No. 19-4197

United States Court of Appeals for the Second Circuit

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff - Appellee,

v.

BARRY D. ROMERIL,

Defendant - Appellant,

PAUL A. ALLAIRE, G. RICHARD THOMAN, PHILIP D. FISHBACH, DANIEL S. MARCHIBRODA, GREGORY B. TAYLER,

Defendants.

On Appeal From The United States District Court
For The Southern District Of New York
Case No. 1:03-cv-4087-DLC, Judge Denise L. Cote

BRIEF OF THE COMPETITIVE ENTERPRISE INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

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INTEREST OF *AMICUS CURIAE* [1]

The Competitive Enterprise Institute ("CEI") is a nonprofit 501(c)(3) organization dedicated to promoting the principles of free enterprise, limited government, and individual liberty. To that end, CEI wishes to oppose the apparent overreach of the Securities and Exchange Commission ("SEC" or "Commission"). It wishes to hear from those—like Barry Romeril—who have been subject to the Commission's "bold and unrelenting" enforcement tactics. Mary Jo White, Chair, SEC, A New Model for SEC Enforcement (Nov. 18, 2016), https://www.sec.gov/news/speech/chair-white-speech-new-york-university-111816.html. And it wishes to publicize their stories in CEI's scholarship, commentary, and congressional testimony.

But CEI cannot do so. And neither can anyone else, because for the last forty years the SEC has leveraged its enforcement discretion to coerce thousands of defendants into agreeing to lifetime gag orders barring them from publicly questioning the veracity—and thus the legitimacy—of the Commission's cases against them. *See* Consent Decrees in Judicial or Administrative Proceedings, 37 Fed. Reg. 25,224 (Nov. 29, 1972) (codified at 17 C.F.R. § 202.5(e)). This systematic silencing of the Commission's critics has impoverished the public debate. And it has deprived

[1] The parties consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for CEI certifies that no counsel for either party authored this brief in whole or in part, and no one other than CEI and its counsel contributed money to fund the preparation or submission of this brief.

CEI—along with all Americans—of the right to hear from those who are "in the best position to know" of the government's abuses. *Harman v. City of New York*, 140 F.3d 111, 119 (2d Cir. 1998) (quoting *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion)). CEI respectfully asks this Court to reopen the debate, to afford Romeril his right to speak, and to afford CEI its right to listen. *See*, *e.g.*, *In re Dow Jones & Co.*, 842 F.2d 603, 607 (2d Cir. 1988) ("[T]he First Amendment unwaveringly protects the right to receive information and ideas," especially "when the restrained speech, as here, concerns allegations" of public malfeasance.).

PRELIMINARY STATEMENT

An American citizen named Barry Romeril is subject to a judicial order that exposes him to costly litigation and ruinous fines if—*and only if*—he publicly criticizes the Securities and Exchange Commission. If he keeps what he knows about the Commission's enforcement conduct to himself for the rest of his life, then his ordeal with this powerful federal agency will finally be over. *See* Appellant Br. 4. But if he makes (or even "permit[s]" anyone else to make) "any public statement" that so much as "creat[es] the impression" that the Commission abused its powers by sanctioning him "without factual basis," all bets are off. J.A. 70. Backed by the judgment of an Article III court, the Commission can drag him "to trial" and try to

sock him with even "greater sanction[s]"—up to roughly $2 million by the Commission's latest count. *See* SEC Mem. in. Opp. to Mot. for Relief from J. 20 & n.3, 24, Dist. Ct. Dkt. No. 31 ("SEC Mem. Opp."). And to what end?

The gag provision appended to the court's final judgment does not even purport to concern itself with investor protection, the SEC's traditional charge. The Commission's own counsel has conceded that Romeril can freely solicit investors by telling them in "*private*" conversations that the SEC's allegations were entirely fabricated. SEC Mem. Opp. 23 (emphasis added). The one thing—the only thing—he cannot do is share with the "public," including Congress, his view that the Commission's enforcers have sanctioned an innocent man. *See id.* (warning that Romeril is free to "petition 'appropriate government bodies,'" "so long as he does not deny the [SEC's] allegations" as part of his petition).

