

**In the
Supreme Court of the United States**

THOMAS JOSEPH POWELL, ET AL.,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

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

**BRIEF OF AMICUS CURIAE
COMPETITIVE ENTERPRISE INSTITUTE
IN SUPPORT OF PETITIONERS**

Ondray T. Harris
Counsel of Record
Marin Murdock
COMPETITIVE ENTERPRISE INSTITUTE
1310 L. Street NW, 7th Floor
Washington, D.C. 20005
(202) 331-2265
ondray.harris@cei.org

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INTEREST OF THE AMICUS CURIAE¹

Amicus Curiae, COMPETITIVE ENTERPRISE INSTITUTE (CEI), is a nonprofit educational and research institute headquartered in Washington, D.C., dedicated to promoting the principles of free markets, personal liberty, and limited government. Since its founding in 1984, the institute has focused on raising public understanding of the problems of overregulation through policy analysis, commentary, and litigation. CEI also pursues public-interest litigation to ensure that federal agencies act within the constraints of the United States Constitution, the Administrative Procedure Act, and its enabling statutes. CEI's mission is to develop and advocate for policies that advance the right to freedom, fairness, property, and prosperity for all Americans.



SUMMARY OF ARGUMENT

Congress imposed a presumption of disclosure on the government. The SEC has inverted that framework by imposing a presumption of silence on private citizens. Since 1972, the Securities and Exchange Commission has required that every settlement includes the

¹ Per Sup. Ct. R. 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than amicus and its counsel made a monetary contribution to the preparation or submission of this brief. Per Sup. Ct. R. 37.2, all parties were given timely notice of the amicus curiae's intent to file.

defendant's permanent promise of silence. Under Rule 202.5(e), settling defendants are forbidden from ever publicly denying or indirectly casting doubt on the SEC's account of its own cases. 17 C.F.R. § 202.5(e) (1972). Settling defendants may not speak to journalists, write op-eds, or contradict the Commission's version of events in any way, even if they are speaking truthfully or speaking to proceedings that concluded years ago. Rule 202.5(e), "the gag rule," serves not only as a restraint on speech but brings about an opacity to government that is contrary to public policy, making this a compelling case for certiorari.

Congress spent sixty years building a legal architecture premised on exactly the opposite principle. The Freedom of Information Act, enacted in 1966, embeds a constitutional norm into federal law: information about how the government exercises its enforcement power belongs to the public. 5 U.S.C. § 552. FOIA places the burden of justifying secrecy on the government and requires agencies to show reasonably foreseeable harm before withholding any record. *Id.* Transparency is the default.

Rule 202.5(e) inverts this architecture. The SEC achieves for human testimony what FOIA's foreseeable harm standard forbids it from achieving for its own documents: permanent, unconditional suppression with no burden of justification and no judicial review. FOIA opens the government's files; Rule 202.5(e) closes the mouths of the people those files are about. A journalist may obtain the SEC's complaint, its internal memoranda, its press releases, and its closing orders via FOIA. But the one person with personal knowledge of the SEC's actions and contravening facts, who can present the public with a complete picture to evaluate whether the

SEC acted fairly, accurately, and within its authority, has been permanently silenced by a boilerplate settlement condition.

Who bears the weight of that silence? In FY2024, the SEC filed 583 total enforcement actions, of which approximately 86 percent were brought against non-public-company defendants.² Namely, individuals, private firms, investment advisers, and broker-dealers.³ In FY2023, the SEC filed 784 enforcement actions; only 91 of the 501 stand-alone actions were against public companies.⁴ Quantitative and qualitative analysis consistently confirms that the SEC has concentrated its volume enforcement on smaller, less-resourced defendants: in FY2017, just 5 percent of all cases generated 62 percent of total penalties collected, and in FY2016, the same 5 percent produced 75 percent of total recoveries.⁵ The natural conclusion from this data is that the gag rule falls hardest on the defendants least able to resist it.

² U.S. Sec. & Exch. Comm’n, Press Release 2024-186, *SEC Announces Enforcement Results for Fiscal Year 2024* (December 17, 2024), <https://www.sec.gov/newsroom/press-releases/2024-186>.

³ *Private Companies and the SEC*, U.S. Securities and Exchange Commission, accessed April 15, 2026, <https://www.sec.gov/resources-small-businesses/capital-raising-building-blocks/private-companies-sec>.

