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 OPENING BRIEF AND STATUTORY ADDENDUM

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STATEMENT OF ADDENDUM

The full text of the 1972 regulation 17 C.F.R. § 202.5 under which the Securities and Exchange Commission (SEC or Commission) initiated the practice of inserting gag orders in its settlement documents is in the attached in an addendum included at the end of this brief. The statutory provisions[1] that SEC erroneously claimed to have authorized the Gag Rule's promulgation without notice and comment, are also set forth therein. *See* Fed. R. App. P. 28(f); 2d Cir. R. 32.1(c).

JURISDICTIONAL STATEMENT

Romeril appeals from the district court's Order denying his Rule 60(b)(4) Motion for Relief from Judgment by opinion and order dated November 18, 2019. JA85. The basis for jurisdiction in the district court was 28 U.S.C. § 1331. This court has jurisdiction over the appeal under 28 U.S.C. § 1291.

Appellants filed a timely notice of appeal on December 16, 2019, JA95, pursuant to Fed. R. App. P. 4. This appeal is from a final order or judgment that disposed of all plaintiffs' claims raised in his Motion for Relief from Judgment under Rule 60(b)(4).

[1] The text of the Gag Rule, 37 Fed. Reg. 25224, and the statutes relied on at the time of promulgation—15 U.S.C. §§ 77s, 78w(a), 79t (now repealed), 80a-37, 80b-11—are set forth in the Statutory Addendum.

ISSUES PRESENTED

Did the district court err in failing to follow controlling circuit court and Supreme Court authority when it denied appellant's constitutional challenge to the SEC's 2003 gag order? More specifically,

1. Is this Rule 60(b)(4) motion timely under the prevailing law of this and other circuits construing the Rule?

2. Do Mr. Romeril's First Amendment claims provide a basis to find a gag void under Rule 60(b)(4)?

3. Does a gag order violate the First Amendment when it operates as a prior restraint in perpetuity, suppresses speech based on its content, gives an agency unbridled enforcement discretion, forbids truthful speech, suppresses information the public has a right to hear and infringes on rights of petition?

4. Is the gag order an unconstitutional condition forbidden by controlling Supreme Court authority?

5. Does the gag order violate Mr. Romeril's due process rights?

6. Does the gag order violate due process because the SEC issued it without statutory authority and cannot bind defendant to a housekeeping rule?

7. Do gag orders violate due process because they implicate the judiciary in violating the Constitution?

STATEMENT OF THE CASE

On November 17, 1972, the Securities and Exchange Commission published its Gag Rule, codified at 17 C.F.R. § 202.5(e). *See* SA09, SA10-11. In that publication SEC asserted that the "Commission finds that the foregoing amendment relates only to rules of agency organization, procedure and practice and, therefore, notice and procedures specified in 5 U.S.C. § 553 are unnecessary. The foregoing amendment is declared to be effective immediately." The SEC lacked statutory authority to enact such a substantive rule and further did not follow the provisions of the Administrative Procedure Act, which require prior publication, notice and comment before it can enact a rule that binds regulated persons or entities or third parties.

On June 5, 2003, SEC filed a Complaint against all defendants in this action, including Defendant-Appellant Barry D. Romeril. Shortly thereafter, the SEC and Romeril reached a settlement agreement and submitted a proposed final judgment to this Court. As part of that settlement agreement Romeril was also required by the SEC to sign a consent order (consent) incorporating that proposed final judgment. Paragraph 11 provided, in relevant part:

> Defendant understands and agrees to comply with the Commission's policy "not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings." 17 C.F.R. § 202.5. In compliance with this policy, Defendant agrees not to take any action or to 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. If Defendant breaches this agreement, the Commission may petition the Court to vacate the Final Judgment and restore this action to its active docket. Nothing in this paragraph affects Defendant's: (i) testimonial obligations; or (ii) right to take legal or factual positions in litigation in which the Commission is not a party.

JA70, at ¶ 11.

The district court, Hon. Denise L. Cote, did not hold a hearing or allocution concerning the execution of the consent order.

On June 13, 2003, the district court entered a judgment against Mr. Romeril, ordering him to pay $5,214,970. JA64. Romeril satisfied the monetary judgment against him on July 16, 2003. JA05. Nevertheless, and despite the passage of nearly 17 years, Romeril continues to be bound by the Gag Order provision.

Romeril desires to engage in truthful public statements concerning the SEC's case against him. However, because Romeril does not want to violate a consent order or risk the consequences, he has refrained from making truthful statements that might indirectly "creat[e] an impression" that the complaint lacked a factual basis or was otherwise without merit. For those reasons, on May 6, 2019, he moved for relief from judgment under Fed. R. Civ. P. 60(b)(4) in the civil action in which the order had been entered, No. 03-cv-4087 (DLC). JA73.

The issues were fully briefed to the district court by Romeril and the SEC. The district court denied relief on November 18, 2019. JA85-94.

The District Court denied Romeril's motion "for two independent reasons":

> First, the motion was not brought within a reasonable time. Romeril brings this motion nearly sixteen years after the Judgment was entered. While the SEC does not explicitly oppose Romeril's motion on the ground that it is untimely, its opposition highlights that Romeril has enjoyed the benefits of his settlement with the SEC for the entirety of the sixteen years….he seeks to keep the Consent in place while excising its no-deny provision. …. Romeril's sixteen-year delay is unreasonable.
>
> Second, even if the motion could be found to be timely, and it cannot, Romeril has not identified a jurisdictional defect or violation of due process that would render the Judgment void for purposes of Rule 60(b)(4).

JA90-91.

Appellant filed a timely notice of appeal on December 16, 2019. JA95-96.

SUMMARY OF THE ARGUMENT

The law of this circuit provides in *Crosby v. Bradstreet*, 312 F.2d 483 (1963), *cert. denied*, 373 U.S. 911 (1963) that a party subject to a judicially imposed unconstitutional prior restraint on his speech may move under Fed. R. Civ. P. 60(b)(4) to have such an order vacated because a court is "without power to make such an order; that the parties may have agreed to it is immaterial." *Id.* at 485. Such a motion may be made at any time under the controlling law of this and other circuits construing Rule 60(b)(4). Such an order is "void, and under Rule 60(b)(4) … the parties *must* be granted relief therefrom." *Id.* (emphasis added). The district court erred in not following this factually indistinguishable precedent. The district court

decision further misapplied the law applicable to challenges for "voidness" under Rule 60(b)(4), and inaccurately set forth the posture of Romeril's due process claims.

The gag order violates the First Amendment because it is a forbidden prior restraint that gives the SEC unbridled enforcement discretion and is unlimited in time. Such silencing of SEC targets in perpetuity is not supported by any compelling public interest, nor is it narrowly tailored to operate by the least restrictive means. Indeed, the compelling public interest lies in free and unfettered expression about the operation of government regulatory authority by administrative agencies.

The gag order is a content-based viewpoint restriction on speech that suppresses criticism of government and impermissibly favors the government's view of the case—for the lifetime of its targets.

It is also imposed as an unconstitutional condition upon defendants making the difficult decision to settle with a powerful government agency. The gag's enforced silence forever damages reputations and livelihoods as the cost of securing peace. Because 98% of its cases settle, this means that the vast majority of SEC's enforcement activity is shielded from balanced public view, in violation of the public's "listener" interest protected by the First Amendment.

The text of the gag order admits that it stifles truthful speech, by providing for a "lift" of the gag in testimonial contexts—with a self-favoring exception for cases where the SEC is a party. This suppression of truth and viewpoint discrimination

means that the agency is shielded from examination and reform, in violation of plaintiff's First Amendment rights of petition.

The gag rule violates due process because it applies where even speech that gives the "impression" that the government charges were unfounded can support re-prosecution. It violates Romeril's due process because the gag is not authorized by Congress, nor was it lawfully promulgated by the SEC. It violates due process because it shields and encourages regulation by settlement, allowing the SEC to pursue cases not well-founded in established law or rules—and the targets of those actions are forever silenced.

Congress itself could not enact a law imposing such a condition on settlement with the government; a mere administrative agency perforce lacks any such authority. Finally, the district court failed to address the bulk of Romeril's arguments. Because those arguments are grounded in controlling U.S. Supreme Court and Second Circuit precedents, this court should reverse and order that the gag be vacated.

For these reasons, Section I of this brief will focus on the opinion's deficiencies, errors, and omissions, especially its failure to follow controlling circuit precedent on vacating a consent order that imposes an unconstitutional prior restraint on speech. Sections II-VII will address the constitutional doctrines that were not addressed by the district court, but were fully raised and preserved below.

ARGUMENT

I. RULE 60(b)(4) IS A PROPER VEHICLE FOR RAISING A CONSTITUTIONAL CHALLENGE TO A COURT JUDGMENT ENJOINING SPEECH IN PERPETUITY

A. Standard of Review

In the Second Circuit, denials of Rule 60 motions are generally reviewed for abuse of discretion, *United Airlines, Inc. v. Brien*, 588 F.3d 158, 175 (2d Cir. 2009), but the Second Circuit reviews "*de novo* a district court's denial of a Rule 60(b)(4) motion." *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 138 (2d Cir. 2011). "That is because … the judgment is either void or it is not." *Id.* (citations omitted.). As this circuit comprehensively stated in *Central Vermont Pub. Serv. Corp. v. Herbert*, 341 F.3d 186 (2d Cir. 2003):

> Generally, we review Rule 60(b) motions for abuse of discretion. *Lawrence v. Wink*, 293 F.3d 615, 623 (2d Cir. 2002). However, a district court's ruling on a Rule 60(b)(4) motion is reviewed *de novo* where "there are no disputes over the subsidiary facts pertaining to [the] issue" of jurisdiction. *United States v. Forma*, 42 F.3d 759, 762 (2d Cir. 1994). "Under Rule 60(b)(4) 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 the judgment under Rule 60(b)(4)." *Jalapeno Prop. Mgmt., LLC v. Dukas*, 265 F.3d 506, 515 (6th Cir. 2001) (Batchelder, J., concurring) (citations and quotation marks omitted); *see also Recreational Properties, Inc. v. Southwest Mortgage Serv. Corp.*, 804 F.2d 311, 314 (5th Cir. 1986) ("[T]he district court has no discretion [in ruling on a 60(b)(4) motion], the judgment is either void or it is not."). Almost every Circuit has adopted *de novo* review of Rule 60(b)(4) motions, and we know of no Circuit that defers to the district court on a Rule 60(b)(4) ruling. *See Vinten v. Jeantot Marine Alliances, S.A.*, 191 F. Supp. 2d

642, 649–50 & nn.12–13 (D.S.C. 2002) (collecting cases); *see also Page v. Schweiker*, 786 F.2d 150, 152 (3d Cir. 1986).