A more obvious attempt to silence a government critic to "avoid creating" a disfavored public "impression" could scarcely be imagined. 17 C.F.R. § 202.5(e) (openly stating why the Commission seeks a gag provision in "any" proceeding "of an accusatory nature"). To Romeril's door, this "wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

Romeril is not the only one whose doorstep has been darkened by this wolf. For the last forty years, the Commission has systematically coerced "*thousands*" of defendants into "agree[ing]" to identical gag provisions. SEC Mem. in Supp. of

Mot. to Dismiss 14, 15, *Cato Inst. v. SEC*, No. 1:19-cv-47-ABJ (D.D.C. May 10, 2019), ECF No. 12-1. Some of those defendants are likely guilty. But make no mistake: many are innocent. In numerous cases against gagged defendants' non-settling peers, courts have thoroughly debunked the Commission's substantive allegations of wrong-doing. *See infra* pp. 25–26 (documenting numerous cases); *compare*, *e.g.*, *State St. Bank & Tr. Co.*, Securities Act Release No. 9107, 2010 WL 421154, at *10 (Feb. 4, 2010) (announcing settlement that forever gags the defendant from denying that its employees sent "misleading" communications), *with Flannery v. SEC*, 810 F.3d 1, 12 (1st Cir. 2015) (holding that those exact communications were "not misleading"). Yet, to this day, those gag orders remain in place, and the American people remain in the dark. They do not know why—or through what methods—one of the most powerful prosecutorial agencies in the country has forced citizens to submit to sanctions for conduct that may not, in fact, have occurred. Whatever the cause, the people deserve an answer.

This Court should let the debate over these sanctions begin. The gag provision tacked on to the district court's final judgment is "void" within the meaning of Rule 60(b)(4). It was sought by an agency with no power to seek it, imposed by a court with no power to impose it, and issued in blatant disregard of the First Amendment.

This outcome is not just compelled by the law, but by sound public policy. By systematically silencing thousands of individuals who have experienced the

SEC's prosecutorial tactics firsthand, the Commission has slanted the public debate in ways that cannot be squared with our Founders' design. Our government, and the public, have paid the price. Congress has less accurate information to oversee the activities of the administrative state. SEC officials face less scrutiny, both at the SEC and when they seek higher office. And the Commission itself has been more distracted with policing "troubling" statements reported in the press, in alleged violation of these ever-proliferating gags, than in rooting out actual misconduct. Experience has thus shown that, whatever the stakes for Romeril, continued enforcement of the gag provision cannot be squared with the larger public interest. On that ground alone, Rule 60(b)(5) requires relief.

ARGUMENT

I. THE GAG PROVISION IS "VOID" UNDER RULE 60(B)(4)

A federal district court may not condition a decree on the defendant's promise to refrain from criticizing the government. That power does not exist, and it never has. Before the Revolution, when colonial merchants settled with royal officials "under a composition (consent decree)," 1 *Legal Papers of John Adams* 113 (Wroth & Zobel eds. 1965), the merchants would (as the SEC might say) turn around and "create[]" the "impression that [the] decree [was] being entered . . . when the conduct alleged did not, in fact, occur," 17 C.F.R. § 202.5(e); *see*, *e.g.*, Letter from Gov. Bernard to Lords of Trade (1761), *in* Langbein et al., *History of the Common Law*

480, 481 (2009) (reporting John Erving's claim that his settlement was "not voluntary, but extorted by violence and duress"). That, of course, created a public "impression" (J.A. 70) that tended to hamper the "effective enforcement" (SEC Mem. Opp. 19) of the crown's customs laws. *See* Letter of Governor Bernard, *supra*, at 481 (warning of an "immediate tendency to destroy . . . the custom house"). Yet, even then, no one—not the Lords of Trade, not the infamous courts of vice-admiralty, not even the royal governors—even suggested that, perhaps, a gag provision be worked into the consents. *See id.* at 482 (lamenting to the Lords of Trade the lack of available remedies). The American people retained the right to speak, consent judgment or not.

That right has not changed. The founding generation did not, to put it mildly, delegate to the federal government *more* authority to silence the American people than that possessed by the courts of George III. To the contrary, they enshrined in the First Amendment "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The gag provision in the instant case falls well outside this venerable tradition. It is a dangerous historical anomaly, and Rule 60(b)(4) mandates relief.

A. The Gag Provision Is Void Because The Commission Did Not Have Power To Seek It, And The District Court Did Not Have Power To Impose It

An order is "void" within the meaning of Rule 60(b)(4) whenever the issuing court lacks "jurisdiction," *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271 (2010), such that "the rendering court was powerless to issue it," *Karsner v. Lothian*, 532 F.3d 876, 886 (D.C. Cir. 2008). That is the case here. First, in seeking the gag provision, the SEC stepped outside its delegated authority and thus outside the unique standing available to agents of the sovereign seeking to enforce public rights. Second, in issuing the gag provision, the district court exceeded the "jurisdiction to impose" remedies that Congress had given it. Third, and finally, under the First Amendment and binding circuit precedent, the gag provision is a nullity. In these circumstances, it was "a *per se* abuse of discretion for [the] district court to deny [Romeril's] motion" to free himself of his lifelong gag. *Burda Media, Inc. v. Viertel*, 417 F.3d 292, 298 (2d Cir. 2005) (quoting *State St. Bank & Tr. Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 178 (2d Cir. 2004)).

