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' REPLY BRIEF

Margaret A. Little
Kara M. Rollins
Kaitlyn D. Schiraldi
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Ste. 450
Washington, DC 20036
Telephone: (202) 869-5210
peggy.little@ncla.legal
Attorneys for Defendants-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages(s)

Cases

Other Authorities

REPLY TO COUNTERSTATEMENT OF FACTS

SEC's reasoning is fatal to its cause. Its brief opens by declaring that consent decrees ("Gag Order" or "gag") are both contracts and judicial decrees in which "compromises [are made] in which the parties give up something they might have won in litigation and waive their rights to litigation," Appellee's Opening Brief at 3–4 ("SEC Br.") (citing *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 235 (1975)). But SEC well knows that a lifetime gag could never be won by the SEC in litigation. Yet this powerful agency has been able to leverage its ability to outlast and outspend Appellants to impose a penalty unheard of at law—a prior restraint in perpetuity—while simultaneously stripping Appellants of all their constitutional due process rights and protections under the Federal Rules of Civil Procedure. Moreover, SEC ignores the obvious: its scheme to silence enforcement targets is unconstitutional. Abridging enforcement targets' speech is antidemocratic and anti-free market because both systems thrive on the free exchange of speech and ideas, even those that might be unfavorable or embarrassing to the Commission.

SEC cavalierly describes this invidious scheme as "provid[ing] parties with a means to manage risk" and resources. *SEC v. Citigroup Glob. Mkts., Inc.*, 752 F.3d 285, 295 (2d Cir. 2014) (*Citigroup II*). Unfortunately for SEC's position in this litigation—but fortunately for Americans under the thumb of government power—Appellants' future free speech rights are not among the chess pieces that SEC can

"manage" in a settlement. They are not, and may never be, on the table. *See* Appellants' Op. Br. 19 ("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").

Justice Gorsuch recently spoke to this disturbing pattern of SEC arrogation of power. Noting that because the "bulk of agency cases settle," *Axon Enter., Inc. v. FTC and Cochran v. SEC*, 598 U.S. 175, 216 (2023) (Gorsuch, J., concurring) (citing *Tilton v. SEC*, 824 F.3d 276, 298, n.5 (2d Cir. 2016) (Droney, J., dissenting)), and the SEC is "[a]ware … that few can outlast or outspend the federal government, agencies sometimes use this as leverage to extract settlement terms they could not lawfully obtain any other way." *Id.* Exactly.

SEC further sets out on page 5 of its brief, and without any introspection about the appropriateness of its demands, a wince-inducing litany of its requirements that Appellants surrender every conceivable due process right imaginable. SEC recites provisions of the "consent" that state that Appellants voluntarily entered the consent without any government threats or coercion, SEC Br. 5, conveniently omitting any mention of the mandatory waiver of notice and opportunity to be heard, incorporation of the "consent" by reference in the judgment in violation of Rule 65(d), and waiver of any Rule 65 challenge required in the *mandatory* SEC-written consent.

Hence, it is with some temerity that SEC asserts in its brief that a ruling in Appellants' favor "would subvert principles of finality and the rules of procedure … [and] distort the law undergirding declaratory judgments." SEC Br. at 11. To the contrary, the pernicious "consent" SEC crafted is itself *designed* to subvert the Federal Rules of Civil Procedure, and its systematic stripping of defendants' constitutional rights, including their right to notice and opportunity to be heard on the gag, betrays a scheme to bind Appellants in a straightjacket of waivers that impose a false "finality"—deliberately crafted to evade judicial review. This Court should decline the invitation to participate in this disgraceful scheme hidden from public view for decades.

SEC's selective omission of the draconian due-process-stripping terms of a "consent" Appellants must sign is made worse by SEC's characterization of the Consent. SEC calls it Appellants' "written offer to settle," SEC Br. at 5. This is profoundly misleading. SEC fails to observe its duty of candor to the court when it omits that the "written offer" is wholly drafted by SEC and must be signed before the agency will even present a settlement to the Commission for approval. Indeed, Appellants' alleged consent does not substantively differ from any of the untold number of settlements into which SEC has entered for decades. A review of settlement agreements from across the country and over nearly two decades shows that the so-called consents are form language drafted by SEC and provided to

defendants in take-it-or-leave-it fashion.[1] That's not an "offer." It is a capitulation to an otherwise unheard-of-at-law government-compelled condition of settlement. It forces defendants who may be financially, reputationally, and emotionally depleted to agree to a lifetime prior restraint of content- and viewpoint-restrictions on speech that forbids them from denying any allegation in SEC's complaint or even creating an "impression that the complaint is without factual basis"—all drafted by SEC, waiving due process rights to notice and opportunity to be heard, compelling speech, and fixing the pleading narrative in perpetuity to reflect only the Commission's view of the case. "Once the [SEC] charges a private party, the person is labeled publicly as a law breaker, even if … the legal theory is new and untested, and faces severe and frequently career or business ending sanctions. The private party must incur the costs, distress, and adverse publicity associated with a defense or succumb … . [T]he pressure to settle is overwhelming even when the SEC case lacks merit." Andrew N.

