No. _____

In the
Supreme Court of the United States

BARRY D. ROMERIL,
Petitioner,
v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Margaret A. Little
Kara M. Rollins
Mark S. Chenoweth
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW
Suite 450
Washington, DC 20036
(202) 869-5210
peggy.little@NCLA.legal

Floyd Abrams
Counsel of Record
Michael B. Weiss
Cahill Gordon & Reindel LLP
32 Old Slip
New York, NY 10005
(212) 701-3621
fabrams@cahill.com

Counsel for Petitioner
March 21, 2022

QUESTIONS PRESENTED

1. Does it violate the First Amendment for the Securities and Exchange Commission to impose a requirement that any party with whom it settles must agree to a lifelong prior restraint barring any statement, however truthful and whenever and however expressed, that even suggests that any allegation in a Securities and Exchange Commission Complaint is insupportable?

2. Does the Securities and Exchange Commission violate the Due Process Clause when it requires that any party with whom it settles must sign an SEC-drafted Consent Form waiving his due process rights and agree to a lifelong prior restraint barring any statement, however truthful and whenever and however expressed, that even suggests that any allegation in a Securities and Exchange Commission Complaint is insupportable?

3. Is a final judgment entered by a United States District Court which includes an unconstitutional lifetime ban on any statement, however truthful and whenever and however expressed, that even suggests that any allegation in a Securities and Exchange Commission Complaint is insupportable, void, and therefore subject to review under Rule 60(b)(4)?

PARTIES TO THE PROCEEDINGS

Petitioner Barry D. Romeril was the defendant in the district court and the defendant-appellant in the court of appeals.

Respondent U.S. Securities and Exchange Commission was the plaintiff in the district court and the plaintiff-appellee in the court of appeals.

Paul Allaire, G. Richard Thoman, Philip D. Fishbach, Daniel S. Marchibroda, and Gregory B. Tayler were co-defendants in the district court. None of these individuals was a party to Petitioner's post-judgment motion or appeal therefrom or to this Petition.

RELATED PROCEEDINGS

SEC v. Romeril, No. 19-4197 (2d Cir.). Panel opinion issued and judgment filed September 27, 2021; petition for rehearing or rehearing en banc filed November 12, 2021; order denying rehearing/ rehearing en banc filed on December 21, 2021.

SEC v. Allaire, No. 03-CV-4087 (S.D.N.Y). Opinion issued and order denying relief from judgment denied November 18, 2019.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDINGS ii
RELATED PROCEEDINGS iii
TABLE OF CONTENTS iv
TABLE OF AUTHORITIES vii
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL PROVISIONS, RULES, AND REGULATIONS INVOLVED 1
INTRODUCTION 4
STATEMENT OF THE CASE 8
REASONS FOR GRANTING THE WRIT 13
I. SEC'S REQUIREMENT THAT ANY SETTLEMENT MUST CONTAIN A LIFETIME GAG ORDER VIOLATES THE FIRST AMENDMENT 13
A. The Gag Order Is an Impermissible Prior Restraint on Speech 14
B. The Gag Order Is a Content- and Viewpoint-Based Restriction on Speech 17
C. The Gag Order Is an Unconstitutional Condition 23
II. THE SETTLEMENT CONSENT AND GAG ORDER DENY DUE PROCESS OF LAW 26
III. THIS COURT HAS LONG PROVIDED RELIEF FOR UNCONSTITUTIONAL COURT ORDERS 31
A. The Panel's Interpretation Misreads *Espinosa* and Is in Conflict with the Fifth Circuit 32

B. The Panel Opinion Contradicts this Court's Jurisprudence on Void Judgments 33
CONCLUSION 36

APPENDIX

Page

Appendix A
Memorandum of the United States Court of Appeals for the Second Circuit, SEC v. Romeril, et al., No. 19-4197-cv (Sept. 27, 2021) App-1

Appendix B
Opinion and Order Denying Plaintiff's Motion to Vacate of the United States District Court for the Southern District of New York, SEC v. Allaire, et al., 03cv4087 (DLC) (Nov. 18, 2019) App-19

Appendix C
Final Judgment as to Defendant Barry D. Romeril of the United States District Court for the Southern District of New York, SEC v. Allaire, et al., 03cv4087 (DLC) (June 11, 2003) (provided by Sec. & Exchange Comm'n) App-28

Appendix D
Consent of Defendant Barry D. Romeril, SEC v. Allaire, et al., 03cv4087 (DLC) (May 22, 2003) (provided by Sec. & Exchange Comm'n) App-34

Appendix E
Order of the United States Court of Appeals for the Second Circuit Denying Rehearing, SEC v. Romeril, et al., No. 19-4197-cv (Dec. 21, 2021)... App-41

Appendix F
Constitutional, Statutory, and Regulatory Provisions Involved.. App-43
U.S. Const. amend. I...................................App-43
U.S. Const. amend. V..................................App-44
Fed. R. Civ. P. 60 ....App-45
7 C.F.R. § 202.5.. App-47
37 Fed. Reg. 25,224 (Nov. 29, 1972) App-51