1. The SEC Lacked Standing To Seek A Gag Provision

Standing is "'an essential and unchanging' predicate to the court's exercise of jurisdiction." *Nat. Res. Def. Council, Inc. v. FAA*, 564 F.3d 549, 555 (2d Cir. 2009) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). It "cannot be waived or forfeited." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019).

And a judgment procured by a plaintiff without standing is not a judgement at all; it is a nullity. Standing, moreover, is not "dispensed in gross." *Davis v. FEC*, 554 U.S. 724, 734 (2008) (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996)). "To the contrary, 'a plaintiff must demonstrate standing for each claim [it] seeks to press and for each form of relief that is sought.'" *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quoting *Davis*, 554 U.S. at 734); *see*, *e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983).

Under these principles, the gag provision must fall; the Commission lacked standing to seek that "form of relief." *Laroe*, 137 S. Ct. at 1650.

As an agent of the government, the SEC has available to it a unique claim to standing—that of the sovereign. Unlike a private litigant, the government may bring an enforcement action in federal court even when it "has no pecuniary interest in the controversy." *In re Debs*, 158 U.S. 564, 586 (1895). That is because the power and duty of the sovereign to enforce public rights "is often of itself sufficient to give it a standing in court." *Id.* at 584.

But there's a catch: when a government agent invokes the sovereign's unique claim to standing, the agent must be acting within the scope of its delegated authority. If the agent roams "beyond" that authority, its ultra vires actions "are considered individual and not sovereign acts," *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949); and its sovereign standing falls by the wayside. Thus, for

example, if a state chooses "to speak as a sovereign entity" only through its attorney general, other agents of the state lose "standing" to "litigate on the State's behalf." *Va. House of Delegates*, 139 S. Ct. at 1951–52. Similarly, if a state transfers authority from one official to the next, such that the transferor has "lost [its] capacity" to act, the transferor has also "lost [its] standing" to proceed. *Hollingsworth v. Perry*, 570 U.S. 693, 710 (2013); *see*, *e.g.*, *Karcher v. May*, 484 U.S. 72, 77, 83 (1987) (dismissing for "want of jurisdiction").

The same analysis applies to the ultra vires acts of agents of the federal government, which has delegated authority in a way that "resemble[es] that of" the states discussed above. *Va. House of Delegates*, 139 S. Ct. at 1952 (citing *United States v. Providence Journal Co.*, 485 U.S. 693, 706 (1988)). In *Providence Journal*, for instance, a special prosecutor was delegated "full authority" to litigate a matter in district court. 485 U.S. at 697. But because that delegation did not confer the power to argue "appeals in the Supreme Court," *id.* at 699, the prosecutor was not a "proper representative of the Government['s]" sovereign interests in *that* forum, and thus, the Court lacked "jurisdiction" over his claims, *id.* at 708. Likewise, in *FDIC v. Grella*, the FDIC had authority to litigate as a receiver of a private, insolvent entity. 553 F.2d 258, 260 (2d Cir. 1977). But, there, "no . . . pecuniary" issue was at stake, so the FDIC could not claim "standing" in its receiver role. *Id.* at 263. Nor, this Court held, could the FDIC claim the special "standing" of "a government agency."

Id. Because the "responsibilities of FDIC as set forth" in its enabling statute were not in play, the FDIC lacked "standing" on that ground as well. *Id.*

The SEC's request for a gag provision suffers from the same infirmity. Like the agents of the federal and state governments discussed above, the SEC has only a limited claim to authority to act on behalf of the sovereign. Under the carefully calibrated scheme that Congress has crafted, the Commission:

- "may bring an action . . . to seek . . . a civil penalty," 15 U.S.C. § 78u(d)(3)(A);
- "may . . . bring an action . . . to enjoin" certain practices and to "prohibit, conditionally or unconditionally, . . . any person . . . from acting as an officer or director of any issuer," *id.* § 78u(d)(1), (2); and
- "may seek . . . any equitable relief that may be appropriate," *id.* § 78u(d)(5).

That's it. Congress never authorized the SEC to walk into a federal court and, on behalf of the federal government, seek a "remedy" that would bar a citizen from publicly criticizing the SEC. And this Court should not infer such a power. *See SEC v. Sloan*, 436 U.S. 103, 117 (1978) (the Commission's power "cannot be judicially or administratively extended," for the "proper source of [its] power is Congress"). When Congress constructs "an enforcement scheme . . . with . . . evident care," the explicit authorization of certain remedies is "strong evidence that Congress did *not*

intend to authorize other remedies that it simply forgot to incorporate." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146–47 (1985). That presumption applies with particular force here, where interpreting the Securities Exchange Act to give the Commission the authority it seeks would, as detailed below (at 14–18), "raise serious constitutional problems." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) (quoting *Edward J. DeBartolo Corp. v. Fla. Golf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). If Congress really wanted to authorize the Commission to seek a judicial order barring a citizen from criticizing the SEC (even to Congress, *see* SEC Mem. Opp. 23), it would have made a "clear indication" to that effect—but did not. *Solid Waste Agency*, 531 U.S. at 172.