⁴ U.S. Sec. & Exch. Comm’n, Press Release 2023-234, *SEC Announces Enforcement Results for Fiscal year 2023* (November 14, 2023), <https://www.sec.gov/newsroom/press-releases/2023-234>.

⁵ Hester Peirce, *Speech: Lies, Statistics, and Enforcement*, U.S. Securities and Exchange Commission (Oct. 26, 2018), <https://www.sec.gov/newsroom/speeches-statements/peirce-speech-lies-statistics-102618>.

Two circumstances make this case an especially compelling vehicle for certiorari. First, the rule conflicts structurally with Congress’s deliberate transparency policy, presenting a significant public policy issue which is compelling grounds for Supreme Court review. S. Ct. R. 10. Congress has enacted FOIA, the Government in the Sunshine Act, and the Open Government Act: each reflecting the same foundational judgment that the public has a right to know what its government does in its name. Rule 202.5(e) is an unauthorized inversion of that policy, imposed not by Congress but by the agency itself, for the agency’s own institutional benefit. The FOIA Improvement Act of 2016 codified a “presumption of openness” requiring agencies to withhold information only where they “reasonably foresee that disclosure would harm a protected interest.” 5 U.S.C. § 552(a)(8)(A)(i). No such foreseeable harm standard governs the SEC’s permanent suppression of defendant speech and denial of public access to information concerning a closed government’s investigation with consequences that affect the American public at-large, where a witness is willing to speak out. Congress has authorized nothing of this kind.

Second, the constitutional question is genuinely unresolved, raising substantial grounds for Supreme Court review under S. Ct. R. 10(c). The SEC no admit/no deny rule is facially invalid under the First Amendment. Although facial challenges generally require showing that no set of circumstances exists under which a law would be valid as established in *United States v. Salerno*, 481 U.S. 739 (1987), this Court has recognized a limited exception in the First Amendment context, where a law may be invalidated if it is substantially overbroad relative to its plainly legitimate sweep.

Broadrick v. Oklahoma, 413 U.S. 601 (1973). It is this overbreadth standard that applies to Rule 202.5(e), and it is that standard the Ninth Circuit declined to apply. The Ninth Circuit, applying the balancing framework established in *Town of Newton v. Rumery*, 480 U.S. 386 (1987), declined to apply prior restraint doctrine, declined to apply strict scrutiny, and expressly reserved the question of whether the restriction is constitutional in perpetuity. *Powell v. United States Securities and Exchange Commission*, 149 F.4th 1029 (9th Cir. 2025). The court subsequently concluded that without a specific set of facts before it, it could not be proven that a substantial amount of protected speech was violated by the rule. *Id.* at 1037. However, in *Securities and Exchange Commission v. Novinger*, 40 F.4th 297 (5th Cir. 2022), the Fifth Circuit declined to address the same First Amendment arguments despite having a specific set of facts before them. Two judges concurred, stating that although they did not rule in favor of settling defendants in this instance, the validity of the SEC's rule was highly questionable, and concluded that the SEC will likely need to reevaluate its policy soon. *Novinger*, at 308 (Jones, J. and Duncan J., Concurring). This doctrinal inconsistency coupled with rule 205(e)'s violation of core constitutional protections warrants this Court's review. This case is an ideal vehicle because it squarely presents the legality of a uniform, nationwide SEC rule, not a case-specific application.

The argument that follows develops both grounds in turn. Argument I addresses the FOIA inversion and the structural constitutional problem it creates. Argument II addresses the First Amendment questions the Ninth Circuit left unresolved.



ARGUMENT

I. Rule 202.5(e) is an Unauthorized Inversion of Congress’s Deliberate Transparency Architecture.

This case presents a structural conflict between an agency-imposed speech restriction and Congress’s comprehensive transparency regime. Rule 202.5(e) does not merely regulate speech. It reverses the statutory presumption that government accountability flows from public access to information. James Madison wrote in 1822 that “a popular government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both.” *Letter to W.T. Barry* (Aug. 4, 1822). That principle is not merely aspirational. Congress translated it into law in 1966 when it enacted the Freedom of Information Act, and the legislature has returned to repeatedly reinforce it ever since. Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966), *amended by* Pub. L. No. 93-502, 88 Stat. 1561 (1974); Pub. L. No. 99-570, §§ 3-6, 9-11, 110 Stat. 3049-54 (1996); Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048; Open Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538. The entire arc of federal transparency legislation reflects a settled congressional judgment that the government bears the burden of justifying secrecy, not the citizen. Rule 202.5(e) reverses that judgment, without congressional authorization, for the benefit of the agency alone.

