No. 23-10525

IN THE

United States Court of Appeals for the Fifth Circuit

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

CHRISTOPHER A. NOVINGER; ICAN INVESTMENT GROUP, LLC,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Texas
Fort Worth Division
No. 4:15-cv-00358-O
Hon. Reed O'Connor

APPELLANTS' OPENING BRIEF

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellants certifies that the following listed persons and entities have an interest in the outcome of this case.

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STATEMENT REGARDING ORAL ARGUMENT

Appellants Christopher A. Novinger (Novinger) and ICAN Investment Group, LLC (ICAN) respectfully request oral argument. Under the law of this Circuit, the district court has both continuing jurisdiction over and the duty to ensure that the terms of its consent decrees do not violate the Constitution or the laws of the United States. Two judges of this Circuit have found that the Securities and Exchange Commission's no-deny provision in its settlement agreements constitutes a prior restraint. Crucial First Amendment rights hang in the balance and are violated each day the gag order remains in effect. The order below threatens to make federal district courts complicit in perpetuating and enforcing an outlier practice unique to two federal agencies—SEC and the Commodity Futures Trading Commission (CFTC)—which unconstitutionally requires settling defendants to never publicly question the charges brought against them.[1] Prompt correction by this Circuit is warranted. Oral argument will help the Court more fully develop the record to do so.

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[1] Only SEC and CFTC have rules like that at issue here. *See* CFTC rule at 17 C.F.R. § Part A, App. A. The New Civil Liberties Alliance, counsel for Appellants, has petitioned CFTC to amend its Gag Rule because it violates the First Amendment, due process of law, and the APA. New Civil Liberties Alliance, *Petition to Amend* (July 18, 2019), https://nclalegal.org/2019/07/petition-to-amend-the-cftc-rule-under-which-the-agency-has-been-unconstitutionally-silencing-persons-who-enter-into-consents-with-cftc/. CFTC has taken no action on the petition in four years.

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JURISDICTIONAL STATEMENT

Novinger and ICAN appeal from the district court's Order denying their Opposed Motion for Declaratory Relief dated March 22, 2023. ROA.778-84. 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 May 19, 2023, pursuant to Federal Rule of Appellate Procedure 4(B)(ii). This appeal is from a final order that disposed of all Appellants' claims raised in their Motion for Declaratory Relief.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did the district court err in denying Appellants' requested declaratory relief? More specifically:

1. Does the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, permit courts to broadly construe motions for declaratory relief when a) bringing a separate action would violate the collateral attack rule; and b) violating the court order is not permitted by the collateral bar rule and would expose the defendants to contempt sanctions?
2. Did the district court err in denying declaratory relief regarding an unconstitutional prior restraint that violates the First Amendment as already acknowledged by two judges of this Circuit?

3. Did the district court err in denying declaratory relief regarding a gag order the Securities and Exchange Commission has no power to secure from a district court at all, much less pursuant to an unlawfully promulgated "rule?"

STATEMENT OF THE CASE

History of the Gag Rule

On November 17, 1972, SEC issued a regulation that requires all defendants who settle with the agency to sign papers that include a nonnegotiable provision (Gag Order) that binds and silences from disagreement all those who settle with SEC *in perpetuity*. *See* Consent Decrees in Judicial or Administrative Proceedings, 37 Fed. Reg. 25,224 (Nov. 29, 1972) (codified at 17 C.F.R. § 202.5(e)) (Gag Rule). In publishing the Gag Rule, SEC asserted 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*." *Id.* (emphasis added). This Gag Rule thus violated the Administrative Procedure Act (APA) from its inception when SEC slipped it into the Federal Register "effective immediately." The SEC lacked any authority to promulgate such a substantive rule, especially when failing

to follow the APA's provisions which require prior publication, notice, and comment before promulgating any rule that binds regulated persons or entities.[2]

History of this Case

On May 11, 2015, SEC filed a complaint against all Appellants in this action, including Novinger and ICAN. Subsequently, on June 3, 2016, SEC, Novinger, and ICAN reached a settlement agreement and submitted a proposed final judgment to the district court below. As a condition of settlement, SEC required Novinger and ICAN to waive a litany of due process rights including notice (Novinger Consent ¶ 10, ROA.381, ICAN Consent ¶ 8, ROA.400) and opportunity to be heard (Novinger Consent ¶ 15, ROA.384, ICAN Consent ¶ 12, ROA.403) based on the non-negotiable terms of SEC's settlement order.

After this mandatory waiver of due process rights, SEC further required, as a condition of settlement, that defendants sign a Consent Order to be incorporated by reference into a proposed final judgment. This is and was non-negotiable. In relevant part the Consent Orders read:

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[2] As Judge Jones and Judge Duncan noted over a year ago, *see SEC v. Novinger*, 40 F.4th 297, 308 (5th Cir. 2022) (Jones, J., concurring), the New Civil Liberties Alliance, counsel for Appellants, petitioned SEC to amend its Gag Rule because it violates the First Amendment, due process of law, and the APA. New Civil Liberties Alliance, *Petition to Amend* (Oct. 30, 2018), http://bit.ly/2XfFD3Z. SEC has taken no action on the petition in almost five years.

> Defendant understands and agrees to comply with the terms of 17 C.F.R. § 202.5(e), which provides in part that it is 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," and "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." As part of Defendant's agreement to comply with the terms of Section 202.5(e), Defendant: (i) will not take any action or make or permit to be made any public statement denying, directly or indirectly, any allegation in the complaint or creating the impression that the complaint is without factual basis; (ii) *will not make or permit to be made any public statement to the effect that Defendant does not admit the allegations of the complaint, or that this Consent contains no admission of the allegations, without also stating that Defendant does not deny the allegations*; (iii) upon the filing of this Consent, Defendant hereby withdraws any papers filed in this action to the extent that they deny any allegation in the complaint. . . . 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 or other legal proceedings in which the Commission is not a party.

ROA.382-83, ROA.401-02 (emphasis added).

The district court did not hold a hearing or allocution concerning the execution of the Consent Order, and on June 6, 2016, the district court entered final judgments against Novinger and ICAN. ROA.448, ROA.452. Appellants continue to be bound—and will, without intervention of this Court, be forever bound—by the Consent Order and its Gag Rule provision that silences them.

Novinger desires to engage in truthful public statements concerning the SEC's case against him and ICAN. However, because Novinger does not want to

violate the Consent Order or risk the consequences of contempt and reopening the case against him—he has refrained from making truthful statements that might indirectly "create[e] an impression" that the complaint lacked a factual basis or was otherwise without merit. Furthermore, such action on his part would expose him to reopened prosecution and contempt sanctions. As set forth below, and despite the district court's suggestion to the contrary, the collateral bar rule prohibits that path to relief.

For those reasons, on June 17, 2021, Novinger and ICAN moved before Judge O'Connor for relief from judgment under Federal Rule of Civil Procedure 60(b), subsections (4) and (5). The issues were fully briefed to the district court by Appellants and SEC. The district court denied relief under Rule 60(b)(4) and (5) on August 10, 2021. *See SEC v. Novinger*, No. 4:15-cv-00358-O, 2021 WL 4497672, at *3 (N.D. Tex. Aug. 10, 2021). The court asserted in a final footnote that "[w]hile the court is mindful of the litany of First Amendment concerns presented in Defendants' briefing, [Fed. R. Civ. P.] 60 is not an appropriate avenue by which to address those concerns." *Id.*, n.3.

