

How End Of SEC ‘Gag Rule’ Affects Free Speech Certiorari Bid

WRITTEN BY

Ghillaine A. Reid | Jay A. Dubow

This article was originally published on [Law360](#) and is republished here with permission as it originally appeared on June 5, 2026.

The [U.S. Securities and Exchange Commission](#)’s decades-old, no-deny settlement policy has effectively come to an end. On May 8, the SEC **quietly sent** a final rule titled “Rescission of Policy Regarding Denials in Settlements of Enforcement Actions” to the [Office of Management and Budget](#) for review under Executive Order No. 12866.

The title alone signaled that the commission was preparing to abandon or significantly revise its long-standing prohibition on postsettlement denials. Within days, the agency confirmed that it had rescinded Rule 202.5(e), the informal rule that since 1972 had conditioned settlement on a defendant’s promise not to publicly deny the SEC’s allegations.

In its public statements, the commission acknowledged that the policy set it apart from most other federal regulators and could give the impression that the agency was trying to insulate itself from criticism. It also emphasized that eliminating the rule should give the SEC greater flexibility to resolve cases while preserving enforcement resources and speeding relief to investors.

At the same time, a high-profile constitutional challenge brought by the [New Civil Liberties Alliance](#) and former SEC defendants, captioned *Powell v. SEC*, is now before the [U.S. Supreme Court](#) on a petition for certiorari seeking to limit of speech restrictions in government enforcement settlements.

The Gag Rule: A Long-Standing but Rarely Used Tool

Since 1972, SEC Rule 202.5(e) has provided that the commission will not settle a civil or administrative enforcement action unless the defendant or respondent agrees not to publicly deny the allegations.

As the SEC has long explained, the purpose, per the text of the rule, was 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.” In practice, this produced the familiar no-admit, no-deny formulation: Defendants could resolve an action without admitting or denying the allegations, but could not later publicly suggest that the charges were unfounded.

Critics labeled this a gag rule, arguing that it operates as a content-based prior restraint on speech about the government's own conduct. A settling defendant who believed the allegations were wrong could either litigate to judgment or accept a perpetual restriction on public criticism, enforced by the threat that the SEC might seek to reopen the case or vacate the settlement.

As a practical matter, however, the SEC appears never to have invoked that theoretical remedy. In its May rescission, the commission stated that it is not aware of any instance in which it sought to reopen an enforcement proceeding or vacate a consent judgment based on a breach of a no-deny clause.

Powell and the First Amendment Attack on Rule 202.5(e)

The Powell appeal, brought in the [U.S. Court of Appeals for the Ninth Circuit](#) and now before the Supreme Court on a petition for a writ of certiorari, directly targets Rule 202.5(e) as unconstitutional.

After individual challenges to no-deny provisions found little traction, the NCLA [petitioned](#) the SEC in 2023 to amend or rescind Rule 202.5(e) to allow settlements without permanent waivers of speech rights. The commission [denied](#) that petition in January 2024 over a strong dissent from SEC Commissioner Hester Peirce, who described the rule as a “plain prior restraint” on speech and warned that it suppresses criticism of the agency itself.

The NCLA and several former SEC defendants then sought judicial review in the Ninth Circuit. Their clients include individuals who had previously entered SEC settlements with no-deny provisions and organizations that argue they have been unable to receive and publish speech from so-called gagged defendants.

The petitioners frame Rule 202.5(e) as a classic unconstitutional condition: The government conditions the benefit of settlement on a perpetual promise not to criticize its allegations — an arrangement they argue is especially suspect in an area where prior restraints are considered “the most serious and the least tolerable” infringements of First Amendment rights.

Ruling in August 2025, the Ninth Circuit recognized that the rule raises “legitimate First Amendment concerns,” but ultimately [upheld it](#).

The Ninth Circuit reasoned that defendants may voluntarily waive constitutional rights as part of a settlement and applied a balancing test derived from the Supreme Court's 1987 decision in *Town of Newton v. Rumery*. The court emphasized that Rule 202.5(e) theoretically does no more than restore the status quo ante. If a defendant later denies the allegations, the SEC may ask a court to reopen the case and litigate the merits, with no guarantee of success.

