No. 24-1899

United States Court of Appeals for the Ninth Circuit

THOMAS JOSEPH POWELL, *et al.*,
Petitioners,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petition for Review from the
United States Securities and Exchange Commission, No. 4-733

BRIEF OF THE BUCKEYE INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

David C. Tryon
Alex M. Certo
THE BUCKEYE INSTITUTE
88 East Broad Street, Suite 1300
Columbus, OH 43215
(614) 224-4422
d.tryon@buckeyeinstitute.org
a.certo@buckeyeinstitute.org

Michael J. Showalter
Joel S. Nolette
WILEY REIN LLP
2050 M Street NW
Washington, DC 20036
(202) 719-7000
mshowalter@wiley.law
jnolette@wiley.law

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 29(a)(4)(A) and 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* The Buckeye Institute states that it has no parent corporation and it issues no stock, thus no publicly held corporation owns more than ten percent of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states.[1] The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing those policy solutions for implementation in Ohio and replication throughout the country. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization as defined by 26 U.S.C. § 501(c)(3). The Buckeye Institute files and joins *amicus* briefs that are consistent with its mission and goals.

The Buckeye Institute seeks to protect individual liberties—especially those liberties guaranteed by the Constitution of the United States—against government overreach. Government overreach increasingly comes in the form of agency rules and regulations imposed by unelected bureaucrats. The result is the insulation of important public policy decisions from any political or judicial accountability. This is incompatible with the representative democracy guaranteed by the Constitution.

[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than *Amicus Curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E). All parties have consented to the filing of this brief.

Thus, the Buckeye Institute has a strong interest in ensuring that agency action is subject to robust judicial review keeping agencies within their constitutionally defined parameters.

INTRODUCTION

Because the "'very essence of civil liberty . . . consists in the right of every individual to claim the protection of the laws,'" there is a "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)). That presumption has become all the more critical as the administrative state has transformed into leviathan. Today, "the Executive Branch . . . wields vast power and touches almost every aspect of daily life." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 499 (2010). Our Constitution's founders "could hardly have envisioned today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities." *City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting). Thus, "the cost of . . . deny[ing] citizens an impartial judicial hearing" when injured by agency action "has increased dramatically." *Kisor v. Wilkie*, 588 U.S. 558, 629 (2019) (Gorsuch, J., concurring in the judgment) (cleaned).

In this case Petitioners seek to vindicate their right to judicial review of unlawful agency action. As Petitioners explain, in 1972 the SEC promulgated a gag

rule requiring persons who settle SEC enforcement actions to forgo ever after criticizing or disputing the SEC's case against them. The rule violated the Constitution the day it was promulgated, and no less today. Petitioners asked the SEC via rulemaking petition to amend the rule to remove its infirmity, but the SEC declined. They now ask this Court to review that denial, vacate it, and order the SEC to fix its unconstitutional rule. The Court should do so.

First, the SEC's denial of the rulemaking petition is an order subject to this Court's review under both the Securities Act and the Securities Exchange Act. And neither finality nor the narrow exceptions to reviewability are barriers to review. Second, under settled law, the substantive challenges Petitioners raise are reviewable in this posture. And third, those substantive challenges illuminate legal flaws in the SEC's denial, which are not entitled to deference and which this Court should order the SEC to correct regardless by vacating the denial and directing the SEC to institute rulemaking.

ARGUMENT

I. The SEC's denial of the rulemaking petition is reviewable.

In seeking review of the SEC's denial of their petition, *see* 17 C.F.R. § 201.192(a), Petitioners invoke this Court's jurisdiction under both Section 9(a) of the Securities Act of 1933 and Section 25(a) the Securities Exchange Act of 1934, *see* 15 U.S.C. §§ 77i(a), 78y(a)(1). These provisions authorize direct review of an

"order" of the SEC (a "final order," the Exchange Act puts it) in the courts of appeals. *Id.*[2] The SEC's denial is a reviewable final order.