341 F.3d at 189.

B. Romeril's Rule 60(b)(4) Motion Was Timely

Rule 60(b)(4) of the Federal Rules of Civil Procedure provides that a "court may relieve a party or its legal representative from a final judgment, order, or proceeding" if "the judgment is void." Fed. R. Civ. P. 60(b)(4).[2] "Although Rule 60(c)(1) purports to require all motions under Rule 60(b) to be made 'within a reasonable time,' this limitation does not apply to a motion under clause (4) attacking a judgment as void. There is no time limit on a motion of that kind." 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2866 (3d ed. 2002 & Supp. 2019).

"Courts have been exceedingly lenient in defining the term 'reasonable time,' with regard to voidness challenges. In fact, 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.'" *Grace v. Bank Leumi Trust Co. of New York*, 443 F.3d 180, 190 (2d Cir.

[2] The district court erroneously says that the text of Rule 60(b)(4) says it "must be made 'within a reasonable time.' Fed R. Civ. P. 60(b)(4)." JA90. Rule 60(b)(4) says nothing about the time to bring a motion. Rule 60(c)(1) does state that 60(b) motions must be made "within a reasonable time—*and for reasons (1) (2), and (3)* no more than a year after the entry of the judgment or order or the date of the proceeding." *Id.* (emphasis added). The prevailing law in this Circuit, as set forth *infra*, is that a motion for voidness under Rule 60(b)(4) may be made at any time.

2006) (quoting *State Street Bank and Trust Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 179 (2d Cir. 2004)). In *"R" Best Produce, Inc. v. DiSapio*, 540 F.3d 115, 123–24 (2d Cir. 2008), this circuit, following its decision in *Beller & Keller v. Tyler*, 120 F.3d 21, 24 (2d Cir.1997), surveyed the prevailing Rule 60(b)(4) law as follows:

> *Central Vermont Public Service Corp. v. Herbert*, 341 F.3d 186, 189 (2d Cir. 2003) (motion to challenge lack of subject matter jurisdiction, filed four years after entry of judgment, was timely); *accord Sea-Land Service, Inc. v. Ceramica Europa II, Inc.,* 160 F.3d 849, 852 (1st Cir. 1998) (recognizing the "any time" rule); *see* 11 Charles Alan Wright *et al., Federal Practice and Procedure* § 2866, at 382 (2d ed. 1995 & Supp. 2008) (no time limit); *cf. Crosby v. The Bradstreet Co.*, 312 F.2d 483, 485 (2d Cir. 1963) (30-year-old judgment vacated as void on First Amendment grounds).[3]

"R" Best Produce, 540 F.3d 124.

C. *Crosby v. Bradstreet* Authorized—and Granted—a Rule 60(b)(4) Motion Under Indistinguishable Facts

The seminal case in this circuit is *Crosby*, 312 F.2d 483. Stanford Crosby and his brother Lloyd had been indicted for mail fraud. Stanford was acquitted by a jury; Lloyd entered a guilty plea and got a suspended sentence. In 1932, Stanford Crosby

[3] *See also* 12 James Wm. Moore, *et al.*, *Moore's Federal Practice* § 60.44(5)(c) (3d ed. 1999) (motion challenging judgment as void is not subject to "reasonable time" requirement and may be made at any time). A Rule 60(b)(4) "motion may be brought at any time after final judgment." *McLearn v. Cowen & Co.*, 660 F.2d 845, 848–49 (2d Cir. 1981) (citing *Crosby*, 312 F.2d 483), *superseded by statute*, 28 U.S.C. § 1367, *as recognized in U.S. Fire Ins. Co. v. United Limousine Serv., Inc.*, 328 F. Supp. 2d 450, 454 (S.D.N.Y. 2004).

brought an action for alleged libel against Bradstreet (then a predecessor to Dun & Bradstreet) arising from a credit report that erroneously stated that Stanford had a mail fraud conviction. Defendant Dun & Bradstreet entered into a stipulation providing for payment of damages and agreed "to refrain from issuing or publishing any report, comment or statement either in writing or otherwise concerning (Stanford) … Crosby, the plaintiff herein, L. Lloyd Crosby (and others) … or concerning the business activities of any of the foregoing persons … whether past, present or future." *Id.* at 484. That stipulated settlement was entered as a court order on July 10, 1933. *Id.*

Thirty years later, Stanford, then in business competition with Lloyd, moved under Fed. R. Civ. P. 60(b) to terminate the 1933 order, "claiming that the absence of a listing by the well-known Dun & Bradstreet credit information company ma[de] it difficult for him to get credit." *Crosby* at 484. Lloyd opposed the motion, alleging that Stanford's purpose was to "destroy his business"; Dun & Bradstreet opposed termination of the order "unless its right to make reference to Lloyd Crosby in its statement about Stanford Crosby [was] protected." *Id.* Stanford was denied relief in the district court. On appeal to the Second Circuit, this court reversed stating:

> We are concerned with the power of a court of the United States to enjoin publication of information about a person, without regard to truth…Such an injunction, enforceable through the contempt power, constitutes a prior restraint by the United States against the publication of facts which the community has a right to know and which Dun &

> Bradstreet had and has the right to publish. The court was without power to make such an order; that the parties may have agreed to it is immaterial.
>
> The order dated July 8, 1933 was in violation of the First Amendment to the Constitution….[] the First Amendment limits court action. The order was void, and under Rule 60(b)(4) … the parties must be granted relief therefrom.

Crosby, 312 F.2d at 485 (citing *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931) (striking down a prior restraint on First Amendment grounds)) (also citing *Shelley v. Kraemer*, 334 U.S. 1 (1948) (judicial enforcement of racial restrictive covenants violates the Fourteenth Amendment)).

The *Crosby* court also summarily dismissed defendant Lloyd Crosby's claim in equity for continuance of the injunction that he argued bound D&B by contract, holding that it would prolong "an injunction which should never have been entered in the first place." 312 F.2d at 485. The district court's order denying Stanford Crosby relief was reversed and the Second Circuit directed that "the district court nullify the order of July 1933." *Id.*

The Supreme Court has held that void judgments are legal nullities that are "so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final." *United Student Aid Funds v. Espinosa*, 559 U.S. 260, 270 (2010). *Crosby*'s rationale applies with even greater force when *the government* is the party imposing it in contrast to the private party settlement at issue in *Crosby*.

Indeed, in *Ronnie Van Zant, Inc. v. Cleopatra Records, Inc.*, 906 F.3d 253 (2d Cir. 2018) this court reversed a trial court's grant of an injunction restricting speech arising from a *private* contract, stating that "even though the injunction here has allegedly been imposed as a result of private contract rather than government censorship, it nonetheless restrains the viewing of an expressive work prior to its public availability, and courts should always be hesitant to approve such an injunction." *Id.* at 257. The Second Circuit vacated the district court's injunction barring the release of a movie, noting that any "prior restraint on expression comes to [the Supreme] Court with a heavy presumption against its constitutional validity." *Id.* (citing *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

The facts of this case are indistinguishable from those in *Crosby* except for the compelling—and decisive —fact that it is a government agency imposing a prior restraint, something clearly prohibited by the First Amendment.

D. Other Circuits Agree that a Rule 60(b)(4) Motion May Be Brought at Any Time

Crosby represents the prevailing law in the circuits: a judgment violating the First Amendment is void under Rule 60(b)(4). As a leading legal encyclopedia explains, "[s]ince a consent order is enforceable as a judicial decree, it is subject to a motion for relief from judgment like other judgments and decrees …. [A] judgment allegedly void on constitutional grounds is subject to attack at any time." 47 Am.

Jur. 2d *Judgments* § 653; *see* 49 C.J.S. *Judgments* § 506 ("A consent judgment may be set aside where it is void on constitutional grounds").

Federal circuit courts overwhelmingly support "the proposition that there are no time limits with regards to a challenge to a void judgment because of its status as a nullity." *United States v. One Toshiba Color Television*, 213 F.3d 147, 157 (3d Cir. 2000) (collecting cases from the Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits); *see Myzer v. Bush*, 750 F. App'x 644, 647 (10th Cir. 2018) (unpublished) ("Rule 60(b)(4) motions are effectively subject to no time limit" and "any time period preceding the filing of a Rule 60(b)(4) motion is reasonable as a matter of law because such a motion claims that the underlying judgment is void *ab initio*."), *cert. denied*, 139 S. Ct. 1189, 203 L. Ed. 2d 221 (2019); *Madura v. BAC Home Loans Servicing, LP*, 655 F. App'x 717, 725 (11th Cir. 2016) (unpublished) ("motions filed under Rule 60(b)(4) are not subject to the reasonable-time limitation").

E. The District Court Was Bound to Follow the *Crosby* Rule of Decision

"When matters are decided by an appellate court, its rulings, unless reversed by it or a superior court, bind the lower court." *Ins. Grp. Comm. v. Denver & R. G. W. R. Co.*, 329 U.S. 607, 612 (1947). *Crosby* is the law of the circuit unless reversed by the circuit sitting en banc, or by the Supreme Court. Stated another way, "[i]t is

axiomatic that in our judicial hierarchy, the decisions of the circuit courts of appeals bind the district courts just as decisions of the Supreme Court bind the circuit courts." *Williams v. United States*, No. 15 CIV. 3302 RMB, 2015 WL 4563470, at *3 (S.D.N.Y. July 20, 2015) (quoting *Doe v. Chao*, 511 F.3d 461, 465 (4th Cir. 2007)), *aff'd*, 712 F. App'x 50 (2d Cir. 2017) (citations omitted). No court has reversed *Crosby*, and it remains good law in the Second Circuit.

F. The District Court Decision Does Not Withstand Close Analysis

The District Court denied Romeril's motion "for two independent reasons." JA90. The first is untimeliness, a ground upon which the court acknowledged the SEC did not "explicitly oppose" Romeril's motion below. JA90-91.