Appellants filed a timely notice of appeal on September 29, 2021. *See* ROA.583-84. This Court affirmed the district court. *See SEC v. Novinger*, 40 F.4th 297, 300 (5th Cir. 2022) (*Novinger I*). Despite the affirmance of the district court,

Judge Jones, joined by Judge Duncan, concurred in the opinion, shedding light on the constitutional interests at stake:

> I write to note that 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. 17 C.F.R. § 202.5(e). If you want to settle, 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. *A more effective prior restraint is hard to imagine*. The defendants' brief informed us that a petition to review and revoke this SEC policy was filed nearly four years ago. New Civil Liberties Alliance, Petition to Amend (Oct. 30, 2018), available at http://bit.ly/2xfFD3Z. However, SEC never responded to the petition. Given the agency's current activism, I think it will not be long before the courts are called on to fully consider this policy.

Id. at 308 (Jones, J. concurring) (emphasis added). Defendants respectfully ask in this appeal for this Court to fully consider this policy.

After thorough consideration, research, consultation, and cogitation, Appellants filed a Motion for Declaratory Relief, ROA.591-627 and ROA.628-661, in order to secure relief for this recognized First Amendment violation under the statute that provides for declaratory relief when the government violates the Constitution. Specifically, defendants sought relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, that the consent decree (1) incorporated a void and unconstitutional prior restraint and a content- and viewpoint-based restriction on speech in violation of the First Amendment of the United States Constitution and compelled speech in violation of the First and Fifth Amendments; further that the

decree (2) awarded relief not authorized by Congress under 15 U.S.C. § 77t or 15 U.S.C. § 78u; and (3) that SEC did not lawfully promulgate Rule 202.5(e), so its gag provision is void.

Judge O'Connor denied the motion, urging Appellants to "bring a separate action for declaratory judgment against the SEC." ROA.782; ROA.783 ("[T]he Court follows the approach of the Eleventh and Ninth Circuits and finds that a *motion* for declaratory judgment is *not an appropriate pleading* for purposes of the Declaratory Judgment Act.") (emphases added).

Appellants come now before this Court seeking relief for a right in pursuit of a remedy.

SUMMARY OF THE ARGUMENT

For over 50 years the federal courts have been complicit in SEC's non-negotiable gag order, silencing for life defendants who settle with the agency. Such orders violate due process and the First Amendment because: 1) they are prior restraints that serve no compelling government interest and do not operate by the least restrictive means; 2) they suppress truthful speech; 3) they compel speech in violation of the First and Fifth Amendments; 4) they are unconstitutional conditions; 5) they are unconstitutionally vague, violate defendants' due process rights to notice and opportunity to be heard and Federal Rule of Civil Procedure 65; 6) they violate defendants' rights of petition and public policy; and 7) presume a power to abridge

the First Amendment that Congress itself lacks. In addition, these unconstitutional gags award the government a right to suppress speech that is outside the statutory power of the SEC to request, much less obtain and which SEC seeks under a regulatory provision never validly promulgated by law. ROA.591-627.

Appellants are trapped in remedy purgatory. To buy peace they were forced to pay the terrible price of surrendering their First Amendment rights. For over five decades, courts and the SEC have been complicit in entering these "incorporated-by-reference" constitutionally infirm settlement "agreements" that silence targets of SEC enforcement. A court—this Court—should heed its "unflagging duty" to declare this practice unconstitutional and free thousands of Americans from the SEC Gag Orders' enforced silence.

Appellants' counsel petitioned the agency to amend its unconstitutional silencing regulation nearly five years ago,[3] to which SEC's response has been radio silence. *Even if* SEC ruled favorably on that petition for rulemaking, it would not provide relief to Appellants, as such a rule amendment would only be *prospective*. Thus, the courts are the only source of relief from the unconstitutional conditions SEC imposed on Appellants. In *Novinger I*, the Federal Rules of Appellate

[3] *See supra* n.1.

Procedure 60(b)(4) and (5) were read narrowly by this Court to deny any possibility of relief for Appellants. Yet violating the Gag Order would run afoul of the collateral bar rule elucidated in the Supreme Court precedent *Walker v. City of Birmingham*, 388 U.S. 307 (1967), which established that defendants cannot speak in violation of a court order and hope for relief without first trying to secure relief *from the court that entered the prior restraint* in the first instance. Invoking the duty imposed upon courts in this Circuit to exercise continuing jurisdiction over their consent decrees to be sure they do not violate the law and/or Constitution, Appellants exercised their remaining option and moved for declaratory judgment. They were denied relief by the district court and told that a separate action must be brought for such relief—when such an action would violate the collateral attack doctrine. In short, Appellants have navigated a roadmap full of dead ends, and federal courts hold the capacity for declaratory relief in their hands—while thousands of Americans are silenced.

An avenue *must* exist for Appellants to vindicate their First Amendment rights already recognized by this Circuit—and settled Supreme Court law. As *Marbury v. Madison* notes, "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). The Supreme Court has also spoken with clarity on government imposition of unconstitutional conditions, asserting that "[t]he government may not 'condition[]' the 'conferral of a benefit … on the surrender of

a constitutional right.'" *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513 (1996)); *id.* (citing *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 546–49 (2001)); *Perry v. Sindermann*, 408 U.S. 593, 598 (1972)).

Additionally, three other Circuits—the Fourth, Sixth, and Ninth—and the Michigan Supreme Court have concluded that courts must invalidate unconstitutional prior restraints and content and viewpoint-based speech restrictions as conditions on settlements with the government—even when entered on consent. *See Overbey v. Mayor of Balt*., 930 F.3d 215, 219 (4th Cir. 2019) (invalidating waiver of First Amendment rights demanded by city as a condition of police brutality settlement); *United States v. Richards*, 385 F. App'x 691, 693 (9th Cir. 2010) (invalidating term of plea agreement forbidding defendant from making public comments about county commissioner); *GV Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1077 (6th Cir. 1994) (agreement required by state agency to restrain free expression as a condition of settlement invalidated as violative of First Amendment); *Davies v. Grossmont Union High Sch. Dist.*, 930 F. 2d 1390, 1399 (9th Cir. 1991) (invalidating portion of settlement agreement in which party waived his right to run for public office); *People v. Smith*, 502 Mich. 624, 644 (2018) (same).

SEC is permitted to bring an action in federal district court to enjoin violations of the Securities and Exchange Acts. *See* 15 U.S.C. §§ 77t(b), 78u(d). An injunction sought pursuant to section 77t(b) can only "enjoin such acts or practices" that

"constitute or will constitute a violation of the [Securities Act or the rules promulgated thereunder]." Likewise, an injunction sought pursuant to section 78u(d) can only "enjoin such acts or practices" that "constitut[e] a violation of the [Exchange Act or the rules promulgated thereunder]." Truthful speech is not a violation of any law, let alone a violation of the Securities Act or the Exchange Act. Thus, even if this case had proceeded to trial and Appellants were found liable, SEC could not have sought an injunction restricting their truthful speech. It should not be permitted to do so through a secretly promulgated "rule" establishing non-negotiable gag provisions.

Indeed, Justice Gorsuch recently recognized that agencies use the federal government's resources and power to secure consent decrees "as leverage to extract settlement terms they could not lawfully obtain any other way." *Axon Enter., Inc. v. FTC*, 143 S. Ct. 890, 918 (2023) (Gorsuch, J., concurring); *id.* n.4 (citing PHILIP HAMBURGER, PURCHASING SUBMISSION: CONDITIONS, POWER, AND FREEDOM 223 (2021) (describing this as "regulatory extortion")); *see also id.* (quoting D. Ginsburg & J. Wright, *Antitrust Settlement: The Culture of Consent*, in 1 W. Kovacic: An Antitrust Tribute 177 (N. Charbit et al. eds. 2013) ("Consent decrees create potential for an enforcement agency to extract from parties under investigation commitments *well beyond what the agency could obtain in litigation*") (emphasis added));

Ginsburg & Wright, *supra*, at ¶ 13[4] ("[T]he agency might well seek to settle upon terms that serve its bureaucratic interests. These include *broadening the agency's goals and responsibilities*, a vector well-expressed by the phrase 'mission creep,' benefiting a politically influential interest group, and accumulating power over the regulated community in general and over the consenting firms in particular.") (emphasis added).

