December 20, 2023

VIA Electronic mail to Secretarys-Office@SEC.GOV

Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Renewed Petition for Rulemaking to Amend the Rule Restricting Speech that is set forth in 17 C.F.R. § 202.5(e) ("The Gag Rule"), File No. 4-733

Dear Secretary Countryman,

Over five years ago, the New Civil Liberties Alliance ("NCLA") petitioned the Securities and Exchange Commission ("SEC") to amend 17 C.F.R. § 202.5(e) (the "Gag Rule", "Gag" or "Rule").[1] Adopted 51 years ago as a so-called housekeeping rule and thus without the benefit of notice-and-comment rulemaking procedures in violation of the APA,[2] § 202.5(e) has gagged countless enforcement targets in perpetuity. SEC justifies its en masse silencing as "important 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."[3] SEC does "not permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings." It enforces this Rule through mandatory provisions in its settlement agreements which gag defendants and respondents.[4] As a result, SEC routinely and systematically demands silence and suppresses speech based on its content and viewpoint as a non-negotiable condition of settlement.[5]

[1] NCLA, Petition for Rulemaking, No. 4-733 (Oct. 30, 2018), https://www.sec.gov/files/rules/petitions/2018/petn4-733.pdf.

[2] *See* Consent Decrees in Judicial or Administrative Proceedings, Securities Act Release No. 33-5337, 37 Fed. Reg. 25,224-01 (Nov. 29, 1972).

[3] 17 C.F.R. § 202.5(e).

[4] SEC Memo. in Resp. to Mot. for Relief from Judgment at 3, SEC v. Allaire, No. 03-cv-4087 (DLC) (S.D.N.Y. June 18, 2019), ECF No. 31.

[5] *See*, *e.g.*, Consent of Def. Arthur S. Hoffman at ¶ 11, SEC v. Hoffman, No. 2:22-cv-00296-ROS (D. Ariz. Feb. 24, 2022), ECF No. 4; Judgment as to Def. Mark J. Ahn at ¶ 11, SEC v. Ahn, No. 1:21-cv-10203-ADB (D. Mass. Apr. 27, 2021), ECF No. 12-1; Consent of Def. John Kenneth Davidson at ¶ 11, SEC v. Davidson, No. 5:19-cv-01153 (W.D. Okla. Dec. 21, 2019), ECF No. 3-1; Consent of Def. Owen H. Naccarato at ¶ 11, SEC v. Naccarato, No. 1:17-cv-24682-JLK (S.D. Fla.

Today, Petitioners—NCLA now joined by Barry D. Romeril, Raymond J. Lucia, and Christopher A. Novinger—renew the pending Petition for Rulemaking (No. 4-733) and ask the Commission to repeal its unconstitutional Gag Rule once and for all.[6]

I. STATEMENT OF INTEREST OF PETITIONERS

NCLA is a nonpartisan, nonprofit civil rights group devoted to defending constitutional freedoms from violations by the administrative state.[7] NCLA regularly represents clients *pro bono* in SEC administrative adjudications and the federal courts, including the U.S. Supreme Court. As such, NCLA and its attorneys are aware of the pressure SEC enforcement targets are under to settle the allegations made against them. It represented Barry D. Romeril in his attempt to seek relief from the Gag provision in his settlement agreement. It currently represents Christopher A. Novinger on appeal before the Fifth Circuit Court of Appeals seeking a declaratory judgment that the Gag provisions in his and his company's settlements are unconstitutional.

Barry D. Romeril, now 80 years old, is the former Chief Financial Officer of Xerox. After a prolonged investigation that imposed daunting reputational, occupational, and financial costs, he settled with the SEC in 2003. He has been silenced by the Commission's Gag Rule for 20 years and counting.