A. FOIA’s architecture Rests on a Presumption of Openness That Rule 202.5(e) Inverts.

FOIA’s framework rests on three foundational principles. First, government information is, by default, public information. *See John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (noting FOIA’s “basic policy of full agency disclosure”) (quotation omitted). Second, the burden of justifying withholding falls on the agency, not the requester. *See Department of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976). Third, exemptions from disclosure must be “narrowly construed.” *Department of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 12 (2001). An agency’s institutional interest in protecting its own reputation, controlling the narrative about its enforcement record, or insulating itself from criticism is not, standing alone, a cognizable interest under FOIA’s exemptions. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004) (public interest under FOIA focuses on shedding light on government conduct).

The FOIA Improvement Act of 2016 sharpened this framework further. Congress codified a “foreseeable harm” standard requiring agencies to identify a specific, concrete harm before withholding any record. 5 U.S.C. § 552(a)(8)(A)(i). Under that standard, the SEC cannot withhold documents about its enforcement conduct merely because disclosure would be embarrassing or contrary to the agency’s preferred narrative. *See Dept. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (public interest under FOIA is limited to shedding light on “what the government is up to”).

Rule 202.5(e) applies none of these constraints to human testimony. Through FOIA, a journalist can obtain the SEC's complaint, its investigative memoranda, its communications with witnesses, and its closing orders. What FOIA cannot provide, and what the gag rule ensures the public will never receive, is the first-hand account of the defendant who has direct knowledge of whether the SEC's allegations were accurate, whether the investigation was fairly conducted, and whether the settlement was genuinely voluntary. The SEC achieves for human testimony what FOIA's foreseeable harm standard forbids it from achieving for its own documents: permanent, unconditional suppression with no burden of justification, no exemption analysis, and no judicial review.

B. The Broader Congressional Transparency Framework Confirms That Rule 202.5(e) Is Contrary to Public Policy.

FOIA does not stand alone. The Government in the Sunshine Act of 1976, 5 U.S.C. § 552b, requires that federal agency meetings be open to the public, reflecting Congress's judgment that the deliberative processes of executive agencies should be subject to public scrutiny. The Open Government Act of 2007, Pub. L. No. 110-175, strengthened FOIA's enforcement mechanisms and reaffirmed the presumption of openness. Together, these statutes form a comprehensive framework premised on the principle that executive agencies operate in the public's name and must answer to the public for how they exercise sovereign power. *See U.S. Department of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749 (1989) (describing FOIA's purpose as ensuring public access to information about "what their government is up to").

By gagging defendants, Rule 202.5(e) deprives the public of access to information directly related to the Agency's prosecution of individuals. These prosecutions are oftentimes for the benefit of the public by protecting shareholders. Yet, the very public the agency seeks to protect cannot access information to evaluate the agency's actions. The rule allows the SEC to settle an investigation with a wrongdoer that may result in the shuttering of a corporation. Yet, the shareholders will never be able to find out any facts beyond what the SEC has authorized publication on. Shareholders and the public at-large have no ability to evaluate the SEC's actions or inactions in its investigations. The opacity that this rule allows the SEC to operate with violates society's interests by preventing the public from learning about government misconduct or agency overreach, particularly where the defendant is financially disadvantaged and lacks legal fees to defend against the SEC's claims.

C. The FOIA Inversion Is the Structural Heart of the Constitutional Problem.

The deepest constitutional infirmity of Rule 202.5(e) is not only that it restricts speech but that it inverts the entire burden structure that Congress and the Constitution have established for government information. Under FOIA, the presumption runs in favor of disclosure. The government must justify secrecy.

Rule 202.5(e) reverses this presumption for the most probative category of information about SEC enforcement: the defendant's firsthand account. Under the gag rule, the presumption runs in favor of silence. The government's account which is transmitted through press releases, enforcement databases, and FOIA-responsive records is the only account that enters the

public domain. The result is a self-referential, permanently one-sided public record composed entirely of what the government chose to say about what it did.