Congress itself could not pass such a Gag Law requiring parties in litigation with the government to agree to be gagged as a condition of settlement.[5] Once called to a court's attention, such an unconstitutional practice must not be perpetuated. That a mere agency has for 50 years arrogated a power the Constitution has explicitly denied to Congress beggars belief and demands correction.

This Court should join the "growing chorus of circuits" which understand "that the Constitution prevents courts from enforcing the waiver of First Amendment

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[4] *Available at* https://www.ftc.gov/sites/default/files/documents/public_statements/antitrust-settlements-culture-consent/130228antitruststlmt.pdf.

[5] *McBryde v. Comm. to Review Circuit Council Conduct*, 83 F. Supp. 2d 135, 140, 177-78 (D.D.C. 1999), *aff'd in part*, *vacated in part*, 264 F.3d 52 (D.C. Cir. 2001) (confidentiality provision of Congress' Judicial Council and Disability Act "operates as an unconstitutional prior restraint" and ruled that the disciplined judge "must enjoy the opportunity to speak openly and freely about [the] proceedings" against him.).

rights as a condition of settlements." *SEC v. Moraes*, No. 22-cv-8343, 2022 WL 15774011, at *4 (S.D.N.Y. Oct. 28, 2022). Declaratory relief is required to vindicate Appellants' constitutional right to speak truthfully about their prosecutions by the government. Indeed, the First Amendment protects more than just Appellants' expression—other citizens have the right to receive information from Appellants. The listener's interest in speech cannot be waived by any purported consent of the regulated party.

Section I of this brief will discuss why the lower court, under any standard of review, should be reversed. Section II will discuss why the lower court has continuing jurisdiction over consent decrees that it cannot ignore, especially considering Supreme Court precedents forbidding the government from extracting such an unconstitutional condition of settlement. And section III will discuss the contours of declaratory relief and why a motion for declaratory judgment is a proper remedy versus filing a separate declaratory action.

ARGUMENT

I. STANDARDS OF REVIEW

The district court's declination to exercise its inherent authority to modify Appellants' consent orders is reviewed *de novo*. *See United States v. El-Mezain*, 664 F.3d 467, 577 (5th Cir. 2011), *as revised* (Dec. 27, 2011) (a court's "invocation of its inherent power" is reviewed "*de novo*."). This is because the federal judiciary's

inherent power is a limited and implied power that lends itself only to that which is "necessary" to the exercise of justice and the functioning of the judiciary. *See NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 894 F.2d 696, 702 (5th Cir. 1990), *aff'd sub nom. Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991).

Questions of law underlying a district court's decision are also reviewed *de novo*. *Ran-Nan Inc. v. Gen. Acc. Ins. Co. of Am.*, 252 F.3d 738, 739 (5th Cir. 2001).

A "district court's decision to grant or deny declaratory relief is reviewed for an abuse of discretion because 28 U.S.C. § 2201 says that a district court 'may' declare the rights and other legal relations of any interested parties." *United Teacher Assocs. Ins. Co. v. Union Lab. Life Ins. Co.*, 414 F.3d 558, 569 (5th Cir. 2005). "A district court abuses its discretion if it: (1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts." *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 310 (5th Cir. 2008) (en banc) (quoting *McClure v. Ashcroft*, 335 F.3d 404, 408 (5th Cir. 2003) (citation omitted)). Moreover, in Declaratory Judgment Act actions, "[t]he district court abuses its discretion if it fails to consider relevant factors, including the purposes of the Declaratory Judgment Act." *Robinson v. Hunt Cty., Tex.*, 921 F.3d 440, 450 (5th Cir. 2019) (internal quotation and citation omitted). Likewise, the court abuses its discretion if it fails to "address[] and balance[] the purposes of the Declaratory

Judgment Act and the factors relevant to the abstention doctrine on the record." *Travelers Ins. Co. v. La. Farm Bureau Fed'n, Inc.*, 996 F.2d 774, 778 (5th Cir. 1993). Similarly, this Court also held that a district court abuses its discretion when it ignores a party's claim for First Amendment protection via the Declaratory Judgment Act because the district court thought the claim was "redundant of [plaintiff's] claims for injunctive relief[.]" *Robinson*, 921 F.3d at 450. More generally, the deprivation of constitutional rights may be deemed reversible error. *See United States v. Guadian-Salazar*, 824 F.2d 344, 347 (5th Cir. 1987) (denial of the right to confront an adverse witness and denial of due process was reversible error). Under either standard—*de novo* or abuse of discretion—this Court should reverse.

II. THE DISTRICT COURT HAS CONTINUING JURISDICTION OVER THIS CONSENT DECREE AND HAS AN UNFLAGGING DUTY TO SUPERVISE ITS CONSTITUTIONALITY

The SEC-drafted consent and final order both provide that district courts retain jurisdiction. Additionally, the district court has a duty not to enforce unconstitutional "consent" decrees.

A. The District Court Retains Jurisdiction over the Consent Decree and Cannot Shirk This Duty

The district court does not have "discretion" because the supervision over the Consent Orders is a requirement of continued jurisdiction. Indeed, 28 U.S.C. § 1331 requires courts to be unflagging in their duty to address constitutional infirmities of

government action. "[D]istrict courts have power to enforce their own orders and to adjudge anyone in civil contempt who willfully violates such orders." *Davies*, 930 F.2d at 1393. Not even an "available state remedy would [ ] divest the district court of this inherent power to enforce its own orders[,]" *id.* , so the lower court had no reason to shrug this duty off to another hypothetical separate action that will face a collateral attack or expose defendants to re-prosecution and/or contempt of court.

In such instances, a consent decree is never final—courts are charged with ensuring that a consent decree does not exceed its appropriate limits. A decree exceeds its limits if it is "aimed at eliminating a condition that does not violate federal law or … if it does not flow from such a violation." *Horne v. Flores*, 557 U.S, 433, 450 (2009) (cleaned up). Further, SEC has already argued that challenging the order in the court that made it is the *only* proper method to raise the constitutional question. SEC brief at 18, Cato Inst. v. SEC, No. 1:19-cv-00047-ABJ (D.D.C. May 10, 2019), ECF No. 12-1 ("[T]he proper vehicle is review of the consent judgments before the courts that entered them, not a premature [separate] action in *this* Court." (emphasis in original)).

Since SEC threatens to reopen this case at any time should Mr. Novinger speak critically—even if truthfully—about his charges, finality should not be an issue of concern, particularly given that it wrote the consent and judgment to provide for continuing jurisdiction. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375,

381 (1994) (where judgment incorporates settlement terms that are prospective or includes provision retaining jurisdiction over settlement, district court has jurisdiction to reopen and enforce settlement agreement); *Alberti v. Klevenhagen*, 46 F.3d 1347, 1365 (5th Cir. 1995) ("There is little question that the district court has wide discretion to interpret and modify a forward-looking consent decree.").

Nor should Appellants' request for judicial review of the constitutionality of the prior restraint imposed by the consent order pose any concern for the court. *League of United Latin American Citizens, Council No. 4434 v. Clements*, 999 F.2d 831 (5th Cir. 1993), holds that even when the parties consent to its terms, a consent decree is a "judicial act," and, thus, "it does not follow that the federal court must do their bidding" by employing the power of a federal court to "achieve by consent decree what they cannot achieve by their own authority." *Id.* at 845-46.

These circuit precedents and the Declaratory Judgment Act's provision that "further necessary and proper relief based on … a decree may be granted after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment[,]" 28 U.S.C. § 2202, provide ample authority for the district court to hear and decide these claims in the instant action. Each and every day that Appellants are denied their First Amendment rights is a new constitutional injury that should not be allowed to bleed out for another 50 years. The district court has the jurisdiction, power, *and duty* to apply a tourniquet.