---

[1] *See*, *e.g.* Consent of Def. Arthur S. Hoffman at ¶ 11, SEC v. Hoffman, No. 2:22-cv-00296-ROS (D. Ariz. Feb. 24, 2022), ECF No. 4; Judgment as to Def. Mark J. Ahn at ¶ 11, SEC v. Ahn, No. 1:21-cv-10203-ADB (D. Mass. Apr. 27, 2021), ECF No. 12-1; Consent of Def. John Kenneth Davidson at ¶ 11, SEC v. Davidson, No. 5:19-cv-01153 (W.D. Okla. Dec. 12, 2019), ECF No. 3-1; Consent of Def. Owen H. Naccarato at ¶ 11, SEC v. Naccarato, No. 1:17-cv-24682-JLK (S.D. Fla. Dec. 27, 2017), ECF No. 3-1; Consent of Def. Tiger Asia Mgmt., LLC at ¶ 11, SEC v. Tiger Asia Mgmt., LLC, No. 2:12-cv-07601-DMC-MF (D.N.J. Dec. 12, 2012), ECF No. 3-1; Consent of Def. Carole D. Argo at ¶ 11, SEC v. Argo, No. 1:07-cv-01397-RWR (D.D.C. Sept. 11, 2008), ECF No. 18-1; Consent of Def. Mark J. Lauzon at ¶ 10, SEC v. Teo, No. 2:04-cv-01815-WGB-MCA (D.N.J. Jan. 5, 2005), ECF No. 43.

Vollmer, *Four Ways to Improve SEC Enforcement*, 43 SEC. REG. L. J. 333, 336 (2015). Appellants were not gagged pursuant to a "give-and-take" negotiation; they were required to surrender First Amendment rights through a codified agency policy, a systematic scheme on which the Supreme Court would look askance. *United States v. Jackson*, 390 U.S. 570, 582 (1968) ("For the evil in the federal statute is not that it necessarily coerces guilty pleas and jury waivers but simply that it needlessly encourages them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right.").

Worse, SEC admits on the prior page that these breathtaking violations of First Amendment and due process rights are involuntary—once charged, any defendant must agree to these rights-stripping provisions or else Appellants "can always decline to settle and litigate the case." SEC Br. 4. Or, to put it another way, SEC's gag 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." *SEC v. Novinger*, 40 F.4th 297, 308 (5th Cir. 2022) (Jones, J., joined by Duncan, J., concurring).

The "option" to continue litigating requires resources far beyond those available to most Americans. Nearly a decade ago, in 2014, it took twelve years and $12 million dollars for one such SEC target to fight his way to a unanimous jury

verdict acquitting him of all charges—charges SEC had tried to intimidate the target into settling over the course of twelve punishing years of financial, occupational, and reputational damage.[2] This Court can end SEC's bullying and administrative weaponization of settlement by declaring the Gag Order unconstitutional.

SUMMARY OF ARGUMENT ON REPLY

SEC makes three arguments: (1) that declaratory relief is not available in district courts in this Circuit on a post-judgment motion; (2) that the relief sought, even if procedurally proper, is not justiciable because "any purported injury relies on a series of hypothetical events that have not yet occurred and may never occur;" and (3), that the government can lawfully demand a lifelong prior restraint on speech as a non-negotiable condition of settlement because Appellants knowingly and voluntarily waived their future First Amendment rights. SEC Br. at 3.

What SEC's brief fails to acknowledge or even address is that the gag is nested amongst other, non-negotiable conditions that require defendants to waive notice and any opportunity to be heard on such a waiver of their future First Amendment rights and that Appellants "agree" that "consent" will be incorporated by reference into a final judgment in violation of the Federal Rules of Civil

---

[2] Nelson Obus, *Refusing to Buckle to SEC Intimidation*, WALL STREET JOURNAL (June 24, 2014), https://www.wsj.com/articles/nelson-obus-refusing-to-buckle-to-sec-intimidation-1403651178.

