

[Securities Regulation Daily Wrap Up, ENFORCEMENT—U.S.: Musk asks for relief from agreement on tweet preapproval, \(Dec. 8, 2023\)](#)

Securities Regulation Daily Wrap Up

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By [Anne Sherry, J.D.](#)

In a petition for certiorari, Elon Musk argues that his agreement with the SEC constitutes an unconstitutional prior restraint.

Elon Musk is petitioning the Supreme Court to review an agreement he made to run his tweets by a Tesla attorney before posting them. The petition reiterates Musk's claim that the SEC has waged an "ongoing campaign against Mr. Musk and his companies." According to Musk, the agreement to have his tweets vetted—which both the Southern District of New York and the Second Circuit have upheld—violates Supreme Court jurisprudence on unconstitutional conditions, giving administrative agencies "intolerable power to coerce private parties into relinquishing their constitutional rights" (*Musk v. SEC*, December 7, 2023).

History. More than five years ago, following a series of tweets in which Musk said—inaccurately—that he had secured funding to take Tesla private, he settled an SEC enforcement action by agreeing to run "material" communications by an in-house securities lawyer. In 2019, the SEC brought contempt proceedings when Musk made another questionable tweet, and the parties [revised their settlement](#) to spell out what is considered material. Musk has since fought the agreement and [unsuccessfully attempted](#) to hold the SEC accountable for harassing him and his businesses. In 2022, the Southern District of New York [rejected](#) Musk's attempt to back out of the tweet-vetting settlement; the Second Circuit [affirmed](#).

Petition for certiorari. In his petition, Musk challenges the constitutionality of the settlement. Specifically, he asks "whether a party's acceptance of a benefit prevents that party from contending that the government violated the unconstitutional conditions doctrine in requiring a waiver of constitutional rights in exchange for that benefit."

Musk cites *Perry v. Sindermann* (U.S. 1972) for the proposition that under the unconstitutional conditions doctrine, "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." According to the petition, both courts below made a misstep in focusing not on whether the SEC had complied with constitutional limits on restriction of speech, but on whether Musk had waived his constitutional rights in accepting the settlement. Musk argues that under the unconstitutional conditions doctrine, such conditions are invalid even when the non-governmental party accepted a benefit in exchange.

By upholding the settlement on the basis that Musk agreed to it, the courts create the problem that the unconstitutional conditions doctrine emerged to address: that of the government "coercively withholding benefits from those who exercise them." The doctrine restricts the government's ability to obtain by agreement something that it could not command directly. If accepted, the SEC's argument before the Second Circuit that the unconstitutional conditions doctrine doesn't apply to SEC settlements would mean that the government could require a waiver of any constitutional right without any judicial scrutiny.

Importance of case. Musk maintains that the case is of utmost importance: "Given that 98 percent of defendants in SEC actions settle, the implications of the court of appeals' failure to consider whether an administrative agency may demand that settling defendants forego First Amendment rights to resolve actions filed against them extend far beyond Mr. Musk and the pre-approval provision here." The SEC regularly chills and restricts speech through its standard gag rule, which bars settling defendants from publicly refuting the SEC's allegations. And if the SEC's argument prevails, the same logic would extend throughout the government.

This is an ideal case on which to clarify if government settlements are immune from constitutional scrutiny, Musk argues. The judgment here contains a quintessential prior restraint, and the SEC has sought to hold Musk in contempt for violating the restraint. “This case thus presents a prime example of the exact harm that results from the SEC’s practice of suppressing speech through settlements.”

It is also a rare case of a settling party appealing the settlement. Often, defendants settle because they cannot afford to litigate, much less appeal. This leaves the Court with few opportunities to weigh in on this question. A Supreme Court ruling would provide meaningful guidance not just to the SEC but to the 98 percent of respondents/defendants who settle SEC enforcement actions, Musk argues.

The case is [No. 23A342](#).

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