No. 19-4197

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Securities and Exchange Commission,
Plaintiff-Appellee,

v.

Barry D. Romeril,
Defendant-Appellant,

Paul Allaire, G. Richard Thoman, Philip D. Fishbach,
Daniel S. Marchibroda, and Gregory B. Tayler,
Defendants.

On Appeal from the United States District Court
for the Southern District of New York
No. 03-cv-4087-DLC
Hon. Denise L. Cote

APPELLANT'S REPLY BRIEF

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ARGUMENT

The law of this circuit provides that a party subject to a judicially imposed unconstitutional prior restraint on his speech may—even decades later—vacate the gag because courts are "without power to make such an order; that the parties may have agreed to it is immaterial." *Crosby v. Bradstreet Co.*, 312 F.2d 483, 485 (2d Cir. 1963), *cert. denied*, 373 U.S. 911 (1963). *Crosby*'s pellucid and prescient holding remains good law today.

The district court erred when it declined to adhere to *Crosby*, misapplied the law applicable to Rule 60(b)(4) "voidness" challenges, and, as SEC admits, inaccurately stated that Romeril had made no due process claims and so failed to rule on them.

I. THE SEC MISCONSTRUES *CROSBY*

A. *Crosby* Is Not Limited to the Defamation Context, Specifically Holds that a Defendant's Agreement to Unconstitutional Orders Is Immaterial, Prohibits Judicially Imposed Prior Restraints, and Provides for the Precise Remedy Sought Here

SEC makes a series of arguments that the clear language of *Crosby* refutes. First, SEC repeatedly makes a puzzling argument that *Crosby* is limited to defamatory speech. SEC Br. at 9, 12–17. But the *Crosby* court was explicit that its holding was *not* limited to defamation. Noting that the stipulation before it was "extremely broad" because the terms "restrained the defendant from publishing any

report, past, present or future, about certain named persons," the court applied its holding to *any* statements:

> It is true that the order arose out of a libel action … even assuming, *contrary to authority*… that it is proper for a federal court to enjoin a libel, the order here in question was not directed solely to defamatory reports, comments or statements, but to "any statements."

Crosby, 312 F.2d at 485 (citation omitted, emphasis added). The *Crosby* court's acknowledgement that future defamation cannot be enjoined does not limit its holding to defamation.

Crosby twice disavowed any such limitation. First, it held that ordering "a prior restraint … against the publication of *facts* which the community has a right to know and which Dun & Bradstreet had and has the right to publish" is outside of the court's power. *Id.* (emphasis added). Facts are by definition not defamation. *Cain v. Atelier Esthetique Inst. of Esthenics, Inc.*, 733 F. App'x 8, 11 (2d Cir. 2018), *cert. & reh'g denied*, 139 S. Ct. 1199, 1598 (2019) ("'[T]ruth provides a complete defense to defamation claims.'") (citation omitted). *Crosby* clarified that courts lack power to prohibit publicizing information "without regard to the truth, falsity, or defamatory character of that information." *Crosby*, 312 F.2d at 485. SEC's reading of *Crosby* as limited to defamation is insupportable. SEC Br. 12–20.

Second, SEC argues that Romeril's consent to the gag allows a court to uphold the provision. *Crosby* specifically refuted that specious claim. "Crosby contends that the order was entered on consent and that Bradstreet is bound by contract to

refrain from publishing matter about him. *We disagree.* … The court was without power to make such an order, that the parties may have agreed to it is *immaterial*." *Crosby*, 312 F.2d at 485. Jurisdictional errors—like subject matter and personal jurisdiction—render a court powerless to enter an order against a party. *See V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 224–225 (10th Cir. 1979) ("It may also arise if the court's action involved a plain usurpation of power.").

Romeril's alleged consent is immaterial because the prior restraint is unconstitutional. Just as parties cannot agree to racially restrictive covenants and expect a court to uphold them, so too judicial prior restraints—the most disfavored category of First Amendment violations—are impermissible. Consent cannot cure restraints of their unlawfulness. *Crosby* explicitly noted that the injunction barred publication of *anything* about the defendant, including matters which Bradstreet had a right to publish and the "community has a right to know." *Crosby*, 312 F.2d at 485. *Crosby* recognizes that judicial prior restraints infringe the public's First Amendment rights to receive information. Even if Romeril could consent to silence, he cannot waive the public's right to know the truth about his prosecution. *See* Garfield Amicus Br., at 16–20, 27–29; CEI Amicus Br., at 23–24, 26; AFPF Amicus Br., at 2–6, 11–15.

Third, SEC argues that the consent order is not a prior restraint. SEC Br. 37. Again, *Crosby* disagrees. "Such an injunction, enforceable through the contempt

power, constitutes a prior restraint by the United States … in violation of the First Amendment to the Constitution." *Crosby*, 312 F.2d at 485.