As a result, the Commission has as much standing to seek a gag provision as it does to seek the annulment of someone's marriage, a revocation of citizenship, or a prison sentence: none. Even if *some* agent of the federal government has authority to seek such remedies on behalf of the United States' sovereign interest, the SEC does not. And without authorization to act on behalf of the sovereign, the Commission, like the special prosecutor in *Providence Journal* and the FDIC in *Grella*, lacked standing to seek the relief that it did. *See*, *e.g.*, *In re Johns-Manville Corp.*, 801 F.2d 60, 61 n.2 (2d Cir. 1986) (without statutory authorization to do so, the SEC "does not have standing to appeal"); *see also Sheftelman v. Standard Metals Corp.*,

839 F.2d 1383, 1386 (10th Cir. 1987) (contrasting the SEC's lack of authority to initiate an appeal with the authority of "a party with standing to do so").

It is no answer that the SEC has (implied) authority to settle cases via consent decree. The power to settle a case via consent decree is the power to seek, as a compromise, something the Commission "might have won in litigation." *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 235 (1975). But the Commission could never win a gag provision in litigation, because (again) Congress has not authorized it. Analogizing the consent decree to a contract, as the Commission did below, only hurts its case. When the Commission agrees to a contractual provision that it "lacked actual authority" to make, even in a settlement, that provision is void, *Dresser Indus., Inc. v. United States*, 596 F.2d 1231, 1237 (5th Cir. 1979), as is the gag provision here. The Commission had no power to seek the gag and no power to agree to it. Under any theory, that provision is "void." *Cf. Grace v. Bank of Leumi Tr. Co.*, 443 F.3d 180, 191–92 (2d Cir. 2006) (consent judgment is void where majority shareholder, as a matter of law, lacked authority to represent settling party).

2. The Gag Provision Exceeded The District Court's Remedial Jurisdiction

The gag provision is void for a second reason: the district court did not have jurisdiction to impose it.

As a court of "limited jurisdiction," the district court has "subject matter jurisdiction only where Congress has conferred" it. *United States v. Balde*, 943 F.3d

73, 88 (2d Cir. 2019). And in no event may the court "disregard" the jurisdictional limits that Congress has "imposed." *Platinum-Montaur Life Scis., LLC v. Navidea Biopharm., Inc.*, 943 F.3d 613, 616 (2d Cir. 2019) (quoting *Durant, Nichols, Houston, Hodgson & Cortese-Costa P.C. v. Dupont*, 565 F.3d 56, 62 (2d Cir. 2009)).

Congress "restrict[s] the subject-matter jurisdiction of federal district courts based on a wide variety of factors." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515 n.11 (2006). Here, Congress used the available remedy as such a jurisdiction-limiting factor. For example, Congress provided, in straightforward jurisdictional terms, that the Commission "may bring an action in a United States district court to seek, *and the court shall have jurisdiction to impose* . . . a civil penalty to be paid by the person who committed [a] violation." 15 U.S.C. § 78u(d)(3)(A) (emphasis added). As relevant here, that is the extent of the district court's jurisdiction—to impose a monetary penalty in the circumstances described. The court had no "jurisdiction to impose" a gag provision, thereby turning the monetary penalty that Congress had authorized the court to impose into a novel, speech-suppressing condition that Congress could never even have imagined. Such a judgment, issued with "no command and no express [statutory] authority" to support it, is "void." *Klapprott v. United States*, 335 U.S. 601, 609–10 (1949); *see also*, *e.g.*, *SEC v. Bolla*, 550 F. Supp. 2d 54, 63 (D.D.C. 2008) (granting Rule 60(b)(4) motion because Congress did "not

authorize the SEC to seek, or grant this Court jurisdiction to impose," a particular remedy).

3. The Gag Provision Is A Nullity Because It Imposes An Unconstitutional Condition On Speech

This Court should relieve Romeril from the gag provision for yet another reason: it violates the First Amendment.

In *Crosby v. Bradstreet Co.*, this Court held that, when a term in a consent decree is "in violation of the First Amendment to the Constitution, . . . [t]he order [is] void, and under Rule 60(b)(4) of the Federal Rules of Civil Procedure, the parties must be granted relief therefrom." 312 F.2d 483, 485 (2d Cir. 1963). *Crosby* resolves this case, because the gag provision violates the First Amendment in a number of ways.

