IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. CHRISTOPHER A. NOVINGER, et al., Defendants.	CIVIL ACTION NO: 4:15-cv-358-O September 27, 2022

REPLY BRIEF IN SUPPORT OF MOTION FOR DECLARATORY JUDGMENT

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I. DECLARATORY RELIEF IS AVAILABLE TO CORRECT UNCONSTITUTIONAL DECREES

This case poses the question: "Where do Defendants go to get their Constitutional rights back?" SEC's Gag Order imposes an unconstitutional prior restraint on their First Amendment rights that "must be vacated," *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 418-20 (1971). As two judges on appeal in this action stated in a separate concurrence: "A more effective prior restraint is hard to imagine." *SEC v. Novinger*, 40 F.4th 297, 308 (2022). It is also an impermissible content- and viewpoint-based prohibition on speech. *Sorrell v. IMS Health Inc*, 564 U.S. 552, 565-566 (2011) (Government "may no more silence unwanted speech by burdening its utterance than by censoring its content."). Worse, the Gag puts Defendants in the position of authorizing future proceedings against them if they, or someone on their behalf, speaks critically of SEC's prosecution against them, something long prohibited under *Near v. Minnesota ex rel. Olson*, 283 U.S. 697,716 (1931). Finally, the Gag is an unconstitutional condition. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (Government may not condition a benefit on suppressing speech.).

Defendants have not "sidestep[ed] Rule 60." SEC Br. 3. To the contrary, Defendants made every effort to secure relief under that Rule, only to find this Court and the Fifth Circuit unwilling to adopt the approach of the out-of-circuit precedent *Crosby v. Bradstreet*, 312 F.2d 383 (2d Cir. 1963). But these earlier rulings recognize a constitutional problem, relief for which sits comfortably within the scope of the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, ("DJA").

A. Consent Decrees Are Subject to Declaratory Relief at Any Time

Consent decrees are never final. *Alexander v. Bahou*, 512 F. Supp. 3d 363 (N.D.N.Y. 2021). Courts are charged with ensuring that a consent decree does not exceed its appropriate limits, which occurs when it is "aimed at eliminating a condition that does not violate [federal law] or does not flow from such a violation." *Horne v. Flores*, 557 U.S. 433, 450 (2009) (cleaned up).

The DJA provides for just that: "In a case of actual controversy within its jurisdiction, … any court of the United States … may declare the rights and other legal relations of any interested party[.]" 28 U.S.C. § 2201. SEC's argument that only a plaintiff can seek declaratory relief is belied by the very terms of the statute and of Federal Rule of Civil Procedure 57, which expressly provide for declaratory relief for "parties." The Commentary to Rule 57 notes:

> Inasmuch as it often involves only an issue of law on undisputed or relatively undisputed facts, it operates frequently as a summary proceeding, justifying docketing the case for early hearing *as on a motion* … The existence or nonexistence of any right … may be declared … with respect to general ordinary or extraordinary legal remedies.

This motion seeks relief under the Constitution on undisputed facts and a pure issue of law, relief for which is only available in Article III courts. Defendants *must* seek relief from the court that issued the order. *Walker v. City of Birmingham*, 388 U.S. 307, 336 (1967).

B. Fifth Circuit Law Amply Supports this Claim for Declaratory Judgment

SEC argues that "defendants do not identify a single decision in which a court has issued a declaratory judgment that affords relief from a previously entered final judgment." SEC Br. 3. Not so! Defendants cited *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc) and *U.S. v. City of Miami, Fla.*, 664 F.2d 435, 441 (5th Cir. 1981) (en banc) (per curiam) (Rubin, J. concurring) which prohibit courts from entering judicial decrees that, even on consent of the parties, violate the Constitution. This Circuit has long recognized that where a legal question arises about "coercive relief," federal courts may take jurisdiction under the DJA "to grant the relief of declaration, either before or after the stage of relief by coercion has been reached." *Gully v. Int'l Nat. Gas Co.*, 82 F.2d 145, 149 (5th Cir. 1936).

The cases SEC cites are not to the contrary. *Cook v. Birmingham News*, 618 F.2d 1149 (5th Cir. 1980), provides no support for the SEC because it is a Rule 60 case, raises no constitutional question, and its critical finding is the decree had no prospective effect. *Id.* at 1153. By contrast,

the decree at issue here not only operates prospectively, but violates the Constitution in perpetuity.