B. The Government Cannot Condition Settlement on Waiver of First Amendment Rights

The district court lacked power to enforce unconstitutional prior restraints as a condition of settlement—even when entered on consent. "Consent" cannot abrogate the law or the Constitution.

This Court held that "[c]onsent is not enough when litigants seek to grant themselves powers they do not hold outside of court." *League of United Latin Am. Citizens, Council No. 4434*, 999 F.2d at 845-46. "Even when it affects only the parties, the court should, therefore, examine [a consent] carefully to ascertain not only that it is a fair settlement but also *that it does not put the court's sanction on and power behind a decree that violates Constitution, statute, or jurisprudence*." *United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981) (en banc) (Rubin, J., concurring in the per curiam) (emphasis added). *Compare Davies*, 930 F.2d at 1399 ("Before the government can require a citizen to surrender a constitutional right as part of a settlement or other contract, it must have a legitimate reason for including the waiver in the particular agreement. A legitimate reason will almost always include a close nexus—a tight fit—between the specific interest the government seeks to advance in the dispute underlying the litigation involved and the specific right waived.") *with Overbey*, 930 F.3d at 222 ("We hold that the non-disparagement clause in [the] settlement agreement amounts to a waiver of her First Amendment rights and that strong public interests rooted in the First Amendment make it

unenforceable and void."); *see also Richards*, 385 Fed. App'x at 693-94 (striking a portion of defendant's condition of probation that "restrict[ed] the right of the defendant to make any public comment regarding [the county commissioner] or any of her family members"); *Overton v. City of Austin*, 748 F.2d 941, 957 (5th Cir. 1984) ("the consent of the parties provides an insufficient basis on which to judicially ordain a different system of council election and composition").

The district court's suggestion of bringing a separate action for declaratory relief is further inconsistent with its duty to supervise the constitutionality and lawfulness of the order it entered *in this case*. A few moments' thought explains why. If Defendants bring a separate action for declaratory relief, even assuming that it survives a collateral attack challenge, *see infra* III.A.1, that would mean either that another judge would be ruling on what the consent orders should be in this case, or if assigned to the same district judge, he would be managing two dockets for administration of the consent orders in this case. This makes no sense. Appellants' motion specifically challenges not only the constitutionality of the gag, but also whether SEC has any power whatsoever to award itself the gag relief under the securities statutes at issue in this case because gags are not among the remedies authorized by Congress under 15 U.S.C. § 77t or 15 U.S.C. § 78u either at trial or upon settlement. That question must be decided in this case, proving the illogic of the district court's decision under review.

Two judges in this Circuit—commenting on this case, nonetheless—recently recognized that the SEC and courts have been, for over 50 years, rubber stamping an unconstitutional prior restraint on speech. *See Novinger I*, 40 F.4th at 308 (Jones, J., and Duncan, J., concurring); *see also* Fed. R. Civ. P. 57 ("The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate."); KARL OAKES AND LISA A. ZAKOLSKI, CYCLOPEDIA OF FEDERAL PROCEDURE § 90:2 (3d ed. 2023) ("Congress having conferred upon federal courts the power to grant declaratory relief in an appropriate case, the right to it is not lightly to be denied.").

C. The Gag Order Violates the First Amendment

The First Amendment's free speech clause runs in three directions—citizens have a right to speak, a right to receive information, and a right to be free from compulsion. The Gag Order violates all three aspects of free speech, a trifecta of unconstitutionality, thus Appellants could not have consented to such violation. *See Democratic Nat. Comm. v. Republican Nat. Comm.*, 673 F.3d 192, 205 (3d Cir. 2012) (The Supreme Court has held that courts must " 'indulge every reasonable presumption against waiver' of fundamental constitutional rights.") (citation omitted).

1. The Gag Order Restricts the Right to Speak

The inaptly named "Consent Order" in pertinent part reads that the Defendant "will not make or permit to be made any public statement *to the effect that Defendant does not admit the allegations of the complaint*, or that this Consent contains no admission of the allegations, without also stating that Defendant does not deny the allegations[.]" ROA.383; ROA.402 (emphasis added). SEC presents the accused with a Hobson's choice: settle with SEC and agree to the non-negotiable mouth-zipping provision, or face years of expensive litigation. Simultaneously, he must also waive any notice or opportunity to be heard on that decision. Take it or leave it—"or get bankrupted by having to continue litigating with the SEC"—is the only option.

Why do parties sign on the dotted line and "consent" to settlement terms that are non-negotiable? SEC well knows "that few can outlast or outspend the federal government," thus the "agencies sometimes use this as leverage to extract settlement terms they could not lawfully obtain any other way." *Axon*, 143 S. Ct. at 918 (Gorsuch, J. concurring); *id.* (it is well-known that the majority of cases brought by

SEC are settled); ROA.628-661 (providing this court with data that 98% of SEC enforcement actions are settled).[6]

Regardless of SEC's rationale, "[i]f 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, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Through this provision, SEC breaks the constitutional promise that "Congress shall make no law … abridging the freedom of speech[.]" U.S. CONST., amend. I.

2. The Gag Order Restricts the Right to Receive Information

The "Consent" Order not only prevents Appellants from speaking, but inadvertently denies the public the information it would gain from hearing about the SEC's regulatory process. "It is now well established that the Constitution protects the right to receive information and ideas." *Kleindienst v. Mandel*, 408 U.S. 753,

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[6] In one study, statistics showed that the "[a]verage costs for responding to a formal investigation[,]" 30% of cases cost between $1 to $5 million dollars. *Examining U.S. Securities and Exchange Enforcement: Recommendations on Current Processes and Practices*, CENTER FOR CAPITAL MARKETS at 46 (2015), https://www.centerforcapitalmarkets.com/wp-content/uploads/2015/07/021882_SEC_Reform_FIN1.pdf.

762-63 (1972) (internal quotation and citation omitted). Those whom SEC silences are in fact "in the best position" to speak out about SEC's methods. *Bd. of Cty. Comm'rs, Wabaunsee Cty., Kan. v. Umbehr*, 518 U.S. 668, 674 (1996).

Indeed, this right to receive information is crucial to the effective operation of the securities markets. The Gag Rule renders 98% of SEC's enforcement actions utterly opaque to the public. Such one-sided, content- and viewpoint-based concealment of truthful information from the market should be eradicated from the very orders that perpetuate this dangerous practice. SEC's insistence on secrecy that permits only agency-favoring statements runs contrary to its mission of full and open market information. This near-monopoly on SEC enforcement information greatly impacts the public's First Amendment protected right to receive all information relevant to the operations of U.S. financial markets and regulation. Requiring regulated parties to bring costly separate actions or face reopened prosecutions (with their speech-chilling threats of contempt) to free the information flow abdicates district courts' duties to supervise the orders they enter and administrate.

3. The Gag Order Compels Speech

The flipside of the coin of denying Appellants the right to speak is *compelling* Appellants to speak favorably of the SEC, to avoid "creating the impression that the complaint is without factual basis[.]" ROA.383; ROA.402; *see also Rumsfeld v. Forum for Acad. and Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006) ("Some of

this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say."). As Judge Abrams pointed out, an SEC defendant "is perfectly free to praise the SEC for its enforcement tactics, for instance, or to confess his culpability in violating the securities laws … . [S]o long as a defendant says what the SEC wants to hear (or says nothing at all) he does not violate the No-Admit-No-Deny Provision." *Moraes*, 2022 WL 15774011, at *5.

Just this term, the Supreme Court struck down a public accommodation law that required a website designer to "speak as the State demands or face sanctions for expressing her own beliefs[.] … Under [the Supreme Court's] precedents that 'is enough,' more than enough to represent an impermissible abridgment of the First Amendment's right to speak freely." *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2303 (2023) (quoting *Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Grp. of Bos.*, 515 U.S. 557, 574 (1995)). The Consent Decree is likely to compel Appellants' speech for fear of criminal contempt. *See infra* III.A.2 (discussing *Walker v. Birmingham*).

