No. 25-1100

In the Supreme Court of the United States

THOMAS JOSEPH POWELL, ET AL.,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA SUPPORTING PETITIONERS

JONATHAN D. URICK
MARIEL A. BROOKINS
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 659-6000

DONALD M. FALK
Counsel of Record
SCHAERR | JAFFE LLP
One Embarcadero Center
Suite 1200
San Francisco, CA 94111
(415) 562-4942
dfalk@schaerr-jaffe.com

AARON S. GORDON
SCHAERR | JAFFE LLP
1717 K Street NW
Suite 900
Washington, DC 20006
(202) 787-1060

Counsel for Amicus Curiae

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INTRODUCTION, SUMMARY, AND INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community. In particular, many of the Chamber's members are subject to securities laws enforced by the SEC.

The constitutionally guaranteed freedom of speech is extremely important to the Chamber and its members. "[T]he free flow of commercial information is *** indispensable to the formation of intelligent opinions" about how the economy should "be regulated or altered." *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). That is particularly true in regulated industries and in interactions with the Securities and

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no person or entity other than *amicus curiae*, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties received timely notice of *amicus curiae*'s intent to file this brief.

Exchange Commission—an agency "vested with sweeping investigatory and prosecutorial powers." 25A Marc I. Steinberg & Ralph C. Ferrara, *Securities Practice: Federal and State Enforcement* §9:16 (2023). This case highlights how the Commission has for decades abused its authority to stifle criticism from those most familiar with its practices: targets of SEC enforcement actions who settle with the Commission.

Since 1972, the SEC has applied 17 C.F.R. §202.5(e) (the "Rule") to require anyone settling an SEC enforcement action to submit to a consent-decree provision forbidding the defendant from taking

> any action or mak[ing] or permit[ting] to be made any public statement denying, directly or indirectly, any allegation in the complaint or creating the impression that the [SEC's] complaint [against the defendant] is without factual basis.

See Pet.App.43a.

The First Amendment prohibits the SEC from forcing all settling parties to abandon the right to publicly criticize the Commission's allegations against them. That these gag clauses are incorporated into self-styled "consent" orders should not obscure their coercive nature. In each case, the SEC threatens to proceed with enforcement action unless the defendants surrender their freedom to criticize the Commission's charges. That surrender is not voluntary, nor is it closely related to a legitimate SEC interest in resolving the dispute, as this Court's precedent requires.

The SEC Rule requires imposition not merely of restraints on protected speech, but *prior* restraints—a particularly pernicious form of censorship. The Ninth Circuit misapprehended the nature of the Rule's restraints, which cannot survive the searching scrutiny that properly applies.

The Ninth Circuit's misapplication of core First Amendment principles further warrants review because the issue is exceptionally important. Businesses and the general public have strong interests in the free flow of information that helps ensure the SEC responsibly exercises its immense power. For all these reasons, the Court should grant certiorari and reverse.

REASONS FOR GRANTING THE PETITION

This Court's intervention is warranted for multiple reasons. The petition raises important First Amendment issues arising from the SEC's suppression of all settling defendants' speech. The decision below mislabels coercive speech suppression as voluntary. It approves a Rule amounting to a prior restraint on hundreds of settling defendants each year. It then approves this across-the-board restraint under a forgiving analysis that departs from the robust scrutiny applied by this Court and other Circuits in similar circumstances. And it misconstrues principles governing facial First Amendment challenges. The SEC's widespread, mandatory use of the Rule underscores the exceptional importance of this case. Businesses and the public have a strong interest in access to the information the SEC

suppresses as a matter of course. For all these reasons, certiorari should be granted.

I. Review Is Warranted To Resolve Whether The Rule Coerces Restraints On Speech Rather Than "Voluntary" Waivers.

This Court should intervene because the Ninth Circuit departed from governing precedent in holding that the surrenders of rights demanded by the SEC's gag Rule are voluntary and therefore constitutional. In reality, the Rule exploits government power to suppress expression without serving a legitimate and closely related government interest.

A. The Decision Below Undermines Precedent Recognizing the Coercive Effect of Conditioning Government Benefits on Surrenders of Constitutional Rights.