As explained by Romeril and others, the gag provision is an unlawful content-based restriction on speech (*see* Appellant Br. 28–37; Br. for *Amici Curiae* Prof. Garfield et al. 7–8)—a restriction that operates as an invalid prior restraint (*see* Appellant Br. 23–28; Br. for *Amici Curiae* Prof. Garfield et al. 4–7). That is true, even *if* Romeril were theoretically "'free' to ignore" the Commission's demand that he "cooperate" with the agency's effort to impose the gag, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68 (1963), as the SEC repeatedly claims, SEC Mem. Opp. 9 ("he did not have to sign the consent"). The Constitution cuts "through forms to the substance" and bars any government "coercion, persuasion, and intimidation" that is

designed to "suppress[]" speech "deemed 'objectionable.'" *Id.* at 67; *see id.* at 66 (finding First Amendment violation even where government "simply exhorts [citizens] and advises them of their legal rights").

The gag provision is also, as detailed here, an unconstitutional condition, imposed in violation of the First Amendment. *See also* Appellant Br. 39–41; Br. for *Amici Curiae* Prof. Garfield et al. 14–16. For that reason alone, the gag provision is a "nulli[t]y." *Crosby*, 312 F.2d at 485.

The SEC cannot seriously dispute that the gag provision, if imposed as a direct regulation, would violate the First Amendment. Imagine an SEC version of the Sedition Act (1 Stat. 596)—a Securities Sedition Rule that penalized making "any public statement" that tended to "creat[e] the impression" that the Securities and Exchange Commission had abused its prosecutorial powers by filing charges "without factual basis." J.A. 70. This would not survive any conceivable level of judicial review. But what the Commission advocates in this case is not very different—a radically expansive view of its powers, under which it can disregard the First Amendment and compel citizens, as a condition of obtaining the "benefit[]" of certain investigatory "concessions," SEC Mem. Opp. 11, to give up their right to criticize Commission officials for life on an *ex ante* basis. This argument, however, cannot be reconciled with the Supreme Court's longstanding admonition that the government may not manipulate outcomes to "produce a result which [it] could not

command directly." *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (alteration in original) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

The unconstitutional conditions doctrine holds that "[g]overnmental imposition of . . . a choice" between foregoing a benefit and relinquishing a constitutional right can violate the First Amendment just as clearly, and just as perniciously, as a direct prohibition. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). Even where a citizen "has no 'right' to a valuable government benefit," the government cannot selectively withhold that benefit in a way "that infringes [a citizen's] constitutionally protected interests—especially, his interest in freedom of speech." *Perry*, 408 U.S. at 597.

Thus, for example, it would be unconstitutional for the government to condition the renewal of a public employee's contract on his agreement to refrain from criticizing his employer's policies, *see Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283 (1977); *Perry*, 408 U.S. at 597–98, or expressing hostility to certain political figures, *see Rankin v. McPherson*, 483 U.S. 378, 381–84, 392 (1987), even though he could avoid those conditions by simply choosing not to seek to renew his employment. Likewise, it would be unconstitutional to condition funding for certain legal services on an agreement to refrain from raising specific legal arguments, even though, again, the lawyer could avoid the restriction by just foregoing the funding. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 546–49

(2001). The bottom line is simple: the government cannot create conditions that are "aimed at the suppression of ideas thought inimical to the Government's own interest." *Id.* at 549 (citing *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 548 (1983)).

Yet that is precisely what the SEC has done here. Its brief below is clear: "If Romeril wanted to deny the Commission's allegations against him"—that is, if he wanted to accuse the Commission of filing charges without a basis in reality—"he did not have to accept the benefits that accrue to defendants from compromise—defendants like Romeril . . . often seek and receive concessions concerning the violations to be alleged in the complaint . . . and the collateral, administrative consequences of the consent decree." SEC Mem. Opp. 11. That is a confession—a textbook example of trading "benefits" in exchange for an agreement to refrain from engaging in government-critical speech.

Perhaps recognizing its precarious constitutional position, the Commission told the district court that the unconstitutional conditions doctrine does not apply "in the settlement context." SEC Mem. Opp. 17. That is an astounding claim for the government to make. And it is as wrong as it is dangerous. Simply put, the government does not have a free hand to coerce whatever promises it wants just because the parties happen to be in litigation. To settle a matter, the government can seek and demand concessions that are necessary to effectuate the settlement; there can't

be a settlement with a jury trial, for example—waiver of that right is "inevitable" in any compromise. *Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973).