A. The SEC's denial is an "order."

The SEC's denial is an "order" under that term's ordinary meaning. Because the securities statutes do not define "order," the term must be "interpreted as taking [its] ordinary, contemporary, common meaning." *A-Z Int'l v. Phillips*, 323 F.3d 1141, 1146 (9th Cir. 2003). And statutes granting direct review in the courts of appeals must be given a "practical rather than a cramped construction." *NRDC, Inc. v. EPA*, 673 F.2d 400, 405 (D.C. Cir. 1982) (Ginsburg, R.B., J.) (citing *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980) (per curiam)). In construing direct-review statutes, courts "presume" that Congress intended to grant direct review "[a]bsent a firm indication" otherwise. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744–45 (1985).

When these securities statutes were enacted, the term "order" was generally understood to mean "some command" directing or restraining action "or granting or

[2] Because neither provision specifies the standards by which such orders are reviewed aside from factfinding, the default review provisions of the Administrative Procedure Act otherwise apply. *See, e.g.*, *Grayscale Invs., LLC v. SEC*, 82 F.4th 1239, 1244–45 (D.C. Cir. 2023) (conducting APA review of an order under Section 78y(a)(1)); *accord ITT World Commc'ns, Inc. v. FCC*, 699 F.2d 1219, 1245 & n.180 (D.C. Cir. 1983), *rev'd on other grounds*, 466 U.S. 463 (1984) (recognizing that the criteria under 5 U.S.C. § 706(2) prescribe the "scope of review" of a rule-making-petition denial).

denying some form of relief." *Carolina Aluminum Co. v. Fed. Power Comm'n*, 97 F.2d 435, 436 (4th Cir. 1938) (construing the term "order" in the direct-review provision of the Federal Power Act of 1935); *see also Order*, Black's Law Dictionary (3d ed. 1933) ("[a] mandate, precept; a command or direction authoritatively given"); *Order*, Pocket Oxford Dictionary (1st ed. 1924) (a "[m]andate, injunction, authoritative direction or instruction," e.g., "*the judge gave, made, refused, an* or *the o*[*rder*]").

A petition for rulemaking is a request for a form of relief. *See, e.g.*, *Auer v. Robbins*, 519 U.S. 452, 459 (1997) (calling rulemaking petitions an "application for relief"). Thus, the denial of a rulemaking petition is a command "denying some form of relief." *Carolina Aluminum Co.*, 97 F.2d at 436. That denial is therefore a reviewable "order" under Section 77i(a) and Section 78y(a)(1). Consistent with that conclusion, the Supreme Court and D.C. Circuit both have held that a federal agency's denial of a rulemaking petition is an "order" under analogous provisions enacted within a decade of the securities statutes. *See Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 398 (9th Cir. 1996) (noting that *FCC v. ITT World Communications*, 466 U.S. 463, 468 (1984), characterized the FCC's denial of a rulemaking petition as a directly reviewable "order" under the Communications Act of 1934); *N.Y. Republican State Comm. v. SEC*, 799 F.3d 1126, 1128–29, 1136 (D.C. Cir. 2015) (holding

that the SEC's denial of a rulemaking petition is directly reviewable in the courts of appeals under the Investment Advisers Act of 1940).

Contrary to this ordinary-meaning approach, some courts at times have looked to the 1946 APA definition of "order"—enacted more than a decade after the securities statutes—as if it controlled the meaning of the undefined term in the securities statutes. *See Watts v. SEC*, 482 F.3d 501, 505–06 (D.C. Cir. 2007). That is wrong.

First, precedent forecloses that approach. In *Hawaiian Telephone Co. v. Public Utilities Commission of Hawaii*, 827 F.2d 1264, 1271 (9th Cir. 1987), this Court declined to "import" the APA's definition of "order" into a review provision of the Communications Act of 1934. Observing that other sections of the Communications Act explicitly incorporated the APA's definition of "adjudication," the Court reasoned that "[w]hen Congress intended the APA's definition of a given term to be incorporated into the Communications Act, it said so." *See id.* That rationale applies equally here—the securities statutes also incorporate the APA's definition of adjudication. *See* 15 U.S.C. § 78d-1(b); *id.* § 78w(c). Under *Hawaiian Telephone*, the APA's definition cannot be imported into the earlier-enacted securities statutes.