And for good reason. The law of this circuit, and that of the many circuits cited above, provides that a Rule 60(b)(4) motion for voidness may be made "at any time. *Crosby* itself granted such a motion made 30 years after it was entered.

This ground for decision not only defies precedent but logic. If timeliness is the gauge, should Romeril have raised his constitutional claims within 60 days, 6 years, or a decade? Would that have then infused his arguments with merit that they otherwise lack due to the passage of time? If the gag endures in perpetuity as it is written to operate, is there ever any time a defendant can move to set it aside? The very statement of the proposition demonstrates its illogic. Our constitutional rights

are not subject to a statute of limitations. If the order was unconstitutional and void when entered, as *Crosby* compels this court to acknowledge, it does not matter when the challenge is raised.

The second independent reason the district court gave is not found in existing law. The court said that Romeril had not identified either 1) a jurisdictional defect or 2) a violation of due process that would entitle him to move to void the judgment's entry of a gag order against him. JA91-93. In its discussion of this second basis for denial of relief, the district court opinion also creates the impression that the Supreme Court in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010) limited Rule 60(b)(4) relief to "a certain type of jurisdictional error." JA93.

Yet neither *Espinosa* nor *Mickalis Pawn Shop*, a Second Circuit case cited in the district court opinion, so restrict the Rule. Each merely describes those as examples of two of the instances in which it is *per se* abuse of discretion for a court to deny a Rule 60(b)(4) motion. In fact *Mickalis Pawn Shop* goes on to cite "voidness" as an additional ground upon which it is an abuse of discretion for a court to deny the Rule 60(b)(4) motion, which is reviewable de novo because a "judgment is either void or it is not." 645 F.3d at 138.

The jurisdiction argument is also a straw man. Romeril does not contest the court's jurisdiction for the SEC's prosecution of him under the securities laws. Or

the court's jurisdiction to set aside its own unconstitutional order. Knocking down his constitutional challenge on this basis fails to fairly state the nature of his claims.

Romeril does indeed identify violations of due process at stake in this appeal. The district court's suggestion that those claims were "mentioned only in a footnote" in his reply brief, JA92, n. 1, is proven inaccurate by the presence of due process arguments labelled and advanced as such throughout his opening brief, particularly Sections II, IV and VI. Dkt. No. 24. Those arguments are set forth for this court in Sections IV – VII of this brief, just as they were put before the court below.

Finally, the district court's suggestion that Rule 60(b)(4) relief may only be secured for these two reasons, and only these two reasons, is just wrong. *Crosby* itself involved neither a jurisdictional defect nor a due process claim. In fact, neither the word "jurisdiction" nor the term "due process" appears anywhere in *Crosby*'s rationale. Instead, the Rule 60 motion sought to set aside the part of a judgment that was an unconstitutional prior restraint. Such an order was void *ab initio*, and must be set aside whether 3 months, 3 years or 30 years after its entry, because the order was "beyond the power of the court to make." *Crosby*, 312 F.2d at 485.

In sum, Rule 60 relief is not limited by its terms to the two categories isolated by the district court. This was recognized, for example, in the Tenth Circuit which noted that "[v]iolations of other fundamental constitutional rights may give rise to

voidness as well." *V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 225 n. 11 (10th Cir. 1979) (citing *Crosby*, 312 F.3d 483).[4]

G. *Espinosa* Neither Questioned nor Overruled *Crosby*

The district court later also dismisses the on-point, case-deciding *Crosby* precedent with this off-hand remark about the Supreme Court's decision in *Espinosa*: "Even assuming *Crosby* survives *Espinosa*, an issue that it is unnecessary to reach, *Crosby*'s holding is inapplicable to Romeril's argument here." JA93.

Yet *Espinosa* does not in any way affect the precedential force of *Crosby*, and thus cannot foreclose the relief sought. In dicta, the *Espinosa* Court addressed the question of relief under Rule 60(b)(4) on the basis of lack of jurisdiction. *See* 550 U.S. at 271. The Court noted that such relief is generally reserved for exceptional cases where "the court that rendered judgment lacked even an 'arguable basis' for jurisdiction." *Id.* The *Espinosa* Court determined that the "case present[ed] no

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[4] The Tenth Circuit reinforces that voidness encompasses more than just jurisdiction and due process:

> For a judgment to be void under Rule 60(b)(4), it must be determined that the rendering court was powerless to enter it. If found at all, voidness *usually* arises for lack of subject matter jurisdiction or jurisdiction over the parties. It may also arise if the courts action involves *a plain usurpation of power* or if the court has acted in a manner inconsistent with due process of law. In the interest of finality, the concept of setting aside a judgment on voidness grounds is narrowly restrict

V.T.A., 597 F.2d at 224-25 (emphases added, internal citations omitted).

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 because" the Petitioner did not claim the court's error was jurisdictional. *Id.* Here, by contrast, Romeril makes an argument that his Gag Order violates his constitutional and due process rights, and therefore is void under *Crosby*. "[C]ases cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality opinion). *Espinosa* did not address in any way a voidness challenge for a violation of the First Amendment, nor did it purport to overrule *Crosby*.

The Fifth Circuit recently rejected such an inaccurate reading of *Espinosa* in *Brumfield v. Louisiana State Bd. of Educ.*, 806 F.3d 289 (5th Cir. 2015). The majority opinion "cordially" disagreed with the dissent that Rule 60(b)(4) was limited to lack of jurisdiction of the subject matter or the parties, noting the Fifth Circuit's own precedent allowed 60(b)(4) relief where, as here, the court "acted in a manner inconsistent with due process of law." Indeed, the *Espinosa* Court expressly said that the case "presented no opportunity to review lower courts' assertions construing Rule 60(b)(4) …. The Supreme Court, in sum, has not definitively interpreted this rule." *Brumfield*, 806 F.3d at 301 (citing *Espinosa*, 559 U.S. at 271).

H. The District Court also Misconstrued the Sixth Circuit's *Northridge Church* Decision

The district court's reference to the Sixth Circuit's interpretation of *Crosby* in *Northridge Church v. Charter Twp. of Plymouth*, 647 F.3d 606, 612 (6th Cir. 2011) also offers no reason to depart from *Crosby*'s binding authority. To the contrary, *Northridge Church* fully supports Romeril's motion in both procedure and substance.

The opinion below correctly quotes *Northridge Church* as—mistakenly—saying that *Crosby* "turned on a unique jurisdictional issue." JA93. That statement is followed by the district court's confusing non sequitur: "The scope of the Judgment entered in this case presents no comparable jurisdictional issue. The no-deny provision does not implicate this Court's jurisdiction to enter the judgment in this securities action." *Id.*

Two problems explain why this portion of the district court opinion does not withstand analysis. First, *Northridge Church* mistakenly describes *Crosby* as a jurisdictional case. *See* 647 F.3d at 612. Second, the district court also mistakenly believed that Romeril could prevail only if he brought a jurisdictional claim. JA93. But, as noted above, Romeril makes no claim that the court lacked jurisdiction over his securities charges—or that the court lacks personal and subject-matter jurisdiction to correct the portion of its order that is unconstitutional. This section

of the district court's opinion improperly conflates having jurisdiction over securities matters with also having jurisdiction or, more properly, the power to enter orders and judgments that include unconstitutional restraints on speech. *See* JA93.

A review of *Northridge Church* shows that the Sixth Circuit decision has nothing but support to offer—*for Romeril.* Here, in its entirety, is what the Sixth Circuit had to say about *Crosby*:

> Finally, in *Crosby*, the Second Circuit set aside an "order[,] entered on consent," that required a party "to refrain from publishing matter about" the other party. 312 F.2d at 485. However, the court in *Crosby* set aside the order because "[t]he court was without power to make such an order." *Id.; accord Robert E. Hicks Corp. v. Nat'l Salesmen's Training Ass'n*, 19 F.2d 963, 964 (7th Cir. 1927) ("The general rule is that a court of equity will not enjoin the publication of a libel."). Therefore, *Crosby* rested on a unique *jurisdictional* issue that rendered the court entering the order without power to do so. Rule 60(b)(4) would be the proper vehicle for such a challenge, but no analogous issue prohibits jurisdiction here. *See Espinosa*, 130 S. Ct. at 1377.

Northridge Church, 647 F.3d at 612 (emphasis in original).

The "unique voidness" issue in *Crosby* is the Court's determination that a district court was without power to make the order at issue. *See Crosby*, 312 F.2d at 485. That is described by the *Northridge Church* court as jurisdictional, which is another way of saying that a court lacks power to enter an unconstitutional order. Most courts use the terminology of "voidness." *See supra* at Subsections F-G. Jurisdiction, whether it be subject-matter or personal, as used in *Northridge Church*

is perhaps a something of a misnomer and not the best synonym for "lack of power." Anyone moving to set aside an unconstitutional portion of a court order must invoke the court's jurisdiction to do so. Voidness—which goes to remedy—is the more common and accepted word used by most courts to describe this ground upon which an unconstitutional portion of a court order may be set aside.[5]

Here, as in *Crosby*, Appellant requested relief from a judgment or order under Rule 60(b)(4) because provisions of his consent order are unlawful prior restraints on his speech and otherwise violate his First Amendment and due process rights. As with the stipulated settlement and injunction in *Crosby*, the speech restraints included in Romeril's consent order are unconstitutional. And, as in *Crosby*, because the gag is void for violating the First Amendment, the district court lacked the power to enter the consent order in the first instance—it is void *ab initio*.

[5] This semantic distinction was noted by the Supreme Court in *Espinosa* when it noted that "the term 'void' describes a result, rather than the conditions that render a judgment unenforceable." *Espinosa*, 559 U.S. at 270. Romeril here challenges a portion of his "judgment … so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final" as *Espinosa* recognizes he may do under existing law of the lower circuit courts. *Id.* The *Espinosa* Court expressly declined "to define the precise circumstances in which a jurisdiction error will render a judgment void," *id.* at 271, but specifically cited in its analysis sections of Wright & Miller that list *Crosby* as a type of claim subject to Rule 60(b)(4) relief. *See, e.g.,* 11 Charles A. Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice & Procedure* § 2862, p. 331 (2d ed.1995 and Supp. 2009).