But if the government goes further—if it tries to obtain concessions that it could not obtain at trial, or that threaten constitutional rights, then it crosses a line. A line this Court has enforced. In *Doe v. Phillips*, for example, a prosecutor in a misdemeanor case offered the defendant a deal: if she swore on a bible that she did not commit the acts she was accused of, he would drop the case. 81 F.3d 1204, 1212 (2d Cir. 1996). If not, he would take her "to trial." *Id.* This Court held that "no reasonable official could believe for one moment" that offering a defendant such a deal could be consistent with the First Amendment. *Id.*

So too here. The agency swapped one First Amendment right (the free exercise of religion) for another (the freedom of speech); the deal was otherwise the same. If Romeril did not want to "waive [his] constitutional right[]" to speak, then "he did not have to sign the consent—he could have proceeded with the litigation." SEC Mem. Opp. 9. As in *Phillips*, such an offer—surrender a First Amendment right or go "to trial," 81 F.3d at 1212—is unconstitutional. *See*, *e.g.*, *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 219 (4th Cir. 2019) (invaliding settlement term, under which citizens agreed "not to speak to the media" about their allegations of police misconduct).

B. The District Court Abused Its Discretion In Denying Romeril's Rule 60(b)(4) Motion

The district court offered two conclusory bases for denying Romeril's Rule 60(b)(4) motion. Each was legally erroneous and irrelevant.

1. Romeril's Motion Is Timely

First, the district court held that Romeril's "motion was not brought within a reasonable time." J.A. 90. But that is irrelevant, because the Commission did "not . . . oppose Romeril's motion on [that] ground," *id.*, so any "objection to the untimeliness of [his] motion was forfeited," *United States v. Robinson*, 430 F.3d 537, 542 (2d Cir. 2005). The district court is also plainly wrong. "[T]here is no time limit on an attack on a judgment as void." 11 Wright & Miller, *Federal Practice & Procedure* § 2862 (3d ed. updated Aug. 2019); *accord*, *e.g.*, *McLearn v. Cowen & Co.*, 660 F.2d 845, 848 (2d Cir. 1981). Indeed, this Court has vacated a consent decree that was 16 years *older* than Romeril's. *See Crosby*, 312 F.2d at 485.

2. Romeril Is Entitled To Relief Under Rule 60(b)(4)

Second, the district court held that even if its judgment *did* violate the First Amendment (it does, *see supra* pp. 14–18), that error would not render the offending provision "void" for purposes of Rule 60(b)(4). J.A. 92. That is because, according to the district court, a party invoking the rule "must identify 'a type of jurisdictional error,'" and a First Amendment violation supposedly is not such an error. J.A. 93

(quoting *Espinosa*, 559 U.S. at 171). Again, the district court is wrong, and in any case, its error does not help the SEC.

It does not help the SEC because the judgment below is infected by other defects—unexamined by the district court—that plainly are jurisdictional. As detailed above, the SEC lacked standing to seek (*see supra* pp. 7–12), and the district court lacked "jurisdiction to impose," 15 U.S.C. § 78u(d)(3)(A) (*see supra* pp. 12–14), the gag provision.

Those jurisdictional defects independently require relief under Rule 60(b)(4). *See*, *e.g.*, *Klapprott*, 335 U.S. at 610–11 (order is "void" under Rule 60(b)(4) where district court issued a judgment based on a statute that contains "no command and no express authority" for such judgments); *Brumfield v. La. State Bd. of Educ.*, 806 F.3d 289, 298 (5th Cir. 2015) (order is "void" where court "exceeded" its remedial "jurisdiction"); *Bolla*, 550 F. Supp. 2d at 63 (order is "void" where court did not, under securities laws, have "jurisdiction to impose" a certain remedy); *see also supra* pp. 13–14. And because a judgment "is either void or it is not," *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 138 (2d Cir. 2011) (quoting *Cent. Vt. Pub. Serv. Corp. v. Herbert*, 341 F.3d 186, 189 (2d Cir. 2003)), this Court may raise such jurisdictional defects under Rule 60(b)(4) "at any time, [and] sua sponte," if need be, *McLearn*, 660 F.2d at 849; *see also Int'l Controls Corp. v. Vesco*, 556 F.2d 665, 668 n.2 (2d Cir. 1977).

In any event, the district court misunderstands the scope of the rule: when a court issues an order that violates the First Amendment, the offending provision is "void" under the rule. That is the holding of *Crosby*. There, this Court held in the clearest possible terms that, because a term in a consent decree "was in violation of the First Amendment to the Constitution, . . . [t]he order was void, and under Rule 60(b)(4) of the Federal Rules of Civil Procedure, the parties must be granted relief therefrom." 312 F.2d at 485.