Second, *Watts* reads the APA as implicitly amending the securities statutes by supplying definitions of words that also are used in the securities statutes. But "[a]mendments by implication . . . are not favored." *United States v. Welden*, 377 U.S. 95, 102 n.12 (1964); *California ex rel. Becerra v. Azar*, 950 F.3d 1067, 1085

(9th Cir. 2020) (en banc) (same). Accordingly, "[a] new statute will not be read as wholly or even partially amending a prior one unless there exists a positive repugnancy between the provisions of the new and those of the old that cannot be reconciled." *See Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 134 (1974) (cleaned). The APA's mere definition of a word it uses obviously does not create any such repugnancy. Perhaps for this reason, in cases involving the interpretation of other direct-review statutes enacted prior to the APA, subsequent D.C. Circuit cases have cabined *Watts*. *See, e.g.*, *N.Y. Republican State Comm.*, 799 F.3d at 1132. And the D.C. Circuit has directly rejected *Watts*'s logic. *See Ass'n for Cmty. Affiliated Plans v. Dep't of the Treasury*, 966 F.3d 782, 788 (D.C. Cir. 2020) (rejecting the argument that a later-enacted statute's definition of a term dictated the meaning of the term in a related "statute written over a decade before").

Third, the SEC itself has generally argued for a broader reading of the securities statutes' direct-review provisions than *Watts*'s. *See, e.g.*, Reply of the SEC to Plaintiffs' Opp. to Mot. to Transfer at 2–3, *Levy v. SEC*, No. 1:06-cv-00269-RMU, 2006 WL 1343822 (D.D.C. Apr. 10, 2006), ECF No. 11 (relying in part on *United States v. Dunifer*, 219 F.3d 1004, 1006–07 (9th Cir. 2000)); *Morello v. White*, 2017 WL 4404306, at *3 (C.D. Cal. 2017), *report and recommendation adopted*, 2017 WL 4355893, at *1 (C.D. Cal. 2017).

The ordinary meaning of "order" at the time of enactment controls, and under that ordinary meaning, the SEC's denial of the rulemaking petition is an "order."

B. The SEC's denial is "final."

As amended in 1975, Section 78y(a)(1) requires that an SEC "order" be "final" to be reviewable. *See* Securities Acts Amendments of 1975, 94 Pub. L. 29, § 20, 89 Stat. 97, 158 (June 4, 1975).[3] The SEC's denial is a "final" order.

"An agency's denial of a rulemaking petition is in general a final, reviewable action." *Clark v. Busey*, 959 F.2d 808, 813 (9th Cir. 1992); *accord Weight Watchers Int'l, Inc. v. FTC*, 47 F.3d 990, 992 (9th Cir. 1995) (observing that agencies' denials of rulemaking petitions "appear to be final orders as a matter of law"); *O'Keeffe's,*

[3] Section 77i(a) does not explicitly require finality, and the APA's general finality requirement does not apply to Section 77i(a), *see* 5 U.S.C. § 704 (specifying that "[*a*]*gency action* made reviewable by statute" is "subject to judicial review" under the APA, along with "*final agency action* for which there is no other adequate remedy" (emphasis added)); *Iowa League of Cities v. EPA*, 711 F.3d 844, 863 n.12 (8th Cir. 2013) (declining to "conjure up a finality requirement for '[a]gency action made reviewable by statute' where none is located in the text of the APA"). In 1955 this Court construed Section 77i(a) to contain an implicit finality requirement. *See Stardust, Inc. v. SEC*, 225 F.2d 255, 257 (9th Cir. 1955). It is unclear whether *Stardust*'s holding remains viable after the Securities Acts Amendments of 1975, which "codif[ied] existing . . . . case law" by adding finality explicitly into Section 78y(a)(1) but left Section 77i(a) unamended on this point (despite amending *other* provisions of Section 77). S. Comm. on Banking, Housing & Urban Affairs, Securities Acts Amendments of 1975, S. Rep. No. 94-75, *reprinted in* 1975 U.S.C.C.A.N. 179, 213–14; 94 Pub. L. 29, §§ 27, 30, 89 Stat. at 163, 169; *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 343 (7th Cir. 1997) ("Congress' choice not to revise [one statute] might indicate, if anything, an intent not to modify or clarify [that statute] (in the way that [a related statute] was modified)."). Because the SEC denial is a final order, the Court need not reach this issue.