SEC's discussion of "important" values of "repose, finality and efficiency" cuts against its position. *Jackson v. FIE Corp.*, 302 F.3d 515, 529 (5th Cir. 2002), vacated a default judgment where personal jurisdiction was lacking. In doing so, the court weighed the competing values of finality under the common law doctrine of *res judicata* against a due process claim that the court lacked personal jurisdiction. It concluded: the constitutional infirmity trumps the doctrinal rule—every time. *Id.* at 530-31. *City of Miami*, *Clements*, and *FIE Corp.* mean that no policy of finality overrides a court's solemn duty not to enter, much less perpetuate, an unconstitutional decree.

Likewise, *City of El Paso v. El Paso Entertainment, Inc.*, 535 F. Supp. 2d 813 (W.D. Tex. 2008), only *strengthens* Defendants' case for declaratory relief. Operators of adult entertainment venues argued that Rule 60(b) was the exclusive means for the City to obtain relief from an agreed settlement judgment. The district court held that Rule 60(b) was *not* "the only procedural remedy available to allow reconsideration of a previously entered judgment once the time for appealing the judgment has passed … [nor] the only means of approaching the interpretation of an existing injunction" entered on consent twelve years earlier. It added that *Cook*'s Rule 60 holding—which the SEC relies on here—did not bar a declaratory ruling on that settlement consent. *Id.* at 818-19.

The Fifth Circuit agreed, holding that a party may file an independent declaratory judgment action to determine the rights of the parties under a prior federal court order. *City of El Paso v. El Paso Entertainment, Inc.*, 382 F. App'x 361, 364-65 (5th Cir. 2010) (per curiam). The DJA was not to "reconsider" the earlier judgment but "to declare the rights of the parties pursuant to the 1995 agreed judgment … as they currently exist[.]" *Id.* at 365. Likewise here, this motion is not to reconsider the consent decree. Instead, it asks this Court to declare the Gag unconstitutional.

Travelers Ins. Co. v. Liljeberg Enters., 38 F.3d 1404 (5th Cir. 1994), is of no help to SEC because (1) that case involved a frivolous claim—which can hardly be the case here where two judges called the Gag a "prior restraint"—and (2) it only addresses relief under Rule 60, saying nothing whatsoever about the DJA. Similarly, *Glitsch, Inc. v. Koch Eng'g Co*., 216 F.3d 1382, 1384 (Fed. Cir. 2000) prohibiting a new DJA action challenging a prior ruling does not support SEC because it is contrary to the law of this Circuit. Notably, this Circuit permitted the City of El Paso to file a separate DJA proceeding twelve years after the settlement consent judgment—and prevail on the claim. Besides, Defendants are *not* filing a new lawsuit—they instead are challenging the prior restraint in the Court that entered the order—as they must under *Walker*.

SEC's attempt to liken this case to serial habeas or immigration appeals, SEC Br. 5, grasps at straws to intimate guilt by association. Not one of its cited cases addresses a motion seeking declaratory judgment. In *Davis v. Johnson*, 158 F. 3d 806, 812 (5th Cir. 1998), there was never a showing "of the denial of a constitutional right." Nor can serial hearings be argued; there was never any hearing in this case because the Consent forbade one, much less successive hearings.

Defendants cannot violate the Gag to challenge it—not only because of the collateral bar rule, but they would risk criminal contempt. *Cato Institute v. SEC*, 4 F.4th 91, 95 (D.C. Cir. 2021) (stating that violations of such SEC Gags "are punishable by criminal contempt"). If SEC had its way, Defendants would have no process by which to challenge the Gag's constitutionality.

SEC makes a last-ditch attempt to attack the procedure of a motion in this action. SEC Br. 15. *El Paso* allowed declaratory relief by separate action. 382 F. App'x at 365. But the Fifth Circuit also considers claims for declaratory relief *on motion*. *See Castle v. U.S.*, 399 F.2d 642, 644 (5th Cir. 1968) ("[M]otion presents a real and substantial controversy, and [it] could be treated as a motion for declaratory judgment under Rule 57."). Neither the DJA nor Rule 57 requires a

DJ to be raised by complaint, nor only by a "plaintiff." The commentary to Rule 57 expressly discusses "as on a motion" and both the statute and the rule say a DJ action may be sought by a "party." Thus, SEC's citation to dicta in the out-of-circuit cases of *Thomas v. Blue Cross & Blue Shield Ass'n*, 594 F.3d 823, 830 (11th Cir. 2010) and *Kam-Ko Bio-Pharm Trading Co., Ltd. v. Mayne Pharma Inc.*, 560 F.3d 935 (9th Cir. 2009), fails to provide a star to which SEC may hitch this wheelless wagon.[1] *Walker* gives Defendants no choice but to proceed by motion in this action.