TABLE OF AUTHORITIES

Cases

Barr v. Am. Ass'n of Political Consultants, Inc.,
140 Sup. Ct. 2335 (2020) 21

Barron v. Burnside,
121 U.S. 186 (1887) 23

Bordenkircher v. Hayes,
434 U.S. 357 (1982) 29

Boyd v. U.S.,
116 U.S. 616 (1886) 35

Brumfield v. La. State Bd. of Educ.,
806 F. 2d 289 (5th Cir. 2015)................................. 32

Cato Inst. v. SEC,
4 F.4th 91 (D.C. Cir. 2021) 13

Citizens United v. FEC,
558 U.S. 310 (2010) 20

Connolly v. General Constr. Co.,
269 U.S. 385 391 (1926).. 29

Crosby v. Bradstreet,
312 F.2d 483 (2d Cir. 1963) 7, 25, 32, 35

Davies v. Grossmont Union High Sch. Dist.,
930 F. 2d 1390 (9th Cir. 1991)................................. 8

Ex Parte Lange,
85 U.S. 163 (1873) 31, 33, 34

FCC v. Fox Television Stations Inc.,
567 U.S. 239 (2012) 29

First National Bank of Boston v. Bellotti,
435 U.S. 765 (1978) 21, 22

Freedman v. Maryland,
380 U.S. 51 (1965) 22

FW/PBS Inc. v. City of Dallas,
493 U.S. 215 (1990) 17

G&V Lounge, Inc., v. Michigan Liquor Control Comm'n,
23 F.3d 1071 (6th Cir. 1994)............................. 7, 29

Gonzales v. Crosby,
545 U.S. 524 (2005) 35

Klapprott v. U.S.,
335 U.S. 601 (1949) 31, 34, 36

Koontz v. St. John's River Water Management Dist.,
570 U.S. 595 (2013) 23, 24

Leathers v. Medlock,
499 U.S. 439 (1991) 22

Legal Servs. Corp. v. Velazquez,
531 US 533 (2001) 19, 23

McBryde v. Comm. to Review Circuit Council Conduct,
83 F. Supp. 2d 135 (D.D.C. 1999) 12, 30

Near v. Minnesota,
283 U.S. 697 (1931) 15

Nebraska Press Ass'n v. Stuart,
427 U.S. 539 (1976) ....passim

New York Times Co. v. U.S.,
403 U.S. 713 (1971) 15, 16

North Carolina v. Pearce,
395 U.S. 711 (1969) 30

Overbey v. Mayor of Balt.,
930 F.3d 215 (4th Cir. 2019).............................. 7, 19

People v. Smith,
502 Mich. 624 (2018) 8

Perry v. Sindermann,
408 U.S. 593 (1972) 23

Pickering v. Bd of Ed. of Twp. High School Dist. 205,
391 U.S. 563 (1968) 18

R.A.V. v. City of St. Paul, Minn.,
505 U.S. 377 (1992) 18

Rosenberger v. Rector & Visitors of the University of Virginia,
515 U.S. 819 (1995) 18

SEC v. Vitesse, Semiconductor Corp.,
771 F. Supp. 2d 304 (S.D.N.Y 2011)...................... 22

Shalala v. Ill. Council on Long Term Care, Inc.,
529 U.S. 1 (2000) 34

Sherbert v. Verner,
374 U.S. 398 (1963) 24

Sherratt v. Friel,
275 F. App'x 763 (10th Cir. 2008).......................... 36

Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.,
502 U.S. 105 (1991) 5, 22

Speiser v. Randall,
357 U.S. 513 (1958) 24

U.S. v. American Library Assn.,
539 U.S. 194 (2003) 24

U.S. v. Cutler,
58 F.3d 825 (2d Cir. 1995) 12

U.S. v. ITT Cont'l Baking Co.,
420 U.S. 223 (1985) 36

U.S. v. Jackson,
390 U.S. 570 (1968) 29

U.S. v. Playboy Ent. Grp., Inc.,
529 U.S. 803 (2000) 17

U.S. v. Richards,
385 F. App'x 691 (9th Cir. 2010) 7

United Student Aid Funds, Inc. v. Espinosa,
559 U.S. 260 (2010) 7, 31, 32

Vance v. Universal Amusement,
445 U.S. 308 (1980) 17

Walker v. City of Birmingham,
388 U.S. 307 (1967) 12

Wilson v. Walker,
109 U.S. 258 (1883) 31, 33

Constitutional Provisions

U.S. Const. amend. I.................................... 6, 7, 8, 12

Statutes

5 U.S.C. § 553.. 8

Rules

Fed. R. Civ. P. 60(b)(4) 6, 12

Regulations

17 C.F.R. § 202.5(e)...................................... 4, 8, 9, 27

Other Authorities

11 Charles Allen Wright & Arthur Miller, Fed.
Prac. & Proc. Civ. § 2862 (3d ed.) 35

47 Am. Jur. 2d Judgments § 653 35

49 C.J.S. Judgments § 506....................................... 35

Alexander M. Bickel, THE MORALITY OF CONSENT
(1975)... 15

Comment, *The Temporal Aspects of the Finality of Judgments: The Significance of Federal Rule 60(b)*, 17 U. Chi. L. Rev. 664, 668 (1950)............... 34

Consent of Def. Arthur S. Hoffman, *SEC v. Hoffman*, No. 2:22-cv-00296-ROS (D. Ariz. Feb. 24, 2022), ECF No. 4...................................... 19

