adviser argued that the injunction struck "at the very foundation of the freedom of the press." *Id.* at 189. The District Court found that the publication was protected by the First Amendment, but the Second Circuit reversed, holding that the injunction was a permissible "regulation of commercial activity." *Id*. at 186–87. The Court avoided the controversy entirely by concluding that the publication fell within an existing statutory exception. *Id*. at 211.

Lowe, among other cases, demonstrates that a constitutional violation can be far from certain when applying the avoidance canon. *See also* Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal*

Change, 128 Harv. L. Rev. 2109, 2117 (2015) ("[t]he modern version of the canon itself encompasses varying levels of constitutional doubt"). In *United States v. Hansen*, the Court narrowed the scope of a statute criminalizing "encouraging or inducing" illegal immigration to avoid implicating protected speech. 599 U.S. 762, 780 (2023). The Court did not suggest that a First Amendment challenge would necessarily succeed under a broader view of the statute. *See id*. at 769–70. Rather, it was enough that the "legislation and the Constitution brush up against each other." *Id.* at 781; *see also Jones v. United States*, 526 U.S. 227, 248 (1999) (applying the avoidance canon because the alternative reading of the statute "would resonate with the claims of earlier controversies, to raise a genuine Sixth Amendment issue not yet settled.").

Similarly, in *United States v. Witkovich*, the Court applied the avoidance canon without specifying the constitutional provisions implicated or the likelihood of unconstitutionality. 353 U.S. 194, 201 (1957). The Court reasoned that a broad reading of the statute raised "issues touching liberties that the Constitution safeguards." *Id.* As explained below, the Rule raises significant, concrete concerns that go well beyond the uncertainty of *Witkovich* or "brush[ing] up against" the Constitution as in *Hansen*. 599 U.S. at 781.

2. The Rule Raises Serious Constitutional Doubts.

The speech restrictions imposed by the Rule implicate serious First Amendment issues.[2] As the panel acknowledged: "Petitioners do validly argue that in application, [the Rule] could impermissibly intrude on First Amendment rights, especially if it prevents civil enforcement defendants from criticizing the SEC. We do not minimize petitioners' concerns." *Powell,* 149 F.4th at 1034. Further, "[p]etitioners rightly point out that we should be concerned about any effort *by* the government to limit criticism *of* the government, including criticism offered by those whom the SEC claims violated the law." *Id*. at 1037. The panel was not the first to acknowledge the risks to freedom of speech posed by the Rule. *See SEC v. Novinger*, 40 F.4th 297, 308 (5th Cir. 2022) (Jones, J., concurring) ("A more effective prior restraint is hard to imagine."); SEC Comm'r Hester M. Peirce, Statement, Unsettling Silence: Dissent from Denial of Request for Rulemaking to Amend 17 C.F.R. § 202.5(e) (Jan. 30, 2024), https://www.sec.gov/newsroom/speeches-statements/peirce-nand-013024 ("a regulatory policy that prevents people from speaking against government action necessarily raises First Amendment concerns.").

[2] While *Amicus Curiae* maintains that the Rule is unconstitutional on its face, the avoidance canon provides a less intrusive means of invalidating the Rule. *See* Brief of the Cato Institute as *Amicus Curiae* in Support of Petitioners at 3, *Powell v. SEC*, No. 24-1899, 149 F.4th 1029 (9th Cir. 2025).

Here, the Rule acts as a particularly harsh form of speech restriction. First, by suppressing speech before it occurs, the Rule functions as a prior restraint on speech, "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Further, the Rule is "presumptively unconstitutional" as a content-based restraint on speech. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."); Brief of the Cato Institute as *Amicus Curiae* in Support of Petitioners at 3–6, *Powell v. SEC*, No. 24-1899, 149 F.4th 1029 (9th Cir. 2025). Finally, by attempting to suppress the particular view that SEC allegations against a defendant were improperly brought, the SEC likely engages in viewpoint discrimination, "an egregious form of content discrimination." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

There is a special impetus in applying the avoidance canon to protect the First Amendment right to free speech, a cornerstone of democracy. *See Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 740 (1996) ("The essence of [First Amendment] protection is that Congress may not regulate speech except in cases of extraordinary need and with the exercise of a degree of care that we have not elsewhere required."); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270

(1964) ("[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ."). Even the Article III case or controversy requirement is read hospitably to accommodate First Amendment protection, as illustrated by the doctrine of overbreadth, which allows for facial challenges to overly broad statutes proscribing free speech due to "the transcendent value to all society of constitutionally protected expression." *Gooding v. Wilson*, 405 U.S. 518, 521 (1972). The strict application of void-for-vagueness where the First Amendment is concerned similarly demonstrates how carefully the courts protect free speech. *See NAACP v. Button,* 371 U.S. 415, 432–33 (1963). As yet another example of First Amendment exceptionalism, the Supreme Court of the United States has inferred the right of freedom of association "as an indispensable means of preserving" First Amendment freedoms. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). Consequently, the possibility of such an egregious free speech violation certainly raises grave enough doubts of the constitutionality of the Rule that the panel erred in failing to invoke the avoidance canon.