II. THE GAG ORDER VIOLATES THE FIRST AMENDMENT

A. The Gag Order Is a Forbidden Prior Restraint

1. Prior Restraints Are Forbidden

Prior restraints on speech and publication "are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). "A prior restraint … has an immediate and irreversible sanction," "[while] a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes it,'" and it is therefore presumptively impermissible. *Id.* at 559. An injunction against future expression issued because of prior acts is incompatible with the First Amendment. *Gayety Theatres, Inc. v. City of Miami*, 719 F.2d 1550, 1551-52 (11th Cir. 1983).

2. The Gag Order Is a Prior Restraint

The consent states that Defendant "agrees not to take any action or to make or cause 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." The consent further provides that if Defendant breaches that agreement to restrain his future speech, "the Commission may petition the Court to vacate the Final Judgment and restore this action to its active docket." JA70, ¶ 11. This consent permanently forbids Romeril from contesting allegations in the Commission's

complaint, regardless of their accuracy or the truth of the forbidden speech, on pain of reopened and renewed prosecution.

That the defendant or respondent "consented" to the ban on his future speech by entering into a consent order does not make the practice lawful. *Crosby* says so:

> Such an injunction, enforceable through the contempt power, constitutes a prior restraint by the United States against the publication of facts which the community has a right to know and which Dun & Bradstreet had and has the right to publish. The court was without power to make such an order; that the parties may have agreed to it is immaterial.

Crosby, at 485.[6]

This constitutional infirmity with gag orders was recognized as an obvious infirmity by a district court reviewing an SEC consent order, noting: "On its face, the SEC's no-denial policy raises a potential First Amendment problem." *SEC v. Citigroup Global Markets Inc*., 827 F. Supp. 2d 328, 333 n. 5 (S.D.N.Y. 2011), *vacated and remanded on other grounds*, 752 F.3d 285 (2d Cir. 2014). The law in the Second Circuit provides for reversing a consent settlement between two parties

[6] *Crosby* represents the prevailing law in the circuits. *Simer v. Rios*, 661 F.2d 655, 663 (7th Cir. 1981) ("where an error of constitutional dimension occurs, a judgment may be vacated as void."); *V.T.A.,* 597 F.2d at 225, n.11 (10th Cir. 1979) (Rule 60 may void a consent order inconsistent with due process of law or that violates other fundamental constitutional rights); *CBS Inc. v. Young*, 522 F.2d 234, 241 (6th Cir. 1975) ("a prior restraint upon First Amendment freedoms is presumptively void."). U.S. district courts agree. *See, e.g., Baker v. Joseph*, 938 F. Supp. 2d 1265, 1269 (S.D. Fla. 2013); *Anderson v. Dean*, 354 F. Supp. 639, 643-44 (N.D. Ga. 1973) (speech ban "unconstitutional and void").

because the "injunction, enforceable through the contempt power, constitute[d] a prior restraint by the United States against the publication of facts which the community has a right to know." *Id.* (quoting *Crosby*, 312 F.2d at 485).

The consent order also attempts to put Romeril in the position of "authorizing" future judicial proceedings against him if he speaks, a situation analogous to that in *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931). In *Near*, because of past conduct, a publisher was subjected to active state intervention that controlled his future speech. The Supreme Court has found that such state intervention is a prior restraint, because it embodies "the essence of censorship." *Alexander v. United States*, 509 U.S. 544, 570 (1993) (quoting *Near*, 283 U.S. at 713). The First Circuit similarly invalidated a judicially imposed order prohibiting future speech, even when past conduct suggested that future defamatory conduct was likely to continue. *Sindi v. El-Moslimany*, 896 F.3d 1, 21-22, 30-32 (1st Cir. 2018). Simply put, the Constitution forbids the kind of censorship the Gag Rule enforces. An injunction against Romeril's future expression whether based on prior acts or the content of later speech is incompatible with the First Amendment. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67-71 (1963); *Universal Amusement Co. v. Vance*, 559 F.2d 1286 (5th Cir. 1977), *on reh'g*, 587 F.2d 159 (5th Cir. 1978) (en banc), *aff'd*, 445 U.S. 308 (1980).

3. The Gag Order Gives SEC Unbridled Enforcement Discretion

There are "two evils" that will not be tolerated in governmental prior restraints. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990), *overruled on other grounds by City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004). First, no system of prior restraint may place "'unbridled discretion in the hands of a government official or agency.'" *Id.* at 225-26 (quoting *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics … or other matters of opinion." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Romeril's order forces him to agree "not to take any action or to 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"—a formulation that leaves a party speechless under threat of further prosecution and a reader unable to define any discernible limits on what is prohibited. JA70, at ¶ 11.

Such a broad, all-encompassing and impressionistic prohibition fails to provide clear notice of what speech is forbidden or to articulate any limits on the reach of the speech ban. Such a prohibition confers impermissible discretion on the

SEC to reopen cases if it does not like the "impressions" created by a settling defendant's statements.

4. The Gag Order Silences Plaintiff in Perpetuity

The second evil arises when "a prior restraint … fails to place limits on the time within which the decisionmaker must issue the license" which is "impermissible." *FW/PBS, Inc.*, 493 U.S. at 226 (citing *Freedman v. Maryland*, 380 U.S. 51, 59 (1965)); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 (1980). The Gag Order never expires. The ban is longer even than a criminal sentence would be for the charged violation, something especially relevant here as Romeril was never criminally charged. Romeril's consent order requires him to restrict his speech forever and without end—a restriction that cannot be justified under any level of constitutional precedent. *See FW/PBS, Inc.*, 493 U.S. at 226-27. Such perpetually mandated silence is unconstitutional.

> The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand.

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-59 (1975). Prior restraints are particularly impermissible because "[e]ven if they are ultimately lifted, they cause irremediable loss, a loss in the immediacy, the impact of speech."

Bernard v. Gulf Oil Co., 619 F.2d 459, 467–69 (5th Cir. 1980) (quoting Alexander Bickel, *The Morality of Consent* 61 (1975)), *aff'd*, 452 U.S. 89 (1981).

B. The Gag Order Is a Content-Based Restriction on Speech

1. The Gag Order Mandates the Content of Speech

The Gag Order regulates the content of speech by mandating that Defendant completely agree with the SEC's view of the same complaint that led to the consent order, further threatening penalties if a defendant creates even an impression of a forbidden view of the complaint. Such restrictions are "presumptively invalid" and subject to the highest level of judicial scrutiny. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992). The Constitution "forbid[s] the State to exercise viewpoint discrimination" which is "an egregious" and "blatant" "violation of the First Amendment." *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 829 (1995). "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* The gag applies across the board to all who settle; the opinion or perspective of the speaker is necessarily that *you were once our target.* A government cannot justify "'the most serious and least tolerable infringement'" on a defendant or respondent's freedom of speech and the press. *United States v. Quattrone*, 402 F.3d 304, 309 (2d Cir. 2005) (quoting *Nebraska Press Ass'n*, 427 U.S. at 559 (1976)).

Furthermore, Romeril is only exposed to reprosecution if he criticizes the government's case against him. The gag order leaves him free to speak favorably about the substance or conduct of SEC enforcement against him. By gagging him only when he takes the government-disfavoring side of the debate, the SEC bakes unconstitutional viewpoint discrimination into the Gag Order. Such one-sided government suppression of speech is forbidden. *R.A.V.*, 505 U.S. at 392.

In *SEC v. Vitesse Semiconductor Corp.*, 771 F. Supp. 2d 304, 308–9 (S.D.N.Y. 2011) the court took a hard look at the one-sided and internally contradictory provisions of the SEC's "standard" consent orders and concluded:

> The result is a stew of confusion and hypocrisy unworthy of such a proud agency as the S.E.C. The defendant is free to proclaim that he has never remotely admitted the terrible wrongs alleged by the S.E.C.; but, by gosh, he had better be careful not to deny them either …
> …here an agency of the United States is saying, in effect, "Although we claim that these defendants have done terrible things, they refuse to admit it and we do not propose to prove it, but will simply resort to gagging their right to deny it."
> The disservice to the public inherent in such a practice is palpable.

771 F. Supp. 2d at 309.

In short, to secure a consent order, the SEC simultaneously assures defendants that they are not admitting or denying guilt, yet promises to punish any who might later create the impression of denying any part of the complaint against them with a reopened civil enforcement proceeding. To put it another way, what SEC giveth with one hand, it taketh away with a gloved fist.

Elevated "judicial scrutiny is warranted" any time a "content-based burden" is placed "on protected expression." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011). As an example, under the "Son of Sam" laws—which seek to prohibit criminals from profiting from accounts of their crimes—courts have held that the content of the publication may not be restrained. *See Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

If murderers are free to publish books about their crimes and their prosecutions—as they must be in a free society—*a fortiori*, the SEC ought not to be able to silence SEC targets from speaking about their enforcement proceedings.

2. The Speech Ban Serves No Compelling Government Interest

To pass constitutional muster, speech bans must be narrowly tailored and serve a compelling government interest by the least restrictive means. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000); *see also Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1255 (11th Cir. 2004).

The Gag Rule was enacted in 1972 "to avoid the perception that the SEC had entered into a settlement when there was not in fact a violation" of the securities laws. *See* 17 C.F.R. § 202.5(e). The 2008 financial crisis "gave way to a new concern that the public might believe that the agency was acting collusively with wrongdoers and allowing them to escape serious punishment." David Rosenfeld, *Admissions in SEC Enforcement Cases: The Revolution That Wasn't*, 103 IOWA L.

REV. 113, 119 (2017). One judge memorably articulated this latter concern about SEC collusion in *SEC v. Bank of Am. Corp.*, 653 F. Supp. 2d 507, 508-12 (S.D.N.Y. 2009):

> The proposed Consent Judgment in this case suggests a rather cynical relationship between the parties: the S.E.C. gets to claim that it is exposing wrongdoing on the part of the Bank of America in a high-profile merger; the Bank's management gets to claim that they have been coerced into an onerous settlement by overzealous regulators. And all this is done at the expense, not only of the shareholders, but also of the truth.[7]

Id. at 512.

Neither policy justification for the enactment or enforcement of the rule is a legitimate basis for extracting silence from SEC targets, let alone a compelling one. Whether the SEC is being overaggressive in its charges or is underenforcing the laws while colluding with its targets at taxpayer expense, purchasing settlements at the price of eternal silence from defendants ill-serves public understanding of the Commission and its workings.