Consent of Def. Carole D. Argo, *SEC v. Argo*, No. 1:07-cv-01397-RWR (D.D.C. Sept. 11, 2008), ECF No. 18-1 19

Consent of Def. John Kenneth Davidson, *SEC v. Davidson*, No. 5:19-cv-01153 (W.D. Okla. Dec. 21, 2019), ECF No. 3-1 19

Consent of Def. Mark J. Lauzon, *SEC v. Teo*, No. 2:04-cv-01815-WGB-MCA (D.N.J. Jan. 3, 2005), 2005 WL 287501 19

Consent of Def. Owen H. Naccarato, *SEC v. Naccarato*, No. 1:17-cv-24682-JLK (S.D. Fla. Dec. 27, 2017), ECF No. 3-1 19

Consent of Def. Tiger Asia Mgmt., LLC, *SEC v. Tiger Asia Mgmt., LLC*, No. 2:12-cv-07601-DMC-MF (D.N.J. Dec. 12, 2012), ECF No. 3-1...... 19

Daniel M. Gallagher, Commissioner, U.S. Sec. & Exch. Comm'n., Remarks at Columbia Law School Conference (Nov. 15, 2013) 9

Floyd Abrams, *The Pentagon Papers After Four Decades,* 1 Wake Forest J.L. & Pol'y 7 (2011) 16

James Valvo, *The CFTC and SEC Are Demanding Unconstitutional Speech Bans in their Settlement Agreements*, Yale J. on Reg.: Notice & Comment Blog (Dec. 4, 2017) 19

Judgment as to Def. Mark J. Ahn, SEC v. Ahn, No. 1:21-cv-10203-ADB (D. Mass. Apr. 27, 2021), ECF No. 12-1 19

Leonard Levy, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICA (1960).. 14

Luis A. Aguilar, Commissioner, U.S. Sec. & Exch. Comm'n., Remarks Before the 20th Annual Securities and Regulatory Enforcement Seminar (Oct. 25, 2013) 4

Marcy Gordon, *SEC Chairman Berates Morgan Stanley Exec*, AP News (May 1, 2003).................. 22

Marius Meland, *Amid Criticism, SEC Sets Standards for Penalties*, Law360 (Jan. 4, 2006, 12:00 AM EST) 10

Philip Hamburger, PURCHASING SUBMISSION: CONDITIONS, POWER, AND FREEDOM (2021) 26

Press Release, Sec. & Exch. Comm'n, Addendum to Division of Enforcement Press Release Fiscal Year 2021 (Nov. 18, 2021)............................ 5

Priyah Kaul, Note, *Admit or Deny: A Call for Reform of the SEC's "Neither-Admit-Nor-Deny" Policy*, 48 U. Mich. J.L. Reform 535 (2015)............ 4

Wendell Bird, THE REVOLUTION IN FREEDOMS OF PRESS AND SPEECH (2020)...................................... 14

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The panel opinion of the court of appeals is reported as *SEC v. Romeril* at 15 F.4th 166 and is reproduced at App-1. The district court's opinion is reported as *SEC v. Allaire* at 2019 WL 6114484 and is reproduced at App-19.

JURISDICTION

The court of appeals issued its judgment on September 27, 2021. Petitioner timely sought rehearing or rehearing en banc, which was denied by order dated December 21, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, RULES, AND REGULATIONS INVOLVED

U.S. Const. Amend. I:

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

Rule 60. Relief from a Judgment or Order

…

(b) GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDING. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief. …

17 C.F.R. § 202.5(e) (2022):

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

INTRODUCTION

This petition seeks review of the U.S. Securities and Exchange Commission's ("SEC") requirement that any settlement with it must include a lifetime restraint on speech, thus barring the settling defendant from ever even "indirectly" leaving the "impression" that "any allegation" in the Commission's original complaint is "without factual basis." Paragraph 11 of the "Consent" (the "SEC Restraint Order") that the SEC requires all settling defendants to sign. The SEC asserts 17 C.F.R. § 202.5(e) mandates this "Gag Rule," but it is unmoored from well-established constitutional doctrine. No act of Congress authorizes such a sweeping restriction on freedom of speech. Nor could it. Of the hundreds of federal agencies, only the SEC and the Commodity Futures Trading Commission ("CFTC") have adopted such a rule. The Department of Justice itself imposes no such requirement.

About 98 percent of SEC filed cases are settled.[1] In fiscal year 2021, the SEC commenced

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[1] *See* Priyah Kaul, Note, *Admit or Deny: A Call for Reform of the SEC's "Neither-Admit-Nor-Deny" Policy*, 48 U. Mich. J.L. Reform 535, 536 (2015); *see also* Luis A. Aguilar, Commissioner, U.S. Sec. & Exch. Comm'n., Remarks Before the 20th Annual Securities and Regulatory Enforcement Seminar (Oct. 25, 2013), https://www.sec.gov/news/speech/2013-spch102513laav ("While going to trial is always an option, it remains infrequent at the SEC. The SEC currently settles approximately 98% of its Enforcement cases and, in 2012, we went to trial in only 22 out of the 734 cases we brought.").

actions against 649 defendants.[2] In the decades since the issuance of the Gag Rule in 1972, the SEC has settled thousands of cases with judgments containing the gag provisions. Among the silenced enforcement targets is the petitioner in this case, Barry D. Romeril, who settled with the SEC in 2003.