Procedure 65(d), which both forbids any such incorporation by reference and waiver of Rule 65's protections. Finally, to wrap up this tidy package, SEC has crafted its "consent" to require Appellants to waive their rights to make a Rule 65 challenge—even while Rule 65(d) expressly provides that its provisions may not be waived. *See 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.").

Through SEC's sleight of hand and flagrant disregard of the Federal Rules, courts have become unwittingly complicit in ordering unconstitutional prior restraints that are never included in the text of the final judgment entered by those courts. Such a wholesale surrender of constitutional protections violates the Supreme Court's precedents on unconstitutional conditions.

Each of SEC's arguments lacks merit. In fact, they eviscerate the very concepts of due process and First Amendment rights. The right to due process of law and First Amendment rights at issue here are conferred by the Constitution as a check on government power. That means that the government cannot turn them into waivable non-negotiable government-imposed conditions of settlement. By crafting pernicious "consent" thusly, SEC transforms Appellants' precious constitutional rights into mere "options" that Americans can retain only so long as they are well-heeled enough to outlast and outspend this powerful government agency. *See* Philip

Hamburger, *The Administrative Evasion of Procedural Rights*, 11 N.Y.U. J. L. & LIBERTY 915, 916 (2018). Shockingly, for over 50 years, once charged by the SEC, Americans' First Amendment and due process rights become mere trading cards, no longer available to Americans—like Appellants—who lacked the resources to fight SEC to the costly bitter end.

SEC's scheme—and brief in support thereof—is shot through with these profound and dangerous misconceptions of what rights mean. Furthermore, SEC's assertion that Appellants' "purported injury" depends on future hypothetical events and so is not justiciable, was not raised below. And, this misconception of when injury occurs from a prior restraint shows either ignorance or disregard of Supreme Court precedents that hold that a prior restraint inflicts immediate and irreversible constitutional injury on Appellants each day and each hour the restraint is in effect—they "freeze" speech. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). And in the case of the SEC's Gag Policy, it freezes the speech of thousands of Americans in perpetuity. This is not a hypothetical future injury, as SEC posits. It is an immediate, ongoing, here-and-now injury that requires correction as soon as it is brought to a court's attention.

Finally, numerous precedents on declaratory relief provide that it can be sought and received on motion. SEC argues otherwise, because they know that if Appellants bring this claim by a complaint in a separate lawsuit, it will be defeated

as a collateral attack on the judgment in *this* case. And if Appellants speak in violation of the court-ordered gag, the Supreme Court's collateral bar rule will forbid them from raising a constitutional defense against a reopened case and/or a contempt sanction, because they are required to challenge the unconstitutional order *in the court that entered it*—as they are now doing. Appellants have faithfully followed that path here in moving for declaratory judgment, as those other avenues are foreclosed. SEC has further refused to act on a petition to amend the rule to remove the gag for five years (and counting) and were called out by two judges of this Circuit for their inaction which evades judicial review in perpetuity. This Court should not enable SEC to further perpetuate this cynical evasion of any judicial review of what this Circuit acknowledges to be a prior restraint.

The judgment below should be reversed and the gag declared unconstitutional.

ARGUMENT

I. DECLARATORY RELIEF IS AVAILABLE IN THIS CIRCUIT

A. SEC Misconstrues or Ignores Key Precedents

SEC claims that Appellants should not be able "to use the Declaratory Judgment Act to sidestep Rule 60(b) or to avoid a prior appellate mandate." SEC Br. at 15. To support this, SEC cites *Cook v. Birmingham News*, 618 F.2d 1149, 1152 (5th Cir. 1980) for the notion that "'if [Rule] 60 is inapplicable, we know of no legal doctrine or rule of civil procedure that even arguably could have empowered a

district court to hear, [multiple] years after entry of a consent decree that acts as a final judgment, a motion to reconsider the decree.'" SEC Br. at 15 (quoting *Cook*).

What SEC failed to include in its discussion of *Cook* is this Circuit's recognition that, "[t]he consent decree at issue in the present case *does not have the prospective effect* or continuing operation that [] [R]ule [60] requires." *Cook*, 618 F.2d at 1152 (emphasis added). This Court concluded, "[t]hus, we cannot ignore the plain language of Rule 60(b)(5) permitting relief from the inequitable operation of a judgment only when the judgment operates prospectively[,]" finding the decree in the case could not be read to have prospective effect, thus the court could not modify the decree under Rule 60. *Id.* at 1153.