[7] Both concerns appear in published critiques of the Gag Rule. Such veiled and silenced settlements raise concerns about public perception of letting defendants off lightly, or even SEC collusion. *See Bank of Am. Corp.*, 653 F. Supp. 2d at 512. At the same time, silence also veils cases where the SEC brought actions that lack merit: "One possibility … is that no fraud was committed. This possibility should not be discounted." Hon. Jed S. Rakoff, U.S. District Judge, Distinguished Jurist Lecture Hosted by the Institute for Law & Economics at the University of Pennsylvania Law School, Why Have No High-Level Executives Been Prosecuted? (Nov. 19, 2013).

It is hard to imagine a policy better designed to suppress truth about these important matters than the Gag Rule as enforced by the SEC in its sweeping gag orders. Securities law professor John Coffee describes these consent settlements as an "artifact": "The SEC is premised on the idea that sunlight is the best disinfectant, and a nontransparent settlement harms the SEC's reputation." Zachary A. Goldfarb, *SEC May Require More Details of Wrongdoing to Be Disclosed in Settlements*, WASH. POST, Apr. 1, 2010, https://www.washingtonpost.com/wp-dyn/content/article/2010/03/31/AR2010033103674.html.

If the SEC in 1972 was extracting settlements when there had been no violation of the securities laws, *it is important for the American public to know that*. By the same token, if the post-2008 SEC was letting powerful defendants off lightly, or even entering into collusive deals, *it is equally important to shed light on those practices.* The government is institutionally highly unlikely to admit to either practice. Silencing the only other parties to the arrangements with a government-enforced muzzle allows the government to act with impunity.

The government has no compelling interest in suppressing speech or suppressing complaints about government regulation and enforcement. The fact that the SEC *systematically* demands gag orders as a condition of its settlements is profoundly dangerous. *See generally* James Valvo, *The CFTC and SEC Are Demanding Unconstitutional Speech Bans in Their Settlement Agreements*, YALE J.

ON REG.: NOTICE & COMMENT BLOG (Dec. 4, 2017), http://bit.ly/2UJ410S. Such a practice prevents the public, Congress, courts, and policymakers from learning the specifics of how the SEC conducts its enforcement actions. Shielding such an important exercise of government power from oversight and scrutiny prevents lawmakers from knowing when to rein in or unleash SEC authority and engage in course correction.

3. The First Amendment Protects the Public's Right to Hear Speech

Far from there being a compelling government interest in a permanent gag, there is a compelling constitutional interest in freedom to discuss government. If government can silence Americans whom it regulates, it can evade public scrutiny and avoid being held accountable. "In the United States, [where] the executive magistrates are not held to be infallible," there is "a freedom in canvassing the merits and measures of public men, of every description." James Madison, *Report of the Committee … Relative to the Resolutions of the Last General Assembly of this State, Concerning the Alien and Sedition Laws* (1799). This is why the interests protected by the First Amendment include the right of the public to hear such criticism.

Furthermore, the interests protected by the First Amendment are not only the right of the speaker to free expression, but also the right of those *hearing* him to receive information unfettered by any government constraints. The First Amendment "necessarily protects the right to receive [information]." *Martin v. City*

of Struthers, 319 U.S. 141, 143 (1943). The U.S. Supreme Court recognizes the "listener's stake," for example, in the context of prior restraints on government employees: "Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions." *Waters*, 511 U.S. at 674 (plurality opinion); *see also United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 470 (1995). Because the 98% of defendants who settle with the SEC are likewise inarguably the most knowledgeable about its enforcement practices, "it is essential that they be able to speak out freely on such questions." *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cty.*, 391 U.S. 563, 572 (1968). In *Harman v. City of New York*, 140 F.3d 111 (2d Cir. 1998), this Circuit affirmed that the rights of both the speaker and the public were violated by a city policy requiring its employees to pre-clear any contacts with the press, noting "free and open debate is vital…[from those] most likely to have informed and definite opinions" about government activity. *Id.* at 118 (quoting *Pickering*, 391 U.S. at 571-72). *Crosby* expressly recognized this interest when it vacated a prior restraint "against the publication of facts which the community has the right to know," declaring that a district court is "without power to make such an order" and "that the parties may have agreed to it is *immaterial*." 312 F.2d at 485 (emphasis added). As a judge in this district observed, "these [SEC] settlements do not always take adequate account of another interest ordinarily at stake as well: that

of the public and its interest in knowing the truth in matters of major public concern." *SEC v. CR Intrinsic Investors, LLC*, 939 F. Supp. 2d 431, 443 (S.D. N.Y. 2013) (Marrero, J.), *abrogated by SEC v. Citigroup Global Markets, Inc.*, 752 F.3d 285 (2d Cir. 2014). Romeril's gag which forbids even truthful speech is accordingly unenforceable.

A 2017 article repeated these concerns noting that a complaint "which largely consists of unproven allegations" filed by the SEC suggests that when "very serious misconduct is being alleged … [t]he public … has an obvious interest in knowing whether such serious allegations made by a government agency are true or untrue." Hon. Jed S. Rakoff, *AGAINST: Neither Admit Nor Deny*, COMPLIANCE WEEK (Sept. 6, 2017, 8:00 AM), https://www.complianceweek.com/against-neither-admit-nor-deny/2539.article. The article notes the self-serving expedience created by the Gag Rule, which

> in addition to impeding transparency and accountability—also means that wrongly accused parties are incentivized not to prove their innocence if they can get a cheap settlement without admitting anything. By the same token, the SEC can avoid having to litigate questionable cases by the simple expedient of offering a cheap settlement. And to make matters worse, the SEC hides the flimsiness of such cases from the public by imposing a "gag" order that prohibits the settling defendants from contesting the SEC's allegations in the media.

Id.

By systematically silencing all defendants, such gag provisions insulate the SEC from criticism by the very people best placed and motivated to expose wrongdoing, over-aggressive prosecutions, and flawed enforcement policies or practices. *Pickering*, 391 U.S. at 572 (recognizing the "public interest in having free and unhindered debate on matters of public interest—the core value of the Free Speech Clause of the First Amendment.) Such a restriction "operates to insulate … [government laws] from constitutional scrutiny and … other legal challenges, a condition implicating central First Amendment concerns." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001).

For just this reason, the Fourth Circuit recently invalidated the City of Baltimore's unconstitutional practice of requiring gag orders in settlements of police brutality case. *Overbey v. Mayor of Baltimore*, 930 F.3d 215 (4th Cir. 2019). That court's trenchant analysis recognized that "Overbey agreed, on pain of contractual liability to the City, to curb her voluntary speech to meet the City's specifications." *Id.* at 223. That decision also punctures the district court's conflation of a clause-specific challenge with an imaginary challenge to jurisdiction. *Overbey* recognized that this was a challenge to a "waiver of a constitutional right" even though it "appears in an otherwise valid contract." *Id.*

4. The Gag Order Does Not Operate by the Least Restrictive Means

The Gag Order's sweeping and perpetual speech restriction is far from the least restrictive means of achieving any compelling interest the government may claim. If the SEC believes specific allegations of the complaint or order should be admitted by the defendant, those specific admissions, with the opportunity provided to defendants to truthfully qualify them, can always be negotiated as part of the settlement. If a settling party asserts his innocence untruthfully, the SEC need only issue a press release to the contrary, a remedy far preferable and less restrictive than the lifetime ban on the defendant's speech procured under the government's boot and enforced by the threat of renewed prosecution.

C. The Gag Order Forbids Truthful Speech

Romeril's Gag Order is also unconstitutional because it forbids true speech just the same as false speech. His consent order ends with a provision that "lifts" the Gag Order—and its substantive commands about admissions and denials—for testimonial obligations or his "rights" to take legal or factual positions in judicial proceedings in which the Commission is not a party. The SEC's "lift" is a tacit admission that the Gag Order *must* contain an exception where it conflicts with a defendant's obligation to speak the truth under oath. This telling exception is fatal to any defense of the Gag Order by the Commission because it concedes that defendants' obligations to tell the truth under oath may be at odds with the SEC's

command that defendants may not deny any allegations in the SEC's settled but unproven complaint. This exception would not be necessary unless SEC knows that the gag policy would otherwise lead to false impressions or even perjury. SEC's self-favoring exemption from the exception—"in which the Commission is not a party"—also disturbingly places SEC's thumb on the scales of justice in any subsequent proceeding in which the Commission is a party. JA70, at ¶ 11.

Indeed, the Gag Rule's original justification when it was adopted in 1972 was that it was "important to avoid creating … an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur." 17 C.F.R. § 202.5(e). Yet the Gag Rule as implemented in consent orders itself creates the false impression that every fact in the complaint or order is accurate, when that is seldom, if ever, the case. We all know complaints consist "largely … of unproven allegations." Hon. Jed S. Rakoff, *supra* p. 35, *AGAINST: Neither admit nor deny*. Thus, the text of the SEC's original justification for the Gag Rule argues *against* having a rule that creates the false impression that the complaint is completely true.

This "lift" of the ban in testimonial situations appears to be a strategic exception designed to avoid a gag order's coming to the attention of a judge in subsequent judicial proceedings who might well invalidate such a disturbing and unconstitutional speech ban unheard of in normal state or federal judicial settlements or consent decrees.

But this exception is much too parsimonious. The government doesn't get to decide *when* defendants may speak the truth, by carving out a caveat calculated to shield the ban from scrutiny in subsequent judicial or testimonial proceedings, but otherwise silencing defendants for life. The statement of the proposition suffices to expose its raw unconstitutionality.

D. The Gag Order Is an Unconstitutional Condition

The SEC cannot condition a person's ability to settle with the government upon the surrender of his First Amendment rights. *Legal Servs. Corp.*, 531 U.S. at 533; *accord Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) (quoting *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983) ("'the government may not deny a benefit to a person because he exercises a constitutional right'")). The Supreme Court has long held that the government may not make its decision to refrain from its adverse exercise of power "dependent upon the surrender … of a privilege secured … by the constitution … of the United States." *Barron v. Burnside*, 121 U.S. 186, 200 (1887). Indeed, the U.S. Supreme Court declared in 1963 that it was by then "too late in the day to doubt that the libert[y] of … expression may be infringed by the denial of or placing conditions upon a … privilege." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

These "cases reflect an overarching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution's enumerated rights by

preventing the government from coercing people into giving them up." *Koontz*, 570 U.S. at 604. Moreover, "regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them." *Id.* The SEC's demand as a condition of settlement that the targets of its enforcement action never publicly question their validity "necessarily…ha[s] the effect of coercing" settling parties into surrendering their freedom to "engag[e] in certain speech" protected by the First Amendment. *Speiser v. Randall*, 357 U.S. 513, 519 (1958).