1. The Ninth Circuit concluded that the surrenders of free-speech rights extracted under the Rule were voluntary. Pet.App.2a. Under the Rule, however, the SEC's threat of reinstituted proceedings extracts the defendant's agreement never to publicly question the Commission's allegations; silence is won with a threat of reprisal. Yet this Court and the courts of appeals have invalidated contractual waivers of First-Amendment rights if public officials secured those waivers with threats of reprisal. See *Elrod* v. *Burns*, 427 U.S. 347, 359 n.13 (1976) (plurality opinion); *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980); see also Aaron Gordon, *Imposing Silence Through Settlement: A First-Amendment Case Study of the New*

York Attorney General, 84 Alb. L. Rev. 335, 346 & n.49 (2021) (citing cases).

The Ninth Circuit departed from this authority when it accepted the SEC's characterization of its gag provisions as "voluntary" waivers of First Amendment rights and upheld them on that basis. See Pet.App.10a-12a. But settling defendants' relinquishments of expressive rights are voluntary only on the surface. And, in the First Amendment context, courts must "look through forms to the substance" of government conduct. *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 67 (1963).

Viewed against the backdrop of threatened or pending enforcement proceedings, settling defendants' surrender of their speech rights under the SEC's policy is anything but "voluntary." The First Amendment protects the freedom of speech "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates* v. *City of Little Rock*, 361 U.S. 516, 523 (1960). Thus, government officials may violate the Amendment through informal measures such as "threat[s] of invoking legal sanctions and other means of coercion," *Bantam Books*, 372 U.S. at 67, including investigations or civil enforcement actions, see *NRA of America* v. *Vullo*, 602 U.S. 175, 188, 191 (2024).

Similarly, under the unconstitutional conditions doctrine, the government "may not deny [someone] a benefit *** on a basis that infringes his *** freedom of speech even if he has no entitlement to that benefit." *Board of County Commissioners* v. *Umbehr*, 518 U.S. 668, 674 (1996) (cleaned up). This principle applies not

only to denying affirmative benefits, but to denying relief from a legal burden. See *Speiser* v. *Randall*, 357 U.S. 513, 518-519 (1958). And the violation remains when government, by threatening denial of a benefit, "succeeds in pressuring someone into forfeiting a constitutional right," *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013).

It follows that the SEC abridges freedom of speech by demanding as a condition of any settlement that the defendant never publicly call into doubt the Commission's allegations. That condition, enshrined in the Rule, "operate[s]" as a powerful "disincentive[] to speak." *Simon & Schuster, Inc.* v. *Members of New York State Crime Victims Bd.*, 502 U.S. 105, 117 (1991). As Judge Edith Jones explained, the SEC tells defendants, "'Hold your tongue *** '—or get bankrupted by having to continue litigating with the SEC." *SEC* v. *Novinger*, 40 F.4th 297, 308 (5th Cir. 2022) (Jones, J., concurring). Likewise, after settlement, if "a defendant breaches" the gag provision, the Commission may "restore the action to the active docket." Pet.App.34a. That—the promised consequence of the Rule—amounts to reprisal for criticism of the agency.

In dismissing constitutional concerns about its actions, the SEC has contended that, in settling proceedings, it does not bestow a "benefit" on the defendant. Thus, it maintains, no constitutional constraints on using government power to suppress speech apply. C.A. Excerpts of Record at ER-60 [Dkt. 17.1].

But ending costly, burdensome enforcement proceedings benefits the SEC's targets substantially, no matter how those proceedings might have turned out. SEC "enforcement actions against regulated persons and businesses *** have serious adverse consequences." Roberta S. Karmel, *Creating Law at the Securities and Exchange Commission: The Lawyer as Prosecutor*, 61 L. & Contemp. Probs. 33, 45 (1998) (former SEC Commissioner). SEC officials well know that "[t]he SEC is more powerful than most respondents" in its enforcement actions, Danné L. Johnson, *SEC Settlement: Agency Self-Interest or Public Interest*, 12 Fordham J. Corp. & Fin. L. 627, 661 (2007) (former SEC enforcement attorney), so "the pressure to settle is over-powering even when the SEC case lacks merit," Andrew N. Vollmer, *Four Ways to Improve SEC Enforcement*, 43 Sec. Regul. L.J. 333, 336 (2015) (SEC's former Deputy and Acting General Counsel). Unsurprisingly under these circumstances, the "vast majority" of SEC enforcement actions settle. See *Axon Enterprises, Inc.* v. *FTC*, 598 U.S. 175, 216 (2023) (Gorsuch, J., concurring in judgment).