C. The Law of the Supreme Court and Other Circuits Is in Accord

The Supreme Court recognizes that partial relief from judgments containing unconstitutional provisions is not only appropriate but required. *See Barrows v. Jackson*, 346 U.S. 249, 258 (1953) (denying court enforcement of restrictive covenant). Other circuits and state supreme courts have concluded that courts lack power to enter unconstitutional prior restraints and content-based speech restrictions as governmental conditions on settlements. *See*, *e.g.*, *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1399 (9th Cir. 1991) (invalidating government-imposed waiver of right to run for elective office); *People v. Smith*, 918 N.W.2d 718 (Mich. 2018) (same); *United States v. Richards*, 385 F. App'x 691, 693 (9th Cir. 2010) (government-imposed condition forbidding public comments about county commissioner invalidated); *Anderson v. Dean*, 354 F. Supp. 639, 643-45 (N.D. Ga. 1973) (speech ban provision unconstitutional); *Groveport Madison Loc. Schs. Bd. of Educ. v. Franklin Cnty. Bd of Revision*, 77 N.E. 3d 957 (Ohio 2017) ("a court's power to vacate a void judgment is inherent, there is no deadline for it to exercise that power."). Indeed, the Fourth Circuit recently set aside a settlement provision "not to speak to the media about [police conduct][.]" *Overbey v. Mayor of Balt.*, 930 F.3d 215, 219 (4th Cir. 2019).

[1] A quick review of case law in other circuits shows that the Tenth, Sixth, and Third Circuits also entertain declaratory judgment relief by motion. *Scherer v. U.S.*, 88 F. App'x 316 (10th Cir. 2004); *City of Columbus, Ohio*, *Dep. of Dev. v. Harambee Uhuru Sch. Inc.*, 909 F 2d 1482 (6th Cir. 1990); *Interdynamics. Inc. v. Wolf*, 698 F2d 157 (3d Cir. 1982).

It "is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury v. Madison*, 5 U.S. 137, 147 (1803) (citation omitted). Accordingly, Defendants have asked this Court to declare that the SEC may not strip them of their First Amendment rights as a condition of settling with the Commission.

II. THIS MOTION IS JUSTICIABLE

A. The Law of the Case Does Not Prohibit this Declaratory Judgment Action

The holding of Defendants' initial appeal in this action simply denies relief under Rule 60(b)(4) and 60(b)(5) for Defendants' Due Process and First Amendment claims, echoing this court's decision that Rule 60 "is not an appropriate avenue by which to address these concerns." (Dkt. 45 at 6 n.3). A concurrence of two Circuit judges added, "Nothing in the opinion (or in the district court opinion, for that matter) approves of or acquiesces in the SEC's longstanding policy that conditions settlement of any enforcement action on parties' giving up First Amendment rights." *Novinger*, 40 F.4th at 308. (Jones and Duncan, JJ.).

SEC's argument that somehow the panel decision is the "law of the case" falls flat considering the limitations of the district and panel decisions. *Todd Shipyards Corp. v. Auto Transp., S.A.*, 763 F.2d 745, 751 (5th Cir. 1985), applied the law of the case because "the district court … determined all rights and liabilities among the parties," which cannot be said here. Oddly, SEC includes cases *denying* law-of-the-case effect to prior rulings. *See Musacchio v. United States*, 577 U.S. 237, 244–45 (2016); *Pepper v. United States*, 562 U.S. 476, 506 (2011). *Gilbert v. City of Cambridge*, 932 F.2d 51, 58 (1st Cir. 1991), is irrelevant because Defendants' constitutional claims have remained consistent and evade no time bar. And *Goodyear Tire & Rubber Co. v. H. K. Porter Co.*, 521 F.2d 699, 700 (6th Cir.1975) irrelevantly involved two identical Rule 60(b) actions, only one of which the court heard. Likewise, SEC's argument that the panel ruled on all claims in equity is refuted by the panel's confining Rule 60(b)(5) relief to "unexpected changes in

the facts or law." 40 F.4th at 307-08. Defendant's claims are steadfast and are grounded in unchanging commands of the Constitution.