Fourth, SEC argues that court-ordered consent decrees are an exception where surrendering constitutional rights may not be line-edited out of a settlement. Yet *Crosby* struck the speech-suppressing part of the "stipulation" that also included an agreement "to pay $300." *Id.* at 484. Just as Romeril asks this Court to only set aside the gag, *Crosby* too only severed the unconstitutional restraint. Further, *Crosby*, citing *Shelley v. Kraemer*, 334 U.S. 1 (1948), specifically recognizes "that the First Amendment limits court action" and "parties must be granted relief" from such unconstitutional orders. *Id.* at 485. In *Shelley*, the court "line-edited" the offending racially restrictive agreements 37 years, and 14 years, respectively, after they were entered. *Shelley*'s holding is as good today as it was in 1948. Constitutional rights do not have statutes of limitation.

SEC's argument that *Crosby* does not apply to SEC's right to enforce the gag by reopening Romeril's case because *Crosby* involved an *injunction* enforced through the *contempt* power is a distinction without a difference. The mechanism used to involve a court in a prior restraint does not matter. Nor does a prohibited injunctive provision metamorphize into a lawful one because it assumes another form. Romeril is not spared the chilling effects of threatened prosecution—all that is needed to establish a First Amendment violation—because a district court *might*

not grant SEC's motion to reopen. *See PHE, Inc. v. U.S. Dep't of Justice*, 743 F. Supp. 15, 26 (D.D.C. 1990) (threatening prosecution for constitutionally protected activity is impermissible); *see, e.g., Prendergast v. Snyder*, 413 P.2d 847, 848–49 (Cal. 1966). Court enforcement of unconstitutional acts, contracts, or agreements is even more repugnant when the government is the enforcing party.

Fifth, SEC argues that Rule 60(b)(4) can only be a remedy in two situations. SEC Br. 12, 17. Romeril's challenge raises both so this is not a cogent point. Even so, SEC does not cite a single case that rules, as opposed to surmising in *dicta*, that Rule 60(b)(4) applies in only two situations. As the Third Circuit recognizes, "[a] judgment may indeed be void, and therefore subject to relief under 60(b)(4), if the court that rendered it lacked jurisdiction of the subject matter or the parties or entered 'a decree which is not within the powers granted to it by the law.'" *Marshall v. Bd. of Ed., Bergenfield, N.J.*, 575 F.2d 417, 422 (3d Cir. 1978) (citation omitted). Likewise, here, the First Amendment deprives the district court of the power of prior restraint.

SEC also incorrectly alleged that Romeril does not raise valid due process claims. But Romeril's motion falls squarely in Rule 60(b)(4)'s ambit because he made such claims. Due process is not just notice and an opportunity to be heard on the imposition of a gag. To attach a penalty for doing what the law plainly allows Romeril to do—speak truthfully now and in perpetuity—is a due process violation

of the most basic sort. *North Carolina v. Pearce*, 395 U.S. 711, 723–26 (1969), *overruled on other grounds by*, *Alabama v. Smith*, 400 U.S. 794, 795 (1989).

SEC also recently conceded that Rule 60(b)(4) is the correct vehicle to raise Romeril's challenge—"the proper vehicle is review of the consent judgment[] before the court[] that entered it"—citing this case, *SEC v. Allaire*![1] SEC cannot assert in one court that a Rule 60(b)(4) challenge to an unconstitutional gag order is proper, and then turn around months later and assert to another court that no such remedy is available. The agency is speaking out of both sides of its mouth, while it seeks to deprive Romeril of any remedy for violating his First Amendment rights.

Romeril is prohibited by the collateral bar doctrine from challenging the gag by disobeying the order and then raising constitutional defect as a defense. *Walker v. City of Birmingham*, 388 U.S. 307 (1967).[2] "Instead, he must move to vacate or modify the order, or seek relief in this court." *United States v. Cutler*, 58 F.3d 825, 832 (2d Cir. 1995). Because of the collateral bar rule, prior restraints are deemed the worst form of censorship.

If SEC had its way, there would be no vehicle to challenge an unconstitutional gag. That is not the law. "It is a settled and invariable principle, that every right,

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[1] *See* Memo. of Points and Auths. in Supp. of Mot. to Dismiss at 18, *Cato Institute v. SEC*, No. 1:19cv47 (D.D.C. May 10, 2019), ECF No. 12.

[2] Where a prior restraint is part of a court order, a person who speaks in violation of the order without first challenging it in court may not then challenge it later, regardless of the constitutionality of his speech.

when withheld, must have a remedy, and every injury its proper redress." *Marbury v. Madison*, 5 U.S. 137, 147 (1803) (citation omitted).

In short, *Crosby* in brisk, crystalline, and unambiguous language defeats each of SEC's arguments. SEC's attempts to cabin *Crosby* with specious and non-material distinctions do nothing to diminish the force and relevance of its holding.

