No. 24-1899

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Thomas Joseph Powell, Barry D. Romeril, Christopher A. Novinger, Raymond J. Lucia, Marguerite Cassandra Toroian, Gary Pryor, Joseph Collins, Rex Scates, Michelle Silverstein, Reason Foundation, Cape Gazette, New Civil Liberties Alliance

Petitioners,

v.

Securities and Exchange Commission

Respondent,

On Petition for Review of an Order of the
Securities and Exchange Commission

BRIEF FOR RESPONDENT SECURITIES AND EXCHANGE COMMISSION

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INTRODUCTION

The Securities and Exchange Commission often settles enforcement actions it brings against defendants. For over fifty years, the Commission has stated that it will agree to settle only if a defendant agrees not to deny the allegations—in a "no deny" provision—which usually is paired with a statement that the defendant does not admit wrongdoing ("no admit"). This has become known as the "no-admit, no-deny policy." This appeal challenges the Commission's denial of a petition to amend that policy by striking the "no-deny" component—which has remained uncontroversial until recently—on the ground that it contravenes the First Amendment. Because the use of no-deny provisions is constitutional under binding Supreme Court and Ninth Circuit precedent, petitioners have failed to clear the high bar for overturning the Commission's discretionary decision not to engage in rulemaking.

"Compromise is the essence of a settlement," *SEC v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984), and while neither a defendant nor the Commission is required to settle, when they choose that path, they each give something up. Defendants avoid the uncertainty of litigation, and usually can resolve the litigation without admissions. But they also agree not to deny the allegations without consequence. The Commission, for its part, settles to end litigation more quickly, conserve resources, and, when applicable, more efficiently return collected sanctions to injured investors.

But it gives up its ability to go to trial, seek a judgment, and obtain remedies that may be higher than what it can negotiate in a settlement.

As part of the voluntary agreement, Commission obtains a limited remedy for breach that is narrowly tailored to the purpose of settlement. If the defendant publicly denies the allegations in the complaint, the Commission may ask the court that entered the consent judgment to restore the action, essentially returning the parties to where they were before settling. This remedy is not self-executing, as a court must agree to reinstate the matter. It preserves the Commission's ability to prove its case in court, subject to the rules of procedure and evidence, under which defendants can deny the allegations and raise any available defenses to liability.

Far from being pernicious, this practice is an anodyne example of defendants waiving their rights as part of a settlement. The Supreme Court and this Court have rejected a per se rule against waivers and have repeatedly held that parties can waive constitutional rights, including First Amendment rights, so long as the waivers are knowing and voluntary.

Petitioners resist this precedent, including the very cases they cite, and bombard the Court with hyperbole, but they have not shown that no-deny provisions are constitutionally or statutorily problematic. They trot out a bevy of First Amendment concepts, such as prior restraint and unconstitutional conditions, but courts do not apply those doctrines to voluntary waivers in settlements in large part

because there is no rule against such waivers. Nor do petitioners acknowledge that accepting their novel views regarding waivers would functionally mean the end of settlements involving waivers, including of First Amendment rights, even though they have been accepted for decades. *See City of Austin, Tex. v. Reagan Nat'l Advertising of Austin, LLC*, 596 U.S. 61, 76 (2022) (rebuffing suggestion that "tens of thousands of jurisdictions have presumptively violated the First Amendment … for more than half a century"). There is a close nexus between what the Commission gives up in settling—its ability to prove its case in court—and its remedy for breach of a no-deny provision—the opportunity to ask a court to restore the case to the court's active docket. Because such waivers are constitutional, and the Commission, like any party, can choose the terms on which it is willing to settle cases, this Court should decline to order the Commission to change its policy.

COUNTERSTATEMENT OF JURISDICTION

Petitioner New Civil Liberties Alliance filed a petition for rulemaking on October 30, 2018, *see* ER 3-38, and a renewed petition on December 20, 2023, which was joined by petitioners Barry Romeril, Christopher Novinger, and Raymond Lucia, *see* ER46-53. The Commission denied both petitions on January 30, 2024. *See* ER55-60. Petitioners filed a timely petition for review in this Court on March 28, 2024. *See* Dkt. 1; 15 U.S.C. 78y(a)(1). As explained below, however, this Court may consider only Lucia's challenge; every other petitioner is either not "aggrieved" by the

Commission's decision or does not "reside[]" or have a "principal place of business" in a state located in this Circuit. 15 U.S.C. 78y(a)(1).

COUNTERSTATEMENT OF THE ISSUES

I. Whether all the petitioners but one should be dismissed because they are not aggrieved by the Commission's decision not to amend its no-deny policy going forward or have not established venue in this Circuit.

II. Whether under binding Supreme Court and Ninth Circuit precedent that rejects per se rules against waivers of constitutional rights, the Commission's use of no-deny provisions in voluntary settlements is consistent with the First Amendment.

III. Whether, under the proper balancing test that would be applied if the Commission were seeking to enforce a waiver, the no-deny provision has a sufficiently close nexus to the underlying settlement containing the waiver.

IV. Whether the Commission's denial of the rulemaking petition is consistent with its authority to settle cases and the Administrative Procedure Act (APA).

COUNTERSTATEMENT OF THE CASE

A. For over fifty years, the Commission has declined to settle cases unless a defendant also agrees to a no-deny provision.

Congress empowered the Commission, "in its discretion," to investigate possible securities-law violations and to bring actions in federal court regarding such violations. 15 U.S.C. 78u(a), (d)(1); ER55. Congress further gave the Commission

"the power" to "make such rules and regulations as may be necessary or appropriate" to implement this authority. 15 U.S.C. 78w(a)(1).

In exercising its enforcement authority, the Commission often agrees to resolve actions through settlements, including consent judgments entered in federal district court. Consent judgments are "compromises in which the parties give up something they might have won in litigation and waive their rights to litigation." *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 235 (1975); *United States v. Bechtel Corp.*, 648 F.2d 660, 665-67 (9th Cir. 1981). They provide "parties with a means to manage risk" and resources. *SEC v. Citigroup Glob. Mkts., Inc.*, 752 F.3d 285, 295 (2d Cir. 2014).

Consent judgments "embod[y] an agreement of the parties and thus in some respects [are] contractual in nature," but they are also "enforceable as * * * judicial decree[s]." *Tex. v. N.M.*, 144 S.Ct. 1756, 1764 (2024). They are contracts because they "are entered into by parties to a case after careful negotiation has produced agreement on their precise terms." *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971); *United States v. Motor Vehicle Mfrs. Ass'n of U.S. Inc.*, 643 F.2d 644, 648 (9th Cir. 1981). And they are decrees because they are memorialized in a judgment over which a court retains jurisdiction. *Armour*, 402 U.S. at 681-82. Because a consent decree is a "judgment," it "offers more security to the parties than a settlement agreement," *Randolph*, 736 F.2d at 528, and a judgment is entered on the public docket, in contrast to a private settlement.

The Commission's "resources are limited," which is why "it often uses consent decrees as a means of enforcement" even if its case is "strong." *Id.* at 529. When the Commission settles an action, it "is not bestowing a benefit on the defendant, but rather is acting in the public interest to minimize litigation risk, maximize limited resources, and accelerate the resolution of the case." ER60. Procedurally, once there is agreement with the defendant on settlement terms, the Commission staff recommends the settlement to the Commission, which must approve it by a majority vote of the active Commissioners. ER55.

Over fifty years ago, the Commission stated that it would not accept a settlement that imposes a sanction if the defendant also publicly denies the complaint's allegations. *See* ER56; 37 Fed. Reg. 25,224 (Nov. 29, 1972) ("[The Commission] hereby announces its policy not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint[.]"). Thus, if a defendant wishes to settle without admissions, the defendant must also agree not to publicly deny the allegations, or the Commission will not agree to the settlement. This policy, codified at 17 C.F.R. 202.5(e) among the Commission's "[i]nformal and other procedures," was intended "to avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur." *Id.* Rule 202.5(e) does not impose obligations on defendants or mandate settlement—defendants can always

decline to settle and force the Commission to prove its case. ER57. Rather, Rule 202.5(e) announces the types of settlements the Commission will accept.

In many consent judgments, the no-deny provision is frequently paired with language that the defendant does not admit the allegations or liability. Defendants insist upon this language to avoid the collateral estoppel effect admissions could have in private actions, including under the securities laws. *See Citigroup*, 752 F.3d at 297. Consequently, many consent judgments contain language stating that the settling defendant neither admits nor denies the allegations or liability. *See, e.g.*, ER129 ("I agreed to settle the SEC's administrative proceeding without * * * admitting * * * the SEC's allegations[.]"); ER133 ("'That 'Consent' was entered into without my admitting * * * the SEC's allegations against me.").

The typical mechanics of a no admit/no deny settlement are as follows. After counsel for parties like Lucia, Romeril, and Novinger negotiate the settlement terms, defendants sign a consent—often also signed by counsel as to form—which is then incorporated into a final judgment (or order). Defendants voluntarily agree to waive multiple rights, including the right to appeal, and state that they are entering into the consent "[w]ithout admitting or denying the allegations of the complaint." ER80; *SEC v. Romeril*, 15 F.4th 166, 169 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 2836 (2022); *SEC v. Novinger*, 40 F.4th 297, 300-01 (5th Cir. 2022) (*Novinger I*). Defendants further agree "not to take any action or to make or permit to be made any public statement

denying, directly or indirectly, any allegation in the complaint." ER83. The consent expressly limits the Commission's remedy: if a defendant "breaches this agreement, the Commission may petition the Court to vacate the Final Judgment and restore this action to its active docket." ER83. "For over 40 years, federal district courts have" unremarkably "entered hundreds of consent judgments" containing such "no admit/no deny" language without any suggestion of a constitutional problem. ER57 (noting that challenges to the Commission's no-deny policy have cropped up only in "the past decade"); *Citigroup*, 752 F.3d at 295 ("[S]etting out the colorable claims, supported by factual averments by the S.E.C., neither admitted nor denied by the wrongdoer, will suffice to allow the district court to conduct its review.").