II. The Panel Should Have Applied Constitutional Avoidance in the Form of a Clear Statement Rule.

The avoidance canon may be applied when a statute is "susceptible of more than one construction." *Clark v. Martinez*, 543 U.S. 371, 385 (2005). Even if the

constitutional reading is not the best reading of the statute, a court should adopt it so long as it is "fairly possible." *Hansen*, 599 U.S. at 781 (2023) (quoting *Jennings v. Rodriguez*, 583 U.S. 281, 296 (2018)).

Accordingly, courts may apply a "restrictive meaning" to broad language that raises constitutional concern. *Witkovich*, 353 U.S. at 198–99 (narrowing the statutory phrase "fit and proper"). Courts may also "read an implicit limitation" into a statute. *Zadvydas*, 533 U.S. at 689, 699 (2001) (interpreting a statute authorizing the detention of removable aliens to extend only until "removal is no longer reasonably foreseeable."). In an administrative context, the avoidance canon typically takes the form of a clear statement rule.

A. Courts Have Required Clear Statements from Congress When Agencies Act at the Edges of Their Authority.

Constitutional avoidance applies with particular force to an agency's interpretation of its statutory authority. This is because courts assume "that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–73 (2001). If an agency's interpretation of a statute "invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *Id.* at 172 (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

The clear statement requirement follows logically from the avoidance canon, as *Webster v. Doe* illustrates. 486 U.S. 592 (1988). There, a provision of the National Security Act granted the CIA Director broad authority to terminate employees "whenever he shall deem such termination necessary or advisable." *Id.* at 594. While this expansive delegation of discretion would typically preclude judicial review under the APA, the Court construed the statute to permit review of a termination alleged to be unconstitutional. *Id.* at 603. The Court held that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Id.* Applying this clear statement requirement avoided the "serious constitutional question" that would arise from denying any judicial forum for a "colorable constitutional claim." *Id.*

Clear statement rules apply across a wide range of issues. *See, e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) (requiring a clear statement to authorize retroactive rulemaking); *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 506 (1979) (same, to apply the National Labor Relations Act to religious entities); *Boechler, P.C., v. Comm'r of Internal Revenue*, 596 U.S. 199, 203 (2022) (same, to treat a procedural deadline as a jurisdictional bar to review). The requirement is increasingly relevant as part of the major questions doctrine, a form of constitutional avoidance that presumes Congress will "speak clearly when authorizing an agency to exercise powers of vast economic and political

significance." *Flower World, Inc. v. Sacks*, 43 F.4th 1224, 1231 (9th Cir. 2022) (quoting *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 595 U.S. 109, 117 (2022)) (finding no clear authorization by Congress for OSHA's vaccine mandate).

While applying to many discrete areas of law, these cases are connected by an understanding that if "a statute implicates historically or constitutionally grounded norms," Congress would not "unsettle [them] lightly." *Jones v. Hendrix*, 599 U.S. 465, 492 (2023). The principle ensures that agencies do not exceed the powers granted to them, as no matter how "serious the problem an administrative agency seeks to address, it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)).

B. The Statute Underpinning the Rule Does Not Clearly Authorize the Agency to Impose Speech Restrictions.

The Securities Exchange Act contains no clear authorization to restrict speech. The Act empowers the SEC to make regulations "as may be necessary or appropriate. . . for the execution of the functions vested in them." 15 U.S.C. § 78w(a). This statutory text is of a kind with ambiguous language narrowed in

Webster ("necessary or advisable") and *Witkovich* ("fit and proper"). 486 U.S. at 594; 353 U.S. at 195.

The phrase "necessary or appropriate" in § 78w(a) has been narrowly interpreted before. In *New York Stock Exchange v. SEC*, the D.C. Circuit rejected the view that the phrase "gave [the SEC] authority to act, as it saw fit, without any other statutory authority." 962 F.3d 541, 554 (D.C. Cir. 2020) (vacating an SEC pilot program to gather data on stock trading fees). As the court noted, the statute was not a blank check for the agency "to adopt regulations as it sees fit with respect to all matters covered by the agency's authorizing statute." *Id.* The court instead interpreted the language in light of a separate restriction that SEC rules must not impose unnecessary burdens on competition. *Id.* at 555; *see also Checkosky v. SEC*, 23 F.3d 452, 469 (D.C. Cir. 1994) (per curiam) (op. of Randolph, J.) ("'Necessary or appropriate,' like 'necessary and proper,' is potentially open-ended language . . . . But no one would suppose that the Commission's rulemaking power is the power to prescribe whatever the agency sees fit.").

A clear statement rule is especially appropriate here because freedom of speech is an intrinsic norm that is fundamental to democratic society. We would not expect Congress to "unsettle lightly" the democratic norm of free speech. *Hendrix*, 599 U.S. at 492. If Congress wished for the SEC to issue speech

restrictions, it would have done so clearly. The SEC therefore lacked authority to impose the Rule.

CONCLUSION

For the foregoing reasons, the Court should grant rehearing or rehearing *en banc*, conclude that the panel erred, and hold that the Rule is invalid under the Securities Exchange Act.

Dated: October 2, 2025

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CERTIFICATE OF COMPLIANCE

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Dated: October 2, 2025 /s/ *Aram A. Gavoor*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

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