As a result of the SEC's gag policy, Mr. Romeril has been unable for over 18 years fully to discuss his case publicly, a sanction that, as a matter of well-established First Amendment law, could not have been imposed on someone convicted of treason or of murdering the highest-ranking federal officials. *See Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

The SEC-imposed gag on Mr. Romeril's ability to criticize it unambiguously abridges his freedom of speech. It is a quintessential prior restraint, described by this Court as "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). At the same time, the lifetime nature of the ban, its application to wholly truthful speech and its content- and viewpoint-discrimination rooted in the notion that the SEC can do no wrong violates the First Amendment for reasons independent of such constitutional vices' embodiment in a prior restraint. The notion that a governmental body may wield its power to decide who is to be permitted to comment on

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[2] Press Release, Sec. & Exch. Comm'n, Addendum to Division of Enforcement Press Release Fiscal Year 2021 (Nov. 18, 2021), https://www.sec.gov/files/2021-238-addendum.pdf.

its own behavior is at odds with the most deeply rooted First Amendment precepts.

Moreover, because the SEC Gag Orders at issue are by their terms non-negotiable, they are unconstitutional conditions in violation of the First Amendment. A private party's supposed "consent" can hardly give the federal government a power of suppression denied it by the First Amendment.

The Gag Rule violates the due process of law by requiring defendants to waive their constitutional rights if they settle with the agency, including rights to be heard on the Consent, rights to notice of what speech would violate the Gag Order, and the right to freely exchange their views of their administrative process at the end of a government proceeding. Gag Orders enable the SEC to suppress information and views about its conduct by the very people best situated to be knowledgeable about them. Of course, by their nature those observations may be less than objective, but that is the nature of free expression. If individuals cannot publicly discuss their experiences with the government, other Americans will lose the benefit of learning about those experiences as a possible guide to their own behavior. When one defendant complains of abuses, it is likely viewed as a mischance, not a structural danger. But when the public can assess multiple accounts, it becomes possible to identify recurring problems which are systemic.

Such orders are void because of their unconstitutionality and thus subject to review under Rule 60(b)(4). That was the essential holding of the Second Circuit in its unanimous and previously

unchallenged ruling over half a century ago in *Crosby v. Bradstreet*, 312 F.2d 483 (2d Cir. 1963), *cert. denied*, 373 U.S. 911 (1963). The Second Circuit panel opinion at issue in this case effectively overruled *Crosby*, a case which was far more consistent with this Court's later ruling in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010), than the Second Circuit's newly substituted analysis of the topic.

Of all the inconsistencies the Second Circuit's ruling in this case exhibits with prior constitutional precedent from this Court, the most glaring may be its blithe conclusion that since Mr. Romeril "willingly agreed to the no-deny provision as part of a consent decree," he was bound by it regardless of its patent inconsistency with the First Amendment. But all the essentially coerced "consents" in the world can hardly grant the SEC and federal courts power to suppress speech that the First Amendment forbids.

This Court has yet to confront such an argument directly in any of its rulings, but three other Circuits and the Michigan Supreme Court have. Each has concluded with clarity that courts lack power to enforce unconstitutional prior restraints and content- and viewpoint-based speech restrictions as conditions on settlements—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); *U.S. 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); *G&V Lounge, Inc., v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1077 (6th Cir. 1994) (agreement to restrain free expression

invalidated as violative of First Amendment); *Davies v. Grossmont Union High Sch. Dist.*, 930 F. 2d 1390, 1399 (9th Cir. 1991) (invalidating the portion of a settlement agreement in which a party waived his right to run for public office); *People v. Smith*, 502 Mich. 624, 644 (2018) (same). Furthermore, the panel decision conflicts with this Court's long-standing jurisprudence prohibiting such prior restraints, content- and viewpoint-based discrimination, and unconstitutional conditions which violate the First Amendment, and due process of law.

All else aside, that direct conflict amongst Circuit courts warrants plenary review by this Court.

STATEMENT OF THE CASE

On November 28, 1972, the SEC published its Gag Rule, codified at 17 C.F.R. § 202.5(e). The SEC asserted that the "Commission finds that the foregoing amendment relates only to rules of agency organization, procedure and practice and, therefore, notice and procedures specified in 5 U.S.C. § 553 are unnecessary. The foregoing amendment is declared to be effective immediately." App-53-52. The SEC lacked statutory authority to enact such a substantive rule and further did not follow the provisions of the Administrative Procedure Act, which require prior publication, notice, and comment of a rule that binds regulated persons or entities or third parties. *See* 5 U.S.C. § 553. The Commission's published rationale for this summary adoption of the Gag Rule was that SEC wants "to avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed, when the conduct alleged did

not, in fact, occur." 17 C.F.R. § 202.5(e).[3] In short, it doesn't like being criticized.

On May 3, 2002, Xerox Corp. entered into a $10 million consent agreement to resolve SEC charges about its accounting practices. As the district judge noted: "This was the largest corporate penalty imposed as of that date through an SEC action." App-21. On June 5, 2003, the SEC filed a complaint against several employees of Xerox including its chief financial officer, Barry D. Romeril. The SEC and Mr. Romeril reached a settlement, and the SEC submitted a proposed final judgment which was entered without a hearing in the district court.