B. Four petitioners asked the Commission to eliminate the no-deny policy.

The New Civil Liberties Alliance (NCLA) filed a petition for rulemaking requesting that the Commission amend 17 C.F.R 202.5(e). ER3-44. The petition contended that Rule 202.5(e) violated the First Amendment and was otherwise unlawful. *See id.* The NCLA did not question the Commission's ability to settle cases or adopt policies regarding settlements, but rather proposed an amendment to Rule 202.5(e) that would "allow defendants to consent to a judgment while denying the allegations with no recourse for the Commission to return to active litigation." ER58.

Far from effectuating a "modest change" to Rule 202.5(e), *id.*, the proposal would upend the Commission's settlement practice.

The NCLA, representing Romeril and Novinger, attempted to reopen their voluntary consent judgments years after entry—more than 15 years for Romeril—and excise the no-deny provisions while keeping the rest of the settlements intact. The Second and Fifth Circuits rebuffed these challenges. *See SEC v. Novinger*, 96 F.4th 774, 776 (5th Cir. 2024) (*Novinger II*); *Novinger I*, 40 F.4th at 300; *Romeril*, 15 F.4th at 172. On December 20, 2023, the NCLA filed a renewed rulemaking petition with the Commission, adding Romeril, Novinger, and Lucia, all of whom are petitioners here. ER46-53.

C. The Commission denied the petition to amend.

The Commission denied the rulemaking petition. It explained why it was maintaining the policy and rejected the petition's legal arguments in a six-page letter that "exceed[ed]" the requirement under the APA that the Commission furnish a "brief statement of the grounds for denial." ER55 n.1 (quoting 5 U.S.C. 555(e)). The Commission explained that the policy "preserves its ability to seek findings of fact and conclusions of law if a defendant, after agreeing to a settlement, chooses to publicly deny the allegations" because the "no-deny provision provides the Commission with the opportunity to ask a district court to return the case to the active docket." ER58. The Commission confirmed that this remedy "is not self-executing"; if the

Commission decided, "based on the facts and circumstances," to invoke its remedy following a public denial, a district court would have to grant the Commission's request before a case would return to the active docket. ER58. "This relief is thus closely tied to the purpose of settlement—voluntarily resolving a matter without further litigation." ER58. The Commission explained that it was "not required to choose a path whereby it waives its right to try a case while the defendant is free to publicly deny the allegations without any real ability for the Commission to respond in court." ER58.

The Commission then turned to the consequence of not having the policy. "[I]f a defendant settles without admissions and then later denies the allegations, that turnabout can negatively impact the public interest" by "creat[ing] the incorrect impression that there was no basis for the Commission's enforcement action." ER58. "Because such a denial would come only after the Commission had relinquished the opportunity to prove its case in court with evidence, it could undermine confidence in the Commission's enforcement program." ER58-59. The Commission rejected the suggestion that, as an alternative to "ask[ing] a court to permit it to test [the defendant's] denial," the Commission could simply "issue its own" press release, explaining that "the Commission does not try its cases through press releases." ER58.

The Commission concluded that the "petition's constitutional arguments" were "not persuasive" and "contravene[d] established precedent regarding waiver of rights"

because "[t]here is a large body of precedent confirming that a defendant can waive constitutional rights as part of a civil settlement, just as a criminal defendant can waive constitutional rights as part of a plea bargain." ER58-59 (citing *Romeril*, 15 F.4th at 172). Those precedents include *Romeril*, which followed directly from the holding in *Town of Newton v. Rumery*, 480 U.S. 386, 393 (1987) "that there is no per se rule of invalidity for waivers of constitutional rights. ER59.

The Commission observed that "*Rumery* and *Romeril* are part of a well-established line of precedent," including this Court's decision in *Leonard v. Clark*, 12 F.3d 885, 889-90 (9th Cir. 1993), which demonstrate that defendants can waive constitutional rights. ER59 n.4. Thus, "waivers" of constitutional rights "in the civil context" are permissible so long as they are "knowing, voluntarily, and intelligent," in which case the "settling defendants" will have made a "highly rational judgment that the advantages of settlement exceeded any costs of waiver." ER60. When settling, the Commission confirmed, it "is not bestowing a benefit on the defendant, but rather is acting in the public interest to minimize litigation risk, maximize limited resources, and accelerate the resolution of the case." ER60.

The Commission also addressed its authority for the policy. It explained that Congress gave the Commission enforcement powers under Section 21 of the Exchange Act, 15 U.S.C. 78u, as well as the power to adopt rules that aid in the execution of those powers in 15 U.S.C. 78w(a). ER56 n.2. And it noted it did not

engage in notice-and-comment rulemaking under the exception for "general statements of policy, or rules of agency organization, procedure, or practice," 5 U.S.C. 553(b)(A). ER56 n.2.

Twelve petitioners have come to this Court. Nine are individuals, most of whom entered into settlements containing no-deny provisions. *See* ER69-127. Three are organizations that purport to have an interest in litigating the validity of the Commission's no-deny policy. Only four of the petitioners participated in the rulemaking proceeding that prompted this appeal.

STANDARD OF REVIEW

An agency's denial of a rulemaking petition may be vacated only if the denial is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. 706(2)(A). Judicial review of an agency's "refus[al] to exercise its discretion to promulgate proposed regulations" is "extremely limited and highly deferential." *Compassion Over Killing v. U.S. FDA*, 849 F.3d 849, 854 (9th Cir. 2017); *see also id.* ("[A]n agency's refusal to institute rulemaking proceedings is at the high end of the range of levels of deference [courts] give to agency action under * * * arbitrary and capricious review." (cleaned up)). As even petitioners recognize, "an agency's refusal to amend its rule is to be overturned only in the rarest and most compelling of circumstances." Br. 28 (internal quotations and citations omitted)).

SUMMARY OF ARGUMENT

Petitioners have identified no basis for overturning the Commission's decision not to engage in discretionary rulemaking because they have not demonstrated that the Commission was required to change its no-deny policy.

I. As a threshold matter, all petitioners except Lucia cannot seek review of the Commission's decision in this Court. The judicial review provisions that petitioners invoke require (1) "a person aggrieved" by a Commission order; (2) to seek review in the "circuit in which he resides or has his principal place of business[.]" 15 U.S.C. 78y(a)(1); *see also* 15 U.S.C. 77i(a) (similar). This Court should evaluate jurisdiction and venue on a petitioner-by-petitioner basis, and find that eight petitioners did not participate in the proceeding below or show that they are otherwise "aggrieved" by the Commission's retention of its policy. In addition, six petitioners (with some overlap) neither reside nor have their principal place of business in a state within this Circuit. These petitioners should be dismissed even though the Court can reach the merits because Lucia has established jurisdiction and venue.

II. Petitioners' First Amendment arguments lack merit. Binding precedent rejects per se rules against voluntary waivers of constitutional rights, including First Amendment rights, which are fundamentally different from laws that restrict rights against the will of the speaker. The Supreme Court and this Court, in cases like

Leonard and *Davies v. Grossmont Union High School District*, 930 F.2d 1390 (9th Cir. 1991), have accepted that settling defendants may waive constitutional rights and have then employed a balancing test to determine whether those waivers should be enforced. Even though petitioners eventually concede that rights "can be waived" as part of the settlement process, Br. 59, they spend most of their brief cycling through inapplicable First Amendment doctrines—prior restraint, viewpoint discrimination, compelled speech, right to listen, unconstitutional conditions, and vagueness.

Unsurprisingly, petitioners do not identify any binding precedent employing those doctrines in the waiver context. Using prior restraint and viewpoint discrimination concepts for waivers ignores the voluntary nature of the restriction and would prove too much: they would functionally preclude the use of waivers in settlements since waivers must describe what is being waived. The no-deny provisions here do not compel speech; they reflect an agreement not to speak. The unconstitutional conditions concept is inapposite because it applies only to government benefits, and the Commission's acceptance of a settlement is not the conferral of a such a benefit. Moreover, even if a settlement could be a benefit, there is a close nexus between the supposed "condition" (the no-deny provision, with its limited remedy) and the purpose of a settlement (resolving the litigation). Finally, the vagueness doctrine has no role to play for contractual waivers, as opposed to legislation, and there is no impermissible ambiguity in the no-deny provisions.

III. While the Commission is not currently seeking to enforce a no-deny provision against Lucia or any other petitioner, the provision would withstand scrutiny under the proper balancing test because it is tailored to ensure that the Commission retains the ability to prove its case in court. Petitioners remain free to speak about the Commission and its enforcement program more broadly, so long as they refrain from denying the specific allegations against them. If defendants publicly deny the allegations, the Commission can seek to reinstate its case, and if a court agrees, the Commission can attempt to prove its case in court in a trial controlled by the rules of procedure and evidence. Because that remedy is closely tied to what the Commission surrenders when it settles, the no-deny policy is enforceable.

IV. Finally, petitioners are wrong that the Commission lacked the authority or erred procedurally when it adopted and then chose to maintain the no-deny policy. The securities laws authorize the Commission to bring enforcement actions in its discretion, and to promulgate rules to implement that statutory mandate. That is exactly what the no-deny policy does. And petitioners' notice-and-comment challenge under the APA is both more than fifty years too late and precluded by the statute's specific carveout for informal rules and procedures.