Inc. v. CPSC, 92 F.3d 940, 942 (9th Cir. 1996) (accepting as "final" the agency's denial of a petition to amend a regulation); *Crist v. Leippe*, 138 F.3d 801, 805 n.5 (9th Cir. 1998) (noting that an agency's denial of a petition for rulemaking constitutes "final agency action reviewable by an appellate court"); *see also ITT World Commc'ns*, 466 U.S. at 468 (observing that the FCC's "denial of respondents' rulemaking petition" was "final" for purposes of the direct-review statute in the Communications Act); *Silberstein v. SEC*, 153 F. Supp. 3d 233, 237 (D.D.C. 2016) (noting that the SEC's denial of a rulemaking petition is a "final order" under Section 78y(a)(1)). This precedent—specific to denials of rulemaking petitions like the one here—controls.

The SEC's denial is also final under this Court's general approach to finality. This Court applies Section 78y(a)(1)'s finality requirement with the familiar two-prong test from *Bennett v. Spear*. *See Saliba v. SEC*, 47 F.4th 961, 967 (9th Cir. 2022) (citing 520 U.S. 154 (1997)). Under that test, an order is final if it (1) "mark[s] the consummation of the agency's decisionmaking process" in the matter before it (rather than being "merely tentative or interlocutory") and (2) is an order "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 177–78 (cleaned). Here, both prongs are easily met.

First, it is "clear" that the SEC's "denial of [the] petition to initiate a rulemaking for the . . . modification" of the gag rule marks the consummation of its

decisionmaking process. *See Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1037 (D.C. Cir. 2002) (applying *Bennett*); *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 989 (9th Cir. 2006) (finding finality where the agency action provided its "definitive statement" on the matter). The order unequivocally "denies the petition and declines to amend" the gag rule. ER-55. That is a "definitive statement." *Ore. Natural Desert Ass'n*, 465 F.3d at 989.

Second, the order is one from which "rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 177–78 (cleaned). This prong is met when the agency decision "has a direct and immediate . . . effect on the day-to-day business of the subject party," even if the decision does not "alter the legal regime" that was in place before the decision. *Ore. Natural Desert Ass'n*, 465 F.3d at 987 (cleaned). Here, the SEC's denial of the petition has a direct and immediate effect on Petitioners' day-to-day business. Collins must acquiesce to the gag rule to settle the SEC's pending charges even though he does not want to be gagged; the other individual Petitioners must remain silent even though they would like to speak about their cases; and the entity Petitioners must forgo learning about those cases even though they would like to learn about them. The only way to remedy their injury is to lift the gag. The decision to leave the gag in place is thus one from which rights and obligations have been determined *and* from which legal consequences flow.

C. The narrow exception to reviewability under *Heckler v. Chaney* does not apply.

For a brief period, *Heckler v. Chaney*, 470 U.S. 821 (1985), created "some uncertainty" as to whether an agency's "refusal to institute a rulemaking" was reviewable. *See Am. Horse Protection Ass'n v. Lyng*, 812 F.2d 1, 3 (D.C. Cir. 1987). But intervening precedent has resolved that uncertainty, and *Heckler* is no hurdle to review.