B. Defendants Have Standing

"Chilling a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement" for standing. *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330-31 (5th Cir. 2020); *Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988) (allowing pre-enforcement challenge where "an actual and well-founded fear that the law will be enforced against" him). Otherwise, challengers "face an unattractive set of options if they are barred from bringing a facial challenge" including refraining from lawful speech. *Florida League of Professional Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 459 (11th Cir. 1996); *Harrell v. Florida Bar*, 608 F.3d 1241, 1255 (11th Cir. 2010) (applying "injury-in-fact requirement most loosely where First Amendment rights are involved" because of chilling effect); *Freedman v. Maryland*, 380 U.S. 51, 56-57 (1965) ("judicial review may be too little and too late."); *accord International Soc. for Krishna Consciousness v. Eaves*, 601 F. 2d 809 (5th Cir. 1979) (facial pre-enforcement challenge to anti-harassment ordinance 'jurisdictionally impeccable'); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (exposure to prosecution not necessary to secure declaratory relief on First Amendment rights.).

C. This Case Is Ripe for Decision

SEC's lengthy ripeness arguments fail to address controlling Supreme Court authority on First Amendment ripeness. SEC's insistence that Defendants can only challenge the rule if and when the SEC moves to reopen prosecution against them, which it might not do, or a court might not grant, ignores the years-long chilling of Defendants' speech. These Gags restrict speech forever and without end—a restriction justified by no constitutional precedent. *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 226-27 (1990) found standing for a facial challenge to an ordinance where the lack

of time limits "creates the risk of indefinitely suppressing permissible speech." Delayed review of prior restraints is 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), *aff'd* 452 U.S. 89 (1981).

III. THE GAG ORDER VIOLATES THE FIRST AMENDMENT

SEC's incantation of *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992) to assert that Defendants are not entitled to relief simply because "it is no longer convenient to live with those terms," profoundly misstates the stakes in this action. It was *never* constitutional for SEC to condition settlement on the surrender of First Amendment rights—and that constitutional injury just grows more intolerable with time, shielding SEC from criticism, disserving the public interest, and daily depriving thousands of Americans of their free speech rights.

Governments may not infringe First Amendment rights by conditioning or withholding a privilege or benefit, *Speiser v. Randall*, 357 U.S. 513, 518 (1958), and those who accept the "deal" may challenge the condition in court. *See Elrod v. Burns*, 427 U.S. 347, 360 n.13 (1976) (plurality opinion) (To say an unconstitutional condition is waived by accepting the benefit "swallows the rule … . [T]o accept the waiver argument is to say that the government may do what it may not do"); *Agency for Int'l Dev. All. for Open Soc'y Int'l, Inc.,* 570 U.S. 205, 211 (2013); *Stephens v. County of Albermarle,* 2005 WL 3533428 at *10 (W.D. Va. Dec. 22, 2005) ("The mere fact that one agrees to the challenged condition, even in a settlement, cannot by itself render the bargain constitutional because the unconstitutional conditions doctrine focuses on the propriety of the condition, not the fact that the claimant agreed to it.").

Consent judgments will always condition the 'benefit' of settlement on the relinquishment of rights to a trial, jury trial and an appeal, or to bring counter or cross-claims because they are logically integral to settlement. This truism provides no justification to suppress speech.

SEC misconstrues the holding of *Town of Newton v. Rumery*, 480 U.S. 386 (1987), as "parties can waive their constitutional rights when voluntarily resolving other types of litigation." Not so. *Rumery* involved the waiver of a possible future § 1983 claim, which the defendant ultimately filed in a separate action. *Id.* at 387. *Rumery*'s substantive test was that "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Id.* at 392 (citation omitted). Justice O'Connor's concurrence, which was necessary to the majority holding, stressed "that it is the burden of those relying upon such covenants to establish" that the agreement is voluntary and not an abuse of government power. *Id*. at 399. Here, "SEC's policy says, 'Hold your tongue, and don't say anything truthful—ever'—or get bankrupted by having to continue litigating with the SEC." *Novinger*, 40 F.4th at 308 (Jones, J. concurring).[2] SEC's prior restraint is effective precisely because of the power it abuses—the full power and force of the federal government—and its ability to coerce silence from enforcement targets. *Davies*' careful analysis of the *Rumery* decision, is instructive:

> While *Rumery* involved the surrender of a *statutory remedy* [§ 1983 damages], here we confront the waiver of a *constitutional right*. This suggests two important distinctions between *Rumery* and the present case. First, because constitutional rights are generally more fundamental than statutory rights, a stricter rule than the one embodied by the *Rumery* balancing test may be appropriate ... Second, foregoing a remedy of money damages for a past injury that cannot be undone may not implicate the public interest to the same extent as does the surrender of the right itself. … [T]he waiver provision is unenforceable.

Davies, 930 F.2d at 1397. Courts applying *Davies* have rejected government settlement conditions that demand a greater surrender of constitutional liberty than is necessary to terminate litigation.

[2] SEC opens its brief admitting that the Gag is required to settle and that any hearing is waived. SEC Br.1-., *See also* Marc I. Steinberg, *The SEC v. Mark Cuban*, Harv. L. Forum on Corp. Gov. (Apr. 11, 2019), https://corpgov.law.harvard.edu/2019/04/11/the-sec-v-mark-cuban/ (The SEC-Cuban case illustrates that, absent resource to plentiful liquid assets or to an impressive insurance policy, targets of government actions have no viable recourse but to settle on the most practicable terms.).

Lil' Man In The Boat, Inc. v. City & Cty. of San Francisco, No. 17-CV-00904-JST, 2017 WL 3129913, at *9–10 (N.D. Cal. July 24, 2017) (waiver of future disputes fails the close nexus test.).[3]

Davies's preservation of First Amendment rights the surrender of which is unnecessary to end litigation provides the template for this court's ruling. *Rumery* fails to support SEC's non-negotiable, blanket, programmatic suppression of speech by all persons who settle with the agency.

IV. SEC LACKS AUTHORITY TO IMPOSE A GAG

SEC asserts that Defendants are wrong to suggest that penalties assessed by SEC require a foundation in law, saying this "gets things backwards … in the absence of an affirmative showing to the contrary, it is presumed that an attorney has authority to compromise and settle a case.'" SEC Br. 23-24. By this logic, the SEC could condition settlement on waiver of future Fourth Amendment rights or require desperate-to-settle targets to donate blood. Worse, it turns centuries of American law on its head. The Supreme Court views agency power otherwise. "[A]n agency literally has no power to act … unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 357 (1986).

SEC does not dispute that its rule was promulgated without notice and comment, but scrambles to save it by saying that any challenge to its force had to be brought in 1973 within 60 days of SEC's slipping it into the *Federal Register* "effective immediately." This argument is absurd. Unconstitutional regulations do not become enforceable as law that binds Americans if they fail to scrutinize the *Federal Register* for such hijinks. This is a substantive rule promulgated without notice and comment and may not be used to adversely affect anyone. *See* Def. Br. 23-24.

[3] Cases cited by SEC Br. 16-17 are inapposite. *Leonard v. Clark*, 12 F.3d 885, 891 (9th Cir. 1993), is of no support to its view that government may condition the surrender of a First Amendment right upon settlement. The waiver was proposed by the settling party, not a condition imposed by the city. *United States v. Int'l Brotherhood of Teamsters*, 931 F. 2d 177 (2d Cir. 1991) (similar). *Berry v. Peterson*, 887 F.2d 635 (5th Cir. 1989) involved a waived § 1983 claim part of the settled dispute. *Lake James Commun. Volunteer Fire Dep't v. Burke County*, 149 F. 3d 277 (4th Cir. 1998) similarly involved a government-as-contractor (not enforcer) term, limited in time, restoring public interest.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the body of this brief is 10 pages in 12-point Times New Roman typeface, except for footnotes which are in 10-point Times New Roman.

/s/ Margaret A. Little_____
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CERTIFICATE OF SERVICE

I certify that on this 27th day of September 2022, I have served a copy of the above and foregoing on all counsel of record through the Court's CM/ECF system.

/s/ Margaret A. Little_____
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