This inversion matters structurally. Congress designed FOIA so that the public could hold agencies accountable through information. Congressional oversight, Inspector General review, and press accountability all depend on it. Judicial review of agency conduct depends on a record that reflects reality, not just the government's preferred version of it. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572–73 (1980) (recognizing a First Amendment right of access grounded in the structural role of transparency in democratic governance); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604–05 (1982) (holding that First Amendment right of access serves to ensure informed public discussion of governmental affairs and citizen participation in self-government); *Lamont v. Postmaster General*, 381 U.S. 301, 306–07 (1965) (striking down a statute requiring affirmative opt-in to receive mail designated as foreign political propaganda as unconstitutional burden on First Amendment right to receive information). Each of these mechanisms is disabled when the only available account of an enforcement action is the account the agency itself provided. Rule 202.5(e) is not merely a speech restriction. It is an institutional self-insulation device which operates by inverting the very presumptions that Congress embedded in sixty years of transparency legislation.

D. The Separation of Powers and Major Questions Doctrine Confirm That No Authorization Exists.

Even if the SEC's asserted interests were legitimate and compelling, the rule would still fail because no act

of Congress authorized it. Under *West Virginia v. EPA*, 597 U.S. 697 (2022), and *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), agencies must identify clear statutory authorization for actions of vast significance. The authority to permanently regulate the public speech of every person who settles a civil enforcement action with the SEC is authority of this magnitude.

The Securities Exchange Act grants the SEC broad authority to regulate securities markets and bring enforcement actions. 15 U.S.C. § 78w(a)(1) (Section 23(a)). It does not grant the SEC authority to impose lifetime speech conditions as the price of settlement. It does not grant the SEC authority to enact rules that are contrary to the spirit FOIA. Under *Loper Bright*, courts must independently determine whether an agency has acted within its statutory authority, and the answer here is plainly no. See *Whitman v. American Trucking Associations*, 531 U.S. 457, 468 (2001) (“Congress . . . does not hide elephants in mouseholes.”). This Court’s decision in *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175 (2023), which recognized that structural constitutional issues are beyond the SEC’s expertise, reinforces the point: an agency that cannot adjudicate the constitutional questions raised by its own rules certainly cannot unilaterally impose and maintain a speech suppression regime that has never been subjected to the scrutiny those rules require.

This Court has held in *Seila Law LLC v. CFPB*, 591 U.S. 197, 213-14 (2020), and *Collins v. Yellen*, 594 U.S. 220, 250-51 (2021), that agency structural arrangements that insulate agencies from democratic accountability are constitutionally suspect. Rule 202.5(e) achieves that insulation not through formal structural arrangement but through speech suppression: by perm-

anently silencing every person, particularly financially disadvantaged defendants, with direct knowledge of SEC enforcement conduct, it insulates the agency from the press coverage, congressional attention, Inspector General complaints, and public advocacy that democratic accountability requires. The constitutional problem the Court identified in *Seila Law* and *Collins* is present here in a different form and equally demands this Court's attention.

II. The Constitutional Question Is Genuinely Unresolved, and the Ninth Circuit's Analysis Is Demonstrably Incomplete.

This Court grants certiorari to resolve questions of constitutional law that are both unsettled and of substantial national importance. S. Ct. R. 10. This case presents both. The constitutional status of Rule 202.5(e) has never been subjected to scrutiny the First Amendment demands. The Ninth Circuit upheld the rule without applying prior restraint doctrine, without applying strict scrutiny, and without answering the durational question the rule most urgently poses. Instead, the court avoided the constitutional questions by applying the balancing framework laid out in *Town of Newton v. Rumery*, 480 U.S. 386 (1987), concluding that the constitutional rights at stake under Rule 202.5(e) may be waived if done so voluntarily, with knowledge, and the individual had the capacity to do so. *Powell v. United States Securities and Exchange Commission*, 149 F.4th 1029 (9th Cir. 2025). The Ninth Circuit erred on two points. First, under the Rumery framework, the SEC gag rule does not allow for “voluntary” waiver of First Amendment rights for many defendants, making a substantial amount of those “waivers” invalid. Second, the court failed to analyze

the gag rule as a prior restraint, which would show that the Gag rule is facially invalid.

A. The Voluntariness of Settlement is a Fiction for Many SEC Defendants Constituting an Invalid Waiver of First Amendment Rights.