As an SEC Commissioner acknowledged in 2013, the Xerox case represented a "sea change," expanding both the powers wielded and size of penalties imposed by SEC.[4] Xerox marked the start of an era in which the SEC sued companies for tens of millions of dollars using new theories of accounting fraud previously unknown as grounds for SEC enforcement. Not only was the theory of the case

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[3] New Civil Liberties Alliance, also counsel for petitioner here, has petitioned the SEC to amend its Gag Rule, 17 C.F.R. § 202.5(e), to remove the prior restraint and content- and viewpoint-based ban on future speech. See New Civil Liberties Alliance Petition to Amend (Oct. 30, 2018), *available at* https://bit.ly/SECGagRulePet. The SEC has not acted on the petition in the nearly three and a half years since it was filed.

[4] Daniel M. Gallagher, Commissioner, U.S. Sec. & Exch. Comm'n, Remarks at Columbia Law School Conference (Nov. 15, 2013), https://www.sec.gov/news/speech/2013-spch111513dmg.

novel, but legal news reports noted SEC's damage calculations were taken out of thin air.[5]

As a non-negotiable condition of his settlement, Mr. Romeril was required by the SEC to sign the SEC-drafted and euphemistically entitled "Consent" that was incorporated by reference into the final judgment. Paragraph 11 states:

> Defendant understands and agrees to comply with the Commission's policy "not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings." 17 C.F.R. § 202.5. In compliance with this policy, Defendant agrees not to take any action or to make or permit to be made any public statement denying, directly or indirectly, any allegation in the complaint or creating the impression that the complaint is without factual basis. If Defendant breaches this agreement, the

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[5] Marius Meland, *Amid Criticism, SEC Sets Standards for Penalties*, Law360 (Jan. 4, 2006, 12:00 AM EST), https://www.law360.com/articles/4891/amid-criticism-sec-sets-standard-for-penalties ("SEC attributed the need for the [new] standards [by which it determines damages in civil cases] to a 'sea change' in the way the SEC uses its authority. As the agency expands its regulatory scope, the fines it imposes have jumped considerably. … [One court observed] "the SEC's analysis was not just superficial; it was non-existent.")

> Commission may petition the Court to vacate the Final Judgment and restore this action to its active docket. Nothing in this paragraph affects Defendant's: (i) testimonial obligations; or (ii) right to take legal or factual positions in litigation in which the Commission is not a party.

App-37.

The district court did not hold a hearing or allocution concerning the representations in and execution of the Consent. As the SEC has consistently argued below, its Settlement Form requires defendants to waive notice and an opportunity to be heard on these waivers of their First Amendment and due process rights. *See* App-36-39 ¶¶ 6-9, 11, 14-15. The court entered a final judgment incorporating the Consent by reference which, in turn, incorporated the Complaint by reference. App-33.

On June 13, 2003, the district court entered a monetary judgment against Mr. Romeril ordering him to pay $5,214,970. Mr. Romeril satisfied the monetary judgment against him on July 16, 2003. Despite the passage of 18 years, Mr. Romeril continues to be bound by the Gag Order provision.

Mr. Romeril desires to speak truthfully about the SEC's case against him and offer his opinions about the case. However, because he does not want to violate an SEC Order that was transformed into a binding federal court order—or even risk doing so—he has refrained from making statements that might be

said to "create an impression" that the complaint lacked a factual basis or was otherwise without merit. Under the SEC's gag, only the Commission may determine what speech, if any, violates the Consent. And the collateral bar rule forbids a speak-first-defend-later challenge. *Walker v. City of Birmingham*, 388 U.S. 307 (1967).[6] "Instead, he must move to vacate or modify the order, or seek relief in this court." *U.S. v. Cutler*, 58 F.3d 825, 832 (2d Cir. 1995). On May 6, 2019, Mr. Romeril moved for relief from judgment under Fed. R. Civ. P. 60(b)(4) in the civil action in which the order had been entered, No. 03-cv-4087 (DLC).

The issues were fully briefed to the district court by Mr. Romeril and the SEC. The district court denied relief on November 18, 2019. App-19-27. Mr. Romeril filed a timely appeal to the Second Circuit, No. 19-4197. A panel of the Second Circuit affirmed the district court on September 27, 2021. App-1-18. Mr. Romeril's timely petition for rehearing or rehearing en banc was denied on December 21, 2021. App-41-42.

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[6] A district court holding a judicial gag unconstitutional described the collateral bar rule as an "immediate menace" "[f]or if a person must pursue his judicial remedy … before he may speak, parade, or assemble … [the reason therefor] will have become history and any later speech … will be fruitless or pointless." *McBryde v. Comm. to Review Circuit Council Conduct*, 83 F. Supp. 2d 135, 174 (D.D.C. 1999) *aff'd in part, vacated in part by* 264 F.3d 52 (D.C. Cir. 2001) (quoting *Walker*, 388 U.S. at 336 (Douglas, J. dissenting)); *Id.* at 140 (confidentiality provision for judicial discipline "operates as an impermissible prior restraint[;]" disciplined judge "must enjoy the opportunity to speak openly and freely about [the] proceedings" against him).