Whereas here, the offending consent decree is wholly prospective *by its terms*. *See* R.E. 41 ("In this case, the consent decrees have prospective effect, so the Court has inherent authority to modify them."). It's a gag order suppressing Appellants' *future* speech based on its content and viewpoint, forbidding them in perpetuity from engaging in any public expression critical of the agency or that even creates the impression of denial of any allegation made against them by the SEC. This onerous gag is extracted by the agency at the very time it has its boot on Appellants' necks and sets surrender of future First Amendment rights as a baseline price of relief.

SEC's brief also opts to virtually ignore Appellants' argument that courts retain continuing jurisdiction over consent decrees to ensure those decrees do not

violate the Constitution. The best SEC can summon up is that "the dynamics of institutional reform litigation differ from those of other cases," SEC Br. at 22, which fails to explain why that distinction matters. Surely, a rule that imposes a duty upon courts that enter consent decrees and retain jurisdiction over them to be sure they are constitutional should not apply to one subset of cases but not another. *Cook* is inapplicable for these reasons, as is SEC's argument about sidestepping reasonable time via the Declaratory Judgment Act, to which they offer no reasoned response. *See* Appellants' Opening Br. at 28 ("First Amendment rights have no statute of limitations.").

Interestingly, SEC cites *Goodyear Tire & Rubber*, which is only helpful to Appellants. *See* SEC Br. at 19–20 (quoting *Goodyear Tire & Rubber Co. v. H.K. Porter Co.*, 521 F.2d 699, 700 (6th Cir. 1975) (per curiam)). In *Goodyear*, the plaintiff filed a Rule 60(b) motion that was denied, and then subsequently filed a separate action in another district court seeking to attack a judgment of infringement rendered by the first district court and affirmed by the Sixth Circuit. *Goodyear*, 521 F.2d at 699. The court held that because plaintiff had already proceeded with a Rule 60 motion, it could not also "proceed for the same relief in an independent action." *Id.* at 700. Appellants could not bring a separate "action" for declaratory relief without running afoul of this collateral attack rule and risking dismissal. As SEC well knows, Supreme Court precedent requires appellants to make their

constitutional challenges "in the court that entered the order." *See* Appellants' Op. Br. 9, 32, 36, 47.

SEC also cites *Humanetics, Inc. v. Kerwit Medical Products, Inc.*, for the notion that "where a litigant sought to attack a judgment on the very same grounds underlying a rejected Rule 60(b)(4) motion, 'the general policy in favor of finality of litigation' counseled against any further relief[.]'" SEC Br. at 19 (quoting *Humanetics, Inc. v. Kerwit Med. Prods., Inc.*, 709 F.2d 942, 944 (5th Cir. 1983)). The plaintiff in that case "filed an independent equitable action to set aside a consent judgment of patent infringement and validity entered … some seven years earlier[.]" *Humanetics*, 709 F.2d at 942. However, the seven years that had passed was never examined as an issue, and this Court looked *beyond* Rule 60 in determining plaintiffs had no equitable recourse, but it did not mention declaratory relief as a potential avenue of equitable recourse. *See id.* at 944 ("The alleged fraud upon the patent office (and thus the public) may indeed inject a value into the weighing of whether equitable relief is available by an independent action *beyond that normally affordable by a Rule 60(b) motion*.") (emphasis added). This case does not support the idea that finality favors disallowing declaratory relief after a Rule 60 motion is denied. Rather, it is simply a fact-specific denial of unidentified equitable relief in a case distinct from Appellants'. *See id.* ("In short, under the circumstances here presented, accepting all the plaintiff's allegations as true, it is not 'manifestly

unconscionable' to enforce the consent judgment against this plaintiff, and it is therefore not entitled to the equitable relief brought by its action.").

SEC cites *City of El Paso* for the proposition that declaratory judgment relief cannot be used to rewrite a consent agreement. *See* SEC Br. at 24–25 (quoting *City of El Paso v. El Paso Entm't, Inc.*, 535 F. Supp. 2d 813 (W.D. Tex. 2008), *aff'd*, 382 F. App'x 361 (5th Cir. 2010) (per curiam)). SEC claims that declaratory relief "'seeks to determine the rights of the parties as they currently exist; it does not involve the modification … of a prior judgment[,]'" thus Appellants are improperly requesting declaratory relief. SEC Br. at 24 (quoting *City of El Paso*, 382 F. App'x at 365). First, this action does seek to determine the rights of Appellants as they currently exist. It maintains that they have rights of speech—and the public has a right to hear—what they will say and what the public can hear and that those here-and-now rights are being violated each and every day the Gag remains in effect.