D. The Gag Order Violates Due Process and Fed. R. Civ. P. 65(d)

The SEC-drafted consents are not subject to negotiation. They require defendants to surrender their right to notice of or a hearing upon entry of their final order and the documents incorporated therein.

The Gag Order is also unconstitutionally vague, requiring a settling defendant to navigate at his peril what he can say about his own prosecution. The Supreme Court has recognized that "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. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). "[L]aws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC 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.

But SEC's 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) (emphasis added). This phrasing confers unlimited discretion on SEC to decide what future speech is or is not permissible and is therefore unconstitutionally vague and must be declared invalid.

Fed. R. Civ. P. 65(d) requires that judicial orders enforceable by contempt proceedings must be specific. *Scott v. Schedler*, 826 F.3d 207, 211-12 (5th Cir. 2016); The judicial contempt power is a potent weapon; those subject to court decrees must know with specificity what actions are restrained. *LabMD, Inc. v. FTC*,

894 F.3d 1221, 1235-37 (11th Cir. 2018). Rule 65(d) expressly proscribes court orders that incorporate other documents to define the forbidden conduct—"*and not by referring to the complaint or other documents.*" Fed. R. Civ. P. 65(d) (emphasis added).[7] Because the Final Judgment here incorporates *both* the Consent *and* the Complaint (the Consent incorporates the Complaint) by reference, the Gag Order violates Rule 65(d). *See State Indus. Prods. Corp. v. Beta Tech. Inc.*, 575 F.3d 450, 457 (5th Cir. 2009) (Rule 65 governs consent judgments that are "clearly injunctive in nature" as evidenced by requirements to abide by set terms and district courts' retaining jurisdiction to enforce them). Compliance with Rule 65(d) "is mandatory." 11A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2955 (3d ed. 2013); *Seattle-First Nat'l Bank v. Manges*, 900 F.2d 795, 799-800 (5th Cir. 1990) ("[The] no-reference requirement [of Rule 65(d)] has been strictly construed in this circuit.")

[7] SEC appears to recognize that its "Consent" violates this rule because the consent states that "Defendant will not oppose the enforcement of the Final Judgment on the ground … that it fails to comply with Rule 65(d) … and hereby waives any objection based thereon." ROA.381; ROA.400. This purported waiver violates holdings by the Supreme Court and this circuit, finding that Rule 65(d)'s requirements are mandatory. Rule 65(d) is unwaivable, not only to preserve due process for defendants, but also the independent interest of clear judicial administration, something no party can waive.

Just recently, this Circuit vacated an injunction where the court of appeals could not ascertain with specificity the enjoined conduct. *Louisiana v. Biden*, No. 21-30505, 2022 WL 3405854, at *3 (5th Cir. Aug. 17, 2022). The specificity requirement is required not only because due process requires it for the parties. It also "performs a second important function … [of making possible] for an appellate tribunal to know precisely what it is reviewing." *Schmidt v. Lessard*, 414 U.S. 473, 477 (1974). The Gag Order, in sum, requires surrender of all of defendants' procedural and due process protections, including notice and opportunity to be heard, compliance with Rule 65(d), or any hearing at all before a judge.

E. The District Court Acknowledges that It Has Inherent Authority to Modify the Decree—and the Gag's Unconstitutionality Requires that It Do So

The district court's opinion acknowledges that "the Court has inherent authority to modify" the consents in this case because they have "prospective effect." ROA.784. Astonishingly, the court asserts that defendants "fail to argue that there has been any change in the underlying law or facts that the court should modify the decree." *Id.*

Not so! Defendants explicitly argued to the district court that two circuit judges had recognized in denying relief under Rule 60, that:

> 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. 17 C.F.R. § 202.5(e). If you want to settle,

> 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. *A more effective prior restraint is hard to imagine*. … I think it will not be long before the courts are called on to fully consider this policy.

Novinger I, 40 F.4th at 308 (Jones, J. joined by Duncan, J. concurring). This is a new recognition, by two judges who sit in hierarchical authority over the district court, that defendants' SEC gag orders, tucked away for decades in a Rule 65-defying, incorporated-by-reference fashion, *see* ROA.653, are prior restraints. For decades they have eluded judicial attention because settling defendants must waive their due process rights to notice and an opportunity to be heard on them. All of this violates the Constitution.

First Amendment rights have no statute of limitations. Once called to the judiciary's attention, federal courts have an unflagging duty to enforce the constitution and prohibit the government's unconstitutional exaction of silence. *See Marbury*, 5 U.S. at 180 ("[A] law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument."); *see e.g.*, *Fed. Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986) (holding that by blocking an unconstitutional act the court "fulfill[ed] our judicial duty—to enforce the demands of the Constitution"); *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 795 (1978) ("Because [the statute] challenged by appellants

prohibits protected speech in a manner unjustified by a compelling state interest, it must be invalidated.").

III. DECLARATORY RELIEF SHOULD BE BROADLY CONSTRUED TO CONSERVE JUDICIAL RESOURCES AND SET ASIDE ONGOING VIOLATIONS OF CONSTITUTIONAL RIGHTS

The Declaratory Judgment Act was enacted precisely to protect individual liberties and constitutional rights. Courts in this and several other circuits provide just such relief by motion. Declaratory relief is a mechanism that saves courts time and resources and is meant to be broadly construed:

> The declaratory-judgement remedy enlarges the judicial process and makes it more pliant and malleable by putting a new implement at the disposal of the courts. . . . It permits actual controversies to be settled before they ripen into violations of law or a breach of contractual duty and it helps avoid a multiplicity of actions by affording an adequate, expedient, and inexpensive means for declaring in one action the rights and obligations of litigants.

4 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2751 (4th ed. 2023). "The Declaratory Judgment Act and Rule 57 must be liberally construed to attain the objectives of the declaratory remedy." *Id.* at § 2754; *Allstate Ins. Co. v. Emp'rs Liab. Assurance Corp.*, 445 F.2d 1278, 1280 (5th Cir. 1971) (internal quotations and citations omitted) ("[t]he declaratory judgment remedy is an all-purpose remedy designed to permit an adjudication whenever the court has jurisdiction, there is an actual case or controversy, and an adjudication would serve

a useful purpose. . . . The act is remedial and is to be liberally construed to achieve its wholesome and salutary purpose.").

Importantly, "declaratory judgments can serve as mechanisms to vindicate constitutional rights even when courts might hesitate to enter the more 'intrusive' remedy of an injunction." Richard H. Fallon, Jr., *Constitutional Remedies: In One Era and Out the Other*, 136 HARV. L. REV. 1300, 1321-22 (2023); 4 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2758 (4th ed. 2023) ("[D]eclaratory relief is alternative or cumulative and not exclusive or extraordinary.") (internal quotation omitted); Michael T. Morley, *Constitutional Tolling and Preenforcement Challenges to Private Rights of Action*, 97 NOTRE DAME L. REV. 1825, 1856 (2022) ("[T]he Declaratory Judgment Act of 1934 made it easier for rightholders to seek preenforcement review of the constitutionality of legal provisions without violating them."). The purpose of declaratory relief and the district court's application of the Declaratory Judgment Act are in tension.

The district court denied Appellants' motion for declaratory relief because the Declaratory Judgment Act provides relief "'*upon the filing of an appropriate pleading*[.]'" ROA.780 (quoting 28 U.S.C. § 2201(a)).

Federal Rule of Civil Procedure 7(a) defines a pleading as one of the following: "(1) a complaint; (2) an answer to a complaint; (3) an answer to a counterclaim designated as a counterclaim; (4) an answer to a crossclaim; (5) a third-

party complaint; (6) an answer to a third-party complaint; and (7) if the court orders one, a reply to an answer."