Nor does it make a difference that the government could have refused to settle at all. Virtually all unconstitutional conditions cases involve an optional governmental action of some kind. As *Koontz* states, "we have repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional rights." 570 U.S. at 608. *See, e.g., United States v. American Library Ass'n, Inc.,* 539 U.S. 194, 210 (2003) ("[T]he government may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech *even if he has no entitlement to that benefit*." (emphasis added and internal quotation marks omitted)). Even if SEC would have been entirely within its rights in refusing to settle, that greater authority does not imply a "lesser" power to condition the settlement upon

defendant's forfeiture of his constitutional rights. *See Nollan v. California Coastal Commission*, 483 U.S. 825, 836-837 (1987). Just as Congress cannot condition its funding "lest the First Amendment be reduced to a simple semantic exercise," *Legal Servs. Corp.*, 531 U.S. at 547, similarly here, the SEC cannot condition the benefit of a conclusively settled case on eternal silence about the merits of the case by those whom it prosecutes. A city's contract that attempted to condition a benefit on the waiver of a party's right to free expression is unenforceable. *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1077 (6th Cir. 1994).

Gag Orders such as Romeril's stifle informed public debate on these matters. They require defendants to make a difficult choice: surrender their constitutional rights to speak freely and to petition the government or forgo consent settlements with the Commission and face the potentially ruinous costs and risks of contesting the proceedings to the bitter end. Under the orders insisted upon by the SEC, the only way for a defendant to settle an enforcement proceeding is to surrender forever his future First Amendment rights of speech and petition with respect to the government's prosecution. Our Constitution does not permit that baleful bargain.

III. THE GAG ORDER VIOLATES MOVANT'S FIRST AMENDMENT RIGHT TO PETITION

The First Amendment provides that "Congress shall make no law … abridging … the right of the people … to petition the Government for a redress of grievances." U.S. CONST. amend. I. Its protections include the right of petition by

defendants "with respect to the passage and enforcement of laws." *Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961). The First Amendment "'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). The Gag Rule as implemented by the SEC in its orders offends our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times*, 376 U.S. at 270. Speech on matters of public concern is at "the heart of … First Amendment[] protection." *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 766 (1978). And it "occupies the highest rung of the hierarchy of First Amendment values." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985). Speech concerning political change "trenches upon an area in which the importance of First Amendment protections *is at its zenith.*" *Meyer v. Grant*, 486 U.S. 414, 425 (1988) (emphasis added) (internal quotation marks omitted). "[S]peech critical of the exercise of the State's power lies at the very center of the First Amendment." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034 (1991).

For these reasons, Congress itself cannot pass a statute that gags people from speaking about government action against them. In *McBryde v. Committee to*

Review Circuit Council Conduct, 83 F. Supp. 2d 135 (D.D.C. 1999), *judgment affirmed in part, vacated in part by McBryde v. Committee to Review Circuit Council Conduct*, 264 F.3d 52, 55 (D.C. Cir. 2001), a district court judge disciplined under Congress' Judicial Council and Disability Act challenged its confidentiality provision. The court held that confidentiality provision of an Act of Congress "operates as an impermissible prior restraint" and ruled that the disciplined judge "must enjoy the opportunity to speak openly and freely about [the] proceedings" against him. *Id*. at 140, 177-78. The government did not appeal the district court's First Amendment ruling. *McBryde v. Committee to Review Circuit Council Conduct*, 264 F.3d 52, 55 (D.C. Cir. 2001).[8] If judges are free to speak about their proceedings, *all* Americans should enjoy that same right.

Congress recently prohibited the use of "gag clauses" in certain private contracts, whether or not the drafters enforce them. *See* 15 U.S.C. § 45b(b). If federal regulatory policy treats gag clauses in consumer contracts as unlawful even when those are private parties not subject to the First Amendment engaged in freedom of contract, not a government subject to the prohibitions of the First Amendment, the same logic extends *a fortiori* to the SEC.

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[8] *McBryde*, 264 F.3d 52, 55 ("On cross motions for summary judgment, the district court agreed with Judge McBryde's First Amendment argument, *McBryde v. Committee to Review Circuit Council Conduct and Disability Orders*, 83 F. Supp. 2d 135, 171-78 (D.D.C. 1999), but rejected the rest. Only Judge McBryde appealed.").

Romeril's Gag Order prohibits him from ever questioning the merits of his prosecution. But history is replete with compelling accounts of prosecutorial abuse of power, including prosecutors who deny their targets access to exculpatory evidence, who engage in misconduct, sharp practice or intimidation, tactics that can and have brought defendants or respondents to their knees. Other prosecutions, brought in good faith, have later been shown to have been based upon perjured or compromised evidence. Further, the prospect of potentially ruinous costs, crippling time demands, and collateral damage mean that even innocent people may find settling with the government preferable to hazarding a full-fledged prosecution. Statistics show that 98% of persons charged by the SEC settle. *See* Priyah Kaul, Note, *Admit or Deny: A Call for Reform of the SEC's "Neither-Admit-Nor-Deny" Policy*, 48 U. MICH. J.L. REFORM 535, 536 (2015) ("Since 2002, the SEC's settlement rate has remained constant at about ninety-eight percent.").

Regulation by enforcement and settlement has drawn the concern and attention of judges and even SEC Commissioners. In a May 2018 speech, SEC Commissioner Hester Peirce noted:

> The practice of attempting to stretch the law is a particular concern when it occurs in settled enforcement actions. Often, given the time and costs of enforcement investigations, it is easier for a private party just to settle than to litigate a matter. The private party likely is motivated by its own circumstances, rather than concern about whether the SEC is creating new legal precedent. However, the decision made by that party about whether to accede to [the] SEC's proposed order can have far-reaching effects. Settlements — whether appropriately or not —

> become precedent for future enforcement actions and are cited within and outside the Commission as a purported basis for the state of the law. Quite simply, a settlement negotiated by someone desperate to end an investigation that is disrupting or destroying her life should not form the basis on which the law applicable to others is based.

Hester M. Peirce, Commissioner, Sec. & Exchange Comm'n, *The Why Behind the No*: *Remarks at the 50th Annual Rocky Mountain Securities Conference* (May 11, 2018) *available at* https://www.sec.gov/news/speech/peirce-why-behind-no-051118. Consent settlements may well represent either the SEC's failure to make a case when put to its burden of proof or a settling target's guilt—or some combination thereof. Any person who waves the white flag to end the process should not be forever silenced on the topic of the merits of his prosecution—most especially, not by the prosecutor.

Speech focused on public concern is "'more than self-expression; it is the essence of self-government.'" *Snyder*, 562 U.S. at 451-52 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964)). Thus, this speech is indispensable to the First Amendment's values and deserves "special protection." *Snyder*, 562 U.S. at 452 (quoting *Connick*, 461 U.S. at 145). When prosecutors abuse their considerable powers beyond lawful and ethical bounds, or a prosecution is based on weak or compromised evidence, their targets, including Romeril, should be free to say so and petition appropriate government bodies for change. When agencies regulate through enforcement, guidance, or other legislatively unauthorized means, the persons

affected should never be silenced by the regulator. Any healthy nation should encourage such self-examination. A constitutional democratic republic requires it.

IV. THE GAG ORDER VIOLATES DUE PROCESS BECAUSE IT IS UNCONSTITUTIONALLY VAGUE

The Gag Order is also unconstitutionally vague. A settling defendant had better stay mum altogether, rather than navigate at his peril what he can say about his own prosecution under the terms of the Gag Order. The Supreme Court has recognized that a penal law:

> must be sufficiently explicit to inform those who are subject to it what conduct … will render them liable to its penalties … a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at [the law's] meaning and differ as to its application, violates the first essential of due process of law.

Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (citing *Connally*, 269 U.S. at 391). "When speech is involved," it is particularly important "to ensure that ambiguity does not chill protected speech." *Id.* at 253-54. The Gag Order has no limiting principle. The order forbids a defendant from even creating "an *impression* that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur." 17 C.F.R. § 202.5(e). This phrasing confers

unlimited discretion on the Commission to decide what future speech is or is not permissible and is therefore unconstitutionally vague.

V. THE GAG ORDER VIOLATES DUE PROCESS BECAUSE THE SEC LACKED STATUTORY AUTHORITY TO ISSUE IT AND CANNOT BIND DEFENDANT TO A HOUSEKEEPING RULE

No agency has any inherent power to make law. Article I, § 1 of the U.S. Constitution vests "[a]ll legislative powers" in the Congress, and "the lawmaking function belongs to Congress … and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996). This constitutional barrier means "an agency literally has no power to act … unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Thus, even if an independent agency could constitutionally exercise the legislative power to write a Gag Rule, it cannot purport to bind anyone without congressional authorization, which is utterly lacking here.

None of the statutes cited by SEC conferred authority upon it to issue a Gag Rule, nor did they exempt the agency from using notice-and-comment rulemaking. *See supra* note 1 and statutes at SA02-08. The SEC's assertion that publication, notice and comment were not required for a binding rule is flatly wrong. Congress has not given the SEC any authority to impose additional restrictions on the

constitutional rights of persons they prosecute, either in court or administratively.[9] Nor is this surprising, as the First Amendment and the unconstitutional conditions doctrine would forbid it.

Given the "stinging criticism" of the rule that has emerged from federal judges and in law journals it is fair to assume that a proposed rule giving the agency power to gag its targets as to how regulations have been enforced against them would attract vigorous negative comments if published for notice and comment. *See* Rosenfeld, *supra* p. 30, at 114. We have no record of such public objection because the SEC chose to push this through in the guise of a "housekeeping rule" that bypassed APA requirements.