That view of remedies fails to acknowledge that declaratory relief is commonly used to declare the government's actions unconstitutional. *See* Helen Norton, *Remedies and the Government's Constitutionally Harmful Speech*, 9 CONLAWNOW 49, 59 n.43 (2018) ("For examples of successful claims for declaratory relief for the government's unconstitutional [suppression of] speech, *see Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000)[,] *Bantam Books v. Sullivan*,

372 U.S. 58 (1963)[,] … *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 140–41 (1951)").

Appellants' opening brief provided the court with solid appellate precedent for declaratory relief modifying portions of judgments or settlements that violate the Constitution, and SEC simply writes its brief as if those cases do not exist. *See* Appellants' Op. Br. at 10 (citing *Overbey v. Mayor of Balt*., 930 F.3d 215, 219 (4th Cir. 2019) (invalidating gag portion of police brutality settlement); *United States v. Richards*, 385 F. App'x 691, 693 (9th Cir. 2010) (invalidating gag term of plea agreement); *GV Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1077 (6th Cir. 1994) (a condition of settlement restraining expression invalidated); *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1399 (9th Cir. 1991) (invalidating unconstitutional portion of settlement)). Pretending these cases allowing modification of judgments do not exist is no aid to the Court in deciding this appeal.

B. Declaratory Relief Can Be Secured by Motion

SEC opines that only a pleading, not a motion, is sufficient to "initiate a declaratory-judgment action." SEC Br. at 11. This argument is incorrect and again, the cited cases that allow declaratory relief on motion go unanswered by SEC. SEC also fails to refute the notion that "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).

Appellants are in a unique procedural posture, foreclosing the comparison of Appellants' situation to the parties in the cases cited by SEC. *See* Appellants' Opening Br. at 44 ("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. 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.").

Furthermore, motions for declaratory relief are permitted in this Circuit. *See United Teacher Assocs. Ins. Co. v. Union Lab. Life Ins. Co.*, 414 F.3d 558, 572 (5th Cir. 2005) (motion for declaratory relief permitted and not barred by either the "filing of an appeal nor a lengthy delay after the trial court's initial ruling."). SEC contends that Appellants "do not identify a single decision in which a court has granted declaratory relief from a previously entered final judgment[.]" SEC Br. at 15. However, Appellants have cited a number of cases—some in the First Amendment context at that—where courts have done exactly that. Appellants' Opening Br. at 18-19. Importantly, "[t]he test for finality is whether the district court

intended that its order be 'effective immediately.' Said another way, a court's ruling is only 'final' if the judge 'intends to have nothing further to do'—with the motion (if an interlocutory appeal) or the case (if a conventional appeal)." *Ueckert v. Guerra*, 38 F.4th 446, 450 (5th Cir. 2022).

In *Overbey v. Mayor of Baltimore*, 930 F.3d 215 (4th Cir. 2019), the court resolved a challenge to a judgment which included a gag penalty. A local news website sued over the City's non-disparagement clause, sought declaratory relief, and the Fourth Circuit found that the news website had "sufficiently [pled] an ongoing or imminent injury" that was necessary to establish "an *ongoing or future* injury in fact" that is necessary for declaratory relief. *Id.* at 230 (internal quotations and citations omitted). Similarly, the seminal case of *Shelley v. Kraemer*, 334 U.S. 1 (1948), set aside racially discriminatory covenants that were judicially enforced in the court below and were declared unconstitutional by the United States Supreme Court. *Id.* at 21, 23. Additionally, *Crosby v. Bradstreet Co.*, 312 F.2d 483 (2d Cir. 1963), vacated and declared unconstitutional a settlement between private parties that entailed a judicial order of prior restraint. The Second Circuit declared the parties' stipulated settlement "in violation of the First Amendment to the Constitution" and void. *Id.* at 485.

While this list is not exhaustive, SEC's exaggerated claim is easily refuted.

C. SEC's Law of the Case Argument Is Waived and Lacks Merit

SEC newly claims for the first time on appeal that if the district court had granted Appellants' motion for declaratory judgment, "it would have violated the law-of-the-case doctrine, which 'generally precludes reexamination of issues or law or fact decided on appeal.'" SEC Br. at 17 (quoting *Todd Shipyards Corp. v. Auto Transp., S.A.*, 763 F.2d 745, 750 (5th Cir. 1985)). First, this argument was not raised below and is waived.