Appellants are in a precarious position. Under this line of authority, the only time Appellants could have sought the declaratory relief issue was in an answer to the complaint. However, Appellants *did* file answers to Appellee's complaint, *see* ROA.77-85, but could not assert anything "upon which a declaratory judgment could be based," *Presbytery of N.J. of the Orthodox Presbyterian Church v. Florio*, 902 F. Supp. 492, 502 (D.N.J. 1995), because they did not settle until *after* the answer was filed. There was no Consent Decree to ask for relief from at the time Appellants filed an answer to the complaint.

There are four reasons why Appellants' request for declaratory relief is proper: (1) the remedies suggested by the district court are foreclosed by the collateral attack rule and the collateral bar rule; (2) Appellants' brief in support of the motion for declaratory relief contains all the prerequisites of a pleading; (3) courts have broadly construed motions for declaratory relief as *motions for summary judgment* on a declaratory judgment *action*, and other courts have granted motions for declaratory relief rather than require separate actions; and (4) the cases relied upon by the district court for denying the motion are distinguishable.

A. The Collateral Attack Rule and the Collateral Bar Rule Foreclose the District Court's Suggestions

The district court erred by suggesting Appellants bring another action or violate the Gag Order. Appellants are confined to a motion for declaratory relief because filing a separate action would run afoul of the collateral attack rule, and violating the SEC's Gag Order would provide no relief under the Supreme Court precedent in *Walker*, 388 U.S. 307, the seminal case regarding the collateral bar rule.

1. The Collateral Attack Rule Prohibits Appellants from Bringing a Separate Action to Alter the Consent Decree Entered by the District Court

The district court erred when it stated that Appellants "are at liberty to bring a separate action for declaratory judgment against the SEC." ROA.782. If Appellants brought a separate declaratory judgment action, it would be a textbook definition of a collateral attack.[8] *Miller v. Meinhard-Com. Corp.*, 462 F.2d 358, 360 (5th Cir. 1972) (defining a collateral attack as when "the integrity of the judgment is

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[8] The collateral attack rule is defined as:

> An attack on a judgment in a proceeding other than a direct appeal[.] … [A]n attempt to undermine a judgment through a judicial proceeding in which the ground of the proceeding (or a defense in the proceeding) is that the judgment is ineffective. Typically a collateral attack is made against a point of procedure or another matter not necessarily apparent in the record, as opposed to a direct attack on the merits exclusively.

Collateral Attack, BLACK'S LAW DICTIONARY (11th ed. 2019).

challenged"); *PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267, 272 (Tex. 2012) ("A collateral attack seeks to avoid the binding effect of a judgment in order to obtain specific relief that the judgment currently impedes.").

This Court has found that a challenge to permissive orders "is not a collateral attack on them[,]" however, challenging mandatory contract claims would not be as forgiving. *EOG Res., Inc. v. Chesapeake Energy Corp.*, 605 F.3d 260, 266 (5th Cir. 2010) (not a collateral attack when the lawsuit "does not challenge an 'operative fact'" and the "orders were permissive, not compulsory"). This Court has also stated that even if "an action has an independent purpose and contemplates some other relief, *it is a collateral attack if it must in some fashion overrule a previous judgment*." *Miller*, 462 F.2d at 360 (emphasis added).

The district court entered the consent decree as a final judgment, *see* ROA.379, ROA.399; thus, Appellants cannot bring a separate suit to challenge the contents of their orders. Appellants would be bringing a separate action in district court (which is a proceeding other than a direct appeal) to declare portions of the Appellants' consent orders unconstitutional.

Additionally, this "[a]mong the factors appropriate to be considered in determining that collateral attack should be permitted are that[:]

> (a) the lack of jurisdiction over the subject matter was clear; (b) the determination as to jurisdiction depended upon a question of law rather than of fact; (c) the court was one of limited and not of general

> jurisdiction; (d) the question of jurisdiction was not actually litigated; (e) the policy against the court's acting beyond its jurisdiction is strong.

Key v. Wise, 629 F.2d 1049, 1056 (5th Cir. 1980) (quoting Restatement (First) of Conflict of Laws § 451 (Am. Law Inst. 1934)); *Matter of Reitnauer*, 152 F.3d 341, 344 n.12 (5th Cir. 1988) ("It is true that (1) jurisdictional defects render a judgment void, and (2) void judgments are subject to collateral attack."); *Jacuzzi v. Pimienta*, 762 F.3d 419, 421 (5th Cir. 2014) ("If federal courts have jurisdiction to entertain collateral attacks for preliminary injunctions on the basis of lack of jurisdiction, then the [Declaratory Judgment Act] did nothing to change that jurisdictional analysis."); 47 Am. Jur. 2d *Judgments* § 698 (2023) ("A final judgment by a court of competent jurisdiction is generally not subject to collateral attack, unless it was procured by fraud, regardless of whether it was rightly or wrongly decided. In other words, where the court has jurisdiction of the parties and the subject matter, its judgment is generally not subject to collateral attack. However, a collateral attack may be allowed if the judgment is void, such as where a judgment was rendered by a court without jurisdiction."). The rule against collateral attacks by separate action has been construed to disallow such attacks, even when the defect in the judgment is that it is unconstitutional. "Federal courts do not have jurisdiction to review collateral attacks of state court judgments, *even when the challenge raises constitutional issues*, and even when the federal suit is filed as a civil rights action." *Rio v. Tex. Dep't of Crim. Just.*, 180 F.3d 261 (5th Cir. 1999) (emphasis added).

Jurisdictional defects are not at issue in this litigation; thus, Appellants do not fall into any exceptions to the collateral attack rule. There is little doubt that under the law of this circuit, any separate lawsuit would be summarily dismissed as an impermissible collateral attack. *McClure*, 335 F.3d at 411-12 ("[T]he district court erred in considering Plaintiffs' constitutional claims. … 'Inroads on the concept of finality tend to undermine confidence in the integrity of our procedures. … Moreover, increased volume of judicial work associated with the processing of collateral attacks inevitably impairs and delays the orderly administration of justice.'" (quoting *United States v. Addonizio,* 442 U.S. 178, 185 n. 11 (1979)).

Respectfully, the district court's suggestion of a futile alternate path to relief that both defies Supreme Court and Fifth Circuit precedents forbidding such collateral attacks—and simple logic is plain error.

2. The Collateral Bar Rule Prohibits Appellants from Simply Violating the Gag Order and Asking for ex post Forgiveness Rather than ex ante Permission

The district court erred when it suggested Appellants could simply violate the no-deny provision and ask for relief again. ROA.782 ("should [Appellants] decide to violate the no-deny provision, the SEC could simply ask this Court to move this lawsuit back to the Court's active docket"). The collateral bar rule is a separate doctrine that also denies Defendants a path to relief—attacking the judgment by *violating* it and then raising unconstitutionality as an affirmative defense. However,

"[w]hile the unconstitutionality of a statute may be raised as a defense to prosecution for its violation, a litigant who disobeys an injunction is precluded from raising its constitutional invalidity as a defense in contempt proceedings." *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 469 (5th Cir. 1980). "[T]he collateral bar rule permits a judicial order to be enforced through criminal contempt even though the underlying decision may be incorrect and even unconstitutional." *In re Establishment Inspection of Hern Iron Works, Inc.*, 881 F.2d 722, 725 (9th Cir. 1989). The district court erred by suggesting a methodology that exposes Defendants to criminal contempt.

The Supreme Court held, in *Walker*, 388 U.S. at 320, that disobeying a court order does *not* provide a remedy. In 1963, civil rights protestors, including Dr. Martin Luther King, Jr., organized demonstrations that were alleged to have created turmoil and chaos in Birmingham. *Id.* at 309. The city sought an injunction and it was granted—"enjoining the petitioners from, among other things, participating in or encouraging mass street parades or mass processions without a permit as required by a Birmingham ordinance." *Id.* Petitioners publicly announced their intention to defy the injunction. *See id.* at 310 ("Injunction or no injunction we are going to march tomorrow.") (internal quotation mark and citation omitted).