Gag Rules that bind persons outside the agency who make the difficult decision to settle a case are not "housekeeping" rules. *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251-52 (D.C. Cir. 2014). Such binding rules require notice

[9] A Gag Rule, binding upon parties brought before the SEC in "any civil lawsuit brought by it or in any administrative proceeding of an accusatory nature" is anything but a rule that "relates only to rules of agency organization, procedure and practice." 17 C.F.R. § 202.5(e); 37 Fed. Reg. 25224 (1972). An agency's *ad hoc* promulgation of a self-protective rule by which SEC not only seeks to bind private parties with the force of law and penalty of re-prosecution, but to silence them on the topic of their prosecution is a wholly illegitimate exercise of government power. Nor is it an "interpretive" rule exempt from the APA. There is no authorizing statute to interpret. An agency regulation is not interpretive if it has "the force and effect of law" or is one "affecting individual rights and obligations." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979). The SEC admitted that "the Commission will accept a settlement *only if* the defendant agrees to such a no-deny provision." *See* Dkt. No. 31, at 3 (emphasis added).

and comment and violate the APA when they are promulgated without it. *Id.* at 252. In this instance, they also exceed any power Congress granted to the SEC in enabling statutes. Thus, in addition to the Gag Rule's fatal constitutional infirmities, it also is unlawful because it lacks statutory authority.

VI. THE GAG ORDER SILENCES PLAINTIFF IN PERPETUITY WHICH CANNOT BE A KNOWN AND VOLUNTARY WAIVER AND VIOLATES DUE PROCESS

Romeril must retain his freedom to speak about the SEC settlement because the law which formed the basis of his charges may change to permit what was previously prohibited, and it may do so 16 days or 16 years after the date of settlement. For example, the SEC itself has enacted such a revision: in 2008, the SEC changed the rules governing its public offering process to allow companies to forecast expected performance. 17 C.F.R. §§ 229.10(b), 229.303(a)(3)(ii). The SEC's original policy was to discourage companies from publicizing these predictions because "the Commission ha[d] taken the position that any such…prediction might be interpreted as an 'offer to sell' forthcoming securities before the registration statement bec[ame] effective, which constitute[d] a violation of the Securities Act of 1933." Harry H. III Wise, *Fearless Forecasts: Corporate Liability for Earnings Forecasts that Miss the Mark*, 18 B.C. L. REV. 115, 117 (1934). That policy has evolved over the years not only to permit such forecasts, *but to encourage them*. 17 C.F.R. §§ 229.10(b), 229.303(a)(3)(ii); Press Release, Sec. &

Exchange Comm'n, News Digest (Aug. 16, 1971) (on file with author). The SEC now "encourages the use…of management's projections of future economic performance" and requires disclosure of "any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." 17 C.F.R. §§ 229.10(b), 229.303(a)(3)(ii). Thus, what was once a violation of the Securities Act of 1933 is now a practice which the SEC requires. Yet under the terms of the SEC's Gag Order, Romeril, had he been charged for issuing public forecasts, would be forever bound to his initial conviction in the court of public opinion for violating a law that is no longer in place. Worse yet, he would be left completely without the power to defend himself by speaking on the subject later or to advocate before Congress or the SEC for policy and enforcement changes. In *Simon & Schuster*, the Supreme Court recognized that "[i]n the context of financial regulation, it bears repeating, as we did in *Leathers* [*v. Medlock*, 499 U.S. 439 (1991)], that the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." 502 U.S. at 116.

The shifting sands of SEC regulation are well known, and have been acknowledged (and denounced) by former high-ranking SEC officials.[10] Hence, the negative consequences of silencing 98% of those directly affected by the SEC's enforcement activities is tremendously detrimental to the public's interest in transparency, particularly given the heightened risk of abuses of government power

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[10] As a former SEC commissioner explains, compelling policy concerns demand more transparency in the settlement process:

> As a Commissioner, I was particularly troubled by the frequent use of settlements to announce Commission policy in borderline cases. Many of my dissents involved the use of [the securities laws] to settle cases which, in my view, would not have succeeded in the courts …. The case-by-case development of regulatory law and policy produces many problems, especially when the policy involves law enforcement actions against regulated persons and businesses that have serious adverse consequences. The SEC is an independent agency that represents itself in the lower courts and can bring a wide variety of enforcement actions, including cease-and-desist cases, without even going to court. Enforcement attorneys can assist and encourage U.S. Attorneys to bring criminal cases. The Commission has considerable latitude in choosing its enforcement targets and theories. The Commission therefore has a serious obligation to restrain the enforcement staff from overzealous prosecutions. Generally, the Commission takes this obligation seriously, but political and time constraints sometimes permit the prosecutors to create the law.

Roberta S. Karmel, *Creating Law at the Securities and Exchange Commission: The Lawyer As Prosecutor*, Law & Contemp. Probs. at 33, 42, 45 (Winter 1998) *available at* https://scholarship.law.duke.edu/lcp/vol61/iss1/4. Similarly, a former General Counsel to the SEC observed in his experience that "the agency seeks to expand liability to the greatest extent possible and well beyond statutory language or established precedent." Andrew N. Vollmer, *Four Ways to Improve SEC Enforcement*, 43 SEC. REG. L. J. 333, 334 (2015).

in this context. This is especially a concern when Commission "[s]ettlements — whether appropriately or not — become precedent for future enforcement actions and are cited within and outside the Commission as a purported basis for the state of the law." Karmel, *supra* at n. 10.

In addition, reputations and livelihoods that were damaged or destroyed at the time of an initial SEC press release are sullied in perpetuity by this rule, because it strips defendants of the opportunity for correction or self-defense. When SEC pushes beyond the bounds of its lawful authority and secures a settlement of a claim for which there was no fair notice of illegality, gagging the besieged target means that this form of regulation will have no check, no sunlight will expose it, and it will fester in the dark.

VII. THE GAG ORDER VIOLATES DUE PROCESS BECAUSE IT IMPLICATES THE JUDICIARY IN VIOLATING THE CONSTITUTION

Agencies that settle charges with their targets are not just acting under their own power. They have harnessed the machinery of the state, whether a court or an administrative tribunal, and they thereby imperil the livelihood, resources, and liberty of defendants. Consent orders impose injunctive prohibitions and fines enforceable by judicial contempt power. Such applications of judicial power by administrative agencies are "inherently dangerous" and implicate a coordinate branch in the constitutional breach:

> The injunctive power of the judiciary is not a free-roving remedy to be invoked at the whim of a regulatory agency, even with the consent of the regulated. . . . .
> …[T]here is an overriding public interest in knowing the truth. In much of the world, propaganda reigns, and truth is confined to secretive, fearful whispers. Even in our nation, apologists for suppressing or obscuring the truth may always be found. But the S.E.C., of all agencies, has a duty, inherent in its statutory mission, to see that the truth emerges; and if it fails to do so, this Court must not, in the name of deference or convenience, grant judicial enforcement to the agency's contrivances.

Citigroup Global Markets, 827 F. Supp. 2d at 335.

As the Second Circuit has noted, prior restraints are "particularly abhorrent to the First Amendment in part because they vest in government agencies the power to determine important constitutional questions properly vested in the judiciary." *New York Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 131 (2d Cir. 1998) (citing Laurence H. Tribe, *American Constitutional Law*, § 12-38, at 1056-57 (2d ed. 1988)).

The First Amendment was *designed* to protect the interests of free and robust speech, including speech critical of government, as noted in 1803:

> those who administer the government … are the … servants of the people, not their rulers or tyrants …. [T]o enforce this responsibility, it is indispensably [*sic*] necessary that the people should inquire into the conduct of their agents; that in this inquiry, they must, or ought to scrutinize their motives, sift their intentions, and penetrate their designs; and that it [is] therefore, an unimpeachable right in them to censure as well as to applaud; to condemn or to acquit …, as the most severe scrutiny might advise.

1 Tucker, Blackstone's Commentaries, appendix to vol. 1, part 2, note G, at 14 (1803).

All judges have a duty to follow the law of the land, and they should not be the enforcers of that which they know to be against the law, even though the parties themselves may have agreed to the conditions.

SEC's contrivance of a power to fashion a Gag Order out of 17 C.F.R. § 202.5(e)'s "policy" works to suppress truth, oppress defendants, and insulate the agency from public understanding and criticism. The value of the free flow of information far outweighs such illegitimate "policies" as bureaucratic discomfort with the appearance of over-reaching or underenforcement, which serves solely the Commission's inherent aversion to criticism. Agencies do not have some special grant of power to shield themselves from public scrutiny, a power Congress, actual courts, prosecutors, and lawmakers all lack under well-established law.

The Gag Rule violates an impressive array of constitutional doctrines, including infringement of First Amendment rights to freedom of speech and the press, unconstitutional conditions, the right to petition, prior restraint, void-for-vagueness, and violation of due process. Any rule that racks up a list of constitutional and legal violations that lengthy compels the conclusion that some fundamental tenet of our constitutional republic has been violated.

CONCLUSION

Because "[f]ragile First Amendment rights are often lost or prejudiced by delay," *Gulf Oil*, 619 F.2d at 470, 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: April 10, 2020

New Civil Liberties Alliance

/s/ Margaret A. Little
Margaret A. Little
Kara Rollins
Attorneys for Appellant
Barry D. Romeril

STATEMENT OF RELATED CASES

Appellant is not aware of any related cases pending in the Second Circuit.

Date: April 10, 2020.

New Civil Liberties Alliance

/s/ Margaret A. Little
Margaret A. Little
Kara Rollins
Attorneys for Appellant
Barry D. Romeril

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 13,798 of 14,000 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: April 10, 2020

New Civil Liberties Alliance

/s/ Margaret A. Little
Margaret A. Little
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Attorneys for Appellant
Barry D. Romeril

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 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: April 10, 2020.

New Civil Liberties Alliance

/s/ Margaret A. Little
Margaret A. Little
Kara Rollins
Attorneys for Appellant

Special Appendix

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U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

15 U.S.C. § 77s (1970)

§ 77s. Special powers of Commission.