ARGUMENT

I. All the petitioners but one are not properly before this Court.

One petitioner (Raymond Lucia) can show that he is aggrieved by the Commission's denial of the rulemaking petition and that he resides in this Circuit, but the other eleven stumble over standing and venue requirements. Although the Court ultimately can reach the merits here, it should assess whether each petitioner meets the requirements of the relevant jurisdictional statutes.

A. The Court should engage in a petitioner-by-petitioner analysis.

The Commission urges the Court to assess standing and venue of each petitioner for three reasons. *First*, the text of the relevant jurisdictional provisions uses the singular in stating that "*A person* aggrieved by a final order of the Commission" may obtain review of the order in the "circuit in which *he* resides or has his principal place of business," or the D.C. Circuit. 15 U.S.C. § 78y(a)(1) (emphasis added); *see also* 15 U.S.C. 77i(a) (similar). *Second*, in interpreting a similarly worded statute, Judge Nelson, in a well-reasoned concurrence, explained that the use of the "the singular noun 'person,'" means that standing and venue must be assessed on a "petitioner-by-petitioner basis" instead of "petition-by-petition[.]" *Nat'l Family Farm Coal. v. EPA*, 966 F.3d 893, 930 (9th Cir. 2020) (Nelson, J., concurring). Third, the Supreme Court recently stated that threshold issues like standing are "'not dispensed in gross'" and that courts err "by treating" litigants "as a unified whole" or analyzing

matters "at a high level of generality." *Murthy v. Mo.*, 144 S. Ct. 1972, 1987-88 (2024) (quoting *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021)). If the Court engages in this analysis, it should dismiss all the petitioners except for Lucia.

B. Eight petitioners have not shown they are aggrieved by the Commission's denial of the rulemaking petition.

Several petitioners have not demonstrated that they were aggrieved by the Commission's decision to maintain the no-deny policy prospectively. *See, e.g.*, *Richards v. NLRB*, 702 F.3d 1010, 1014 (7th Cir. 2012) ("[O]nly persons who are 'aggrieved' by the Board's final order may petition for review of the decision by the Court of Appeals."). The phrase "aggrieved" is "a term of art used in many statutes to designate those who have standing to challenge or appeal an agency decision[.]" *Dir., Office of Workers' Compensation Programs, Dept. of Labor v. Newport News Shipbuilding & Dry Dock Co. et al.*, 514 U.S. 122, 126 (1995). For the APA, the phrase "person aggrieved" requires a litigant to demonstrate Article III standing. *See id.* at 127 (cleaned up); *Bonds v. Tandy*, 457 F.3d 409, 413 (5th Cir. 2006) (holding that "aggrieved" persons must "meet[] Article III standing requirements" to seek "judicial review"); *PDK Labs Inc. v. U.S. DEA*, 362 F.3d 786, 793 (D.C. Cir. 2004) (same).

Collins, Powell, Toroian, Pryor, Scates, Silverstein, Reason Foundation, and Cape Gazette did not "directly participate[] in the agency proceedings." *ACLU v. FCC*, 774 F.2d 24, 25 (1st Cir. 1985); *see* ER5, ER47. They did not join the petition,

they were not directly affected by its denial, and they have failed to show that they are "aggrieved" by the Commission's decision in some other manner. In particular, they have not shown Article III standing, which requires them to demonstrate injury-in-fact—that is, "an actual or imminent injury as a result of the alleged illegal conduct," which in this case is the Commission's decision not to amend its no-deny policy. *Wright v. Serv. Emp. Int'l Union Local 503*, 48 F.4th 1112, 1118 (9th Cir. 2022) (cleaned up). The petitioners must also demonstrate "a causal connection between the injury and the conduct complained of" (traceability) and that the injury will " 'likely'" be " 'redressed by a favorable decision of the court.'" *Id.* (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)).

The Reason Foundation has failed to demonstrate an injury-in-fact. Like all petitioners, it must demonstrate standing with "evidence," *Nuclear Info. & Res. Serv. v. NRC*, 457 F.3d 941, 951 (9th Cir. 2006), facing the "the same burden as that of a plaintiff" seeking summary judgment. *Nat'l Family Farm Coal.*, 966 F.3d at 908 (cleaned up). Petitioners have not submitted declarations from the Reason Foundation, a deficiency that, by itself, warrants dismissal. *See Assoc. Gen. Contractors of Am., San Diego Chapter Inc. v. Cal. DOT*, 713 F.3d 1187, 1194-95 (9th Cir. 2013) (finding no standing where organization did not "submit[] declarations by any of its members attesting to harm they have suffered or will suffer").

In any event, because the Reason Foundation has not entered into a consent agreement, its standing rests on the assertion that unnamed "enforcement targets" who *may* settle with the Commission will not be able to communicate with it. Br. 24. But "when (as here), a plaintiff challenges the government's unlawful regulation * * * of *someone else*, standing * * * is ordinarily substantially more difficult to establish." *FDA v. All. for Hippocratic Med.*, 144 S.Ct. 1540, 1556 (2024) (cleaned up). And Reason Foundation has not satisfied its burden because, *inter alia*, it has not identified which "enforcement targets" it has been unable to communicate with. Br. 24; *see All. for Hippocratic Med.*, 144 S.Ct. at 1561 ("[T]he claim that the doctors will incur those injuries as a result of FDA's * * * relaxed regulations lacks record support and is highly speculative.").

Collins also has not suffered an actual or imminent injury because there is no indication that Collins has or will sign a consent judgment with a no-deny provision. *See* Br. 23 ("Collins [is] the only plaintiff who has not signed a * * * Consent[.]"). The Commission has filed an action against Collins, alleging that he raised more than $1.2 million through unregistered securities offerings. *SEC v. Punch TV Studios Inc.*, No. 21-cv-07787, Dkt. 1 (C.D. Cal. Sept. 30, 2021). Collins claims that the Commission "may" offer to settle on a no-deny basis, ER161, but there is no settlement on the horizon; the district court granted the Commission's motion for summary adjudication of liability in September 2023 (*Punch TV Studios Inc.*, Dkt. 57 (C.D. Cal.

Sept. 6, 2023)) and partly granted the Commissions' request for remedies in August 2024 (*id.*, Dkt. 91 (C.D. Cal. Aug. 21, 2024)). Collins's unsubstantiated "fears" of settlement, Br. 23, are "nothing more than rank speculation," which does not establish standing. *Wright*, 48 F.4th at 1119-20; *see Murthy*, 144 S. Ct. at 1993 ("Hoft must rely on a speculative chain of possibilities to establish a likelihood of future harm * * * Hoft cannot satisfy his burden with such conjecture."); *Duran v. Cal. Dep't of Forestry & Fire Protection*, No. 23-16155, 2024 WL 3565266, at *1 (9th Cir. July 29, 2024) ("It is Plaintiffs' burden to establish each element of standing, and Plaintiffs' speculation is not sufficient to establish a substantial risk of being subject to the challenged practices in the future." (internal citation omitted)).

Finally, Powell, Toroian, Pryor, Scates, Silverstein and Cape Gazette "have failed to show how [their] injur[ies] [are] directly traceable to any actual or possible unlawful Government conduct." *Cal. v. Tex.*, 593 U.S. 659, 675 (2021). Powell, Toroian, Pryor, Scates, and Silverstein entered into their consents in the past, before the Commission issued its decision denying the rulemaking petition, and those agreements have been embodied in final judgments or Commission orders. *See, e.g.*, ER79 (noting that Powell signed his consent agreement in September 2021). The petition for rulemaking asked for only prospective relief—to alter Rule 202.5(e) going forward—and did not discuss earlier entered consent judgments.

For these petitioners, the Commission's action denying the petition for rulemaking maintained the status quo, and because the Commission's contractual remedy for breach is not self-executing, there is no injury directly caused by the denial of the rulemaking petition. To the extent the Commission sought to enforce a no-deny provision by invoking its contractual remedy, the continued existence of the policy could play a role, but petitioners have not offered any evidence that the Commission has sought or is seeking to "reopen[] [the] actions." Br. 32. There is also a "redressability problem," *Murthy*, 144 S. Ct. at 1995; if the Court were to rule that the no-deny provisions could not be enforced, these petitioners would be in the same position as they are now, when the Commission is not trying to enforce a no-deny provision against them.[1]

C. Six petitioners neither reside nor have their principal place of business in a state within the Ninth Circuit.

Additionally, six petitioners should be dismissed because they do not reside or have their principal place of business in the Ninth Circuit, as required under the judicial review provisions they invoke. The NCLA is headquartered in Washington D.C., Br. i; the Cape Gazette is a Delaware newspaper, Br. 24; Novinger resides in Texas, ER137; and Romeril, Toroian, and Silverstein reside in Florida, ER133, 145,

[1] Petitioner Cape Gazette—which also did not submit a declaration—claims that it has standing because it is unable to "talk freely" to Toroian. Br. 34. Since Toroian cannot show traceability or redressability, Cape Gazette does not have standing.