Raymond Lucia, now 73 years old, is a former financial advisor whom the SEC first charged in an administrative proceeding in 2012. Mr. Lucia successfully appealed SEC's decision against him all the way to the Supreme Court, which determined that SEC's Administrative Law Judges ("ALJ") were "Officers" of the United States and subject to the Appointments Clause.[8] Despite his win, SEC forced Mr. Lucia back into its administrative process. Although it was before a different ALJ, all of SEC's ALJs still enjoyed multiple layers of tenure protection, a constitutional violation that the Solicitor General admitted in Mr. Lucia's case. In November 2018, Mr. Lucia filed an action in federal court raising this constitutional infirmity, which the Supreme Court had recognized violated the Constitution since its holding in *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010). The district court nonetheless dismissed his case for lack of jurisdiction, under a theory that the Supreme Court has since unanimously repudiated.[9] Unable to outlast and outspend the agency, Mr. Lucia settled in 2020, forced to accept a gag that has silenced his truthful criticism for three and a half years.

Christopher A. Novinger, now 47 years old, is a businessman and former director of ICAN Investment Group, LLC. After over a year of defending himself, suffering irreparable reputational

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Dec. 27, 2017), ECF No. 3-1; Consent of Def. Tiger Asia Mgmt., LLC at ¶ 11, SEC v. Tiger Asia Mgmt., LLC, No. 2:12-cv-07601-DMC-MF (D.N.J. Dec. 12, 2012), ECF No. 3-1; Consent of Def. Carole D. Argo at ¶ 11, SEC v. Argo, No. 1:07-cv-01397-RWR (D.D.C. Sept. 11, 2008), ECF No. 18-1; Consent of Def. Mark J. Lauzon at ¶ 10, SEC v. Teo, No. 2:04-cv-01815-WGB-MCA (D.N.J. Jan. 3, 2005), 2005 WL 287501.

[6] NCLA initially filed the petition on its own behalf. In this supplemental letter, it has been joined by three individuals whose First Amendment rights have been permanently infringed by SEC's Gag Rule. *See infra* at Section II.

[7] *See* Petition No. 4-733 at 6–7 (describing NCLA's interest in amending the rule).

[8] *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

[9] *See generally Axon Enter., Inc. v. FTC and Cochran v. SEC*, 598 U.S. 175, 185 (2023).

damage in his community, and being unable to outlast and outspend the agency, Mr. Novinger and ICAN settled with SEC in 2016. The Commission's Gag Rule has now silenced him for seven years.

II. INTRODUCTION

In the years since the petition was filed, SEC has vigorously defended its unconstitutional Gag Rule and continues to do so despite clear indications that it is one of the most effective prior restraints conceived by any governmental body. As Judge Edith Jones and Judge Kyle Duncan of the U.S. Court of Appeals for the Fifth Circuit declared, SEC's Gag Policy says, "'Hold your tongue, and don't say anything truthful—ever'—or get bankrupted by having to continue litigating with the SEC. A more effective prior restraint is hard to imagine."[10]

In that same vein, Judge Ronnie Abrams of the U.S. District Court for the Southern District of New York—a court that hears a disproportionately high number of SEC enforcement actions—voiced a similar conclusion.[11] As she noted, "the non-negotiable inclusion of the [gag] Provision in consent decrees by an arm of the federal government is as rare as it is severe."[12] Judge Abrams set forth a litany of the various ways SEC's Gag is "inconsistent with the spirit of the First Amendment and our Nation's time-honored tradition of protecting free expression."[13] She also observed how the Gag Rule (1) "raises the specter of violating the unconstitutional conditions doctrine[;]" (2) "has all the hallmarks of a prior restraint on speech[;]" and (3) "is a textbook content- or viewpoint-based prohibition on speech."[14] Despite this trenchant and accurate analysis, Judge Abrams determined she was bound to approve the proffered consent agreement under applicable Second Circuit precedent.[15]

Justice Gorsuch also recently sounded the same alarm. Given that the "bulk of agency cases settle,"[16] the SEC is "aware, too, that few can outlast or outspend the federal government, agencies sometimes use this as leverage to extract settlement terms they could not lawfully obtain any other way."[17] His concern has its most disturbing realization in SEC's arrogation of power to silence those whom it prosecutes in perpetuity—something it could never win at trial in a court of law.

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[10] *SEC v. Novinger*, 40 F.4th 297, 308 (5th Cir. 2022) (Jones, J., joined by Duncan, J., concurring).