REASONS FOR GRANTING THE WRIT

I. SEC'S REQUIREMENT THAT ANY SETTLEMENT MUST CONTAIN A LIFETIME GAG ORDER VIOLATES THE FIRST AMENDMENT

The SEC Order at issue in this case is as unequivocal as it is unconstitutional. Mr. Romeril, in response to the SEC's being unwilling to settle with him on any other terms, was obliged to agree that he would never "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." The speech ban imposed by that language, then embodied in a federal court order by reference, has already silenced Mr. Romeril for 18 years. Unless held unconstitutional by this Court, it will continue to do so for the rest of his life. Truth is no defense for him with respect to any statement he might make. However accurate anything he says might be, if he even suggests that the SEC has misstated any fact in its complaint—which it may have done—or overreached in the legal theory of his prosecution—which it also may have done—he not only will have breached the court order but also be at potential risk for contempt of court.[7] No one will ever know whether this prosecution was flawed because he may not speak.

Nor would Mr. Romeril retain his otherwise constitutionally protected right to express his critical

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[7] The D.C. Circuit observed that speech in violation of the SEC Gag orders is subject to the court "institut[ing] criminal contempt proceedings." *Cato Inst. v. SEC*, 4 F.4th 91, 95 (D.C. Cir. 2021).

opinion of SEC conduct reflected in its proceedings against him. The SEC has publicly branded him as a securities fraudster, but he may not criticize or even publicly disagree with anything it said about his conduct.

Relief of this magnitude would not and could not have been available to the SEC had the case proceeded to trial. Indeed, under well-established First Amendment law, such provisions of an agreement drafted by a government entity and embodied in a judicial decree cannot begin to withstand constitutional scrutiny. Most obviously, the decree embodying the SEC's demands is an unconstitutional prior restraint, the sort of order described by this Court as "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press*, 427 U.S. at 559.

A. The Gag Order Is an Impermissible Prior Restraint on Speech

Throughout American history, scholarly and judicial debate has persisted about the degree to which the First Amendment originally protected against governmental punishment of speakers or writers for what they have said or written after it occurs.[8] But there has been no disagreement about the

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[8] *Compare* Leonard Levy, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICA (1960) (maintaining that only prior restraints were banned under English common law and in the understanding of American founders), *with* Wendell Bird, THE REVOLUTION IN FREEDOMS OF PRESS AND SPEECH (2020) (maintaining that both English and American practice and common law protected speech and press more generally).

correctness of this Court's observation in *Near v. Minnesota*, 283 U.S. 697 (1931), that as originally enacted, the freedoms guaranteed by the First Amendment provided "principally although not exclusively, immunity from previous restraints or censorship" and the prime reason that the First Amendment was adopted was to provide "immunity from previous restraints." *Id.* at 713-716.[9] That kind of restraint is what is at issue in this case.

So firmly has what has become the near-total ban on prior restraints by the government been enforced, that even powerful arguments made about the potential harm of speech at issue have consistently been rejected. In the Pentagon Papers Case, *New York Times Co. v. U.S.*, 403 U.S. 713 (1971), for example, in the midst of the Vietnam war, the *New York Times* obtained a 7000-page study compiled by the Department of Defense of how the nation became involved in the war, a study classified as TOP SECRET (the highest level of classification of

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[9] The prime objection to prior restraints is: "Prior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted, they cause irremediable loss—a loss in the immediacy, the impact, of speech. They differ from the imposition of criminal liability in significant procedural respects as well, which in turn have their substantive consequences. The violator of a prior restraint may be assured of being held in contempt; the violator of a statute … may be willing to take his chance, counting on a possible acquittal. A prior restraint, therefore, stops more speech, more effectively. A criminal statute chills, prior restraint freezes." Alexander M. Bickel, THE MORALITY OF CONSENT, 61 (1975). Language from that passage was quoted and adopted by the Supreme Court in *Nebraska Press*, 427 U.S. at 559.

information "the unauthorized disclosure of which could result in exceptionally grave damage to the nation"). The government maintained that revelation of information in the study would imperil American soldiers then in combat and those held as prisoners of war.

The *Times* prevailed in the case by a six-three vote in which two of the six prevailing jurists (Justices Byron White and Potter Stewart) observed in a concurring opinion that they were "confident" that revelation of information in the study "will do substantial damage to public interests."[10] They only joined (and thus created) the majority, they observed, "because of the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system." *Id.* at 730-31.

Similarly, in *Nebraska Press*, the potential harm to a defendant in a highly publicized case in a small rural community in which the defendant was accused of murdering a family of six was undeniable with respect to accounts of confessions or admissions made by him. Nonetheless, relying in good part on the fact that "the barriers to prior restraint remain high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it," this Court held a prior restraint

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[10] In fact, none of the dire consequences predicted by the government to this Court of publication by the New York Times of the documents at issue ever occurred. *See* Floyd Abrams, *The Pentagon Papers After Four Decades,* 1 Wake Forest J.L. & Pol'y 7-8 (2011).

entered by the trial court violated the First Amendment.