The petition for a writ of certiorari was filed on March 16, and briefing is now complete. The petition argues that the SEC's no-deny requirement is an unconstitutional condition that burdens core speech about government conduct, that it cannot be justified as a voluntary waiver given the SEC's settlement leverage and that the absence of any meaningful opportunity to negotiate such language makes the Powell case an especially suitable vehicle for Supreme Court review. The petition further contends that the Ninth Circuit misapplied *Town of Newton v. Rumery* and created a conflict with decisions such as the 2019 ruling from the [U.S. Court of Appeals for the Fourth Circuit](#)

in *Overbey v. Mayor of Baltimore* and other cases limiting government-imposed nondisparagement clauses.

In its May brief in opposition, the SEC urged the court to deny certiorari, arguing that the case is moot in light of the rescission of Rule 202.5(e), that any recurrence of the policy is too speculative to sustain a live controversy, and that the question presented lacks prospective importance and does not create a circuit split.

The SEC's Rescission: Prospective and Retroactive Effects

Against that backdrop, the SEC's May action represents a dramatic policy shift. The commission's rescission of Rule 202.5(e) does three important things.

First, it eliminates the no-deny requirement in future enforcement settlements. The SEC has made clear that its basic "neither admit nor deny" framework remains in place. The commission can still settle without admissions or, in appropriate cases, require admissions as a condition of settlement. What has changed is that it will no longer insist on a blanket promise of silence or nondenial as the price of resolving an enforcement action.

Second, the SEC has stated that it will not seek to enforce existing no-deny provisions. The commission has publicly acknowledged that it is unaware of any instance in which it actually sought to reopen a case based on a no-deny breach, and it has now committed that, in light of the rescission, it will not move to vacate prior settlements or reopen administrative proceedings if a settling defendant publicly denies the allegations.

Third, the SEC has taken the position that rescinding Rule 202.5(e) is a general statement of policy and an internal procedural change, not a legislative rule, and therefore did not require notice-and-comment rulemaking.

Implications for Powell and Beyond

The SEC's rescission of Rule 202.5(e) and its disavowal of enforcement of existing gag provisions will inevitably affect how the Supreme Court views the Powell petition. Those developments now sit at the center of the parties' Supreme Court briefing.

The SEC expressly contends that the case is moot because the agency has rescinded the rule and disclaimed any intent to enforce existing no deny provisions, and that the question presented lacks ongoing practical importance and does not warrant certiorari.

The petitioners, by contrast, argue that the long-standing rule inflicted ongoing First Amendment harm on those who entered settlements under the prior regime and that the gag rule is an unconstitutional prior restraint and condition on settlement. In light of the SEC's subsequent rescission and nonenforcement policy and its mootness arguments in the Supreme Court, they may contend in a further briefing that those steps do not fully cure those harms or eliminate the risk that a future administration could reinstate a similar policy.

How the court resolves those competing positions will determine not only whether Powell goes forward, but also how far agencies may go in conditioning settlements on restrictions on speech about government conduct.

Regardless of what action the Supreme Court takes in the Powell case, the SEC's rescission of Rule 202.5(e) will

be a relief to a number of parties that have settled — or will settle — with the SEC and will now be able to make statements of denial about the SEC enforcement action. Of course, public companies will need to be careful in what they say or otherwise could create secondary liability for making a false or misleading statement about the settled action.

Jay A. Dubow is a partner and co-leader of the securities investigations and enforcement practice group at Troutman Pepper Locke LLP. He previously served as branch chief of the SEC's Division of Enforcement in Washington, D.C.

Ghillaine A. Reid is a partner and co-leader of the securities investigations and enforcement practice group at Troutman. She previously served as branch chief of the New York Regional Office of the SEC's Division of Enforcement.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

RELATED INDUSTRIES + PRACTICES

- [Securities Investigations + Enforcement](#)