Even assuming the claim had been raised, it lacks any merit. The only matter decided on the prior appeal is that relief from this unconstitutional order is not available under Rule 60(b)(4) and (5). This case now asks: "Is relief available under the Declaratory Judgment Act?" That question was not decided in the prior appeal. SEC's cited authority acknowledges that the law-of-the-case doctrine applies to "a claim already adjudicated." SEC Br. at 19 (citing the RESTATEMENT (SECOND) OF JUDGEMENTS § 33 cmt. A). Both the district court's first ruling, and the Fifth Circuit's concurring opinion acknowledging that SEC's condition contains constitutional infirmities, suggest that Appellants must pursue other avenues of relief. *See SEC v. Novinger*, 4:15-cv-00358-O, 2021 WL 4497672, at *3, n.3 (N.D. Tex. Aug. 10, 2021) ("While the Court is mindful of the litany of First Amendment concerns presented in Defendants' briefing, Federal Rule of Civil Procedure 60 is not an appropriate avenue by which to address those concerns."); *Novinger*, 40 F.4th at 308

(Jones, J. and Duncan, J., concurring) ("A more effective prior restraint is hard to imagine.").

In addition, the law-of-the-case doctrine, "[d]espite its importance, … 'is an amorphous concept' with no 'precise requirements.'" *Matter of AKD Invs.*, 79 F.4th 487, 491 (5th Cir. 2023) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)). Importantly, "[l]aw of the case directs a court's discretion, *it does not limit the tribunal's power*." *Arizona*, 460 U.S. at 618 (emphasis added). This Court stated:

> While the 'law of the case' doctrine is *not an inexorable command*, a decision of a legal issue or issues by an appellate court establishes the 'law of the case' and must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court, unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, *or the decision was clearly erroneous and would work a manifest injustice*.

White v. Murtha, 377 F.2d 428, 431–32 (5th Cir. 1967) (emphases added). So, even if the law of the case were applicable—it is not—this Court has room to reconsider should the prior decision "work a manifest injustice" such as perpetuating an unconstitutional suppression of speech. *Id. See also Lincoln Nat'l Life Ins. Co. v. Roosth*, 306 F.2d 110, 113 (1962) ("while this is a rule guiding decision in a given case, the Court is not compelled to follow its former decision. We have too often held that this Court is, and must be, free to determine whether, first, the prior decision was erroneous, and second, and more important, whether the circumstances are such that a different result should be reached").

II. THIS CASE IS JUSTICIABLE

SEC's second argument on appeal asks whether Appellants' "motion, even if procedurally proper, is … justiciable because any purported injury relies on a series of hypothetical events that have not yet occurred and may never occur." SEC Br. at 3. SEC made no argument below that this case is not justiciable nor that Appellants suffer a hypothetical injury, so this line of argument is waived.

It is also absurd, and contrary to Supreme Court precedent, to call prior restraints—which two judges of this Circuit acknowledge this gag is—hypothetical. Instead, they "are the most serious and the least tolerable infringement on First Amendment Rights" because they "[have] an immediate and irreversible sanction;" in effect they "freeze[]" speech. *Nebraska Press Ass'n* at 559. This is a here-and-now injury inflicted each day on every defendant who wishes to tell his side of the story about his prosecution. SEC's dismissive account of "purported injury" completely devalues the heavy and ongoing burden of chilled and suppressed speech by Appellants, and thousands of Americans gagged by the SEC over the course of decades. This Court must not join forces with the SEC in so abridging the right of future speech—especially when that devaluation is instigated and perpetuated by a powerful agency resisting public criticism and accountability.

SEC further dismisses in a footnote the idea of a court's holding Appellants in contempt for violating a consent order. *See* SEC Br. at 27, n.5. They are wrong.

In this Circuit, civil contempt is found if "(1) a court order was in effect, (2) the order required specified conduct by the respondent, and (3) the respondent failed to comply with the court's order." *United States v. City of Jackson*, 359 F.3d 727, 731 (5th Cir. 2004). Similarly, "[c]riminal contempt in the federal courts is governed by 18 U.S.C. § 401, which allows punishment of '[d]isobedience or resistance' to a court's 'lawful writ, process, order, rule, decree, or command.'" *In re Bradley*, 588 F.3d 254, 264 (5th Cir. 2009). SEC's claim that "[t]he parties here agreed that the only remedy for a breach is a motion to reinstate the case to the active docket, not contempt," SEC Br. at 27 n.5, ignores the critical role of independent courts.