Finally, *Crosby* involved an agreement between private parties ordinarily not bound by the First Amendment, but for the court's contempt power. Here, where the *government* insists upon this court-enforced prior restraint on speech, it plainly violates the First Amendment. *Crosby*, which has never been reversed or even qualified, remains the law of this circuit—and the district court was bound to follow it. *See Ins. Grp. Comm. v. Denver & R.G.W.R, Co.*, 329 U.S. 607, 612 (1947).

B. *Espinosa* Does Not Diminish *Crosby*'s Precedential Force

SEC argues that *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270–71 (2010) holds that a judgment is void under Rule 60(b)(4) for only two possible reasons—jurisdictional errors or due process violations—but it does nothing of the sort. *Espinosa* noted in *dicta* that relief under Rule 60(b)(4) is generally reserved for exceptional cases where "the court that rendered judgment lacked even an 'arguable basis' for jurisdiction." *Id.* at 271. But it then determined that the "case present[ed] no occasion to engage in such an 'arguable basis' inquiry or to define the precise circumstances in which a jurisdictional error will render a

judgment void." *Id.* Besides which, *Espinosa*'s formulation encompasses *Crosby*'s holding that the court had no "power" to enter the order—a jurisdictional error—and thus *supports* Romeril's challenge here. App. Br. at 20–21.[3]

The dispute here is over the meaning of the word "jurisdiction." Black's Law Dictionary defines jurisdiction as "[a] court's power to decide a case or issue a decree." *Jurisdiction*, *Black's Law Dictionary* (11th ed. 2019). SEC asserts that Romeril's agreement to SEC's jurisdiction to prosecute him under the securities laws gives them the power to gag him. That logic does not withstand even cursory scrutiny. Under this logic, SEC could have demanded, and the court could have entered, an order consenting to future warrantless searches of his home. Courts can and should refuse to be implicated in such unconstitutional actions. *See Bridges v. State of Cal.*, 314 U.S. 252, 259–60 (1941) ("[i]n deciding whether or not the sweeping constitutional mandate against any law 'abridging the freedom of speech or of the press' forbids it, we are necessarily measuring a power of all American courts").

[3] *Klapprott v. United States*, 335 U.S. 601, 610–11 (1949) (order exceeding statutory authority conferred on district court is "void"); *Brumfield v. La. State Bd. of Educ.*, 806 F.3d 289, 298 (5th Cir. 2015) (order void where court exceeded its remedial jurisdiction).

Further, the question of when and how often Rule 60(b)(4) may be invoked was not before the *Espinosa* court. "[C]ases cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994).

Espinosa does not overrule *Crosby*. *Crosby* held that a prior restraint was "void."[4] That void orders are legal nullities, which a court is without power to issue, warrants relief under Rule 60(b)(4) and is entirely consistent with *Espinosa*.

C. Courts Lack Power to Enter Unconstitutional Orders

The Ninth Circuit explicated this point in *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1399 (9th Cir. 1991), where it invalidated the portion of a settlement agreement in which a party waived his constitutional right to run for office:

> Before the government can require a citizen to surrender a constitutional right as part of a settlement or other contract, it must have a legitimate reason for including the waiver in the particular agreement … [There must be] a close nexus—a tight fit—between the specific interest the government seeks to advance in the dispute underlying the litigation … and the specific right waived. … Had it not been for the District's insistence on the inclusion of the waiver provision in the settlement agreement, [the party's] right to run for elective office could not have been affected by a resolution of the litigation.

Id. Infringing the constitutional right to seek public office was improper because it "extracted a waiver of [a constitutional] right … as a condition to settling the

[4] SEC also asserts that Rule 60 does not permit review of an order that is incorrect or erroneous. SEC Br. 15–17. This is a pointless distraction as *Crosby* holds that the order is "void."

lawsuit." *Id.*; *id.* at 1400 (setting aside the constitutionally offensive part of the order).[5] *People v. Smith*, 502 Mich. 624 (2018), (invalidating the portion of a plea bargain restricting seeking public office; representation was a legislative right of the public and could not be negotiated away.). As noted above, *Crosby* and the eloquently argued *amici* also recognize the public's interest in hearing the speech, which cannot be waived even on consent.

SEC's brief offers no case for a "tight fit" or necessity of the gag to the effectuation of settlement. Americans routinely settle or plea bargain cases. No gag is ever even proposed, much less imposed.

D. The Gag Order Is Unconstitutionally Vague

The gag order which Romeril seeks to set aside provides in vague, impressionistic terms that he will not "take any action or make or permit to be made any public statement denying, directly or indirectly, any allegation in the complaint or creating the impression that the complaint is without factual basis." JA 70 ¶ 11.

[5] These cases and others also dispense with the argument repeated throughout SEC's brief that Romeril must accept the entire settlement and may not seek relief from the court to sever and invalidate his gag provision. This is not so. *See, e.g.*, *Barrows v. Jackson*, 346 U.S. 249, 258 (1953) (denying court enforcement of restrictive covenant); *Overbey v. Mayor of Balt.*, 930 F.3d 215, 219 (4th Cir. 2019) (invalidating portion of settlement "not to speak to the media" about police misconduct); *Anderson v. Dean*, 354 F. Supp. 639, 643–45 (N.D. Ga. 1973) (speech ban "unconstitutional and void").