156. The relevant provisions state that "[*a*] *person* aggrieved" by a Commission order may seek review in the circuit where *that* person resides or has its principal place of business, a textual formulation that focuses on the residence of each petitioner, not whether any one person among a dozen has established venue. 15 U.S.C. 78y(a)(1) (emphasis added). As Judge Nelson urged in his concurrence, similar phrasing should require a court "to analyze venue on an individual basis, even if multiple petitioners join one petition." *Nat'l Family Farm Coal.*, 966 F.3d at 930 (Nelson, J., concurring); *see also Fed. Power Comm'n v. Texaco, Inc.*, 377 U.S. 33, 39 (1964) (holding that court erred in failing to dismiss petitioner, "a Delaware corporation," that had no claim to residence "within the Tenth Circuit"); *Amerada Petroleum Corp. v. Fed. Power Comm'n*, 338 F.2d 808, 810 (10th Cir. 1964) (concluding, based on similar statutory language, that "the venue deficiencies require a dismissal of the petition as to all petitioners" but one).

All of the petitioners could have proceeded in the D.C. Circuit, *see* 15 U.S.C. 77i(a), 78y(a)(1), where the NCLA is headquartered. Alternatively, each petitioner could have gone to a proper venue, and the petitions would have been consolidated in accordance with 28 U.S.C. 2112. Having chosen to forgo either of these two options, all twelve petitioners should not be allowed to proceed here, as the carefully calibrated scheme in section 2112 "would be circumvented if all petitioners could join a single

petition in the same circuit, regardless of whether each petitioner had proper venue." *Nat'l Family Farm Coal.*, 966 F.3d at 931 (Nelson, J., concurring).

II. Voluntary waivers of First Amendment rights in settlements are constitutional.

Petitioners have fallen far short of carrying their considerable burden under the "extremely limited and highly deferential" review standard applicable to the Commission's denial of their request for discretionary rulemaking, *Compassion Over Killing*, 849 F.3d at 854. Unable to overcome binding precedent, they have failed to show that the use of no-deny provisions is unconstitutional and required the Commission to change its fifty-year-old policy.

A. Under Supreme Court precedent, waivers of constitutional rights in settlements are permissible.

The Supreme Court has long recognized that litigants may waive a variety of constitutional rights when settling litigation. The Court has upheld waivers in settlements and plea bargains so long as the waivers are knowing, voluntary, and intelligent. *See Iowa v. Tovar*, 541 U.S. 77, 88 (2004).[2] Just as "it is well settled that plea

[2] *See also INS v. St. Cyr*, 533 U.S. 289, 321-22 (2001) ("In exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial)[.]"); *Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 703 (1982) ("Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived."); *D.H. Overmyer Co. Inc., of Ohio v. Frick Co.*, 405 U.S. 174, 184-87 (1972) (holding that due process rights can be waived); *Armour*, 402 U.S. at 682 ("Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the

Continued on next page.

bargaining does not violate the Constitution even though a guilty plea waives important constitutional rights," it is well settled that parties can waive constitutional rights when voluntarily resolving other types of litigation. *Rumery*, 480 U.S. at 393. When "parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation," a defendant "has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause" and "the conditions upon which he has given that waiver must be respected[.]" *Armour*, 402 U.S. 673, 681-82 (1971) (cited at ER59 n.4)); *see also D.H. Overmyer Co.*, 405 U.S. at 187 ("We therefore hold that Overmyer * * * voluntarily, intelligently, and knowingly waived the rights it otherwise possessed to prejudgment notice and hearing, and that it did so with full awareness of the legal consequences." (cited at ER59 n.4)).

Rumery springs from this line of precedent, and it controls here. In *Rumery*, the Court upheld the enforcement of an agreement in which a defendant released his right to bring a Section 1983 action in exchange for the dismissal of pending criminal charges—a waiver of his First Amendment right to petition, among other rights. 480

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conditions upon which he has given that waiver must be respected[.]"); *Barker v. Wingo*, 407 U. S. 514, 529, 536 (1972) (waiver of speedy trial rights); *Brady v. United States*, 397 U. S. 742, 748 (1970) (waiver of trial rights and right against self-incrimination); *Ill. v. Allen*, 397 U.S. 337, 342-343 (1970) (waiver of right to be present at trial); *Miranda v. Ariz.*, 384 U.S. 436, 444 (1966) (waiver of rights to counsel and self-incrimination); *Fay v. Noia*, 372 U.S. 391, 439 (1963) (habeas corpus).

U.S. at 390-92. The Court rejected the contention that such agreements are always improper simply because they require "difficult choices that effectively waive constitutional rights"; it did not agree that the pressures of criminal charges and trial justified "invalidating *all*" waiver agreements. *Id.* at 393 (emphasis in original) (citing *McGautha v. Cal.*, 402 U.S. 183, 213 (1971)) (stating that the "criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments"). The Court in *Rumery* saw "no reason to believe that [the agreements at issue] pose a more coercive choice than other situations," and it declined to establish "a *per se* rule of invalidity" because in "many cases," a defendant's "choice to enter" into a waiver agreement "will reflect a highly rational judgment that the certain benefits" of ending the litigation exceed the benefits of what it is ceding. *Id.* at 393-95. Instead, the Court established a balancing test for the enforceability of a waiver if a party ever seeks to enforce such a provision: "a promise 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.

B. This Court and other courts of appeals have confirmed that settling litigants can waive constitutional rights, including First Amendment rights.

Courts of appeals, including this Court, have followed *Rumery* and other Supreme Court cases, rejecting a per se rule against waivers based other First

Amendment concepts and instead applying a balancing test when considering whether to enforce waivers of constitutional rights in settlements.

1. In a case that is directly on point—and involves one of the petitioners here—the Second Circuit applied *Rumery* and affirmed the constitutionality of the Commission's no-deny provision. In *Romeril*, the Second Circuit stated that, in "the course of resolving legal proceedings, parties can, of course, waive their rights, including such basic rights as the right to trial and the right to confront witnesses." 15 F.4th at 172 (citing *Rumery*, 480 U.S. at 393). "The First Amendment is no exception, and parties can waive their First Amendment rights in consent decrees and other settlements of judicial proceedings." *Id.* Thus, *Romeril* held that the no-deny provision at issue here did "not violate the First Amendment because Romeril waived his right to publicly deny the allegations of the complaint" when he agreed to the "provision as part of a consent decree." *Id.* at 172-73.

2. This Court's decisions in *Leonard* and *Davies* confirm the constitutionality of no deny-provisions by demonstrating that: (1) waivers of First Amendment rights are not per se unconstitutional; (2) this Court applies *Rumery* when there is an attempt to enforce a waiver; (3) the *Rumery* test depends upon several factors, including the link between the waiver and the underlying settlement; and (4) other First Amendment doctrines, such as prior restraint or unconstitutional conditions, play no role in assessing whether to enforce a voluntary waiver of First Amendment rights.

In *Leonard*, this Court considered whether to uphold a contractual provision that required a union to bear the costs of "any new economic or benefit improvement" that resulted from the union's specific "endorse[ment] or sponsor[ship]" of "legislative issues" and that caused "increased payroll costs" to a municipality. 12 F.3d at 886. The union maintained that the provision was "an unconstitutional restriction on its First Amendment right to petition the government," but this Court disagreed. *Id.*

The Court recognized that "[t]he Supreme Court has held that First Amendment rights may be waived upon clear and convincing evidence that the waiver is knowing, voluntary, and intelligent," and all three conditions were satisfied. *Id.* at 889 (citing *D.H. Overmyer Co.*, 405 U.S. at 185, 187). It thus rejected any per se rule against First Amendment waivers. The Court noted that although the union "informed the City of its view" that the provision "was unconstitutional, illegal, and unenforceable," its protest did not make "the Union's execution of the agreement any less voluntary." *Id.* at 890. The Court, moreover, specifically contrasted the voluntary nature of the waiver with an involuntary condition imposed by a legislative enactment. *Id.* "If the Union felt that First Amendment rights were burdened," the Court wrote, "it should not have bargained them away and signed the agreement." *Id.*

In deciding whether to enforce the waiver, the Court followed "simple *Rumery* balancing" and expressly "decline[d] to adopt a stricter standard," *id.* at 891 & n.8,

explaining that although parties can waive their "constitutional right[s]," the waiver will not be enforced "if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Id.* at 890. The Court weighed the "public interest in the stability and finality of collective bargaining agreements," which contained a "compensation package between a city and group of its employees," and the "public interest in the Union's unfettered ability to present its views to the state legislature." *Id.* at 891.

The Court upheld the waiver, in significant part because the provision did "not ban *all* Union speech" and "[t]he Union remain[ed] free to endorse legislation on a variety of topics that [did] not trigger" the provision. *Id.* n.10 (emphasis in original). The provision was "thus narrowly tailored to achieve the City's goal of budgetary predictability," and there was a "close nexus" between the "dispute resolved in the settlement agreement" and the restriction on the Union's First Amendment rights. *Id.* Moreover, the Court factored in that the Union could speak, albeit with a cost; the Union remained free to "endorse benefit-increasing legislation if it fe[lt] that the benefits to be gained" outweighed "the salary foregone." *Id.* at 892.

In sum, because the provision was a "relatively narrow limitation on the Union's political speech," this Court did not find "that the public policy in favor of the Union's completely unfettered freedom of expression outweigh[ed] the public interests" in finality and predictability. *Id.* This Court concluded its analysis by

rejecting the notion that "constitutionally-based public policy argument[s]" must always be given the greatest weight: "If constitutional arguments always outweighed ones grounded in other sources of law, then we could never enforce individuals' waivers of their constitutional rights, an outcome that would fly in the face of a long line of Supreme Court precedent holding that such waivers are permissible[.]" *Id.* at 892 n.12.

This Court hewed to the same methodology two years earlier in *Davies*, although it reached a different result in light of the facts and circumstances of the waiver. Davies and his spouse, a teacher, sued a school district in an employment-related action. The parties settled, and in exchange for monetary relief, the plaintiffs agreed that neither Davies nor his spouse would seek employment or office with the district, which restricted Davies's "right to run for public office." 930 F.2d at 1392. Davies later won an election for a seat on the district's board, and the district sought to enforce the settlement agreement.