[11] *SEC v. Moraes*, No. 22-cv-8343 (RA), 2022 WL 15774011 (S.D.N.Y. Oct. 28, 2022); *id.* at *3 ("[T]he Court is concerned that the SEC's use of the [gag] Provision is inconsistent with the spirit of the First Amendment and our Nation's time-honored tradition of protecting free expression.").

[12] *Id.* at *1.

[13] *Id.* at *3.

[14] *Id.* at *3–5.

[15] *Id.* at *1 (citing *SEC v. Romeril*, 15 F.4th 166 (2d Cir. 2021) as binding precedent). The *Romeril* decision conflicts with earlier law-of-the-circuit precedent in *Crosby v. Bradstreet*, 312 F. 2d 483 (2d Cir. 1963). This is an important question that has yet to be resolved as the Second Circuit declined to rehear the Romeril panel decision *en banc*, even though such intra-circuit splits furnish explicit grounds for *en banc* review. The U.S. Supreme Court declined to take up this question on a writ of certiorari. *Romeril v. SEC*, 142 S. Ct. 2836 (2022).

[16] *Axon Enter., Inc. v. FTC and Cochran v. SEC*, 598 U.S. 175, 216 (2023) (Gorsuch, J., concurring) (citing *Tilton v. SEC*, 824 F.3d 276, 298, n. 5 (2d Cir. 2016) (Droney, J., dissenting)). The Supreme Court overruled *Tilton* in *Axon/Cochran* when it adopted Judge Droney's view of Article III courts to review SEC's administrative adjudications.

[17] *Id.*

Today, by this renewed petition, Petitioners pose the same question to the SEC that Judge Abrams rhetorically asked in 2022:[18] "What is the SEC so afraid of?" This petition further echoes Judges Jones and Duncan:[19] When will the Commission respond to this Petition? The responses to both questions are important not only to the regulated community but our Nation more broadly as "speech 'is the means to hold officials accountable to the people,' … "and is 'essential to effective democracy[.]"[20] SEC's mandatory Gag is unconstitutional, undemocratic, and unnecessary.[21] It is time for SEC to recognize the same and abandon this misguided Rule.

III. SEC SHOULD ACT ON THIS PETITION AND AMEND 17 C.F.R. § 202.5(e) TO REMOVE THE RULE'S UNCONSTITUTIONAL PROVISIONS

Petitioners incorporate and adopt all the arguments made in their initial filing but by this letter raise additional concerns given SEC's five-plus years of inexcusable inaction on Petition No. 4-733.

A. SEC Has Allowed This Petition to Languish While Thousands of Individuals and Businesses Have Been Silenced

SEC's annual reports indicate that since Fiscal Year 2017 (October 1, 2016–September 30, 2017) the agency filed between 405 to 526 "standalone enforcement actions."[22] And while the reports do not include current data regarding how many enforcement actions are resolved by settlement, older Commission data suggests that as many as 98% of all SEC enforcement actions are settled.[23] Using rough estimates, it is possible to get some sense regarding the scale of this problem. Applying the earlier settlement estimate rate (98%) to the total number of standalone enforcement actions since Fiscal Year 2017 (2,763 actions), there could be over 2,700 settlements in standalone actions, each with a Gag provision, during that six-year period.[24] Expanded across five decades, it is easy to see how SEC may have gagged many thousands of individuals by requiring the Gag as a condition of settlement. As the *Moraes* court put it, SEC's use of compulsory gag provisions "and its reliance upon [them] to dispose of enforcement actions is *breathtaking*."[25]

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[18] *Id.* at *5 ("What is the SEC so afraid of? Any criticism, apparently—or, rather, anything that may even 'create the impression' of criticism—of that governmental agency.").

[19] *Novinger*, 40 F.4th at 308 (Jones, J. joined by Duncan, J. concurring).

[20] *Moraes*, 2022 WL 15774011 at *5 (quoting *Citizens United v. FEC*, 558 U.S. 310, 339 (2010) and *Whitney v. Cal.*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

[21] Among the agencies with enforcement powers, only the SEC and the Commodities Futures Trading Commission ("CFTC") demand enforcement target's silence. *Id.* at *2.