SEC argues, without authority, that void-for-vagueness arguments apply only to statutes, not consent orders. If true, that argument is fatal—to SEC. The SEC consent repeats verbatim the imprecise and fluid text of its unlawful, sneaked-in regulation.

Furthermore, vagueness challenges *do* apply to judicial orders and other, non-statutory government action. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048 (1991); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976); *United States v. Salameh*, 992 F.2d 445, 447 (2d Cir. 1993).

While the doctrine of void-for-vagueness often arises in the criminal context, in 2018, the Supreme Court affirmed that this doctrine applies to civil matters too. As Justice Gorsuch noted:

> I cannot see how the Due Process Clause might often require any less than [fair notice] in the civil context … to ensure [due process] … whether under the banner of the criminal or civil law … [T]oday's civil laws regularly impose penalties far more severe than those found in many criminal statutes … includ[ing] confiscatory rather than compensatory fines … [and] remedies that strip persons of their professional licenses and livelihoods, … [that are] "sometimes more severely punitive than the parallel criminal sanctions *for the same conduct*."

Sessions v. Dimaya, 138 S. Ct. 1204, 1228–29 (2018) (Gorsuch, J., concurring in part) (emphasis in original). In Romeril's case, some $5.2 million in penalties, enduring reputational damage, a professional lifetime bar, and a lifetime gag were the steep price of settlement.

E. A Gag that Silences Someone in Perpetuity Cannot Be a Knowing and Voluntary Waiver and thus Violates Due Process

SEC's only response to this argument, besides its untrue assertion that this claim was not raised below,[6] is that the absence of a time limit on the gag was apparent from the text of the consent order. But the case law provides that unlimited prior restraints are presumptively impermissible. SEC cites no contrary authority that would allow this court to ignore or distinguish the Supreme Court cases that prohibit prior restraints that are unlimited in time. *See, e.g., Freedman v. Maryland*, 380 U.S. 51, 59 (1965); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316–17 (1980).

II. A RULE 60(b)(4) MOTION MAY BE BROUGHT AT ANY TIME

SEC argues that this challenge is untimely. But *Crosby* set aside a 30-year-old order. Other courts have set aside judgments long after they were entered, and the leading treatise notes that "[t]here is no time limit on a motion of that kind." 11 Wright & Miller, *Federal Practice and Procedure* § 2866 (3d ed. 2002 & Supp. 2019); *accord Grace v. Bank Leumi Trust Co. of N.Y.*, 443 F.3d 180, 190 (2d Cir. 2006) (noting that Rule 60(b)(4) motion "may be made at any time"). *Grace* binds the district court, and this panel, just as does *Crosby*.

[6] Romeril's brief specifically argued that the gag is unlimited in time, violating the First Amendment and his constitutional rights. *See* Dkt. No. 24 at 7-8.

While Rule 60(c)(1) requires that Rule 60(b)(4) motions "be made within a reasonable time," this Court has been "exceedingly lenient" regarding the timeliness of voidness challenges. *Beller & Keller v. Tyler*, 120 F.3d 21, 24 (2d Cir. 1997). So much so, that "it has been oft-stated that, for all intents and purposes, a motion to vacate a default judgment as void 'may be made at any time.'" *Id.* (citing *McLearn v. Cowen & Co.*, 660 F.2d 845, 848 (2d Cir. 1981) and *Crosby*, 312 F.2d at 485).[7]

Despite SEC's suggestion to the contrary, this lenient timeliness standard does not turn on whether the underlying judgment was a default. *See Grace*, 443 F.3d at 190 (2d Cir. 2006) (default judgment case relying on *Beller & Keller*, 120 F.3d at 24, relying on non-default judgment cases *McLearn*, 660 F.2d at 848 and *Crosby*, 312 F.2d at 485). The limits were not triggered because of *when* Rule 60(b)(4) motions were filed. The limits were triggered because previous Rule 60 motions were filed that failed to raise voidness arguments. *See State St. Bank & Tr. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 179 (2d Cir. 2004) (Defendants' Rule 60(b)(4) motion denied because prior Rule 60(b) motion failed to raise voidness); *see also Beller & Keller*, 120 F.3d at 24 (same). If the underlying judgment is void, as here, leniency applies. *See Crosby*, 312 F.2d at 485; *see also McLearn*, 660 F.2d at 848.

[7] The overwhelming majority of circuits has expressly taken the position that a Rule 60(b)(4) motion may be brought at any time. *See United States v. One Toshiba Color Television*, 213 F.3d 147, 157 (3d Cir. 2000); *Hertz Corp. v. Alamo Rent-A-Car, Inc.*, 16 F.3d 1126, 1130 (11th Cir. 1994); *Garcia Fin. Grp., Inc. v. Va. Accelerators Corp.*, 3 F. App'x 86, 88 (4th Cir. 2001).