This Court declined to enforce the settlement. As in *Leonard*, this Court started with the proposition that waivers of constitutional rights "are not per se unenforceable," and then engaged in *Rumery* balancing. *Id.* at 1396-97. Notably, the Court did not cite prior restraint cases, mention unconstitutional conditions, or refer to any of the other First Amendment concepts that petitioners invoke here.

Applying *Rumery*, the Court declined to uphold the waiver. The Court noted that the waiver affected not only Davies's right to run for office, but also every resident's "right to vote." *Id.* at 1398. The district, on the other hand, contended that enforcing the agreement was necessary to promote a "policy favoring enforcement of private agreements" and encouraging settlements. *Id.* That interest did not carry the day, the Court reasoned, because "[b]efore the government can require a citizen to surrender a constitutional right as part of a settlement or other contract, it must have a legitimate reason for including the waiver in the particular agreement. A legitimate reason will almost always include a close nexus—a tight fit—between the specific interest the government seeks to advance in the dispute underlying the litigation involved and the specific right waived." *Id.* at 1399. The nexus was lacking in *Davies* because, as the Court later explained in *Leonard*, "the right waived (running for office)" had nothing to do with the "dispute resolved by the settlement agreement," which concerned the employment of Davies's *spouse*, and not Davies's role as a political official. 12 F.3d at 890-91.

Relying on *Leonard* and *Davies*, this Court has upheld waivers of First Amendment rights on multiple occasions. *See Nat'l Abortion Fed'n v. Ctr. for Medical Progress*, Nos. 21-15953 & 15955, 2022 WL 3572943, at *1 (9th Cir. Aug. 19, 2022) (upholding waiver of First Amendment rights effectuated by party's decision to "voluntarily" sign nondisclosure agreements); *Malem Med., Ltd. v. Theos Med. Sys., Inc.*,

761 F. App'x 762, 764-65 (9th Cir. 2019) (affirming district court's decision to enforce consent decree containing a party's waiver of its First Amendment "right to petition the government" codified in a "non-disparagement provision" and finding that the interest in enforcing the waiver was not "outweighed in the circumstances by a public policy harmed by enforcement of the agreement"). And in the analogous plea-bargaining context, this Court has upheld defendants' waivers of their right to appeal, which yields their right to petition. *See United States v. Joyce*, 357 F.3d 921, 922-25 (9th Cir. 2004) ("Because Joyce validly waived his right to appeal any aspect of his sentence [on First Amendment grounds], we lack jurisdiction to consider the merits of his challenge to the computer and Internet use restrictions."); *see also United States v. Wells*, 29 F.4th 580, 586 (9th Cir. 2022) (noting that an appeal waiver that extends to the "express[] waive[r] [of] a certain constitutional right" will be upheld because "plea agreements are bargained-for contracts" and this Court "enforce[s] the literal terms of the plea agreement"); *United States v. Lopez-Armenta*, 400 F.3d 1173, 1177 (9th Cir. 2005) ("[W]e hold that Lopez knowingly and voluntarily waived his right to appeal the suppression ruling[.]").

3. Other courts (including the Second Circuit in *Romeril*) likewise have routinely "enforced voluntary agreements with the government in which citizens have" ceded First Amendment rights. *Lake James Cmty. Volunteer Fire Dep't v. Burke Cty., N.C.*, 149 F.3d 277, 280-81 (4th Cir. 1998) (citations omitted).

Applying *Rumery*, the Fourth Circuit explained that "simply because a contract includes the waiver of a constitutional right does not render the contract *per se* unenforceable." *Id.* at 280. It added that "making a choice rendered difficult because of a weak bargaining position * * * does not render the execution of the contract involuntary." *Id.* at 281. The Fifth Circuit reached an identical conclusion based on *Rumery* in upholding a waiver of a constitutional right to sue under Section 1983 as part of a settlement. *See Berry v. Peterson*, 887 F.2d 635, 636 (5th Cir. 1989). In *Erie Telecomms., Inc. v. City of Erie, Pa.*, the Third Circuit held that *Rumery* supported its decision to uphold a release of constitutional claims, observing: "[W]e know of no doctrine * * * providing a *per se* rule that constitutional claims, even first amendment claims, may not be waived * * * . [W]e are of the opinion that the knowing, voluntary, and intelligent standard established by the Supreme Court subsumes consideration of the public's interests." 853 F.2d 1084, 1096, 1099 (3d Cir. 1988) (cleaned up); *cf. Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 673 F.3d 192, 206-07 (3d Cir. 2012) (holding that a private party cannot seek *vacatur* of a settlement with another private party on the basis that the settlement violated the First Amendment when it "voluntarily agreed" to "abide by the very provisions that it now challenges as unconstitutional"). The Eighth Circuit agrees that when a litigant has "bargained away some of its free speech rights," it cannot "invoke the [F]irst [A]mendment to

recapture surrendered rights." *Paragould Cablevision, Inc. v. City of Paragould, Ark.*, 930 F.2d 1310, 1315 (8th Cir. 1991).

The outcomes in these cases are consonant with *Leonard* and *Davies*. In *Lake James*, for example, the court concluded that: (1) the relevant waivers of First Amendment rights were knowing, intelligent, and voluntary; and (2) upholding the waivers did not run afoul of public policy because the waivers were "limited" and "narrowly tailored[.]" 149 F.3d at 281. And in *Overbey v. Mayor of Baltimore*, which petitioners cite, *see* Br. 34, 50, 52, 58-59, the court stated that it "[i]s well-settled that a person may choose to waive certain constitutional rights pursuant to a contract with the government," but then declined to enforce a waiver after applying the *Rumery* balancing test. 930 F.3d 215, 223 (4th Cir. 2019) (*citing Pee Dee Health Care, P.A. v. Sanford*, 509 F.3d 204, 212 (4th Cir. 2007) and *Davies*, 930 F.2d at 1397). Taken together, these cases show that a party to a consent decree "is in no position to claim that such decree restricts his freedom of speech" because "[h]e has waived his right and given his consent to its limitations[.]" *In re George F. Nord Bldg. Corp.*, 129 F.2d 173, 176 (7th Cir. 1942).

C. Petitioners' First Amendment arguments should be rejected.

Confronted with this "large body of precedent" demonstrating that the Commission's no-deny policy is constitutional, ER59, petitioners invoke a bevy of First Amendment doctrines—prior restraint, viewpoint/content discrimination,

compelled speech, right to listen, unconstitutional conditions, vagueness—that apply to laws and regulations but not to voluntary waivers in settlements. Br. 36-57. Ultimately, their arguments that the no-deny provisions are categorically invalid cannot be squared with binding precedent, including cases that they rely on and that reject a per se rule against First Amendment waivers.

1. Prior restraint law is inapposite in the waiver context.

While petitioners frame this case as being about "an impermissible prior restraint," Br. 39, there is a mismatch between prior restraint law and voluntary contractual waivers. To begin with, *Rumery*, *Leonard*, *Davies, Romeril,* and other cases instruct that post-enforcement balancing, rather than prior-restraint analysis, is the appropriate framework for assessing whether a waiver of First Amendment rights should be upheld. If, as petitioners argue, prior restraint law applies, then waivers of First Amendment rights would almost always be unlawful, yet this Court has analyzed the waivers of First Amendment rights without applying, let alone mentioning, prior restraint law. Petitioners never explain why this Court should apply prior restraint law now when the cases they cite, including *Davies* (Br. 58-59) and *Overbey* (Br. 52, 59), instead analyzed First Amendment issues through the lens of *Rumery* and rejected a per se rule against waivers (or upheld waivers, as in *Leonard*).

Moreover, petitioners disregard the difference between a voluntary agreement not to speak and a restraint imposed against the will of the speaker. Numerous courts

"have rejected First Amendment challenges to non-disclosure agreements, all emphasizing that the challenging party voluntarily undertook a duty not to speak." *Ostergren v. Frick*, 856 F. App'x 562, 569 (6th Cir. 2021) (collecting cases); *see Snepp v. United States*, 444 U.S. 507, 510 n.3 (1980) ("Snepp relies primarily on the claim that his agreement is unenforceable as a prior restraint on protected speech [but] he voluntarily signed the agreement that expressly obligated him to submit any proposed publication for prior review."); *Nat'l Abortion Fed'n, NAF v. Ctr. for Med. Progress*, 685 F. App'x 623, 626 (9th Cir. 2017) ("[T]he defendants * * * claim [that] the preliminary injunction is an unconstitutional prior restraint * * * [T]he district court did not clearly err in finding that the defendants waived any First Amendment rights[.]").

By contrast, most "prior restraints involve a unilateral command—either through an injunction, licensing-scheme rejection, or administrative order or threat—not to speak," not a voluntary agreement. *Frick*, 856 F. App'x at 569; *see* Br. 41 (relying on licensing-scheme case involving absence of limits governing time "within which the decisionmaker [had] to issue the license"). For instance, petitioners cite the Supreme Court's decision in *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.* (at Br. 42, 55), which struck down a statute limiting criminals' ability to profit from books related to their crimes. 502 U.S. 105, 117 (1991). In so ruling, the Supreme Court recognized that "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content

of their speech," 502 U.S. at 115, a rationale that has no applicability to this case, because a voluntary decision to waive First Amendment rights is far afield from a statute penalizing speech, and nothing in *Simon & Schuster* suggests otherwise.