As an initial matter, *Heckler* does not apply here because it involved a question of general reviewability under the APA—not under a special statutory-review provision. *See, e.g.*, *Env't Def. Fund v. Reilly*, 909 F.2d 1497, 1504–05 (D.C. Cir. 1990) (suggesting that when a special statutory-review scheme applies, general APA reviewability doctrine is inapplicable). In *Heckler*, several death-row inmates facing execution by lethal injection petitioned the Food and Drug Administration to take several particular "enforcement actions" to prevent violations of the Federal Food, Drug, and Cosmetic Act with respect to the drugs to be used. 470 U.S. at 823. The FDA responded by "refusing to take the requested actions." *Id.* at 824. The Supreme Court held that these petitions were unreviewable under the APA because an agency's "refusal to take requested enforcement action" in this way was committed to agency discretion by law. *See id.* at 831.

In any event, the Supreme Court has since recognized "key differences between a denial of a petition for rulemaking and an agency's decision not to initiate

an enforcement action" making the former reviewable. *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007). *Heckler* is a "very narrow exception" (it says itself), 470 U.S. at 830 (cleaned), limited to "refusals to take ad hoc enforcement steps," *see Am. Horse Protection Ass'n*, 812 F.2d at 3. The SEC's denial of the rulemaking petition is not a refusal to take a particular enforcement action; it is a refusal to modify a rule of general applicability. Thus, *Heckler* does not bar review.

II. Petitioners' substantive challenges are reviewable.

Because Petitioners are timely challenging the SEC's denial of their rulemaking petition, under settled law they may obtain substantive review of the gag rule in the process. This Court has long recognized that statutes of limitations governing review of agency action do not bar indirect, substantive challenges to that action after the direct-review limitations period has expired. In particular, following the D.C. Circuit, this Court has held that a petitioner may challenge an agency rule as exceeding the agency's statutory or constitutional authority when petitioning from the denial of a rulemaking petition.

Functional Music, Inc. v. FCC, 274 F.2d 543 (D.C. Cir. 1958), is the seminal case. There, about two years after the FCC had promulgated certain rules—when the applicable sixty-day period to bring a direct challenge to those rules had "long since passed"—an FM broadcasting licensee petitioned the FCC to amend those rules. *Id.* at 545–46. The FCC denied that request, and the petitioner sought direct

review of the denial, "alleging the invalidity of the . . . rules" in the process. *Id.* at 545–46. The D.C. Circuit held that "judicial examination" of the rules was "now permissible," reasoning that "[a]s applied to rules and regulations, the statutory time limit restricting judicial review of Commission action is applicable only to cut off review directly from the order promulgating a rule." *Id.* at 546. That is, when agency action "applying" a rule—such as a denial of a petition to amend the rule—is challenged, the direct-review limitations period "does not foreclose subsequent examination of [the] rule" indirectly in that way. *Id.*

Thus, under *Functional Music*, even after the applicable "limitations period has run" to challenge a regulation directly, a litigant still may obtain judicial review of the regulation by "petition[ing] the agency for amendment or rescission . . . and then . . . appeal[ing] the agency's decision." *NLRB Union v. FLRA*, 834 F.2d 191, 196 (D.C. Cir. 1987). In this way, litigants may raise "indirect attacks on the substantive validity of regulations"—such as that the "issuing agency acted in excess of its statutory authority in promulgating them"—even after the limitations period applicable to a direct challenge has passed. *Id.* at 195.