Romeril's motion challenging a void order may be made at any time. The lower court's determination to the contrary is erroneous.

III. THIS COURT CAN AND SHOULD REACH ALL CLAIMS

SEC argues that "the only issue legitimately on appeal" is the correctness of the district court's ruling on timeliness and scope of Rule 60(b)(4) relief and says this court should not reach the constitutional claims in this appeal. SEC Br. 10. That contention ignores that *Crosby* is a constitutional decision which the district court failed to follow.

Denials of Rule 60(b)(4) motions are reviewed "*de novo* because … the 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); *accord Burda Media, Inc. v. Viertel*, 417 F.3d 292, 298 (2d Cir. 2005) ("[A] deferential standard of review is not appropriate because if the underlying judgment is void, it is a per se abuse of discretion for a district court to deny a movant's motion to vacate."). Where, as here, the claims require no factual development, an appellate court is well situated to adjudicate all claims, this Court should not hesitate to reach them.

A. Romeril Did Not Waive this Challenge—He Did Not Give up Anything SEC Had the Power to Win in the First Place

Settlement agreements are a "compromise[] in which the parties give up something they might have won in litigation and waive their rights to litigation." *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 235 (1975). But the

right SEC seeks to take from settling parties, the right to publicly criticize any aspect of SEC's many allegations, is not one they would have lost if SEC had been successful, nor is the right necessary to settlement finality. Thus, SEC unwittingly shows that the permanent no-public-denial clause is not a proper term of a settlement agreement. *Cf. Lowe v. SEC*, 472 U.S. 181 (1985) (holding that SEC lacked power to bar a serially-convicted investment adviser from publishing investment advice).

SEC argues that consent judgments, which embody compromises, will always condition the "benefit" of settlement on the relinquishment of rights, including the waiver of the right to a trial and an appeal. SEC Br. 32. That self-evident statement provides no justification for suppressing Romeril's speech. Agreements with governmental actors to settle ongoing or imminent legal disputes are constitutional only where the right surrendered was one necessary to effectuate the finality that is the practical object of settlement. *See Davies*, 930 F.2d at 1399. Rights to jury trial, appellate review, counterclaim, and cross-suit may be waived because they are inextricably intertwined with the dispute; cessation of legal process is essential to a negotiated settlement's goal of purchasing—or selling—peace. *See Town of Newton v. Rumery*, 480 U.S. 386, 399 (1987) (holding that a knowing and voluntary waiver of a right that might be raised in looming proceedings *arising out of the dispute* to be settled was valid). But a constitutional right surrendered as part of a settlement must have "a close nexus—a tight fit—between the specific interest the government

seeks to advance in the dispute … and the specific right waived." *See Davies*, 930 F.2d at 1399.

SEC's waiver cases are widely off mark. *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam) enforcing a former CIA agent's pre-employment confidentiality agreement to not reveal government secrets is of no relevance whatsoever. Romeril's views about the merits of the SEC's prosecution are *not* confidential or classified information that he could only acquire as a government employee. Voluntary pre-dispute arbitration agreements waiving jury trial are routinely enforced between private parties of equal bargaining power. *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S 643, 648–49 (1986). No court would ever conceivably force a party already in litigation with the government into arbitration and waiver of jury trial rights upon a government demand for such submission.[8]

[8] *See Leonard v. Clark*, 12 F.3d 885, 891 (9th Cir. 1993) (waiver was proposed by the settling party, not a condition imposed by the city); *United States v. Int'l Bhd. of Teamsters*, 931 F.2d 177, 187 (2d Cir. 1991) (agreement regarding union campaign literature was not a government condition forced on it); *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 673 F.3d 192 (3d Cir. 2012) (involved no government demand for surrender of First Amendment rights); *Malem Med., Ltd. v. Theos Med. Sys.*, 761 F. App'x 762 (9th Cir. 2019) (privately negotiated non-disparagement agreement between commercial parties); *In re George F. Nord Bldg. Corp.*, 129 F.2d 173 (7th Cir. 1942) (privately negotiated agreement); *Paragould Cablevision, Inc. v. Paragould*, 930 F.2d 1310 (8th Cir. 1991) (bargained-for commercial speech limitations by cable company were consideration, not unilateral non-negotiable conditions imposed by the government); *SEC v. Clifton*, 700 F.2d 744 (D.C. Cir. 1983) (wholly inapposite review of a consent decree for hardship which raised no constitutional questions).

This court should not accept the sly and disingenuous insinuation that the gag is negotiable. SEC admits it gags those who settle and affords them no opportunity to be heard on the condition.[9] Any purported consent is a fiction. Such systematic schemes that, through a promulgated agency policy, strong-arm defendants to surrender their First Amendment rights are prohibited. This point was fully briefed here and below; SEC offers no contrary authority in response.