[22] *Addendum: FY22 Enforcement Statistics*, SEC (Nov. 15, 2022), https://www.sec.gov/files/fy22-enforcement-statistics.pdf.

[23] Luis A. Aguilar, Commissioner, SEC, Remarks Before the 20th Annual Securities and Regulatory Enforcement Seminar (Oct. 25, 2013), https://www.sec.gov/news/speech/2013-spch102513laav ("While going to trial is always an option, it remains infrequent at the SEC. The SEC currently settles approximately 98% of its Enforcement cases.").

[24] SEC enforcement actions often involve multiple defendants, and settlement agreements with gag provisions are entered for each party that settles, so the numbers could be far higher.

[25] *Moraes*, 2022 WL 15774011 at *2 (emphasis added).

But in the free speech context, the numbers need not be large, or even specific, to render the Commission's action unconstitutional. That is because the First Amendment clearly states that "Congress shall make no law … abridging the freedom of speech[.]"[26] Likewise agencies cannot diminish an individual's speech rights. And there is little doubt that the Commission's Gag does just that. As both the concurrence in *Novinger* and the court in *Moraes* noted, the Gag operates as a prior restraint on speech.[27] Prior restraints "are the most serious and least tolerable infringement on First Amendment Rights" because they "[have] an immediate and irreversible sanction."[28] In effect they "freeze[]" speech.[29] And, in the case of SEC's Gag, it freezes the speech of thousands of Americans in perpetuity.

The systematic silencing of thousands of individuals is not only unconstitutional, but also antithetical to effective democratic governance. "Speech 'is the means to hold officials accountable to the people' … and is 'essential to effective democracy.'"[30] By its nature, the Gag Rule—as enforced through mandatory provisions in consent agreements—deprives the markets, investors, and the public of access to information about the process, nature, and outcome of SEC enforcement actions. SEC's narrative wins and anyone subject to a gag who even hints that something may be amiss risks reopening SEC's prosecution against them and civil or criminal contempt sanctions.[31]

The Gag Rule is especially pernicious because it restricts the speech of parties who settle their cases with SEC based upon the content and viewpoints they are permitted to express.[32] Speech that favors the agency is permitted. The Gag Rule requires Defendants to agree not only not to deny the allegations of the complaint but not even to "creat[e] the impression that the complaint is without factual basis." It further compels speech by requiring that if a Defendant makes "any public statement to the effect that Defendant does not admit the allegations of the complaint, or that this Consent contains no admission of the allegations" he cannot say that "without also stating that Defendant does not deny the allegations. It even forces Defendant's prior pleadings down the memory hole of administrative power: "upon the filing of this Consent, Defendant hereby withdraws any papers filed in this action to the extent that they deny any allegation in the complaint."[33] Again, as Judge Abrams said, such arrogation of power is nothing short of "breathtaking."

Through this compelled process, the gag deprives the public of critical information about how SEC conducts its business—which is the business of the people.[34] Does SEC strong-arm enforcement

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[26] U.S. CONST. amend. I.

[27] *Novinger*, 40 F.4th at 308 (Jones, J., joined by Duncan, J., concurring) ("A more effective prior restraint is hard to imagine."); *Moraes*, 2022 WL 15774011 at *4 ("[T]he No-Admit-No-Deny Provision has all the hallmarks of a prior restraint on speech.").

[28] *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

[29] *Id.*

[30] *Moraes*, 2022 WL 15774011 at *5 (quoting *Citizens United v. FEC*, 558 U.S. 310, 339 (2010) and *Whitney v. Cal.*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

[31] *Id.* at *2 (citing *Cato Inst. v. SEC*, 4 F.4th 91, 95 (D.C. Cir. 2021)).

[32] *See generally supra* n.5 (identifying gag provisions in numerous settlement agreement across the country over almost two decades).

[33] *Id.*; *see also SEC v. O'Brien*, No. 21-cv-9575 (DLC), 2023 WL 3645205, at *7 (S.D.N.Y. May 25, 2023).