The district court claims that *Crosby* is "inapplicable," because *that* case turned on a "jurisdictional issue," whereas Romeril's case "does not." J.A. 93. Respectfully, that is wrong. *Crosby* held that the issuance of a First-Amendment-transgressing decree *is* a jurisdictional issue for purposes of Rule 60(b)(4). *Northridge Church v. Charter Twp. of Plymouth*, 647 F.3d 606, 612 (6th Cir. 2011) (*Crosby* rested on a "*jurisdictional* issue"). The court is "without power to make such an order," *Crosby*, 312 F.2d at 485; it lacks jurisdiction, *see Black's Law Dictionary* (11th ed. 2019) (defining "jurisdiction" as a "court's power to . . . issue a decree"). Accordingly, if the *Crosby* court lacked jurisdiction for purposes of Rule 60(b)(4) to issue a First-Amendment-transgressing decree—and it did, as this Court held—then so, too, did the *Romeril* court. Neither court should have entered the decree "in the first place." *Crosby*, 312 F.2d at 485. Rule 60(b)(4) requires "relief" from both. *Id.*

In treating a judicial order, issued in violation of the First Amendment, as a "nulli[t]y," *Crosby*, 312 F.2d at 485, this Court broke no new ground. Like the Commission today, the drafters of the Sedition Act of 1798 also thought it "important to avoid creating, or permitting to be created," 17 C.F.R. § 202.5(e), an "unfair impression" of the government, SEC Mem. Opp. 20. President Jefferson, however, recognized that Act for what is was: an unconstitutional "nullity." *Sullivan*, 376 U.S. at 276 (quoting Letter to Mrs. Adams (July 22, 1804), *in* 4 *Jefferson's Works* 555, 556 (Washington ed.)). Which is why he (rightly) "discharged every person under punishment . . . under the sedition law." *Id.* (quoting Letter to Mrs. Adams, *supra*, at 556). This Court did not err in following Jefferson's lead.

The Supreme Court has not said otherwise. In *Espinosa*, the Court expressly left open "the precise circumstances" in which a judgment would be "void." 559 U.S. at 271. And it "express[ed] no view" on whether a violation of certain *statutory* "conditions"—conditions that provided that certain "debts are not dischargeable under any circumstances"—could render a judgment "void." *Id.* at 273 n.10 (emphases omitted). It is inconceivable that the Court, without comment, would have overruled cases holding that *constitutional* errors render a judgment void, while having "no view" on mere *statutory* transgressions. *Id.*

Crosby is still the law in this circuit.

II. ALTERNATIVELY, RULE 60(B)(5) REQUIRES RELIEF BECAUSE CONTINUED ENFORCEMENT OF THE GAG PROVISION WOULD BE DETRIMENTAL TO THE PUBLIC INTEREST

Even if this Court were to overlook the fundamental jurisdictional and constitutional errors riddled throughout the judgment below, the gag provision still cannot stand. When "a significant change either in factual conditions or in law" renders continued enforcement of a consent decree "detrimental to the public interest," a court "abuses its discretion when it refuses to modify" the decree "in light of such changes." *Horne v. Flores*, 557 U.S. 433, 447 (2009) (citations and internal quotation marks omitted); *accord Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 384 (1992). Given the exceptional public importance of these issues, this Court should treat Romeril's Rule 60(b)(4) motion as a "motion under all relevant subdivisions of Rule 60(b)," *Int'l Controls Corp. v. Vesco*, 556 F.2d 665, 668 n.2 (2d Cir. 1977), and it should vacate the gag provision under subdivision (b)(5).

The SEC today is far more powerful than the SEC of 2003. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 gave the SEC enormous power over large swaths of the economy, greatly expanding the Commission's rule-making and adjudicatory authority. Pub. L. No. 111-203, 124 Stat. 1376. This has made it even more "essential" that the American people hear from someone who has a firsthand, "informed" experience interacting with the Commission's enforcers. *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 572 (1968).

The public interest demands—even more than in 2003—that Romeril be allowed to add his voice to the debate.

"[T]ime and experience" have further undercut the case for prospective enforcement of the Commission's gag orders. *United States v. Eastman Kodak Co.*, 63 F.3d 95, 102 (2d Cir. 1995) (citing *King-Seeley Thermos Co. v. Aladdin Indus., Inc.*, 418 F.2d 31, 35 (2d Cir. 1969)). With its expanded authority to bring defendants before its in-house judges (where the Commission wins over 90% of the time, *see* Jean Eaglesham, *SEC Wins With In-House Judges*, Wall St. J. (May 6, 2015), https://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803), the agency has become even more effective at coercing defendants into settlements (and gag orders). *See* Brian Mahoney, *SEC Could Bring More Insider Trading Cases In-House*, Law360 (June 11, 2014), https://www.law360.com/articles/547183/sec-could-bring-more-insider-trading-cases-in-house (quoting then-Director of Enforcement: "I will tell you that there have been a number of cases in recent months where we have threatened administrative proceedings, it was something we told the other side we were going to do and they settled."); *see also* Jean Eaglesham, *Fairness of SEC Judges Is in Spotlight*, Wall St. J. (Nov. 22, 2015), https://www.wsj.com/articles/fairness-of-sec-judges-is-in-spotlight-1448236970 (reporting administrative law judge's warning to "defendants during settlement discussions" that "they should be aware he had never ruled against the agency's enforcement division").