B. SEC's Policy Arguments Do Not Withstand Reasoned Scrutiny

SEC argues that extracting gags promotes a strong public policy favoring settlements to conserve resources. But "the First Amendment does not permit" government "to sacrifice speech for efficiency." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). SEC's interests in efficiency are no more "compelling" than those of any government actor that would prefer to punish and silence suspected wrongdoers. SEC's policy is not even rationally related, let alone "narrowly tailored," to promoting efficiency. *But see Lake James Comty. Volunteer Fire Dep't, Inc. v. Burke Cty.*, 149 F.3d 277, 281 (4th Cir. 1998) (waiver was limited in time and narrowly tailored).

SEC argues that "*Crosby* also pre-dates precedent favoring settlements and consent decrees, which necessarily involve waivers of procedural rights." SEC Br. 34. But the First Amendment rights of free expression, publication, and petition at

[9] Dkt. No. 31, 3.

stake here are *substantive* rights which do not change with the fashions of litigation, nor is their waiver justifiable by law, now or ever. Invalidating this gag order will have no likely effect on settlements. If anything, defendants are likely to be more willing to settle if no surrender of constitutional rights is required.

SEC's contention that allowing people to speak about their settlement would "undermine the credibility of the courts that approve consent agreements" attempts to bring the court in league with a SEC policy that the courts had no part in crafting or extracting from defendants, and which has come under sharp criticism from judges sitting in this district. App't Br. 29. Moreover, "the law gives 'judges as persons, or courts as institutions … no greater immunity from criticism than other persons or institutions.'" *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 839 (1978) (citation omitted).

SEC's final defense is that allowing settling parties to truthfully speak will create confusion for investors and the market. SEC Br. 42–43. Current SEC policy insists upon viewpoint-favoring "no-deny" as to every allegation of their kitchen-sink complaints, which are *unproven* allegations. It is well known that government agencies rarely prevail on *all* charged allegations.[10] Yet, as it stands now, settling

[10] CEI Amicus Br. 4, 25–26, includes several deeply troubling examples of gagged defendants later found innocent of the charged conduct or whose conduct was not unlawful in the first place. AFPF's Amicus Br. 16–19, documents censorship, compelled pro-government speech, and weaponization of gags in manners repugnant to a free society, affirming the public interest in exposing and terminating this power.

defendants cannot deny charges brought against them. Thus, market information is asymmetrical and relies on SEC's untested allegations. Any market confusion is *entirely the creation of SEC*. Severing this gag will allow Romeril, and similarly situated defendants, to correct this asymmetry and provide investors and the market with information-rich, balanced, and truthful views.

SEC's gag policy demands permanent surrender of First Amendment rights. *That* is forbidden by our Constitution. *See United States v. Goodwin*, 457 U.S. 368, 372–78 (1982) ("[W]hile an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right."). Such a condition is not necessary to effectuate settlement proceedings and flagrantly violates the Constitution.[11]

The First Amendment, and particularly its solicitude for political speech is a key check on expansive agency power. Allowing SEC to self-confer the power to strip its targets of First Amendment protection, unlike any other court, agency, or other governmental regulator is an unheard-of innovation in political design—lawless in its enactment and unconstitutional in its consequences.

[11] Unconstitutional conditions similarly apply to plea agreements. *United States v. Oliveras*, 905 F.2d 623, 627–28 (2d Cir. 1990), *superseded by*, U.S.S.G. § 3E1.1, *as recognized in U.S. v. Mazza*, 505 Fed. App'x 9, 11 (2d Cir. 2012); *see also United States v. Ramirez*, 113 F.3d 1230 (2d Cir. 1997); *Warner v. Orange Cty. Dep't of Prob.*, 968 F. Supp. 917, 923 (S.D.N.Y. 1997), *aff'd*, 173 F.3d 120 (2d Cir. 1999).

C. No Compelling Public Interest Justifies this Content-Based Viewpoint-favoring Gag; Policy Interests All Operate in Romeril's Favor, Including Rights of Petition and Free Expression and Regulatory Reform

Romeril and *amici* raise powerful policy arguments explaining why this Rule inhibits and suppresses regulatory reform. Those concerns include public statements by SEC Commissioners, across the political spectrum, that settlements are used in borderline cases that would not have succeeded in court and used to stretch the law. App. Br. 44–45, 51–52. *Amicus curiae* supplemented with concrete examples of innocent parties being gagged, settling parties being bullied, and dubious agency practices being insulated from public view. SEC did not deign to respond to its own Commissioners' concerns where settling parties' views of the charges against them are a critical factual—and otherwise unavailable—perspective, nor did it respond to a single policy concern raised by *amici*.

SEC responded to only one policy argument raised by Appellant, a fact-based hypothetical, in which Romeril argued that SEC forecasting rules can and have changed, so that a person could settle charges that are no longer even considered unlawful. SEC's response is telling. The hypothetical is "beside the point," it says, because those specific now defunct forecasting rules weren't the actual charges levied at Romeril. SEC Br. 27. This rebuttal would only make sense if forecasting is the only issue on which the agency has or ever will change its mind. Otherwise, it is a non sequitur. SEC's rebuttal is reasoning unworthy of a venerable agency that

should be responsive to and honest about its own Commissioners' concerns about stretching the law and over-charging Americans for actions that may not be unlawful.