Here, the "extraordinary protection" against prior restraints is at issue where the limitation on speech insisted on by the government never expires until the death of the settling defendant. That is itself an independent but related reason why the prior restraint in this case cannot be sustained. This Court has held statutes unconstitutional that restrict speech for "indefinite duration," *Vance v. Universal Amusement*, 445 U.S. 308, 316 (1980). There is no reason to believe that a rule that restricts speech for an entire lifetime would fare any better. *FW/PBS Inc. v. City of Dallas*, 493 U.S. 215, 226 (1990). This ban, now in effect for 18 years and with no expiration date except Mr. Romeril's death, is longer than any criminal sentence could have been for the charged violation, something especially relevant here since Mr. Romeril was never criminally charged.

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

Even if the Gag Order were not a prior restraint on speech, it would be unconstitutional as a content- and viewpoint-based restriction. On its own this warrants a ruling holding the SEC's Gag Order unconstitutional. And Mr. Romeril does not have the burden of proof on this question. "When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded Congressional enactments is reversed," *U.S. v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 817 (2000), a burden shift that must attach more forcefully to an

unlawfully enacted regulation by a mere administrative agency.

This Court has made clear that the Constitution "forbid[s] the State to exercise viewpoint discrimination" which by its nature is "an egregious" and "blatant" "violation of the First Amendment[.]" *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995). "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.*

That is surely the only basis for the restriction here. The order itself allows Mr. Romeril to speak in support of the SEC's conduct. By gagging him only when he criticizes the SEC—even modestly—the SEC imports viewpoint discrimination into its speech censorship. Such an imbalance of speaking rights, which empowers the government itself to decide who may speak about its conduct and what topics and viewpoints may be expressed allows the precise control over speech that the First Amendment exists to prevent. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 392 (1992).

It is difficult to imagine a policy better designed to suppress truth about SEC's conduct than this self-conferred power barring full-throated and uninhibited speech about that conduct. The 98 percent of defendants who settle with the SEC are particularly knowledgeable, if obviously opinionated, about the cases being settled. In those circumstances it has long been held "essential that they be able to speak out freely on such questions[.]" *Pickering v. Bd of Ed. of Twp. High School Dist. 205*, 391 U.S. 563,

572 (1968). By systematically silencing SEC enforcement targets, the restriction "operates to insulate … [government conduct] from constitutional scrutiny and … other legal challenges, a condition implicating central First Amendment concerns." *Legal Servs. Corp. v. Velazquez*, 531 US 533, 547 (2001).[11]

That the SEC *systematically* demands broad restraints on speech as a condition of settlement is thus profoundly limiting at the same time, and for the same reasons, it is unconstitutional. See generally, James Valvo, *The CFTC and SEC Are Demanding Unconstitutional Speech Bans in their Settlement Agreements*, Yale J. on Reg.: Notice & Comment Blog (Dec. 4, 2017), https://bit.ly/3IV5oP6 .[12]

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[11] For just this reason, the Fourth Circuit invalidated Baltimore's unconstitutional practice of requiring gag orders in settled police brutality cases. *Overbey*, 930 F.3d at 215. The city may not demand a "waiver of a constitutional right[,]" even though it "appears in an otherwise valid contract[.]" *Id.* at 223.

[12] *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. 21, 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. 3, 2005), 2005 WL 287501.

The SEC's scheme ensures the agency not only the *first* public word—by Complaint and press release—about its enforcement targets' culpability, but also gives the government the final and *only* word in nearly all SEC cases. The speech restraint leaves 98 percent of SEC enforcement targets defenseless for life in the court of public opinion. This asymmetry is profoundly dangerous, especially where, as here, the government decides who shall speak about what. As this Court has observed:

> Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. … Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. … Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.

Citizens United v. FEC, 558 U.S. 310, 339-40 (2010) (internal citations omitted).

In fact, the SEC's gag orders are content- and viewpoint-based in the most threatening fashion: they exist for the very purpose and with the likely effect of creating an unequal disclosure of "facts" in the public arena. Doing so not only favors one side—the SEC's—

stifling any potential controversy about its own behavior, but it effectively bars shared public articulation of criticism of the SEC. Indeed, it goes so far as to bar speech capable of even "giving the impression" that the agency might have, to any degree, overstepped appropriate boundaries.

Restraints on speech such as the SEC imposes are by their nature violative of the First Amendment's bar on government control over the content of speech. This Court's recent decision in *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 Sup. Ct. 2335 (2020), is illustrative of the degree to which the First Amendment limits government self-favoritism in the speech arena. In that case, the Court determined that the government violated the First Amendment when it banned robocalls by private parties at the same time it continued to engage in that conduct itself. Here, the risks to private parties who wish to differ publicly with the message the government chooses to disseminate are even greater than in *Barr*. If they dare to speak out, they are potentially subject to sanctions for criminal contempt.

In addition, this Court has recognized that the government is "constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978). The Court's reasoning that "[s]uch power in government to channel the expression of views is unacceptable under the First Amendment" and that that is "[e]specially" true when the attempted "suppression of speech suggests an attempt to give one side of a debatable public question an advantage" is particularly applicable in this case

where the very entity subject to potential but now banned criticism is itself a governmental body. *See id.* at 785.