Petitioners' proposed application of prior-restraint law here has no stopping point. By definition, parties who waive their First Amendment rights are contractually agreeing—prior to the speech—to restrain themselves from speaking in certain ways. Moreover, in order for waivers to be valid, they must be knowing, and the language describing the waiver must inform the person choosing to waive their rights in advance what rights are being surrendered. If all such agreements are impermissible prior restraints, that would lead to the widespread invalidation of contractual waivers, including criminal defendants' agreements not to appeal, *see* pp. 30-31, *supra*. Neither petitioners nor *amici* cite a single case that has endorsed such a "bizarre result," or that has applied prior-restraint analysis to a case involving a party's voluntary waiver of his or her First Amendment rights. *City of Austin*, 596 U.S. at 76 (rebuffing First Amendment argument that would mean that "tens of thousands of jurisdictions have presumptively violated the First Amendment … for more than half a century").[3]

[3] The single-paragraph concurrence in *Novinger I*, 40 F.4th at 308, which petitioners invoke, described the Commission's no-deny provision as a "prior restraint" without citing support, but that view is inconsistent with *Rumery,* and it has not been followed by any appellate panel, including the three judges who decided *Novinger II*.

2. Cases addressing viewpoint and content discrimination are inapposite.

Petitioners' reliance on cases involving regulations—not waivers—that contained content or viewpoint-based restrictions is misplaced for similar reasons. *See* Br. 42-43; *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995) (invalidating a "regulation" imposed by a public university); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395-96 (invalidating a city "ordinance"). Neither *Leonard* nor *Davies* analyzed the waivers in those cases in viewpoint/content terms. Rather in *Leonard*, the provision to which the Union agreed "penaliz[ed]" its "endorsements" of certain topics, namely "payroll-increasing legislation … enacted by the state legislature." 12 F.3d at 891. The waiver, like all waivers, specified what the Union would be waiving to ensure that it was knowing and intelligent. Yet, because the Union voluntarily agreed to the provision, this Court did not scrutinize the provision as if it were a viewpoint-based city ordinance, but instead employed *Rumery* balancing. *See id.* at 890-91. The same is true of *Davies*, which analyzed Davies's agreement not to seek public office under the *Rumery* "balancing test" without viewing the waiver through the lens of viewpoint or content discrimination. 930 F.2d at 1398.

Petitioners' erroneous contention that the Commission is regulating "the content and viewpoint of speech" by "threatening penalties if a defendant creates even an impression of a denial," Br. 42, ignores the terms of the voluntary consent

and the nature of the relief potentially available to the Commission. If there is a breach of a no-deny provision, the Commission must first decide if wants to "dedicate resources to reviving a once-settled case." ER57. If the Commission decides to forge ahead, it must "petition the district court to vacate the final judgment and restore the action to the active docket," a request that the district court "may deny." ER57; *see also* ER83. If, and only if, the district court grants the Commission's request, then the Commission has the opportunity to "prove its case in court with evidence." ER58-59. And the restoration of a case to the docket—where the defendant can then continue to deny the allegations—is not a "penalty," it is just a return to where the parties were before they reached agreement to settle on terms that the defendant repudiated by denying the complaint's allegations.[4]

Finally, there is no basis for the argument that the Commission's policy "incentivizes" charging defendants based "on new and novel theories of liability" in the hopes of procuring a settlement. Br. 45. Petitioners offer no evidence that the Commission engages in this practice, and these supposed incentives cannot be squared with the limited remedy afforded to the Commission in the event of breach—

[4] Petitioners' accusation that the Commission issues press releases containing "inflammatory" rhetoric, Br. 44, is factually incorrect, legally irrelevant, and sourced only to an opinion piece penned by an attorney who now works for the NCLA. *See* https://nclalegal.org/personnel/russ-ryan/.

the possibility of a restored case—where the Commission would be required to prove its case and support its legal theories with evidence, just as defendants would be freely able to deny the allegations backed by their own evidence.

In any event, even if petitioners' description were apt, it would not move the needle because this Court has upheld a similar incentive structure. In *Lynch v. City of Alhambra*, 880 F.2d 1122, 1124, 1127-28 (9th Cir. 1989), the Court considered the constitutionality of a "charge and release" scheme where police officers confronted with civil rights claims threatened criminal prosecution unless the plaintiff agreed to release its civil claims. This Court acknowledged that the "arresting officer, facing potential civil liability, has every incentive to arrest a person on a marginal or nonexistent violation, and push for a charge and release," because a "risk-averse civil rights plaintiff will have little choice but to give up his civil claim." *Id.* at 1127; *see also id.* n.7. "Nevertheless," this Court rejected the argument that the policy was "*per se*" invalid on that ground because such a conclusion was "clearly inconsistent with * * * *Rumery*." *Id.* Because of the cases where application of the policy was "based on 'legitimate' objectives," this Court embraced the approach the Commission is advocating for in this case: "case-by-case" *Rumery* balancing. *Id.*

3. The no-deny policy does not compel speech.

In contrast to statutes and regulations that require speech, *see* Br. 46-48, the no-deny provisions reflect voluntary agreement—the opposite of compulsion. And the

provision does not require defendants to speak at all. Silence is an option, which means defendants have "the right to refrain from speaking at all." Br. 46 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). Only if a defendant, after agreeing to settle, chooses to publicly state that it does not admit the relevant allegations does that defendant then have to also state that it "does not deny the allegations." Br. 46. This case is thus a far cry from *National Association of Manufacturers v. SEC*, 800 F.3d 518, 520, 522 (D.C. Cir. 2015) (cited at Br. 47-48), a case involving disclosures that were "compelled by" statute and "implementing regulations." *Nat'l Ass'n of Mfrs.*, 800 F.3d at 520.

4. The no-deny policy does not infringe on the public's right to listen.

Petitioners' claim that the no-deny policy violates the public's right to receive ideas (Br. 48-52) suffers from two core defects. First, the petitioners that sought to abrogate Rule 202.5(e) did not advance this argument before the Commission, and arguments not raised "during the administrative process" are "waived[.]" *Nat'l Family Farm Coal.*, 966 F.3d at 914 ("NRDC has therefore waived this particular challenge to the 2014 registration."); *see also* 15 U.S.C. 78y(c)(1) ("No objection * * * may be considered by the court unless it was urged before the Commission * * * ."). Second, the Supreme Court recently clarified that in order for a litigant to have standing to advance a right-to-listen theory, the litigant must show that "the listener has a concrete, specific connection to the speaker." *Murthy*, 144 S. Ct. at 1988, 1996

(holding that litigants "must demonstrate standing for each claim that they press"). Petitioners make no effort to elucidate such a connection. *Id.*[5]

In any event, petitioners' right-to-listen theory fails on the merits because it is predicated on the assumption that there is "a willing speaker." Br. 48; *Pa. Family Inst. v. Black*, 489 F.3d 156, 165 (3d Cir. 2007) ("A precondition of asserting this right to receive, however, is the existence of a willing speaker. In this respect * * * the right to receive speech is entirely derivative of the rights of the speaker." (cleaned up)). Like the other First Amendment doctrines that petitioners rely on, the right-to-listen theory only works for involuntary regulations; "to show the existence of a willing speaker * * * a party must at least demonstrate that but for a *regulation*, a speaker subject to it would be willing to speak." *Id.* at 167 (emphasis added). Petitioners cite no cases that support applying that same theory where a speaker voluntarily agreed not to speak (even if that speaker later changes its mind).

The unbounded right-to-listen theory that petitioners advocate for, *see* Br. 48-52, would mean that unnamed listeners could supersede the "highly rational judgment" of a defendant to voluntarily waive First Amendment rights to settle litigation. *Rumery*, 480 U.S. at 394. In petitioners' telling, even if a defendant wishes to settle on "no deny" terms given the advantages of settling, a court must always

[5] The only petitioner that arguably can advance this claim is the Cape Gazette, *see* Br. 33-34, which is not properly before this Court. *See* pp. 20-22, *supra*.

consider the rights of unidentified listeners, a result that is antithetical to First Amendment principles that individuals can choose to "refrain from speaking at all." *Wooley*, 430 U.S. at 714. Furthermore, the no-deny policy is congruent with the public's right to listen because the lone remedy for breach would mean that the public would have the ability to listen because either the defendant could speak without consequence (if the Commission elected not to enforce the no-deny provision) or, alternatively, the public could listen (and report on) a reinstated enforcement action.

5. Petitioners' unconstitutional conditions argument is meritless.

Petitioners allude to the "unconstitutional conditions" framework, which sometimes applies when certain government benefits are involved. Br. 54-57. Benefits include "land-use permit[s]," *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604-05 (2013) (cited at Br. 56), "tax benefits," *Koontz*, 570 U.S. at 608, or a right to "public employment," *Perry v. Sindermann*, 408 U.S. 593, 596-97 (1972) (cited at Br. 56). But the Commission's acceptance of defendants' offers of settlement is not a "gratuitous governmental benefit[.]" *Koontz*, 570 U.S. at 608. It is not the equivalent of granting a permit or making "crop payments." *Id.* The Commission does not settle cases to benefit defendants—it settles to obtain the best possible outcome for the public, while minimizing risk and maximizing finite resources. *See* ER60 ("The Commission is not bestowing a benefit on the defendant, but rather is acting in the

public interest to minimize litigation risk, maximize limited resources, and accelerate the resolution of the case."); *Citigroup*, 752 F.3d at 295.