2. In evaluating the SEC's uniform gag practice, the Ninth Circuit undercut this Court's jurisprudence about coerced relinquishment of rights. The opinion below considered it "critical[]"—and largely dispositive—that "the consequence for violating the Rule is *** only that the SEC may seek to reopen the civil enforcement proceedings[.]" Pet.App.24a. But the threat of costly SEC enforcement proceedings, like any other "threat of adverse government action," cannot be used "to punish or suppress [a defendant]'s speech,"

Vullo, 602 U.S. at 191, without exposing that suppression to full First Amendment scrutiny.

The Ninth Circuit also suggested that the SEC's gag provisions are constitutionally unobjectionable because they merely threaten to "to return things to how they were before the settlement," when an enforcement action was pending. Pet.App.21a. Yet *every* condition attached to a governmental benefit merely threatens "to return things to how they were before" the benefit was conferred. Nevertheless, "the libert[y] of *** expression may [not] be infringed by the *** placing of conditions upon a benefit," *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963)—even where such a condition is arguably nothing more than a threat to return to the *status quo ante*. See *Koontz*, 570 U.S. at 607-608.

The panel opinion's conflict with precedent governing the voluntariness of waivers of constitutional rights calls for this Court's review.

B. The Decision Below Departs from Decisions of This Court and Others Requiring that Government-Imposed Surrenders of Constitutional Rights Be Closely Tied to Legitimate Government Interests.

The decision below departs from precedent in another significant respect. This Court has repeatedly held that government "may not require a person to give up a constitutional right *** in exchange for a discretionary [government] benefit" that "has little or no relationship to" the right being surrendered. *Dolan* v. *City of Tigard*, 512 U.S. 374, 385 (1994). The

relationship here is too tenuous to support the across-the-board Rule.

1. The Ninth Circuit considered the SEC's speech-suppressing settlement clauses no more constitutionally infirm than waivers of other rights common in criminal plea agreements and other contracts to which the government is a party. Pet.App.11a-13a. Granted, a criminal defendant accepting a plea deal "inevitab[ly]" forfeits certain procedural guarantees, such as the right to a jury trial. See *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978). But there are limits: public officials may not strong-arm settling parties into relinquishments of constitutional rights that are *not* reasonably necessary to settle the underlying dispute. See Gordon, *supra*, at 347-348 (citing cases). For example, a school district could not condition a civil settlement on a plaintiff's waiver of his First Amendment right to run for office because "the nexus between the individual right waived and the dispute" was "not a close one." *Davies* v. *Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1399 (9th Cir. 1991). Applying the same principle, this Court has indicated that a plea agreement may be constitutionally invalid if it includes terms that "by their nature" have "no proper relationship to the prosecutor's business." *Bousley* v. *United States*, 523 U.S. 614, 619 (1998) (quoting *Brady* v. *United States*, 397 U.S. 742, 755 (1970)). See also Gordon, *supra*, at 346-348 (collecting criminal cases invalidating rights waivers).

In holding that the SEC's gag clauses were valid "waiver[s] of First Amendment rights," Pet.App.13a-25a, the decision below relied on *Town of Newton* v.

Rumery, 480 U.S. 386 (1987). That reliance was misplaced.

In *Rumery*, this Court upheld a "release-dismissal" agreement in which a criminal defendant, in return for dismissal of charges against him, waived the right to file a civil-rights action. The Court acknowledged "that in some cases these agreements may infringe" defendants' rights but rejected "a *per se* rule" of invalidity. *Rumery,* 480 U.S. at 392. The Court upheld that particular agreement because "the prosecutor had an independent, legitimate reason to make th[e] agreement" that was "directly related to his prosecutorial responsibilities." *Id.* at 398. "The agreement foreclosed both the civil and criminal trials concerning [the plaintiff], in which [an assault victim] would have been a key witness." *Ibid.* The victim "therefore was spared the *** embarrassment she would have endured if she had had to testify in either of those cases." *Ibid*.

Rumery involved the waiver of a statutory, not constitutional, right. *Id.* at 392. But even *Rumery* required a close nexus between the right waived and the government's specific interest in the dispute or its settlement.

Here, the Ninth Circuit found "a close nexus between" the SEC's claimed interest in "proving the allegations supporting its enforcement actions—and the specific right waived—the defendant agreeing not to deny those same allegations." Pet.App.21a (cleaned up). On the contrary, however, the speech rights exacted in the Rule lack the kind of "direct[] relat[ionship]" to the SEC's legitimate interests that

was present in *Rumery*. See 480 U.S. at 397-398. The SEC's interest in proving its allegations evaporates when the defendant settles the case; nothing remains to be proved, and the SEC is in the position it would have occupied if its proofs had been successful.