In *Wind River Mining Corp. v. United States*, 946 F.2d 710 (9th Cir. 1991), this Court adopted the *Functional Music* doctrine. There, a mining company sought to challenge as *ultra vires* a 1979 determination by the Bureau of Land Management designating certain lands as a "Wilderness Study Area," a challenge subject to a six-

year statute of limitations. *See id.* at 711–14. But rather than seek judicial review of that determination within the limitations period, the company pursued certain administrative remedies to have the 1979 determination invalidated, efforts that were ultimately denied in 1987. *See id.* at 711. The mining company then filed suit in 1989—more than six years after the 1979 determination but within six years of the 1987 decision. *See id.* at 712. This Court concluded that the suit was not time-barred, adopting *Functional Music* and holding that "a substantive challenge to an agency decision . . . may be brought within six years of the agency's application of that decision to the specific challenger." *Id.* at 714–16. Because the "application" in *Wind River* was the 1987 decision, the limitations period on the mining company's "substantive" challenge to the 1979 determination ran from 1987. *Id.*

This Court has since applied the *Functional Music* doctrine repeatedly, including where (as here) the petitioner raised an indirect, substantive challenge to a rule by petitioning for rulemaking and then seeking review of the denial of that petition. *See, e.g.*, *Nw. Env't Advocates v. EPA*, 537 F.3d 1006, 1010, 1012–15, 1018–19 (9th Cir. 2008) (concluding that *Wind River* "controls" in those circumstances); *Cal. Sea Urchin Comm'n v. Bean*, 828 F.3d 1046, 1051 (9th Cir. 2016) (applying *Wind River* to permit a similar, indirect challenge to a "generally applicable agency rule").

Petitioners raise several substantive challenges to the gag rule that are properly before this Court under *Wind River*. For instance, Petitioners argue that the gag rule is invalid because it violates the First Amendment, violates the Fifth Amendment's guarantee of due process, and imposes unconstitutional conditions. Powell Br. 36–60. *Wind River* specifically allows petitioners to challenge a rule as "exceeding constitutional . . . authority" in this posture. 946 F.2d at 715. Petitioners also argue that the SEC exceeded its statutory authority in promulgating the gag rule, Powell Br. 61–65, a substantive, "*ultra vires*" challenge, *see Wind River*, 946 F.2d at 715.

Thus, the Court should reach the merits of Petitioners' arguments.

III. The Court should vacate the SEC's denial and order rulemaking to prevent further deprivations of Americans' core constitutional rights.

Petitioners' substantive challenges identify several legal flaws in the gag rule, and thus in the SEC's order. The Court must apply "exacting judicial scrutiny" to the SEC's denial rather than deference. And even if deference were warranted that would not be enough to overcome the gag rule's flaws. To protect Americans' constitutional rights, the Court should order the SEC to institute rulemaking.

To begin, the SEC's denial is not entitled to deference. While judicial review of an agency's denial of a rulemaking petition has historically been deferential in certain contexts, *see Massachusetts*, 549 U.S. at 527–28 (citing *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–45 (1984)), Petitioners' challenges do not trigger

deferential review. Such deference generally has been applicable "only where the rejected proposal is addressed to matters within the agency's broad policy discretion." *ITT World Commc'ns*, 699 F.2d at 1246. In the "area of traditional judicial preeminence, that of determining pure questions of law, Congress commanded an exacting judicial scrutiny." *NRDC, Inc. v. SEC*, 606 F.2d 1031, 1048 (D.C. Cir. 1979) (citing 5 U.S.C. § 706(2)(B)–(D)). Petitioners' challenges to the gag rule (and thus to the SEC's refusal to amend the gag rule) turn on "pure questions of law," such as whether the gag rule violates the Constitution. The SEC has no expertise on these questions. Even in a world of *Chevron* deference, therefore, deference is inappropriate here. And if the Supreme Court soon limits or overrules *Chevron*, *see Loper Bright Enters. v. Raimondo*, 143 S. Ct. 2429 (2023); *Relentless, Inc. v. Dep't of Com.*, 144 S. Ct. 325 (2023), the foundation for deferential review of rulemaking-petition denials even in more policy-laden contexts will have eroded.