Neither *Leonard* nor *Davies* has applied the unconstitutional conditions theory to preclude waivers. Indeed, the same Fourth Circuit that decided *Overbey* also made clear that the unconstitutional conditions theory "does not categorically preclude parties from negotiating contractual relationships that include waivers of constitutional rights[.]" *Lake James*, 149 F.3d at 282. And the theory proves too much because if every settlement were a benefit and every waiver of constitutional rights an "unconstitutional condition," it would effectively end government settlements, which always contain waivers. *See id.* To that end, this Court has recognized that the unconstitutional conditions doctrine "has no application" in the "context" of an individual's decision to waive constitutional rights. *Bingham v. Holder*, 637 F.3d 1040, 1046 (9th Cir. 2011) ("Bingham's right to enter the United States was not conditioned on a waiver of constitutional rights. He was free to decline to waive his rights to contest removal and seek entry by way of a tourist visa."). Petitioners' belief that "[t]he problem is in the ask," Br. 56, cannot be reconciled with *Bingham*.[6]

[6] Petitioners cite *SEC v. Moraes*, No. 22-cv-8343, 2022 WL 15774011, at *3-*4 (S.D.N.Y. Oct. 28, 2022), *see* Br. 14, 38-39, 44, which gestures at the doctrine but provides no explanation of how a settlement is a government benefit—an essential predicate of the theory.

Moreover, not all conditions are unconstitutional. *Cf. United States v. Geophysical Corp. of Alaska*, 732 F.2d 693, 700 (9th Cir. 1984) ("If the condition is rationally related to the benefit conferred, its imposition does not coerce the recipient to forgo constitutional rights."). In *Bingham*, this Court concluded the "condition of waiving the ability to contest removal" was "closely related to the benefit of entering the United States" under the visa waiver program because of the inextricable relationship between a "truncated entry procedure" and a "truncated removal procedure." 637 F.3d at 1046. In the Takings Clause context, the Supreme Court has stated that "the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development" so long as those aims are in furtherance of ends that have "an essential nexus and rough proportionality to those impacts." *Koontz*, 570 U.S. at 606. And the Court has held in the context of government funding that "Congress can, without offending the Constitution, selectively fund certain programs to address an issue of public concern, without funding alternative ways of addressing the same problem" if those actions are designed to ensure "that public funds [are] spent for the purposes for which they were authorized." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l Inc.*, 570 U.S. 205, 217 (2013).

Even if the unconstitutional conditions theory applied here, and the agreement to settle was considered a benefit, the no-deny provision has a tight nexus to the supposed benefit. The remedy (the possibility of returning to court) corresponds to

what the parties' settlement accomplishes (ending court proceedings). Unlike a permit seeker who is required to cede a property interest—say, an easement—as a condition of obtaining a permit even though the easement is unconnected to the land for which the permit is sought, the no-deny provision is closely intertwined with the goals of the settlement, which are to end litigation without further proceedings and to obtain a favorable judgment for the public.

In another variation of this erroneous argument, some amici suggest that no-deny provisions are unconstitutional because they are not voluntary. *E.g.*, Chamber of Commerce Amicus Br. 11 ("[H]ere, the waiver is not voluntary, but coerced."). The petitioners wisely avoid this argument because they do not offer any evidence that those who entered into consent judgments did not do so knowingly and voluntarily. To the contrary, settling defendants, including the petitioners here, are often represented by counsel, *see Novinger I*, 40 F.4th at 301; *Romeril*, 15 F.4th at 169, and the consents provide that the "Defendant enters into this Consent voluntarily and represents that no threats, offers, promises, or inducements of any kind have been made * * * to induce Defendant to enter into this Consent." ER82, 88, 103, 110, 117, 124; *see also* ER78, ER98.[7]

[7] Petitioners eschew the details of their settlements, which is telling. Romeril, for instance, agreed to pay disgorgement of $4.2 million and a penalty of $1 million, but Xerox indemnified Romeril; the shareholders paid for his legal fees and most of the

Continued on next page.

Amici's manufactured coercion argument would undermine the entire concept of settlements. If the mere existence of an action is coercive, all waivers and all settlements will cease to be voluntary, which is irreconcilable with numerous court-approved settlements that contain waivers, as well as the Supreme Court's recognition that "difficult choices that effectively waive constitutional rights" are permissible under the Constitution. *Rumery*, 480 U.S. at 393; *see also FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) ("[T]he expense and annoyance of litigation is part of the social burden of living under government." (cleaned up)).

6. Petitioners' vagueness argument fails.

Petitioners' claim that the Commission's no-deny policy is "unconstitutionally vague," Br. 52, fails because, as they recognize, vagueness is a doctrine that "typically applies to statutes or other legislative prohibitions," not agreed-upon settlements. *Blanco GmbH Co. KG v. Laera*, 620 F. App'x 718, 726 n.8 (11th Cir. 2015) (per curiam); Br. 52 ("[A] statute which forbids or requires the doing of an act in terms so vague * * * violates * * * due process of law."). Petitioners do not cite a single case scrutinizing consent judgments for vagueness.

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monetary sanctions. *See* Brief for the Plaintiff-Appellee, *SEC v. Romeril*, 2020 WL 3960694, at *6, *36 (2d Cir. July 10, 2020).

Nor is such a claim persuasive on its own terms. To be void for vagueness in the civil context, a statute or regulation must be "so vague and indefinite as really to be no rule or standard at all." *Fang Lin Ai v. United States*, 809 F.3d 503, 514 (9th Cir. 2015). There is no impermissible ambiguity about what it means to publicly deny the Commission's allegations, and petitioners do not identify any confusion that left them unclear about what the consents covered.

Petitioners are also wrong that the Commission has "unlimited discretion * * * to decide what future speech is or is not permissible." Br. 53. The Commission has discretion to decide whether to invoke its remedy under the consent, but it must "petition the district court to vacate the final judgment and restore the action to the active docket." ER57. If the district court were to conclude that the Commission was interpreting the no-deny provision too aggressively, it could decline to do so. *See United States v. State of Or.*, 913 F.2d 576, 580, 584-85 (9th Cir. 1990) ("A consent decree is essentially a settlement agreement subject to continued judicial policing * * *. [T]he district court retains continuing jurisdiction to grant further or amended relief.").

Petitioners also briefly assail a different component of the consent judgments: the agreement to waive "procedural protections of Rule 65(d)(1)," which sets forth requirements applicable to injunctions and restraining orders. Br. 53; ER88. This is a *non sequitur*, as the agreement not to oppose "enforcement of" the final judgment on the ground "that it fails to comply with Rule 65(d)," ER88, has nothing to do with the no-

deny provision, which is housed in an entirely separate part of the consent agreement and is not injunctive. *See* ER89-90.

III. If the Court were to apply *Rumery*, the respective no-deny provisions would be enforceable under *Leonard* and *Davies*.

The Commission is not actively attempting to enforce a no-deny provision against any of the petitioners, so any application of the *Rumery* balancing test is hypothetical. But if this Court were to engage in "simple *Rumery* balancing" now, it should conclude that the Commission's no-deny provision closely resembles the provision in *Leonard*, and not the provision in *Davies*, because it "is a relatively narrow limitation" on defendants' First Amendment rights and does not "ban *all* * * * speech," *Leonard*, 12 F.3d at 891-92 n.8 (emphasis in original).

The no-deny provision is tailored to the purpose of the settlement in which it appears. The Commission settles cases to resolve its claims against defendants "without further litigation" (ER58), and the no-deny provision allows it to revisit what it has "cede[d]," namely, "its ability to prove its allegations," *id.*, by "ask[ing] a court to permit it to test that denial, controlled by the rules of procedure and evidence." *Id.* There is a close nexus between the no-deny provision (getting back into court) and what has been yielded in settlement (the Commission's day in court).

Thus, the no-deny provision here is "narrowly tailored to achieve the * * * goal" underlying settlement, *Leonard*, 12 F.3d at 891. It differs from the waiver and

settlement in *Davies*, where the settled action (an employment suit) had little connection to the waived right (the political rights of the settling plaintiff's spouse). ER58 ("This relief is thus closely tied to the purpose of the settlement * * * It is reasonable for the Commission to agree to settle only if the defendant agrees that, upon a public denial, the Commission can seek to challenge that denial in court."). And the close nexus here also distinguishes this case from *Overbey* (cited at Br. 59), where the remedy for a breach of the settlement agreement—$31,500—was unrelated to what "the defendants gave up" by settling, namely "their opportunity for vindication by a judge or jury." 930 F.3d at 220, 233 (Quattlebaum, J., dissenting).

The language of the provision here also more closely resembles the provision in *Leonard*. Defendants who enter into settlements with the Commission remain free to speak about the Commission, enforcement actions, and a host of other topics so long as they do not publicly deny the Commission's allegations. *See Leonard*, 12 F.3d at 892 (finding that the government's interest in enforcing the waiver trumped "the public policy in favor of [petitioners'] completely unfettered freedom of expression"). By contrast, the waiver in *Davies* prevented the plaintiff from "ever seek[ing], apply[ing] for, or accept[ing] future employment, [a] position, or [an] office with Defendant District in any capacity." *Leonard*, 12 F.3d at 890.

The Commission's interests underpinning the no-deny provision are no less important than the interests in *Leonard*, particularly given the informational role

Commission enforcement actions can play. The filing of a complaint describes a set of facts that prompted the Commission to bring an action. *See* ER58 ("The filing of a complaint memorializes the results of an investigation and reflects a determination by the Commission that the evidence reveals a violation of the securities laws."). Upholding the Commission's ability to revive its case would avoid issues that could result if a defendant settles without admissions one day and denies those admissions the next day. If a defendant denies the allegations—unlike in criminal pleas that require admissions, FED. R. CRIM. P. 11—it could create the "incorrect impression" that there was no basis for the Commission's enforcement action. ER58. And that, in turn, could "negatively impact the public interest," *id.*—a harm the Commission would be unable to counter because, by entering the settlement, it "relinquished the opportunity to prove its case in court with evidence." ER58-59.