Yet the Commission demands from settling parties more than just a waiver of their right to keep litigating the allegations against them. Settlors also must forever surrender their right to *publicly criticize* those allegations, which goes beyond the SEC's interest in fully resolving the proceedings. By contrast, in *Rumery* both the criminal charges and the civil suit against the prosecutor involved the same incident and the same victim-witness, so that the proceedings could not be fully resolved unless both actions were settled.

Also pertinent to the close-relationship inquiry, consent decrees "normally" involve "parties giv[ing] up something they might have won in litigation ***." *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 235 (1975). But the First Amendment right that SEC consent decrees extract from settling parties is not one they would have lost if the SEC prevailed in an enforcement action, nor is it one of the rights necessarily surrendered when a matter is resolved out of court (such as the right to an impartial adjudicator).

Finally, insofar as the SEC characterizes the "interest" undergirding its policy more broadly—not just as settling enforcement proceedings but as reinforcing in the public's mind the soundness of the SEC's allegations—that is a constitutionally invalid basis for muzzling speech. The First Amendment

subjects "police, prosecutors, and judicial processes to extensive public scrutiny and criticism," *Landmark Commc'ns, Inc.* v. *Virginia*, 435 U.S. 829, 839 (1978) (cleaned up), whether it concerns the legal system generally or a "particular *** controversy." *Bridges* v. *California*, 314 U.S. 252, 277-278 (1941).

2. The application of *Rumery* below departs from decisions by other courts of appeals. For example, the D.C. Circuit invalidated a plea agreement provision that required a criminal defendant to surrender his right to file FOIA requests about charges against him. See *Price* v. *U.S. Department of Justice Attorney Office*, 865 F.3d 676, 681 (D.C. Cir. 2017). The court of appeals recognized that a prosecutor's "set of legitimate interests places boundaries on the rights that can be bargained away in plea negotiations." *Ibid.* The government's attempt to link that condition to its "interest in finality" under *Rumery* took that "interest too far." *Id.* at 681-682. But the gag Rule takes the SEC's interest in finality even further.

For similar reasons, the First Circuit invalidated an arrestee's release of the right to sue police officers that was imposed as a condition of dismissal of charges and release from custody after his arrest. See *Hall* v. *Ochs*, 817 F.2d 920, 924 (1st Cir. 1987). The court noted that the police had no legitimate law-enforcement interest in using the fact of custody as a lever to extract the release. *Ibid.* See also Gordon, *supra*, at 347-349 (collecting similar cases).

This Court should grant review to ensure a uniform articulation of the *Rumery* standard.

C. The Uniform, Mandatory Rule Is Categorically Distinct from Routine Plea Bargaining or Other Contractual Negotiations.

The Ninth Circuit's effort to analogize the Rule to plea bargaining highlights another reason for review. Unlike typical criminal plea bargaining or civil settlement negotiations, the SEC demands that defendants surrender their First Amendment rights under an across-the-board policy. The Commission's regulations bind it "not [to] agree to a settlement" unless it includes a standard gag provision. Pet.App.34a; see 17 C.F.R. §202.5(e). That presents "a situation very different from the give-and-take negotiation common in plea bargaining." *Bordenkircher*, 434 U.S. at 362-363 (cleaned up). As a "unilateral imposition of a penalty upon" those who "cho[ose] to exercise a legal right," the universal policy is unconstitutional. *Ibid.*

Applying the same principles, this Court invalidated a criminal statute under which only defendants who pleaded not guilty or demanded jury trials were eligible for the death penalty. Although similar conditions might have been imposed via plea bargaining—where a deal to avoid death would involve a guilty plea and no jury trial—their imposition by statute "needlessly chill[ed] the exercise of basic constitutional rights." *United States* v. *Jackson*, 390 U.S. 570, 582 (1968). Rule 202.5(e) is invalid for the same reasons.

* * *

Because the right to publicly criticize the SEC is extraneous to the civil settlement process, the SEC cannot legitimately extract a waiver of that speech right as a condition to settling. The SEC's policy of silencing settling defendants is a systematic violation of constitutional rights—not a series of voluntary waivers. Because the Ninth Circuit's contrary conclusion departs from the reasoning of this Court and other Circuits, prompt review is needed.