[34] This is because it is the people who confer power on the government. *United States v. Cruikshank*, 92 U.S. 542, 549 (1875); *id.* at 551 ("The government of the United States is one of

targets? Does it over plead complaints in hopes of forcing settlements? Are SEC actions reflective of how regulated entities operate? Has SEC exceeded its statutory authority? Are SEC's theories of violation and threatened penalties sound? Maybe having to answer these questions is exactly what the SEC is so afraid of. But the Commission's fear is no reason to continue violating the Constitution.

B. SEC Routinely Ignores Petitions for Rulemaking in an Apparent Attempt to Avoid Judicial Scrutiny

Section 553(e) of the Administrative Procedure Act ("APA") provides that agencies "shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."[35] The APA contemplates, indeed encourages, interested parties to directly petition agencies to change regulations that they deem problematic. But the ability to petition means nothing if an agency, like SEC, systematically ignores the petitions it receives in an apparent attempt to avoid judicial scrutiny.

A review of SEC practices suggests that it routinely ignores petitions for rulemaking.[36] Between January 1, 2018 and May 3, 2023, SEC only substantively responded to five of the 77 (6.5%) petitions for rulemaking that it received.[37] Even excluding petitions filed in 2023, SEC's numbers do not improve much, as it only substantively responded to five of the 72 (6.9%) petitions filed.[38] SEC's recalcitrance to address petitions for rulemaking is not new either. As one commentator described the process back in 2014, the Commission's petition-for-rulemaking process is a "black hole."[39]

It is hard to see how SEC's delay in acting on this petition is anything other than a cynical and strategic ploy to avoid impartial judicial review of the Gag Rule on the merits by an Article III court. As SEC is aware, two of the Petitioners have sought relief from the gag provisions in their settlements, with NCLA serving as counsel, but have been stymied by procedural decisions curtailing those efforts. However, civil procedure rules regarding closed cases have no bearing upon SEC's refusal to act on NCLA's petition that stands in the way of any judicial review of SEC's unconstitutional policy. If, for example, SEC denied the Petition—a likely scenario given SEC's staunch defense of the Gag Rule in the courts—Petitioners would be entitled to seek review of that denial and consideration of the merits of the petition by a court of law. But, unfortunately for SEC, judges who have looked at the merits of the petition's main contention—that § 202.5(e) violates the First Amendment in multiple ways—have agreed with Petitioners that the Rule is likely unconstitutional.

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delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people.").

[35] 5 U.S.C. § 553(e).

[36] Kara McKenna Rollins, *Have the SEC's Delay Tactics Made Its Petition for Rulemaking Process Vulnerable to Challenge? A Look at In re Coinbase Inc. and SEC's Nullification of 5 U.S.C. § 553(e) by Inaction*, YALE NOTICE & COMMENT BLOG (May 3, 2023), https://www.yalejreg.com/nc/have-the-secs-delay-tactics-made-its-petition-for-rulemaking-process-vulnerable-to-challenge-a-look-at-in-re-coinbase-inc-and-secs-nullification-of-5-u-s-c-%C2%A7-553e-by-inacti/.

[37] *Id.*

[38] *Id.*

[39] Jason A. Schwartz and Richard L. Revesz, Petitions for Rulemaking, *Final Report to the Administrative Conference of the United States*, ACUS.GOV, 56 (Nov. 5, 2014), https://www.acus.gov/sites/default/files/documents/Final%2520Petitions%2520for%2520Rulemaking%2520Report%2520%255B11-5-14%255D.pdf.

So, why has SEC not acted on this Petition? If it stands by its Rule and believes it does not violate the Constitution—as it has argued before numerous courts across the country—then deny the Petition and permit that denial to be reviewed by an Article III court. Or, if SEC has doubts about the constitutionality of the Gag, it should grant the Petition and amend the Rule. But the Fifth Circuit Court of Appeals judges are right to call out SEC for allowing this Petition to languish, while thousands of Americans are subjected to this coercive, unconstitutional, and unjust rule.