The public has not been served by this increase in agency power. Since Romeril was gagged, it has become evident that the Commission has coerced into settlements—including gags—innocent defendants. *Compare* SEC Press Release 16-270, Company Settles Charges in Whistleblower Retaliation Case (Dec. 20, 2016), https://www.sec.gov/news/pressrelease/2016-270.html (announcing settlement that forever gags defendant from denying retaliation against "internal whistleblower"), *with Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 772 (2018) (unanimously holding that such retaliation, even if true, is not actually illegal).

Potentially worse still, the Commission has coerced numerous defendants into consenting to sanctions—and gags—for conduct that, we now know, "did not, in fact, occur." 17 C.F.R. § 202.5(e). In *State Street*, for example, the defendant firm agreed to a no-admit, no-deny settlement, which almost certainly gagged it (and all of its employees) from creating the impression that certain employees did not send "misleading" communications. 2010 WL 421154, at *10. But because one of those employees took his case to trial, the First Circuit discovered that the communications, all along, were "not misleading." *Flannery*, 810 F.3d at 12. Similar results can be seen in jury trials from coast to coast, where the Commission coerces some defendants into settlements—and gags—but juries later rule in favor of the alleged co-conspirators on identical counts. *Compare*, *e.g.*, Consent of Robert J. Steffes

¶ 11, *SEC v. Steffes*, No. 1:10-cv-6266 (N.D. Ill. Sept. 30, 2010), ECF No. 6-2 (gagging Richard Steffes from ever publicly questioning whether he did in fact trade on non-public information with members of his family), *with* Judgment, *SEC v. Steffes*, No. 1:10-cv-6266 (N.D. Ill. Jan. 27, 2014), ECF No. 295 (returning jury verdict in favor of all members of Richard's family); *see also SEC v. Life Partners Holdings, Inc.*, No. 6:12-cv-2 (W.D. Tex.), ECF Nos. 180, 201, 258 (similar disparity); *SEC v. Yang*, No. 1:12-cv-2473 (N.D. Ill.), ECF Nos. 244, 252, 260 (same). The American people have a right to know how and why the Commission is coercing defendants into settlements for conduct that judges and juries do not think occurred.

This is not just about individual defendants. The Commission's practice of silencing its critics has allowed it to present its enforcement results for congressional oversight without any opportunity for the people's elected representatives to learn all the facts. As the Commission's own lawyers admit, an innocent defendant who was coerced into settling with the Commission could not petition Congress regarding the one fact that matters—that he "den[ies] the allegations." SEC Mem. Opp. 23. This has not only shielded the Commission's officials from scrutiny while they were at the Commission; it has shielded them from scrutiny when they have sought even higher office throughout the government.

The gag policy is bad for the agency as well. It invites agency officials to review the public statements of former defendants. *See*, *e.g.*, *Excerpts From Exchange of Letters*, N.Y. Times (May 2, 2003), https://www.nytimes.com/2003/05/02/business/excerpts-from-exchange-of-letters.html (quoting then-Chairman reprimanding defendant for publicly stating that the alleged conduct "was not a matter of concern to retail investors," and "caution[ing]" him that the gag provision "is enforceable by the court," and that the Commission takes inappropriate public statements "as seriously as a failure to comply with any other term of the settlement"); *see also Settlement of Claims by Financial Regulatory Agencies: Hearing Before H.R. Fin. Servs. Comm.*, 112th Cong., 2012 WL 1743135 (May 17, 2012) (statement of Robert Khuzami, Director, Div. of Enforcement, SEC) ("Khuzami Statement") (describing SEC practice of demanding "retraction or correction" of defendants' public statements). And it distracts those officials from far more important (and legitimate) business. Take the Chairman's letter, quoted above. Days earlier, the SEC had received a "detailed complaint" about Bernie Madoff's Ponzi scheme, and the agency "would have uncovered" that scheme had it taken a few "basic steps." Office of Investigations, SEC, *Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme* 28–29 (Aug. 31, 2009). But officials did not have "time[]" for that. *Id.* at 30.

The SEC can surely do better. Other agencies settle cases all the time without imposing gag orders. They even permit defendants to deny allegations in the settlements themselves—and the sky has not fallen. Khuzami Statement, *supra*, 2012 WL 1743135; *see*, *e.g.*, Consent Order 4, *United States v. Countrywide Fin. Corp.*, No. 2:11-cv-10540 (C.D. Cal. Dec. 28, 2011), ECF No. 4 (defendants "deny all the allegations and claims").

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the district court, and grant Romeril's motion for Relief under Rule 60(b).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of April, 2020, a true and correct copy of the foregoing Brief for *Amicus Curiae* was served on all counsel of record in this appeal via CM/ECF pursuant to Local Rule 25.1(h)(1) & (2).

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