II. Review Is Warranted Because The SEC's Gag Policy Directly Violates The First Amendment.

The case also warrants review because the SEC's gag clauses violate its enforcement targets' First Amendment rights. Because the Rule requires uniform, nationwide imposition of constitutionally infirm clauses, the constitutional violation is widespread and worthy of this Court's intervention.

A. The Rule's Gag Policy Fails Strict Scrutiny.

An SEC gag clause bars a defendant from publicly "denying" the SEC's allegations, "directly or indirectly." Pet.App.26a (emphasis omitted). Yet the defendant may voice agreement with those allegations. This viewpoint-based restriction on speech is "presumptively unconstitutional and may be justified only if" it survives "strict scrutiny": the government must "prove[] that [the restriction is] narrowly tailored to serve compelling [government] interests." *Reed* v. *Town of Gilbert*, 576 U.S. 155, 168, 163 (2015) (cleaned up).

What compelling interest might this restriction serve? The SEC has warned that allowing settling parties to criticize it could "undermine confidence in the Commission[]" by "creating an unfair impression" of its enforcement practices. Mem. in Opp. to Mot. for Relief from Judgment 20, *SEC* v. *Allaire*, No. 1:03-cv-04087-DLC, 2019 WL 6114484 (S.D.N.Y. Nov. 18, 2019), ECF No. 31 ("*Allaire* Opp."). But few interests are less "compelling." It is "firmly established *** that injury to official reputation," including agencies' "institutional reputation[s]," "is an insufficient reason for repressing speech that would otherwise be free." *Landmark Commc'ns*, 435 U.S. at 841-842 (cleaned up).

The Ninth Circuit acknowledged that the SEC's claimed interest in "silenc[ing] defendants in order to promote public confidence in the SEC's work" is "improper." Pet.App.23a. But the court of appeals implicitly approved that "improper" rationale by holding that the SEC's suppression of subsequent public discussion of the allegations underlying enforcement proceedings was justified by two SEC interests: (1) proving facts for which settling defendants already agree to accept remedial consequences, and (2) resolving proceedings generally. See Pet.App.21a-25a. That relabels a desire to be insulated from public criticism as an interest in settlement.

The SEC has also suggested that its settlement provisions are permissible under authority upholding gag orders on trial participants. See *Allaire* Opp. at 18. But such orders "have been upheld only where necessary either to ensure the impartial

administration of justice in pending proceedings, or to prevent dissemination of private or confidential information acquired by participants through their involvement in the trial process." See Gordon, *supra*, at 377. Neither rationale applies to the SEC's gags. Because the proceeding is over, the suppressed views on the SEC's allegations cannot "have a materially prejudicial effect" on "a pending case." *Gentile* v. *State Bar of Nevada*, 501 U.S. 1030, 1076 (1991). And in stifling criticism of the Commission's allegations, the gag clauses go far beyond prohibiting disclosure of any confidential information defendants may have obtained during SEC investigations. See *Butterworth* v. *Smith*, 494 U.S. 624, 631-632 (1990).[2] The Rule cannot survive strict scrutiny.

B. The Rule's Gag Policy Is an Unconstitutional Prior Restraint.

Review is further warranted because the SEC's gag clauses are not just restraints on speech, but *prior* restraints. For prior restraints, the presumption of invalidity "is heavier—and the degree of protection broader—than that against limits on expression" enforced by subsequent punishment. *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 558-559 (1975).

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[2] Similarly, the Ninth Circuit's invocation of *Snepp* v. *United States*, 444 U.S. 507 (1980) (per curiam), see Pet.App.13a, is misguided. *Snepp* upheld contractual limits on a former CIA agent's ability to publish writings discussing CIA activities without agency pre-approval. While the government's compelling interest in national security would justify such restrictions even without an agreement, see *id.* at 510 n.3, no such interest arises here.

The SEC formalizes its settlements in consent decrees. See Pet.App.31a-32a. A gag provision in a consent decree is a "classic" prior restraint, see *Alexander* v. *United States*, 509 U.S. 544, 550 (1993), in that violators of such orders cannot challenge their validity in subsequent proceedings—a principle known as the collateral bar rule. See 2 *Smolla & Nimmer on Freedom of Speech* §15:72 (Apr. 2026 update). The SEC's speech-suppressing clauses are prior restraints even if the penalty for violation is reopening proceedings; a restriction "need not effect total suppression in order to create a prior restraint." *Southeastern Promotions*, 420 U.S. at 556 n.8.