It is not SEC's decision whether a federal court will hold Appellants in criminal or civil contempt for violating the Gag Order. *See Cato Inst. v. SEC*, 4 F.4th 91, 95 (D.C. Cir. 2021) ("Violations of court orders are punishable by criminal contempt … 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 … So regardless of whether the SEC is enjoined from seeking to enforce the no-deny provisions in its consent decrees, *the courts that issued the consent decrees would still be able to enforce the no-deny provisions contained therein*.") (emphasis added) (citations omitted); *see also SEC v. Moraes*, No. 22-CV-8343 (RA), 2022 WL 15774011, at *1 (S.D.N.Y. Oct. 28, 2022) ("[T]he Commission may reopen their cases or seek to hold [defendants]

in contempt, thereby subjecting them to the risk of enormous financial and professional penalties, if not imprisonment."); *id.* at *2 (citing *Cato Inst.*, 4 F.4th at 95).

SEC also tries to compare this case to *Glass v. Paxton*, 900 F.3d 233, 242 (5th Cir. 2018), noting that there was "no standing where a professor alleged a subject First Amendment chill based on a fear that students holding concealed-carry permits might act violently[.]" SEC Br. at 35–36. Again, SEC has made no argument that Appellants lack standing to pursue this claim at any stage of these proceedings, and this argument is both meritless and waived. Besides, if Appellants lacked standing—as those ensnared in the SEC's "consent" order—who would have it?

However, based on the civil and criminal contempt threat in this jurisdiction, Appellants' fear is far from subjective. "[G]overnment action that chills protected speech without prohibiting it can give rise to a constitutionally cognizable injury[.]" *Zimmerman v. City of Austin*, 881 F.3d 378, 389–90 (5th Cir. 2018). The Gag Order says exactly what will happen if Appellants violate the Order—"'[i]f Defendant breaches this agreement, the Commission may petition the Court to vacate the Final Judgment and restore this action to its active docket.'" Appellants' Br. at 4 (quoting ROA.401–02). The fact that the sword of Damocles hangs is harmful enough, lest it should fall. That threat is both real and current, not hypothetical, and particularly

effective in inflicting the immediate and irreparable damage that the Supreme Court recognizes as the hallmark of a prior restraint.

III. SEC'S REQUIRED WAIVER IS AN UNCONSTITUTIONAL CONDITION

SEC claims that Appellants "voluntarily waived their First Amendment rights when they agreed to the no-deny provisions[,]" SEC Br. at 36, but ignores Appellants' argument that the First Amendment runs in three directions—the right to speak, to receive information, and to be free from compulsion. The Supreme Court makes it clear that "the Constitution protects the right to receive information and ideas. This freedom (of speech and press) necessarily protects the right to receive. … This right to receive information and ideas, regardless of their social worth, … is fundamental to our free society." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (citations omitted). Appellants cannot waive the rights of others to receive information.

SEC's heavy reliance on *Town of Newton v. Rumery*, 480 U.S. 386 (1987), in which a criminal case was settled including a § 1983 claim arising from the same factual nexus, is unavailing. *Rumery* does not stand for the proposition that a party can freely waive any constitutional right as a condition of settlement. *Rumery* simply rejected a rule that would deem release-dismissal agreements as "invalid *per se*." *Id.* at 397. First, *Rumery* by its terms, would invalidate such an agreement if it adversely affects "public interests." *Id.* at 397–98. SEC's gag is adverse to public interests

because it demands that defendants give up their right to criticize SEC's prosecution forever. Such a condition of surrender of rights both shuts down free and open discourse concerning core subjects such as government power, and it denies listeners their First Amendment right to hear speech. Moreover, *Rumery* involved the settlement of claims and cross-claims that had a tight fit with the goal of cessation of a criminal incident which involved no surrender of future rights or expression.