(a) The Commission shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this subchapter, including rules and regulations governing registration statements and prospectuses for various classes of securities and issuers, and defining accounting, technical, and trade terms used in this subchapter. Among other things, the Commission shall have authority, for the purposes of this subchapter, to prescribe the form or forms in which required information shall be set forth, the items or details to be shown in the balance sheet and earning statement, and the methods to be followed in the preparation of accounts, in the appraisal or valuation of assets and liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating Income, and in the preparation, where the Commission deems it necessary or desirable, of consolidated balance sheets or income accounts of any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer; but insofar as they relate to any common carrier subject to the provisions of section 20 of Title 49, the rules and regulations of the Commission with respect to accounts shall not be inconsistent with the requirements imposed by the Interstate Commerce Commission under authority of such section. The rules and regulations of the Commission shall be effective upon publication in the manner which the Commission shall prescribe. No provision of this subchapter imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the Commission, notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or be determined by Judicial or other authority to be invalid for any reason.

(b) For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this subchapter, any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States or any Territory at any designated place of hearing.

(May 27, 1933, ch. 38, title I, § 19, 48 Stat. 85; June 6, 1934, ch. 404, § 209, 48 Stat. 908.)

15 U.S.C. § 78w (1970)

§ 78w. Rules and regulations; annual reports.

(a) The Commission and the Board of Governors of the Federal Reserve System shall each have power to make such rules and regulations as may be necessary for the execution of the functions vested in them by this chapter, and may for such purpose classify issuers, securities, exchanges, and other per- sons or matters within their respective jurisdictions. No provision of this chapter imposing any liability shall apply to any act done or omitted In good faith in conformity with any rule or regulation of the Commission or the Board of Governors of the Federal Reserve System, notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

(b) The Commission and the Board of Governors of the Federal Reserve System, respectively, shall Include in their annual reports to Congress such In- formation, data, and recommendation for further legislation as they may deem advisable with regard to matters within their respective jurisdictions under this chapter. The Commission shall include In its annual reports to the Congress for the fiscal years ended on June 30 of 1965, 1966, and 1967 information, data, and recommendations specifically related to the operation of the amendments to this chapter made by the Securities Acts Amendments of 1964.

(June 6, 1934, ch. 404, § 23, 48 Stat. 901; Aug. 23, 1935, ch. 614, § 203(a), 49 Stat. 704; May 27, 1936, ch. 462, § 8, 49 Stat. 1379; Aug. 20, 1964, Pub. L. 88-467, § 10, 78 Stat. 580.)

15 U.S.C. § 79t (1970)

§ 79t. Rules, regulations, and orders.

(Repealed. Pub. L. 109–58, title XII, § 1263, Aug. 8, 2005, 119 Stat. 974)

(a) Authority of Commission to make.

The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as it may deem necessary or appropriate to carry out the provisions of this chapter, including rules and regulations de- fining accounting, technical, and trade terms used in this chapter. Among other things, the Commission shall have authority, for the purposes of this chapter, to prescribe the form or forms in which in- formation required in any statement, declaration, application, report, or other document filed with the Commission shall be set forth, the items or details to be shown in balance sheets, profit and loss statements, and surplus accounts, the manner in which the cost of ail assets, whenever determinable, shall be shown in regard to such statements, declarations, applications, reports, and other documents filed with the Commission, or accounts required to be kept by the rules, regulations, or orders of the Commission, and the methods to be followed in the keeping of accounts and cost-accounting procedures and the preparation of reports, in the segregation and allocation of costs, in the determination of liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the keeping or preparation, where the Commission deems it necessary or appropriate, of separate or consolidated balance sheets or profit and loss statements for any companies in the same holding-company system.

(b) Consistency with laws of United States or States.

In the case of the accounts of any company whose methods of accounting are prescribed under the provisions of any law of the United States or of any State, the rules and regulations or orders of the Commission in respect of accounts shall not be inconsistent with the requirements imposed by such law or any rule or regulation thereunder; nor shall anything in this chapter relieve any public-utility company from the duty to keep the accounts, books, records, or memoranda which may be Required to be kept by the law of any State in which it operates or by the State Commission of any such State. But this provision shall not prevent the Commission from imposing such additional requirements regarding reports or accounts as it may deem necessary or appropriate in the public interest or for the protection of investors or consumers.

(c) Effective date; classification of persons and matters; hearings.

The rules and regulations of the Commission shall be effective upon publication in the manner which the Commission shall prescribe. For the purpose of its rules, regulations, or orders the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. Orders of the Commission under this chapter shall be issued only after opportunity for hearing.

(d) Filing information or documents by reference.

The Commission, by such rules and regulations or order as it deems necessary or appropriate in the public interest or for the protection of investors or consumers, may authorize the filing of any information or documents required to be filed with the Commission under this chapter, or under the Securities Act of 1933, as amended, or under the Securities Exchange Act of 1934, by incorporating by reference any information or documents theretofore or con- currently filed with the Commission under this chapter or either of such Acts. No provision of this chapter imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or order of the Commission, notwithstanding that such rule, regulation, or order may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

(Aug. 26, 1935, ch. 687, title I, § 20. 49 stat. 833.)

15 U.S.C. § 80a-37 (1970)

§ 80a-37. Rules, regulations, and orders; general powers of Commission.

(a) The Commission shall have authority from time to time to make, Issue, amend, and rescind such rules and regulations and such orders as are necessary or appropriate to the exercise of the powers conferred upon the Commission elsewhere in this subchapter, including rules and regulations defining accounting, technical, and trade terms used in this subchapter, and prescribing the form or forms in which information required in registration statements, applications, and reports to the Commission shall be set forth. For the purposes of its rules or regulations the Commission may classify persons, securities, and other matters within its jurisdiction and prescribe different requirements for different classes of persons, securities, or matters.

(b) The Commission, by such rules and regulations or order as it deems necessary or appropriate in the public interest or for the protection of investors, may authorize the filing of any information or documents required to be filed with the Commission un- der this subchapter, subchapter II of this chapter, the Securities Act of 1933, the Securities Exchange Act of 1934, the Public utility Holding Company Act of 1935, or the Trust Indenture Act of 1939, by incorporating by reference any information or documents theretofore or concurrently filed with the Commission under this subchapter or any of such Acts.

(c) No provision of this subchapter imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or order of the Commission, notwithstanding that such rule, regulation, or order may, after such act or omission, by amended or rescinded or be deter- mined by judicial or other authority to be invalid for any reason. (Aug. 22, 1940, ch. 686, title I, § 38, 54 Stat. 841.)

15 U.S.C. § 80b-11 (1970)

§80b-11. Rules, regulations, and orders of Commission.

(a) The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as are necessary or appropriate to the exercise of the functions and powers conferred upon the Commission elsewhere in this subchapter. For the purposes of its rules or regulations the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters.

(b) Subject to the provisions of the Federal Register Act and regulations prescribed under the authority thereof, the rules and regulations of the Commission under this subchapter, and amendments thereof, shall be effective upon publication in the manner which the Commission shall prescribe, or upon such later date as may be provided In such rules and regulations.

(c) Orders of the Commission under this sub- chapter shall be issued only after appropriate notice and opportunity for hearing. Notice to the parties to a proceeding before the Commission shall be given by personal service upon each party or by registered mail or certified mail or confirmed telegraphic notice to the party's last known business address. Notice to interested persons, if any, other than parties may be given in the same manner or by publication in the Federal Register.

(d) No provision of this subchapter imposing any liability shall apply to any act done or omitted in good faith In conformity with any rule, regulation, or order of the Commission, notwithstanding that such rule, regulation, or order may, after such act or omission, be amended or rescinded or be deter- mined by judicial or other authority to be invalid for any reason.

(Aug. 22, 1940, ch. 686, title II, § 211, 54 Stat. 855; June 11, 1960, Pub. L. 86-507, § 1(16), 74 Stat. 201; Sept. 13, 1960, Pub. L. 86-750, § 14, 74 Stat. 888.)

7 C.F.R. § 202.5(e) (2020)

§ 202.5 Enforcement activities.

(e) The Commission has adopted the policy that in any civil lawsuit brought by it or in any administrative proceeding of an accusatory nature pending before it, it is important to avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur. Accordingly, it hereby announces its policy not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings. In this regard, the Commission believes that a refusal to admit the allegations is equivalent to a denial, unless the defendant or respondent states that he neither admits nor denies the allegations.

37 Fed. Reg. 25224

Title 17-COMMODITY AND SECURITIES EXCHANGES
Chapter II-Securities and Exchange Commission
[Release Nos. 33-5337, 34-9882, 35-17781, IC-7526, IA-352.]

PART 202-INFORMAL AND OTHER PROCEDURES
Consent Decrees in Judicial or Administrative Proceedings

The Securities and Exchange Commission today announced adoption of a policy with respect to consent decrees in judicial or administrative proceedings under the laws which it administers. In this connection it has amended § 202.5 of Part 202 of the Code of Federal Regulations relating to informal and other proceedings, as indicated below.

COMMISSION ACTION

Pursuant to the authority granted in section 19 of the Securities Act of 1933, section 23 (a) of the Securities Exchange Act of 1934, section 20 of the Public Utility Holding Company Act of 1935, section 38 of the Investment Company Act of 1940 and section 211 of the Investment Advisers Act of 1940, the Securities and Exchange Commission hereby amends § 202.5 of Chapter II of Title 17 of the Code of Federal Regulations by adding thereunder a new paragraph (c) reading as follows:

§ 202.5 Enforcement activities.

* * * * * *

(e) The Commission has adopted the policy that in any civil lawsuit brought by it or in any administrative proceeding of an accusatory nature pending before it, it is important to avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur. Accordingly, it hereby announces its policy not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings. In this regard, the Commission believes that a refusal to admit the allegations is equivalent to a denial, unless the defendant or respondent states that he neither admits nor denies the allegations.

(Secs. 19, 209, 48 Stat. 85, 908, 15 U.S.C. 77s; sec. 23(a), 48 Stat. 901, sec. 8, 49

Stat. 1379, 15 U.S.C. 78w(a); sec. 20, 49 Stat. 833, 15 U.S.C. 79t; sec. 38, 54 Stat. 841, 15 U.S.C. 80a-37; sec. 211, 54 Stat. 855, sec. 14, 74 Stat. 888, 15 U.S.C. 80b-11)

The Commission finds that the foregoing amendment relates only to rules of agency organization, procedure and practice and, therefore, notice and procedures specified in 5 U.S.C. 553 are unnecessary. The foregoing amendment is declared to be effective immediately.

By the Commission.

RONALD F. HUNT, Secretary.

NOVEMBER 28, 1972.

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