Petitioners attempted to argue that "the Constitution compelled Alabama to allow the petitioners to violate this injunction," but constitutional martyrdom did not override violating a court order. *Id.* at 315. The Court grappled with the fact that the

ordinance had constitutional deficiencies, however, "the way to raise that question was to apply to the Alabama courts to have the injunction modified or dissolved." *Id.* at 317. This holding means parties have to ask for declaratory or other relief—there is no other procedure to obtain this declaratory remedy. At the very least the collateral bar rule is consistent with moving the court for declaratory relief. Ultimately, the Court decided that petitioners were not "constitutionally free to ignore all the procedures of the law and carry their battle to the streets[,]" despite being sympathetic to "petitioners' impatient commitment to their cause." *Id.* at 321. "But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom." *Id.*

Appellants cannot simply violate the Gag Order because, like the injunction in *Walker*, they must challenge the order in the court that made it. *see also* 25 Marc I. Steinberg and Ralph C. Ferrara, Securities Practice: Federal and State Enforcement § 3:66 (2022) ("The judge normally will sign the consent judgment making it an order of the court.") *See* ROA.450, ROA.459. "'Court orders have to be obeyed until they are reversed or set aside in an orderly fashion.'" *United States v. Dickinson*, 465 F.2d 496, 509 (5th Cir. 1972) (citation omitted). More importantly,

> violations of court orders are punishable by criminal contempt, *see United States v. United Mine Workers*, 330 U.S. 258, 294 (1947), and a court may institute criminal contempt proceedings against an SEC defendant who violates a no-deny provision contained in a consent decree issued by that court even absent the SEC's consent[.]

Cato Inst. v. SEC, 4 F.4th 91, 95 (D.C. Cir. 2021). The district court apparently ignored this well-known precedent that violations of court orders are punishable by criminal contempt, and it simply accepted SEC's false contention that the only harm that accrues from violating the gag provision is SEC's potential reopening of the case. ROA.782.

B. Courts Dispense with Strict Labeling and Broadly Construe Motions for Declaratory Judgment

The Fifth Circuit is among the several circuits that have allowed parties to seek declaratory relief by motion. *Castle v. United States*, 399 F.2d 642 (5th Cir. 1968). Instead of adhering to this precedent—and also recognizing the preclusive effect of the collateral attack rule—the district court oddly resorted to out-of-circuit case law to rule that defendants have to bring a separate action. This makes no sense, either as a matter of law or as a reading of the Federal Rules.

Many courts in other circuits have broadly construed a motion for declaratory judgment *as a motion for summary judgment on a non-filed action for a declaratory judgment* rather than prohibiting its use. This Court should follow its own precedent and do this, too. *See Kam-Ko Bio-Pharm Trading Co. Ltd-Australasia v. Mayne Pharma (USA) Inc.*, 560 F.3d 935, 943 (9th Cir. 2009) ("The district court thus properly construed Kam-Ko's 'motion' for declaratory judgment as a motion for summary judgment on Kam-Ko's 'action' for declaratory judgment."); *compare Martinez v. City of Santa Fe*, No. 14-cv-0016-smv-kbm, 2014 WL 12493737, at *3

(D.N.M. Sept. 24, 2014) ("It is not uncommon for courts—including courts within the Tenth Circuit—to construe a 'motion for declaratory judgment' as a motion for summary judgment on a declaratory judgment action.") *with Marsh v. Anderson*, No. 21-cv-10348, 2022 WL 816399, at *2 (E.D. Mich. Mar. 17, 2022) ("[T]he magistrate judge properly construed [plaintiff's] declaratory judgment motion as one for partial summary judgment because the motion raised factual questions—as opposed to 'purely legal issues'—that are not suited for resolution on a declaratory basis."); *Halmos v. Ins. Co. of N. Am.*, No. 08-10084, 2010 WL 11447257, at *1 (S.D. Fla. Mar.10, 2010) ("The motion here should be construed as a motion for partial summary judgment on an action for a declaratory judgment rather than a motion for declaratory judgment.").

Alternatively, the court can construe this as an "action" or a "petition" for declaratory relief under Fed. R. Civ. P. 57. The Declaratory Judgment Act, 28 U.S.C. § 2201, and its accompanying rule, Fed. R. Civ. P. 57 recognize that a court "may declare the rights and other legal relations of any interested party seeking such declaration:

> These rules govern the procedure for obtaining a declaratory judgment under 28 U.S.C. §2201. … The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. The court may order a speedy hearing of a declaratory-judgment *action*.

Fed. R. Civ. P. 57 (emphasis added). And the commentary to Rule 57 provides:

> A declaratory judgment is appropriate when it will "terminate the controversy" giving rise to the proceeding. 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, duty, power, liability, privilege, disability, or immunity or of any fact upon which such legal relations depend, or of a status, may be declared. The *petitioner* must have a practical interest in the declaration sought and all parties having an interest therein or adversely affected must be made parties or be cited.

Fed. R. Civ. P. 57 Notes of Advisory Committee on Rules (1937) (emphasis added). Thus the operative Rule calls it an "action," contemplates hearing "as on a motion," and refers to the party seeking relief as a "petitioner."

Indeed, in an early case construing the Declaratory Judgment Act, this Circuit denominated it a "supplementary bill for declaratory judgment. *Gully v. Int'l Nat. Gas Co.*, 82 F.2d 145, 149 (5th Cir. 1936).

> We think, too, the court was right in the view it took on final hearing, that the supplementary bill for declaratory judgment was properly brought, and that the case was one for such a judgment. For while it may not be doubted that the Federal Declaratory Judgment Act is a purely remedial statute, and does not purport to, nor does it, add to the content of the jurisdiction of the national courts, it certainly does purport in cases where federal jurisdiction is present, to effect and we think it does, effect thoroughgoing, remedial changes, by adding to the coercive or warlike remedies in those courts by way of prevention and of reparation, the more pacific and more prophylactic one of a declaration of rights.

Id. The *Gully* court also specifically recognized the availability of pre-enforcement declaratory relief: "When, then, an actual controversy exists, of which, if coercive relief could be granted in it the federal courts would have jurisdiction, they may take

jurisdiction under this statute, of the controversy to grant the relief of declaration, either before or after the stage of relief by coercion has been reached" *Id.* meaning that defendants do not need to speak out and risk contempt to obtain relief.

The SEC-drafted Gag Order allows it to seek post-judgment relief by *petition*—"If Defendant breaches this agreement, the Commission may petition the Court." ROA.383, ROA.402. Likewise, Defendants may seek declaratory relief under this Court's inherent authority to supervise its orders, whether by "action," "motion," "bill" or "petition," all of which are referenced by either Rule 57, its commentary, case law, or the Consent Order itself. The nomenclature varies and is irrelevant to the relief.

A motion for declaratory judgment is not a rare occurrence—in fact, many courts have granted such motions. *See Fox Sports Net Minn., LLC v. Minn. Twins P'ship*, No. 01-961, 2022 WL 1001057, at *7-*8 (D. Minn. May 6, 2002) ("[d]efendants' motion for declaratory judgment … is granted in part" to "declare that defendants did not breach plaintiff's right of first refusal; and" to declare they didn't breach confidentiality); *R. Ready Prods., Inc. v. Cantrell*, 85 F. Supp. 2d 672, 694-95 (S.D. Tex. 2000) (defendants moved for declaratory judgment which the court granted in part); *Genworth Life and Annuity Ins. Co. v. Munao*, No. 19-c-698, 2019 WL 6888580, at *1 (E.D. Wis. Dec. 18, 2019) (granting defendants' motions for declaratory judgment); *Bolden-Gardner v. Liberty Mut. Ins. Co.*, No. rdb-19-

3199, 2021 WL 3080053, at *3 (D. Md. July 21, 2021) (same); *Grubaugh. v. USAA Casualty Ins. Co.*, No. 5:22-cv-00069-llk, 2023 WL 4372709, at *1 (W.D. Ky. July 6, 2023) (same); *Lambert v. Nationwide Mut. Ins. Co.*, No. 5:16-cv-06160, 2017 WL 320926, at *1 (S.D.W.V. Jan. 20, 2017) (same).