Here, Appellants were charged civilly. "In the civil area, the Court has said that [w]e do not presume acquiescence in the loss of fundamental rights[.] … Indeed, in the civil no less than the criminal area, courts indulge every reasonable presumption against waiver." *Fuentes v. Shevin*, 407 U.S. 67, 94 n.31 (1972) (internal quotations and citations omitted). *See also Aetna Ins. Co. v. Kennedy to Use of Bogash*, 301 U.S. 389, 393 (1937) ("[C]ourts indulge every reasonable presumption against waiver" of fundamental rights); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), *abrogation recognized by Jones v. Hendrix*, 599 U.S. 465 (2023) ("It has been pointed out that courts indulge every reasonable presumption against waiver of fundamental constitutional rights and that we do not presume acquiescence in the loss of fundamental rights.") (internal quotations omitted); Deborah J. La Fetra, *Miranda for Janus: The Government's Obligation to Ensure Informed Waiver of Constitutional Rights*, 55 LOY. L.A. L. REV. 405, 418 n.56 (2022) (citing *Ohio*

Bell Tel. Co. v. Pub. Utils. Comm'n, 301 U.S. 292, 307 (1937)) (there's a "heavy burden against the waiver of constitutional rights in civil cases").

In *Davies*, 930 F.2d at 1399, the Ninth Circuit required "a close nexus—a tight fit—between the specific interest the government seeks to advance … and the specific right waived." *Id. Davies* invalidated the portion of a judgment "where the government obtained a waiver of a litigant's right to seek elective office" because it lacked any nexus or relation to the underlying dispute. SEC Br. at 40. So, too, silencing those who settle with the SEC lacks a close fit to securities enforcement, and the gag's content and viewpoint restrictions work only in the service of shielding the agency from criticism. This is dangerous, anti-democratic, and not a "legitimate reason for including the waiver' in the consent. *Davies*, 930 F.2d at 1399; *see also Moraes*, 2022 WL 15774011 at *4 (quoting *New York Times Co. v. U.S.*, 403 U.S. 713, 723–24 (1971) (Douglas, J., concurring)).

SEC's last ditch policy argument—that citizens will have no idea how to conform their behavior if settling parties are able to question the allegations of an SEC action—reveals how divorced from reality SEC's concept of the law governing Americans is. We are governed by laws and regulations, not perusal of fact-specific, party-specific allegations in a complaint. Regulation by enforcement and settlement has drawn the concern and attention of judges and even SEC Commissioners. In a May 2018 speech, Commissioner Hester Peirce noted:

> The practice of attempting to stretch the law is a particular concern when it occurs in settled enforcement actions. Often, given the time and costs of enforcement investigations, it is easier for a private party just to settle than to litigate a matter. The private party likely is motivated by its own circumstances, rather than concern about whether the SEC is creating new legal precedent. However, the decision made by that party about whether to accede to [the] SEC's proposed order can have far-reaching effects. Settlements—whether appropriately or not—become precedent for future enforcement actions and are cited within and outside the Commission as a purported basis for the state of the law. Quite simply, a settlement negotiated by someone desperate to end an investigation that is disrupting or destroying her life should not form the basis on which the law applicable to others is based.

Hester M. Peirce, Commissioner, Sec. & Exch. Comm'n, *The Why Behind the No*: *Remarks at the 50th Annual Rocky Mountain Securities Conference* (May 11, 2018) (https://www.sec.gov/news/speech/peirce-why-behind-no-051118).

Americans are not required to conform their behavior or silence their expression pursuant to remedies fabricated by the SEC that Congress did not authorize—especially remedies that the SEC deceitfully promulgated without notice and comment in violation of law.

* * *

SEC's arguments have devolved into waived, inapplicable, and/or illogical doctrine. But each new position reveals a telling insistence that SEC *always* be in control of every aspect of defendants' dealings with the agency and their future ability to ever challenge the gag that silences them in perpetuity. SEC's complaints and press releases are always and forever to have the last word. Appellants have no

injuries until SEC decides to reopen their case, a proposition so absurd in its assumption and lacking in understanding of the law of prior restraints that it is fair to ask, "Why is the agency conjuring up these new and absurd theories?" Or, to echo Judge Abrams, "What is the SEC so afraid of?" *Moraes*, 2022 WL 15774011, at *5.

CONCLUSION

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

Respectfully submitted,

/s/ Kara M. Rollins
Kara M. Rollins
Margaret A. Little
Kaitlyn D. Schiraldi
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Ste. 450
Washington, DC 20036
Telephone: (202) 869-5210
kara.rollins@ncla.legal

Attorneys for Defendants-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 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.

/s/ Kara M. Rollins
Kara M. Rollins
NEW CIVIL LIBERTIES ALLIANCE
Attorney for Defendants-Appellants

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 6,400 words out of 6,500, 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.

/s/ Kara M. Rollins
Kara M. Rollins
NEW CIVIL LIBERTIES ALLIANCE
Attorney for Defendants-Appellants