Yet the panel assumed away the collateral-bar rule. According to the panel, were the SEC to "seek to reopen the civil enforcement proceedings" based on a gag-clause violation, a court would address any First-Amendment issue at that time, or when entertaining a request for relief from a consent judgment. Pet.App.24a. But that is unrealistic: courts consistently reject First Amendment objections as grounds for relief from an SEC consent judgment. See *Novinger*, 40 F.4th at 307. Nor may parties to a consent decree challenge its validity in subsequent proceedings to enforce that judgment. See *Siris* v. *SEC*, 773 F.3d 89, 96 (D.C. Cir. 2014). The Ninth Circuit's assurance that settlors may someday assert as-applied challenges to SEC settlements (see Pet.App.26a-27a) rings hollow.

Even if they fell outside the collateral-bar rule, the SEC's gag clauses would constitute prior restraints. Under this Court's "broader definition," *Alexander*, 509 U.S. at 553, a "prior restraint" includes

most "orders or administrative rules that operate to forbid expression before it takes place." 2 *Smolla & Nimmer*, *supra*, §15:1. In *Interstate Circuit, Inc.* v. *City of Dallas*, for instance, this Court found an unconstitutional prior restraint in an administrative board's power to classify films as "not suitable for young persons," thereby requiring a license to show the films, even though those classifications received *de novo* judicial review after the fact. 390 U.S. 676, 681-682, 685 (1968).

Because the gag clauses cannot survive strict scrutiny, they certainly cannot meet the still more demanding standards for prior restraints. First, a prior-restraint system must provide procedural "safeguards *** against the suppression of *** constitutionally protected[] matter," including "judicial superintendence" and "an almost immediate judicial determination of the validity of the restraint." *Bantam Books*, 372 U.S. at 70. The SEC's policy, far from ensuring prompt judicial review, gags the defendant for life regarding the allegations. Prior restraints are also potentially permissible "only [in] narrow *** situations," such as "obscenity, *** imminent threats to national security, or as a last resort to protect a defendant's right to a fair trial." 2 *Smolla & Nimmer*, *supra,* §15:7. Criticism of the SEC's allegations does not "fit within" any of these "narrowly defined" categories. *Southeastern Promotions*, 420 U.S. at 559.

C. The Decision Below Inappropriately Restricts Facial First Amendment Challenges.

The decision below also warrants certiorari because it misapplies principles of judicial review established by this Court. The Ninth Circuit treated NCLA's rulemaking petition "as a facial challenge" to Rule 202.5(e), which the court rejected because it was unconvinced that "a substantial number of [the Rule's] applications are unconstitutional, judged in relation to the [Rule's] plainly legitimate sweep." Pet.App.9a (quoting *Moody* v. *NetChoice, LLC*, 603 U.S. 707, 723 (2024)). In the Ninth Circuit's view, "First Amendment concerns could well arise," but only "in a more particularized type of challenge." Pet.App.10a.

That is wrong. The gag policy is facially unconstitutional "not simply [because] it includes within its sweep some impermissible applications, but [because] in all its applications it operates on a fundamentally mistaken premise," *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U.S. 947, 966 (1984): that the SEC may stifle criticism to protect its reputation. And the SEC exerts the same coercive pressures on *all* settling defendants. Even if some of the speech suppressed by the SEC's consent decrees could be restricted consistent with the First Amendment—if, say, a settling defendant acquired sensitive nonpublic information through involvement in an SEC investigation—that would not save the Rule in its current form. And the prospect that the Commission theoretically might draft a different gag rule that would only apply to such confidential information does not mean that the existing Rule is

constitutional in some cases. See *Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964). Because the Rule targets speech using invalid criteria in every case, it is unconstitutional in every case. See *Shelby County* v. *Holder*, 570 U.S. 529, 554-555 (2013).

Even if some applications of the SEC's speech-suppressant policy could be constitutional, the opinion below wrongly assumed without analysis that the proportion of applications that were unconstitutional was not "substantial." This Court recently admonished that such summary treatment of First Amendment facial challenges is improper: "neither parties nor courts can disregard the requisite inquiry into how a [challenged] law works in all of its applications." *Moody*, 603 U.S. at 744. A "court must evaluate the full scope of the [challenged] law's coverage. It must then decide which of the law's applications are constitutionally permissible and which are not," "weigh[ing] the one against the other." *Ibid.*

Because the record compels the conclusion that the proportion of the Rule's applications that are unconstitutional is at least "substantial" compared to any legitimate applications, see *Moody*, 603 U.S. at 718, the correct application of *Moody* here is straightforward and requires reversal on the merits. That is especially so given the government's burden of proving on a case-by-case basis that a compelled waiver of constitutional rights is justified. See *Rumery*, 480 U.S. at 399, 401 (opinion of O'Connor,

J.).[3] Review would simply clarify how facial First Amendment challenges operate.