D. The Gag Is an Unconstitutional Condition

SEC argues that the unconstitutional conditions doctrine is inapplicable because the government benefits in the typical case do not involve settlement. The reason why the Supreme Court case law does not include a settlement case like Romeril's is that the SEC's practice of demanding gags as a condition of civil settlement is an outlier practiced by only two agencies who self-confer that power and silence detractors.

SEC fails to cite a single case or authority that provides this court with the power to uphold a government-imposed lifetime gag enforced through the threat of a reopened prosecution. Not one. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68–71 (1963), held that the First Amendment prohibits government imposition of content-based prior restraints on speech enforced, as here, by threats of prosecution. Forcing a choice between forgoing a benefit and relinquishing a constitutional right violates the First Amendment as clearly, and dangerously, as a direct prohibition. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). Even where a defendant "has no 'right' to a valuable government benefit," the government cannot withhold that benefit in a way "that infringes [a citizen's] constitutionally protected interests—

especially his interest in freedom of speech." *Perry v. Sinderman*, 408 U.S. 593, 597 (1972). This is especially true when the conditions are "aimed at the suppression of ideas thought inimical to the Government's own interest." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 546–49 (2001) (citation omitted).

SEC's argument that its settlement practices involve seeking and receiving concessions is a textbook *confession* of trading benefits for refraining from engaging in government-critical speech. SEC's argument that the unconstitutional conditions doctrine does not apply in settlements is particularly pernicious because the condition is extracted under the full weight of the government. *See Doe v. Phillips*, 81 F.3d 1204, 1212 (2d Cir. 1996); *Overbey*, 930 F.3d at 219; *Cohen v. Barr*, No. 20 Civ. 5614 (AKH), 2020 WL 4250342 (S.D.N.Y. July 23, 2020). SEC's demand is indistinguishable from the gag efforts overturned in these precedents.

In the context of plea bargains, unconstitutional conditions are unlawful, and there is no principled distinction why this would differ in civil settlements. Courts have uniformly set aside provisions of plea bargains requiring defendants to relinquish their civil liberties where the condition had no bearing to the underlying charge or the effectuation of settlement. *Oliveras*, 905 F.2d at 627–28; *United States v. Richards*, 385 F. App'x 691, 693 (9th Cir. 2010) (invalidating an agreed-to term of a plea agreement preventing defendant from making "public comments concerning [a county commissioner]" because it "violated the First Amendment.);

PHE, Inc., 743 F. Supp. at 26 (unconstitutional to demand that defendants not distribute First Amendment protected materials as part of a non-prosecution agreement, waiver argument notwithstanding).[12]

SEC has offered no reasoning to counter the fact that courts require waivers of constitutional rights to have a close nexus and tight fit with settlement—because there is no nexus or fit of the gag to cessation of litigation.

E. SEC Lacked Authority to Require a Gag for Settlement; SEC Demands the Gag Pursuant to an Unlawfully Promulgated Rule

SEC is empowered to bring enforcement actions for violations of the securities laws. But that limited grant of power does not extend to its orders restraining future speech, much less promulgating unlawful binding rules without notice or comment or violating the Constitution. *See La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).[13] *SEC v. Bolla*, 550 F. Supp. 2d 54, 63 (D.D.C. 2008) (vacating portions of remedies order as "void" where court had no "jurisdiction to impose" such).

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[12] This Court's language in *Oliveras* dispenses with SEC's "nobody's forcing you to settle" argument. *See* 905 F.2d at 627–28 ("The government argues that … it simply withholds a benefit to which the defendant is not automatically entitled. . . . To require a defendant to accept responsibility for crimes [he was not charged with or pled guilty to] forces defendants to choose between incriminating themselves. . . or forfeiting substantial reductions in their sentences to which they would be otherwise entitled.").

[13] SEC again tries unsuccessfully to argue that this point was not raised below. It was prominently raised by Romeril in Section II of his brief and argued at length. *See* Dkt. No. 24 at 3–4.

SEC falsely asserts that the rule does not bind third parties outside SEC. But of course, it binds defendants like Romeril. Otherwise SEC would not claim in its brief that Romeril could petition for reform if he made no "public denials of the allegations." SEC Br. 46. The government may not use its power to "produce a result which [it] could not command directly." *Perry*, 408 U.S. at 597 (citation omitted). Obviously, SEC believes the rule binds Romeril and the thousands of Americans who have settled with SEC; the *amicus* briefs provide numerous instances of SEC threatening parties who settled who made statements not congenial to SEC enforcement staff. *See* CEI Br. at 27 (showing SEC actively policed the public statements of former defendants—and threatened them with enforcement); AFPF Br. 16–19. SEC's contention that the rule only binds staff is indefensible to the point of being absurd.