Courts have likely done this because the Federal Rules of Civil Procedure "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1; 4 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1029 (4th ed. 2023) ("There probably is no provision in the federal rules that is more important than this mandate."); *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 465 (2000) ("The Federal Rules of Civil Procedure are designed to further the due process of law that the Constitution guarantees."). Notably, Federal Rule of Civil Procedure 57[9] states that "[t]he existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate."

The federal rules should not be construed to deny justice. *See* 4 Charles Alan Wright & Arthur R. Miller, *supra* § 1029 (4th ed. 2023) ("The primary purpose of procedural rules is to promote the ends of justice."). Courts that have entered

[9] Federal Rule of Civil Procedure 57 incorporates the Declaratory Judgment Act. *See* Fed. R. Civ. P. 57 ("These rules govern the procedure for obtaining a declaratory judgment under 28 U.S.C. § 2201.").

unconstitutional gags should not shirk their duty or otherwise avoid determining the SEC has been improperly silencing citizens for half a century by claiming the parties mislabeled their motion or that an alternative remedy exists—especially when the roadblocks to those putative alternate remedies are plainly set out in the case law and briefed before the court.

C. The Cases Relied on by the District Court that Render Motions for Declaratory Relief Procedurally Defective Are Inapposite and Ignore Appellants' Unavoidable Procedural Posture

The district court erred by relying on out-of-circuit or lower court decisions that either conflict with the law of this circuit and/or which are procedurally and substantively inapposite to this case. They do not negate the court's inherent authority to invalidate an unlawful and unconstitutional order.

For instance, in *Thomas v. Blue Cross and Blue Shield Ass'n*, 594 F.3d 823, 827 (11th Cir. 2010), and *Kam-Ko Bio-Pharm Trading Co., Ltd.-Australasia*, 560 F.3d at 943, it was the plaintiff who filed a motion for declaratory relief rather than the defendant. Those plaintiffs could have amended their complaint as a complaint is an "appropriate pleading" under the Declaratory Judgment Act. Similarly, the party in *Arizona v. City of Tucson*, 761 F.3d 1005, 1010 (9th Cir. 2014), was an intervenor who "did not request this relief in their complaints."

The district court cites three district court cases where defendants moved for declaratory relief, as in this case. ROA.780-81. First, those cases are in tension with

Castle, which permits declaratory relief on motion. Second, in *Enniss Fam. Realty I, LLC v. Schneider Nat'l Carriers, Inc.*, 916 F. Supp. 2d 702, 711 (S.D. Miss. 2013), the court construed the defendant's motion for declaratory relief "as a motion for partial summary judgment" as suggested *supra* III.B. Third, in *Stephenson v. Caterpillar Inc.*, No. 2:16-cv-00071-jrg-rsp, 2019 WL 498337, at *2 (E.D. Tex. Feb. 8, 2019), defendants "did not plead a claim for declaratory judgment relief against [co-defendant] in its latest crossclaim[,] … [t]hus, [defendant's] motion for declaratory judgment … is procedurally defective[.]"

The answer or counterclaim to a complaint is the only instance in which Appellants could have theoretically asserted declaratory relief. However, even that was not an option here considering the answer to the complaint was filed pre-settlement.[10] Appellants obviously do not have the option to plead a claim for declaratory relief in a crossclaim after settlement—and so have done so by a "motion" or "action" petitioning the court for declaratory relief as provided under the Federal Rule 57 and its Commentary.

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[10] *See also* Fed. R. Civ. P. 13(d) ("These rules do not expand the right to assert a counterclaim—or to claim a credit—against the United States or a United States officer or agency.").

In any event, the district court's detour into out-of-circuit or lower court cases it prefers to the law of this circuit, which allows for motions for declaratory relief, does nothing to lessen the effect of the collateral bar and collateral attack rules discussed above. Appellants briefed the collateral bar rule below, *see* ROA.645-46, and has briefed the collateral attack rule now that the court has suggested that defendants bring one in its decision. Simply put, Appellants are not "at liberty to bring a separate action for declaratory relief against the SEC." ROA.782. They are barred from doing so in this Circuit. The district court erred in not recognizing the Supreme Court's clear precedent and the procedural straightjacket it has placed on Appellants. The order on appeal unjustly offers no way out of an unconstitutional decree.

D. The Motion for Declaratory Relief Meets Basic Pleading Standards

The district court erred by not broadly construing the motion for declaratory relief as an appropriate pleading under the Declaratory Judgment Act. The Declaratory Judgment Act states a court may grant relief "upon the filing of an *appropriate pleading*[.]" 28 U.S.C. § 2201(a). At its core, a pleading is "a short and plain statement of the grounds for the court's jurisdiction[;] … a short and plain statement of the claim showing that the pleader is entitled to relief; and [] a demand for the relief sought[.]" Fed. R. Civ. P. 8(a). Appellants have done just that.

In Appellants' brief in support of its motion for declaratory relief, jurisdiction was established. *See* ROA.646 ("The SEC-drafted consent and final order provide that this court retains jurisdiction."); ROA.645 ("[A]s briefed to this Court and the Fifth Circuit, and as discussed at oral argument in the Circuit, the collateral bar rule prohibits Novinger from speaking without first challenging the gag *in the court that entered it*."). Appellants expressed why they are entitled to relief. ROA.642; ROA.652; ROA.654 (explaining that the Gag Order violates the First Amendment, Due Process, the Federal Rules, public policy, and the right to petition). Appellants also enumerated the declarations it hoped the court would assert, thus demanding relief. ROA.642-43 ("[P]ursuant to 28 U.S.C. § 2201 and Fed. R. Civ. P. 57, Christopher A. Novinger and ICAN Investment Group, LLC ('ICAN') ask this court to declare that the consent (1) incorporates a void and unconstitutional prior restraint and content- and viewpoint-restriction, unconstitutional condition on speech and a compulsory self-condemnation in violation of the First and Fifth Amendments of the United States Constitution; (2) imposes restrictions on speech that are not among the remedies authorized by Congress under 15 U.S.C. § 77t or 15 U.S.C. § 78u either at trial or upon settlement; and (3) that 17 C.F.R. § 202.5(e) is void *ab initio* because SEC bypassed the Administrative Procedure Act's ('APA') requirement for notice and comment.").

Importantly, "'the requirements of pleading and practice in actions for declaratory relief are exactly the same as in other civil actions.'" *See Kam-Ko Bio-Pharm Trading Co. v. Ltd. Australasia*, 560 F.3d at 943 (quoting 4 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2768 (4th ed. 2023)). Appellants' request for relief from the Gag Order should be granted.

* * *

CONCLUSION

The SEC Gag Rule was conceived in secrecy, compelled as an unconstitutional condition of settlement by the government, and every day it is in effect it freshly inflicts a constitutional injury upon Americans whose speech is either silenced and/or compelled to favor the government's viewpoint. With its Gag Rule, the SEC has monopolized for far too long the power to tell the story of how it regulates.

For these reasons, Appellants respectfully request that this Court reverse the district court's order and directly grant their motion for relief from judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth 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.

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CERTIFICATE OF COMPLIANCE

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

This brief complies with the type-volume limitation of 5th Cir. R. 32(a)(7)(B) because this brief contains 11,356 words out of 13,000, 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.

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