III. The SEC's Rule Is Contrary To The Public Interest And Violates Listeners' Rights.

This Court's review is particularly appropriate because the issue presented is exceptionally important to the Nation. The speech-suppressing provisions required by the Rule stifle speech about the SEC's enforcement activities, an issue of paramount importance to businesses and the public. And the Rule ensures that the suppressive clauses are imposed hundreds of times each year across the country.

The First Amendment "serves significant societal interests" beyond "those of the party seeking *** vindication" of its right to speak. *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 776 (1978). In particular, the protection extends to recipients of speech. *Virginia State Board*, 425 U.S. at 756.

Thus, even a voluntary contractual waiver of constitutional rights "is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Rumery*, 480 U.S. at 392. Under *Rumery*, the government must prove, on a case-by-case basis, that a waiver is in the public interest. See *id.* at 399, 401 (O'Connor, J., concurring). This the SEC cannot do because its policy operates by categorical Rule rather than case-by-case negotiation.

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[3] Parts of Justice O'Connor's opinion are controlling in this respect. See, *e.g.*, *Lynch* v. *City of Alhambra*, 880 F.2d 1122, 1127 (9th Cir. 1989).

In reaching the opposite conclusion, the court below rejected Petitioners' facial challenge to the SEC's Rule but suggested the public interest might weigh against enforcing the speech-suppressant provisions in particular cases. See Pet.App.25a-27a. *Rumery*, however, calls for "a case-specific showing" that *each* government-demanded waiver of rights is appropriate, ruling out a "blanket policy" of demanding waivers in a whole "class of cases." *Cain* v. *Darby Borough*, 7 F.3d 377, 382-383 (3d Cir. 1993) (en banc). "[A] district court [must] hear the evidence and evaluate whether the public interest is served by enforcement of [each] agreement." *Lynch*, 880 F.2d at 1128. The SEC's blanket policy requiring speech-suppressant clauses in settlements makes case-by-case consideration impossible before the restraint is in place.

Moreover, in light of the SEC's broad prerogatives and voluminous enforcement docket, the Rule has grave consequences for businesses seeking to communicate with their customers, and for the Nation. In the past decade, the SEC brought 4,556 standalone enforcement actions (against far more defendants). See Gerald Hodgkins et al., *SEC Focused On Fraud As Actions Markedly Declined in 2025*, Law360 (Nov. 12, 2025), https://tinyurl.com/57s69n5v; SEC, Addendum to Div. of Enforcement Press Release, Fiscal Year 2024, at 1 (Nov. 22, 2024), https://tinyurl.com/ypedekyx; SEC Division of Enforcement, 2020 Annual Report 16 (Nov. 2, 2020), https://tinyurl.com/ms8ccjej. The SEC's policy has forever foreclosed thousands from freely speaking about the Commission's allegations against them.

The SEC's regulation-by-settlement tactics compound the importance of this enforced silence. Even when the Commission's "legal theory is new and untested," "the pressure to settle is over-powering." Vollmer, *supra*, at 336. Settlement thus affords regulators "extra-ordinary discretion" to press "novel legal theories" that "no judge will ever scrutinize." Robert Reich, *Smoking, Guns*, Am. Prospect (Dec. 19, 2001), https://prospect.org/features/smoking-guns/.

The potential for abuse of this authority highlights the need for open discourse regarding SEC allegations. The First Amendment, after all, "protect[s] the free discussion of governmental affairs" precisely to expose "abuses of power." *Mills* v. *Alabama*, 384 U.S. 214, 218-219 (1966). The public interest suffers when the Commission silences targets of its investigations, as they are "most likely to have informed and definite opinions" on the SEC's practices. *Pickering* v. *Board of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 572 (1968). For similar reasons, Congress banned even private companies' inclusion of nondisparagement clauses in consumer contracts in 2016. See 15 U.S.C. §45b. The rationale for this prohibition surely applies with greater force to government agencies like the SEC, where First Amendment values are at their apex.

Perhaps most concerning, the SEC's gag clauses contemplate suppression of *truthful* speech. By including in its gag provision the proviso that settlors may criticize the SEC's allegations if "testimonial obligations" so require, *SEC* v. *Romeril*, 15 F.4th 166, 170 (2d Cir. 2021), the SEC effectively admits to suppressing some truthful criticisms of its conduct.