In *Town of Newton v. Rumery*, 480 U.S. 386 (1987), this Court held that agreements waiving the right to pursue civil claims are enforceable only if they satisfy a case-specific balancing test. Courts must determine whether the waiver was entered into voluntarily, deliberately, and with full awareness of the rights relinquished, and whether enforcement would be consistent with public policy. *Id.*, at 392. Even where a waiver appears voluntary, it is unenforceable if the public interest harmed (such as the suppression of claims that promote government accountability) outweighs the benefits of enforcement in the particular case. *Id.*

The Ninth Circuit’s application of *Rumery* depends entirely on the premise that defendants voluntarily agreed to the gag condition. That premise fails empirically for a majority of the defendants the rule reaches. In FY2024, the SEC filed 583 enforcement actions, of which approximately 86 percent were brought against non-public-company defendants. U.S. Sec. & Exch. Comm’n, Press Release 2024-186, *SEC Announces Enforcement Results for Fiscal year 2024* (December 17, 2024), <https://www.sec.gov/newsroom/press-releases/2024-186>. In FY2023 it filed 784, including 501 stand-alone actions of which only 91 were against public companies—approximately 18 percent. U.S. Securities and Exchange Commission, *SEC Announces Enforcement Results for Fiscal Year 2023* (November 14, 2023), <https://www.sec.gov/newsroom>

/press-releases/2023-234. The overwhelming majority of enforcement targets are individuals, private firms, small investment advisers, and broker-dealers: parties likely without institutional legal infrastructure, with no option for a public defender, and likely without the financial resources to sustain extended federal litigation. SEC enforcement data further reveals that in FY2017, just 38 cases out of 754, or 5 percent, generated 62 percent of all penalties collected. In FY2016, 43 cases out of 868 generated 75 percent of total recoveries. See Hester Peirce, *Speech: Lies, Statistics, and Enforcement*, U.S. Securities and Exchange Commission (Oct. 26, 2018), <https://www.sec.gov/newsroom/speeches-statements/peirce-speech-lies-statistics-102618>. The structural implication is clear: the agency generates the bulk of its enforcement volume from smaller defendants generating smaller penalties—defendants who are simultaneously the most common targets and the most disadvantaged in the process.

For these smaller defendants, the word “voluntary” does not describe the reality of settlement. The SEC investigates for months or years before filing, compiling a record the defendant cannot access during the investigation. 17 C.F.R. § 202.5 (“[u]nless otherwise ordered by the Commission, all formal investigative proceedings shall be non-public”); Comments on Proposed Rule: Amendments to the Commission’s Rules of Practice, 2 (Release No. 34-75976; File No. S7-18-15) (S.E.C. Misc., 2015); By the time settlement is offered, the defendant faces a choice between accepting the boilerplate conditions which includes the lifetime gag or continuing to litigate before an in-house adjudicator with compressed timelines, severely limited discovery,

no jury right, and an appellate process statistically more likely to increase sanctions than reduce them. *SEC v. Jarkesy*, 603 U.S. 109 (2024) (recognizing the constitutional asymmetries of SEC administrative proceedings). There is no option for a public defender in administrative proceedings, so legal costs accumulate from the moment a subpoena arrives. See *Boruski v. Securities and Exchange Commission*, 340 F.2d 991, 992 (2nd Cir. 1965) (there is no right to appointed counsel in administrative proceedings); *U.S. v. Bloom*, 450 F.Supp. 323, 338 (E.D. Penn. 1978). Defendants who hoped to fight their cases in federal court may find themselves in administrative proceedings stripped of the evidentiary tools and procedural protections they expected. See Priyah Kaul, *Admit or Deny: A Call For Reform of the SEC's "Neither-Admit-Nor-Deny" Policy*, 48 U. MICH. J.L. REFORM 535 (2015). Under these conditions, the agreement to a lifetime speech condition is not a knowing, voluntary, and intelligent waiver of a fundamental constitutional right.

Therefore, under the unconstitutional conditions doctrine, the agreement to a lifetime speech prohibition cannot constitute a valid waiver of First Amendment rights for a substantial portion of the defendants the rule reaches. The Constitution requires that waivers of fundamental rights be knowing, voluntary, and intelligent. *Brady v. United States*, 397 U.S. 742, 748 (1970). Where substantial coercive pressure negates any meaningful exercise of choice, that standard is not met. The factual record here—compressed timelines, no right to a public defender, statistically punishing administrative appeal, and the financial impossibility of sustained federal litigation for smaller defendants—establishes that the conditions of settlement are coercive

in the constitutional sense, not merely in the colloquial one.

B. Rule 202.5(e) Functions as a Prior Restraint in Operation, Regardless of Its Characterization as a Settlement Condition.