Even if deference were called for—though it is not—that would not immunize the SEC's denial. In circumstances where agencies' rulemaking-petition denials have received deference in a world with *Chevron*, courts will still "overturn[]" those denials when they are based on "plain errors of law," such as when the "agency has been blind to the source of its delegated power." *Am. Horse Protection Ass'n*, 812 F.2d at 5 (cleaned). An agency "literally has no power to act . . . unless and until Congress confers power upon it." *Washington v. Dep't of State*, 996 F.3d 552, 564

(9th Cir. 2021) (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)). And Congress, of course, cannot authorize agencies to act unconstitutionally. Thus, an agency acting in excess of either statutory or constitutional authority has necessarily "been blind to the source of its delegated power." *See Am. Horse Protection Ass'n*, 812 F.2d at 5 (cleaned).

That is the case here. As Petitioners argue, the gag rule crosses several constitutional boundaries. *See* Powell Br. 36–60. And the rule exceeds the SEC's statutory authority as well. *See id.* at 61–65. The SEC's decision to leave the gag rule in place repeats and compounds these flaws, so it entails plain errors of law that warrant vacatur even under deferential review.

Given the gag rule's infringement on core constitutional rights, this Court should order the SEC to institute rulemaking to correct the problem. Courts will "force[] agencies to institute rulemaking proceedings on a particular issue" when "most compelling" circumstances justify doing so after the agency has denied a rulemaking petition. *WWHT, Inc. v. FCC*, 656 F.2d 807, 818 (D.C. Cir. 1981). Here, because the gag rule will continue to infringe core First Amendment rights if left unamended, that standard is met.

The Supreme Court has left no doubt that the First Amendment's "rights to expression" hold "favored status . . . in the constitutional scheme." *See* Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 852 (1970). Stare

decisis, for example, "applies with perhaps least force of all to decisions that wrongly denied First Amendment rights." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 917 (2018). And the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" warranting judicial intervention. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). But the longer the gag rule remains, the more those rights are lost. They are lost both to Americans currently gagged and to future SEC enforcement targets who lack the nearly boundless resources and stamina needed to go toe-to-toe with the SEC. *See Axon Enter., Inc. v. FTC*, 598 U.S. 175, 216 (2023) (Gorsuch, J., concurring in the judgment). Any additional delay will give rise to new irreparable First Amendment injury.

Thus, this case presents sufficiently compelling circumstances justifying an order directing the SEC to institute rulemaking proceedings.

CONCLUSION

For these reasons and those stated by Petitioners, the Court should vacate the SEC's denial of the rulemaking petition and direct the SEC to initiate rulemaking to amend 17 C.F.R. § 202.5(e) to remove the language imposing the gag from the rule.

June 24, 2024

Respectfully submitted,

s/ Joel S. Nolette

Michael J. Showalter
Joel S. Nolette
WILEY REIN LLP
2050 M Street NW
Washington, DC 20036
(202) 719-7000
mshowalter@wiley.law
jnolette@wiley.law

David C. Tryon
Alex M. Certo
THE BUCKEYE INSTITUTE
88 East Broad Street, Suite 1300
Columbus, OH 43215
(614) 224-4422
d.tryon@buckeyeinstitute.org
a.certo@buckeyeinstitute.org

Counsel for Amicus Curiae

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 24-1899

I am the attorney or self-represented party.

This brief contains 4,556 **words,** including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- ○ complies with the word limit of Cir. R. 32-1.
- ○ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ◉ is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ○ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ○ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
  - ☐ it is a joint brief submitted by separately represented parties.
  - ☐ a party or parties are filing a single brief in response to multiple briefs.
  - ☐ a party or parties are filing a single brief in response to a longer joint brief.
- ○ complies with the length limit designated by court order dated ____.
- ○ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Joel S. Nolette **Date** June 24, 2024
*(use "*s/[typed name]*" to sign electronically-filed documents)*

CERTIFICATE OF SERVICE

I, Joel S. Nolette, certify that on June 24, 2024, I caused the foregoing to be filed with the Clerk of Court of the U.S. Court of Appeals for the Ninth Circuit by using the Court's CM/ECF system. I further certify that all counsel of record will be served by the CM/ECF system.

s/ Joel S. Nolette
Joel S. Nolette

Counsel for Amicus Curiae