Indeed, settling parties remain silenced even when their alleged misdeeds are no longer unlawful. For instance, the SEC once generally prohibited forward-looking projections of economic performance in firms' public disclosures. In 1976, however, the Commission amended its rules to permit such projections. See Notice of Adoption of an Amendment to Rule 14a-9 and Statement by the Commission on Disclosure of Projections of Future Economic Performance, S.E.C. Release No. 33-5699, 1976 WL 160385, at *2 (Apr. 23, 1976). And in 1982, the SEC adopted its current policy of "encourag[ing]" such projections. 17 C.F.R. §229.10(b); Adoption of Integrated Disclosure System, 47 Fed. Reg. 11380, 11402 (Mar. 16, 1982).

Yet parties who settled SEC charges of unlawful forecasting under the former regulations are forever forbidden from publicly criticizing the basis for those charges. That suppressed speech would offer unique contributions to the public debate over the scope and exercise of SEC regulatory authority.

Citing similar public-interest concerns, many courts have invalidated contractual gag clauses, even between private parties where no coercion was present. See Gordon, *supra*, at 372-373 (citing cases). In an example involving a local government, the Fourth Circuit applied *Rumery* in a way that conflicts with the Ninth Circuit's decision below. The Fourth Circuit held that a would-be plaintiff who settled her civil-rights claims against city police was not bound by a nondisparagement clause in her settlement agreement. *Overbey* v. *Mayor of Baltimore*, 930 F.3d 215, 224 (4th Cir. 2019). "[E]nforcement of [such a]

clause *** was contrary to the citizenry's First Amendment interest" in hearing "speech critical of the government." *Id.* at 224-225. Here, too, a powerful law-enforcement agency silences its critics: defendants forced to settle the SEC's charges against them. "The disservice to the public inherent in such a practice is palpable." *SEC* v. *Vitesse Semiconductor Corp.*, 771 F. Supp. 2d 304, 309 (S.D.N.Y. 2011).

To the SEC's concern that defendants might tell the public self-serving accounts of the charges after settlement, the SEC could advance its own counter-narrative instead of silencing critics. After all, the normal remedy for unwelcome speech is more speech. *United States* v. *Alvarez*, 567 U.S. 709, 727 (2012) (plurality opinion). The SEC "has not shown, and cannot show, why counterspeech would not suffice to achieve its interest." *Id*. at 726. Indeed, apart from the CFTC and New York Attorney General for civil settlements, see Gordon, *supra*, at 338-339, the Chamber's counsel know of no prosecutors or other government agencies that routinely insist on similar gag provisions in plea agreements or civil settlements.

The presence of media petitioners challenging the Rule as a violation of their First-Amendment rights to "news gathering," *Branzburg* v. *Hayes*, 408 U.S. 665, 707 (1972), underscores the public interests supporting review. This Court has recognized that, where there is "a willing speaker" who would communicate in the absence of a challenged restraint, the First Amendment protects both the source and the would-be recipients of the suppressed communication. *Virginia State Board*, 425 U.S. at 756. The record includes declarations from parties bound by SEC gag

clauses stating that they would speak to the media petitioners but for the speech-suppressant provisions. C.A. Further Excerpts of Record at FER4-FER5, FER19-FER20 [Dkt. 66.1]. These declarants constitute "willing speakers" for First-Amendment purposes even if one believes they consented to the gags when entered. *Overbey*, 930 F.3d at 228. Whatever the standard to evaluate their rights—whether "exacting scrutiny," or a likelihood of prejudice to ongoing proceedings, 2 *Smolla & Nimmer*, *supra*, §15:42—the Rule cannot survive it. As explained above, it fails strict scrutiny; it cannot meet the requirements for prior restraints; and, after a settlement, there is no risk of prejudicing the outcome of any proceeding.

The significant adverse public-policy effects underscore the need for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted.

JONATHAN D. URICK
MARIEL A. BROOKINS
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 659-6000

DONALD M. FALK
Counsel of Record
SCHAERR | JAFFE LLP
One Embarcadero Center
Suite 1200
San Francisco, CA 94111
(415) 562-4942
dfalk@schaerr-jaffe.com

AARON S. GORDON
SCHAERR | JAFFE LLP
1717 K Street NW
Suite 900
Washington, DC 20006
(202) 787-1060

Counsel for Amicus Curiae