F. SEC Does Not Get to Tell Defendants Whether, When and Under What Conditions They May Tell the Truth

The SEC's Gag Order contains an exception which lifts the gag if the defendant is under oath. Not only does this confirm that SEC knows the gag suppresses truthful speech, SEC has the audacity to characterize this lift as a favor to defendants, dispensed to them as a benefit. SEC chides Romeril for having "employed that strategy to his advantage; he was able to deny the allegations against him in a private securities-fraud class action." SEC Br. 48. SEC seems to think that because the exception allows for "more" speech than their Gag Rule would require,

that justifies gagging Romeril in all other contexts. But SEC does not get to play "Mother, May I." It cannot tell Americans whether, when, and under what conditions they can speak truthfully. The issue here is not volume of speech, whether too little or great, but the inability of SEC to silence truthful speech altogether. And the notion that any SEC defendant who settles his case speaks at the SEC's dispensation turns the First Amendment on its head.

As for SEC's argument that lifting the gag is strategic for defendants, but not the Commission, that is not so. If another court were to hear from gagged defendants that they cannot testify, this pernicious rule would certainly have drawn judicial attention decades ago and been summarily set aside as unconstitutional. The "lift" is no more than an agency-protective device shielding its unconstitutional practices from judicial scrutiny.

SEC's gag is not only unconstitutional, but also an outlier. Only two federal agencies, out of hundreds of agencies regulating and prosecuting the conduct of Americans, require gags. Thousands of other agencies in state and federal courts and tribunals routinely settle cases without gagging defendants. No harm has befallen the vast enforcement powers of government by recognizing that Americans retain their free speech rights.

Letting this ruling stand means that SEC can tell Americans: "We will only let you out of this prohibitively expensive nightmare if you agree to remain silent

forever about every allegation we make against you. Otherwise, you cannot buy peace."

U.S. Attorneys do not require gags as a condition of plea bargains. No state or federal court presides over such unconstitutional practices in any other context. For example, when Judge Alvin Hellerstein recently confronted an attempt to gag Michael Cohen, his response was:

> I have never seen such a clause. In 21 years of being a judge and sentencing people and looking at the terms and conditions of supervised release, I have never seen such a clause [preventing media contact] . . . [What] purpose to it, unless there was a retaliatory purpose saying, you toe the line about giving up your First Amendment rights or we will send you to jail[?]

Tr. of Hr'g at 8–9, Order Granting Prelim. Inj., *Cohen v. Barr*, No. 20 Civ. 5614 (AKH) (S.D.N.Y. July 23, 2020), ECF No. 30. No principled distinction exists between the shocking conditioning of home confinement on a gag order denied by Judge Hellerstein, and SEC's long-entrenched practice.

Congress cannot gag federal judges disciplined for misconduct. *McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of Judicial Conference of U.S.*, 83 F. Supp. 2d 135, 177-78 (D.D.C. 1999) *aff'd in part, vacated in part*, 264 F.3d 52 (D.C. Cir. 2001). A prosecutor cannot condition a convicted felon's supervised release on surrender of his First Amendment rights. Surely, SEC cannot self-confer power to restrain the future free speech of parties who merely

settle unproven allegations—under the same First Amendment that denies these powers to Congress and federal prosecutors.

This court should not hesitate to end this unconstitutional practice that was lawless from its inception and that has gone unquestioned for far too long. "Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020).

It is hard to overstate the importance of this appeal and the judicial courage required for its success. Elsewhere in the American justice system, civil, criminal, state or federal, defendants/respondents, or other charged parties retain their free speech rights throughout the process and beyond, whether they win, lose, or settle. Fortunately, Supreme Court precedents and the law of this circuit fully protect those inalienable rights despite their secret—and shocking—decades-long deprivation by SEC.

CONCLUSION

This appeal challenges an aberrant, unconstitutional practice unlawfully instituted by the Securities and Exchange Commission in 1972. SEC requires an unconstitutional gag order in its thousands of no-admit, no-deny settlements resolving its securities enforcement actions. For nearly 50 years, courts have been

complicit in violating the First Amendment rights of persons charged by SEC and who, as 98% of them do, settle the cases brought against them. Overturning that is a hard ask of any court, particularly one sitting at the nerve center of American financial markets. Yet Mr. Romeril, with unwavering faith in the Bill of Rights, asks this Court to vindicate the First Amendment and this circuit's own controlling precedent, which require that his gag be untied.

For all of the foregoing reasons, Romeril respectfully requests that this Court reverse the district court's order, and grant his motion for relief from judgment under Rule 60(b)(4).

Dated: July 31, 2020

New Civil Liberties Alliance

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of 2d Cir. R. 32.1(a)(4)(A) because this brief contains 6,989 of 7000 max words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word for Office365 Times New Roman 14-point font.

Date: July 31, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2020 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: July 31, 2020.

New Civil Liberties Alliance

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