The First Amendment strongly disfavors prior restraints, or government restrictions that prohibit speech before it occurs, because such measures carry a “heavy presumption” of invalidity. *Near v. Minnesota*, 283 U.S. 697, 713–15 (1931); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam).

The SEC will likely characterize Rule 202.5(e) as a voluntary settlement condition rather than a classic prior restraint. But the doctrine turns on functional effect, not formal label. A restriction that prospectively bars speech without meaningful opportunity for review operates as a prior restraint, even if framed as a waiver.

Rule 202.5(e) operates in precisely that manner. It imposes a prospective prohibition on speech that would deny or cast doubt on the SEC’s allegations, and it does so as a non-negotiable condition of settlement. The restriction applies indefinitely, without sunset or mechanism for reconsideration, and reaches not only false statements but also potentially truthful or contextual ones. In practice, defendants must accept this ongoing speech limitation before resolving the case, leaving no realistic opportunity to bargain over its scope.

In these respects, the rule functions as a prior restraint in operation: it suppresses speech before it occurs, applies broadly and indefinitely, and lacks the procedural safeguards that typically accompany restrictions of this kind.

C. The Gag Rule Does Not Survive Strict Scrutiny—Even in the Best of Circumstances.

When a regulation restricts speech protected by the First Amendment, it is subject to strict scrutiny, requiring the government to show that the restriction is narrowly tailored to serve a compelling interest. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Reed v. Town of Gilbert*, 576 U.S. 155 (2015).

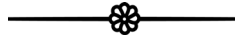
The SEC asserts that Rule 202.5(e) preserves its ability to litigate if a settling defendant later publicly denies the allegations. Even accepting that interest, the rule appears difficult to reconcile with strict scrutiny.

First, it is not narrowly tailored. The rule prohibits not only false statements but also truthful ones, applies indefinitely rather than for the duration of any litigation risk, and extends beyond formal denials to any statement that might “indirectly” cast doubt on the SEC’s allegations. 17 C.F.R. § 202.5(e). That sweeping, perpetual restriction far exceeds what would be necessary to preserve any legitimate litigation interest.

Second, the asserted interest is not compelling. The First Amendment does not permit the government to suppress speech simply to avoid criticism of its own enforcement conduct. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Third, less restrictive alternatives are readily available. The SEC could pursue case-specific limitations, target demonstrably false statements, or rely on existing remedies such as defamation law. The availability of these alternatives underscores that the rule is not narrowly tailored and suggests that its function

is to suppress criticism rather than preserve litigation options.



CONCLUSION

Congress spent decades building a legal architecture premised on the principle that the government bears the burden of justifying secrecy. The Freedom of Information Act, the Government in the Sunshine Act, and the Open Government Act each reflect the same foundational judgment: information about how federal agencies exercise sovereign power belongs to the public. Rule 202.5(e) is an unauthorized inversion of that judgment that is against public policy. Transparency is the foundation of legitimacy. Allowing the government to suppress the “other side” of a story prevents the public from having honest conversations about whether a law or agency is actually working. This opacity does more than limit public discourse; it alters the constitutional balance between the governed and those who govern. By suppressing the only firsthand accounts capable of testing its enforcement narrative, the SEC effectively insulates itself from the mechanisms of democratic accountability that Congress designed to constrain administrative power. The result is not merely a restriction on speech, but a structural distortion—one that permits the agency to exercise its authority without the transparency necessary for meaningful oversight by the public, Congress, or the courts.

Rule 202.5(e) presents constitutional questions of national importance that remain genuinely unresolved.

The Ninth Circuit upheld the rule without applying prior restraint doctrine, without applying strict scrutiny, and while expressly reserving the constitutional question the rule most urgently poses. It applied a balancing framework designed for narrow, time-limited plea arrangements to a permanent, categorical, agency-wide speech prohibition, and in doing so left standing a rule that suppresses truthful criticism of government enforcement conduct for hundreds of defendants each year: most of them individuals and small businesses with no realistic alternative to settlement and no public voice once silenced.

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Ondray T. Harris

Ondray T. Harris

Counsel of Record

Marin Murdock

COMPETITIVE ENTERPRISE INSTITUTE

1310 L. Street NW, 7th Floor

Washington, D.C. 20005

(202) 331-2265

ondray.harris@cei.org

Counsel for Amicus Curiae

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