As another point of distinction, the Commission cannot make cases reappear on a docket by itself. By contrast, in *Overbey*, the City of Baltimore unilaterally "withheld half of [the] settlement" when the settlement agreement was breached. 930 F.2d at 221. The Commission has no such unilateral authority under the no-deny policy, and there may be reasons why a court does not accede to the Commission's

request—the passage of time, the difficulty in assembling evidence—at which point a settling defendant will have spoken with no change in its status.[8]

The Commission's ability to request restoration of a case is not just "closely tied to the purpose of the settlement," ER58, it is also public facing. A trial "controlled by the rules of procedure and evidence," *id.*, is readily accessible to members of the press and the public. And since the outcome at trial is not preordained, it is anomalous to suggest that the Commission designed this remedy to "save face." Br. 59. The no-deny provision provides for potential reinstatement of an action, which allows the defendants to publicly deny and defend against the allegations, through evidence, with a neutral factfinder ultimately deciding the outcome, which is not guaranteed to favor the Commission.

Consent judgments allow parties to "manage risk," but if defendants can enjoy the benefits of settlement while retaining the ability to deny the Commission's allegations—a one-sided outcome where only the Commission surrenders something, namely its ability to prove its case in court—the Commission (and defendants who would like to settle) may proceed to trial more often. *Citigroup*, 752 F.3d at 295. This

[8] Petitioners also cite *United States v. Richards*, 385 F. App'x 691 (9th Cir. 2010), *see* Br. 59, but that case is readily distinguishable. The district court in *Richards* was unconstrained by a written plea agreement from imposing conditions in connection with probation, and this Court concluded that one of those conditions, which was not agreed to, violated the First Amendment. *Id.* at 692-93.

would affect the Commission's ability to conserve its "limited resources[.]" ER60. And it would undercut the "strong judicial policy that favors settlements[.]" *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992).

IV. Petitioners' statutory arguments are meritless.

In addition to their faulty constitutional claims, petitioners raise two erroneous statutory challenges to the no-deny policy.

A. First, petitioners erroneously argue that the Commission lacks the authority to tell the public that it will not settle lawsuits on certain terms, which is all Rule 202.5(e) accomplishes. The Commission has "discretionary authority to settle on a particular set of terms." *Citigroup*, 752 F.3d at 295; *accord Hot Springs Coal Co. v. Miller*, 107 F.2d 677, 680 (10th Cir. 1939) ("In the absence of an affirmative showing to the contrary, it is presumed that an attorney has authority to compromise and settle a case."). Settlement authority springs from the Commission's discretionary authority to initiate enforcement actions. 15 U.S.C. 78u(d)(1); *see Thomas v. INS*, 35 F.3d 1332, 1339 (9th Cir. 1994) ("The authority to 'prosecute' implies the power to make plea agreements incidental to prosecution." (quoting 28 U.S.C. 547(1)). Petitioners do not cite any case suggesting that the government cannot settle cases simply because a statute does not expressly mention settlement or specific terms of settlement. Their argument is not even consistent; their proposed amendment to Rule 202.5(e) presumes that the Commission can settle cases even in the absence of granular

statutory provisions regarding settlement. ER39 (retaining parts of Rule 202.5(e) that allow the Commission to settle and state a policy regarding settlements).

Petitioners also lose sight of Rule 202.5(e)'s purpose, which implements the Commission's enforcement authority. 15 U.S.C. 78w(a)(1) (authorizing the Commission to "make such rules and regulations as may be necessary or appropriate to implement" the "provisions" of the securities laws); *see SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 744 (1984) (upholding Commission's policy "of not routinely informing anyone, including targets, of the existence and progress of its investigations" because of the "authority" "vest[ed]" in the Commission by 15 U.S.C. 78w(a)(1)) *Davy v. SEC*, 792 F.2d 1418, 1421 (9th Cir. 1986) (rejecting argument that "specific statutory grant from Congress" was needed for Commission to "regulate accountants" because of "15 U.S.C. 78w(a)(1)"). The Commission could have chosen to allow its staff to inform each settling defendant that it would not agree to a settlement without a no-deny clause. Instead, the Commission chose to announce its stance via Rule 202.5(e), streamlining the settlement process by communicating the Commission position on denials.

Petitioners erroneously accuse the Commission of relying on "*post hoc* rationalization[s]" because the Commission provided a longer explanation for why it declined to change Rule 202.5(e) than when it adopted Rule 202.5(e). Br. 62-23. To begin with, the Commission confirmed in 2024 that it was relying on the same

authority it cited in 1972. ER56 n.2 (citing 15 U.S.C. 78w(a)(1)). In any event, petitioners misunderstand the law regarding "post hoc rationalization[s]." Br. 62. A subset of the petitioners *asked* the Commission to revisit Rule 202.5(e), and the Commission's denial constitutes a new agency action distinct from the adoption of Rule 202.5(e) (otherwise, petitioners' challenge would be time-barred). Petitioners cite *Biden v. Texas*, which is generally inapposite because it addressed what an agency must do on remand after a court vacates an agency action, but states clearly, counter to petitioners' argument, that when an agency takes new action, it "'is not limited to its prior reasons,'" even though those reasons did not change here. 597 U.S. 785, 808 (2022) (quoting *DHS v. Regents of Univ. of Cal.*, 591 U.S. 1, 21 (2020)).

Finally, petitioners' argument that 15 U.S.C. 78u is inapplicable because injunctions may be targeted only at violations of the securities laws, not speech, Br. 63-64, ignores the distinction between other, unrelated aspects of the consent judgments and no-deny provisions. When defendants enter into consent judgments, they "consent[] to the entry of [a] final [j]udgment," that, among other things, "permanently restrains and enjoins" them from violating the securities laws. ER116. And they separately agree to the no-deny provision, *see* ER118-19, which is why the provision "aids in the execution of the Commission's enforcement powers[.]" ER56 n.2. But the no-deny provision is not injunctive and does not make defendants' speech a violation of the securities laws.

B. Second, petitioners claim that the no-deny policy was adopted without notice and comment. Br. 65-67. But procedural APA challenges are foreclosed if not brought in a timely fashion. *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 220 (2016), citing *JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 324-26 (D.C. Cir. 1994). Petitioners are more than fifty years late in seeking this type of relief because review of Commission orders is exclusive in a proper federal court of appeals and upon a petition filed within 60 days of the order. *See* 15 U.S.C. 77i(a), 78y(a)(1); *N.Y. Republican State Comm. v. SEC*, 799 F.3d 1126, 1128, 1130-36 (D.C. Cir. 2015).

To the extent petitioners claim that they can somehow raise a procedural issue regarding the adoption of Rule 202.5(e) now, or that the Commission should have noticed the rulemaking petition for comment, there was no procedural error. Rule 202.5(e) fits within the exemption from notice and comment for "general statements of policy, or rules of agency organization, procedure, or practice[.]" 5 U.S.C. 553(b)(A) (cited in ER56 n.2). Rule 202.5(e) is a rule of agency "procedure" or "practice" that notifies the public of the terms under which the Commission will agree to a settlement. *W. Radio Servs. Co v. Espy*, 79 F.3d 896, 901 (9th Cir. 1996) (agency manual was not a substantive rule when it "merely establishe[d] guidelines for the exercise of the [agency's] prosecutorial discretion"); *S. Cal. Edison Co. v. FERC*, 770 F.2d 779, 783 (9th Cir. 1985) ("The express exemption under section 553(b)(3)(A) extends to technical regulation of the form of agency action and proceedings."

(cleaned up)).[9] Rule 202.5(e) could also be considered a general statement of policy—a statement "issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power," such as settling lawsuits. *Lincoln v. Vigil*, 508 U.S. 182, 197 (1992) (cleaned up); *see also Gonnella v. SEC*, 954 F.3d 536, 546-47 (2d Cir. 2020) (holding that Commission enforcement guidance was a policy statement not subject to notice-and-comment requirements).

Either way, Rule 202.5(e) is not the type of action that requires notice-and-comment rulemaking. Instead of identifying relevant decisions about comparable actions, petitioners initiate an irrelevant debate about "[w]hether a rule is legislative or interpretive," misquoting the Commission's rulemaking denial. Br. 65-67 (citing ER56 n.2). But the Commission never claimed that Rule 202.5(e) is an interpretive rule, and it is not remotely comparable to a legislative rule that has the "force of law." *Erringer v. Thompson*, 371 F.3d 625, 630 (9th Cir. 2004). A defendant cannot violate Rule 202.5(e); it is not a "judicially enforceable dut[y]." *Lowry v. Barnhart*, 329 F.3d 1019, 1022 (9th Cir. 2003). Rather, the policy in Rule 202.5(e) manifests itself through a no-deny provision in a consent, which defendants can decline to sign. Rule 202.5(e)

[9] *Accord Gillette v. Warden Golden Grove Adult Correctional Facility*, 109 F.4th 145, 157 (3d Cir. 2024) (holding that regulations governing "disclosure of documents" were rules of agency procedure or practice); *AFL-CIO v. NLRB*, 57 F.4th 1023, 1043-46 (D.C. Cir. 2023) (holding that NLRB rules regarding litigation near elections were "internal house-keeping rules" that were "exempt from notice and comment").

announces a litigation practice about what settlements the Commission will accept, and the Commission acted appropriately when it adopted Rule 202.5(e), and then declined to modify it fifty years later, without notice and comment.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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