IV. DELAYING REVIEW OF THIS PETITION EVISCERATES PETITIONERS' STATUTORY RIGHT AND CIRCUMSCRIBES THEIR CONSTITUTIONAL RIGHT TO PETITION

The First Amendment provides a right to petition the government: "Congress shall make no law … abridging … the right of the people … to petition the Government for a redress of grievances."[40] The right to petition traces its roots to the Magna Carta.[41] Over time, the limited right to petition the crown expanded. "By the time of the American Revolution, Delaware, New Hampshire, North Carolina, Pennsylvania, and Vermont [in addition to Massachusetts] provided explicit protection for the right of colonists to petition local governing bodies for redress of both individual and collective grievances."[42] Indeed, King George III's failure to address "Petitions" was a central indictment against the crown and the Declaration of Independence's language bears striking resemblance to the First Amendment's later formulation of the right stating "We have Petitioned for Redress[.]"[43]

Historically, the right to petition included the right to a response and that understanding was "firmly embedded in pre-Revolutionary colonial America."[44] At the time the First Amendment was ratified, Congress understood that the right to petition included "a concomitant right to receive a response."[45] But the Supreme Court—devoid of the benefits of "contemporary historical understanding"—has circumscribed this right by declining to find that it encompasses a right to a

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[40] U.S. CONST. amend. I.

[41] Julie M. Spanbauer, *The First Amendment Right to Petition Government for A Redress of Grievances: Cut from A Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 22 (1993) ("Spanbauer") ("By signing the Magna Carta in 1215,36 King John granted the right to petition the crown to his barons."); *see also* Norman B. Smith, *"Shall Make No Law Abridging...": An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153, 1155 (1986) ("Smith") ("Petitioning as a right was specifically recognized in Magna Carta: '[I]f we, our justiciar, or our bailiffs or any of our officers, shall in anything be at fault toward anyone, or shall have broken any one of the articles of the peace or of this security, and the offences be notified to four barons of the five-and-twenty, the said barons shall repair to us (or our justiciar, if we are out of the realm) and, laying the transgression before us, petition to have the transgression redressed without delay.'").

[42] Spanbauer, *supra* n.41, at 28.

[43] The Declaration of Independence para. 1 (U.S. 1776) ("In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury."); *see also* Smith, *supra* n.41 at 1173-74 (colonists' "claim" was not that "petitioning itself had been punished, only that the petitions had not met with favorable response").

[44] Spanbauer, *supra* n.41, at 28 ("Inherent in the right to petition was a corresponding right to a response."); Smith, *supra* n.41, at 1174.

[45] Spanbauer, *supra* n.41, at 38, 49.

response or even the government's consideration.[46] And while some commentators take the opposing view—that historically the First Amendment right did not include a right to consideration or response—the Supreme Court has never been presented with the historical materials or argument for its review and consideration.

The APA codified the right to petition in § 553(e), which provides that "Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." The APA's statutory "right to petition" reflects the constitutional right.[47] However, the § 553(e) "right is distinct from the constitutional right in some key ways that may more clearly obligate agencies to consider and respond to petitions[.]"[48] Importantly, the statutory right shows that "Congress clearly intended that, under the APA, agencies would consider and respond to public petitions for rulemaking."[49] Thus, even though the constitutional right may have been limited in such a way as to not require a response, the APA and the courts, have recognized a petitioner's right to response.[50]

The SEC has failed to provide a response to this Petition and its inaction violates Petitioners' statutory rights. Current Supreme Court precedent notwithstanding, it is also likely that the Commission's inaction violates Petitioners' First Amendment right to petition.

V. CONCLUSION

SEC has refused to act on this petition for over five years. Petitioners respectfully request that the Commission act on this petition within the next 90 days and amend or repeal 17 C.F.R. § 202.5(e).

Very truly yours,

/s/ Kara M. Rollins

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[46] *We the People Found., Inc. v. United States*, 485 F.3d 140, 149 (D.C. Cir. 2007) (Rogers, J., concurring); *see also id.* at 145 (noting that existing Supreme Court precedent regarding the right to a response "does not refer to the historical evidence and we know from the briefs in [*Minn. State Bd. For Cmty. Colls. v. Knight*, 465 U.S. 271 (1984)] that the historical argument was not presented to the Supreme Court").

[47] ACUS Report, *supra* n.39, at 9 (quoting the "congressional debate over the APA's passage").

[48] *Id.*

[49] *Id.* at 12.

[50] *Id.* at 13.