The SEC has not, in any event, hidden its evident intent to limit speech critical of its enforcement activities by use of the gag order at issue in this petition. *See SEC v. Vitesse Semiconductor Corp.*, 771 F. Supp. 2d 304, 309 (S.D.N.Y 2011) (discussing history of the "neither admit nor deny" policy). Once one is forced to accept a gag order and then has the temerity to speak out of turn, the SEC responds with all-too-credible threats.[13]

As a result, and with the required assistance of the federal judiciary before which the agreements are filed, the SEC has become the very censor of criticism of itself that our system of free expression forbids. *See Freedman v. Maryland*, 380 U.S. 51 (1965). This Court warned in *Simon & Schuster* that "in the context of financial regulation, it bears repeating, as we did in *Leathers* [*v. Medlock*, 499 U.S. 439 (1991)] that the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." 502 U.S. at 116. Yet that precise outcome is regrettably both the stated purpose and the inevitable effect of the silence imposed by the SEC regarding criticism of its conduct.

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[13] In 2003, for example, an executive at a bank that had settled an enforcement action spoke critically of the SEC case. SEC demanded a retraction which so threatened the speaker it was provided. *See* Marcy Gordon, *SEC Chairman Berates Morgan Stanley Exec*, AP News (May 1, 2003), https://bit.ly/3JrDjPG.

Topping off the Gag Order's content- and viewpoint-discrimination, the SEC has no lawful—much less compelling—interest in suppressing speech critical of its settled enforcement actions. Orders such as the one imposed on Mr. Romeril stifle public debate and public information. They require defendants to make the difficult choice of surrendering their rights to speak out or to forgo consent settlements with the Commission and face the potentially ruinous costs and risks of litigating to the bitter end. If the SEC were correct, the only way to settle an enforcement proceeding would be to surrender forever one's First Amendment rights of free speech. Our Constitution does not require our people to choose between two such repugnant alternatives.

C. The Gag Order Is an Unconstitutional Condition

The very demand that those who wish to settle with the SEC must abandon their constitutional rights is itself unconstitutional. The government may not condition anyone's ability to receive a benefit on the surrender of their constitutional rights. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Legal Servs. Corp.*, 531 US at 533; *accord Koontz v. St. John's River Water Management Dist.*, 570 U.S. 595, 604 (2013). And this Court has long held that the government may not make its decision to refrain from its exercise of power "dependent upon the surrender … of a privilege secured … by the Constitution and laws of the United States." *Barron v. Burnside*, 121 U.S. 186, 200 (1887). Indeed, the Court declared in 1963 it was by then "too late in the day to doubt that the libert[y] of religion and expression may be infringed by the denial of or placing of conditions upon

a benefit or privilege." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

These "cases reflect an overarching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz*, 570 U.S. at 604. The SEC's demand—its asserted requirement—as a condition of settlement that the targets of its enforcement activity never publicly question their complaint's validity "necessarily [has] the effect of coercing" settling parties into surrendering their freedom to "engag[e] in certain speech" protected by the First Amendment. *Speiser v. Randall*, 357 U.S. 513, 519 (1958).

Nor does it make a difference that the government could have refused to settle. Virtually all unconstitutional conditions cases involve an optional governmental action of some sort. As *Koontz* states, "we have repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional rights." 570 U.S. at 608; *see, e.g.*, *U.S. v. American Library Assn.*, 539 U.S. 194, 210 (2003). In *Sherbert*, 374 U.S. at 405-06, this Court held that even a gratuitous benefit could not be conditioned upon a loyalty oath because it "inevitably deterred or discouraged the exercise of First Amendment rights of expression and thereby threatened to 'produce a result which the State could not command directly.'" (quoting *Speiser*, 357 U.S. at 526).

Thus, even if the SEC would have been within its rights in refusing to settle, that greater authority does not imply a "lesser" power to condition settlement upon the forfeiture of constitutional rights.

The circuit opinion asserts that, since Mr. Romeril agreed to the terms set forth by the SEC, he is bound by them, however constitutionally offensive they may be. That position is not only contrary to *Koontz*'s articulation of the unconstitutional conditions principle, but is flatly contrary to the unanimous determination of the Second Circuit in *Crosby*, 312 F.2d 483 (Lumbard, C.J., Moore and Hays, JJ.).

The parties in that case had agreed a credit reporting agency would not publish anything about the Crosbys and related companies in a stipulated settlement entered as a court order. When challenged three decades later, the Second Circuit unanimously concluded that "[s]uch an injunction, enforceable through the contempt power, constitutes a prior restraint by the United States against the publication of facts which the community has a right to know and which Dun & Bradstreet had and has the right to publish. The Court was without power to make such an order; that the parties may have agreed to it is immaterial." 312 F.2d at 485.

The same is true in this case. It is perfectly understandable that to avoid the expense and risk of litigating further with the SEC that a party would yield to SEC's demand that it agree to say nothing that might antagonize this powerful agency in the future. One could easily imagine other such demands as preconditions to settlements with the SEC. But as

the court in *Crosby* correctly held, such an agreement is constitutionally void. This is all the more true when, unlike the agreement between private parties in *Crosby,* it is the *government* setting the preconditions and banning future speech in perpetuity.

At stake is not only the freedom of speech but also one of the highest of constitutional principles, that a private party's consent—even if truly voluntary—cannot give the federal government a power that the Constitution denies to it. "The Constitution is a law enacted by the people and therefore is not variable with the consent of any state or private person. No such consent can relieve the federal government of the Constitution's limits." Philip Hamburger, PURCHASING SUBMISSION: CONDITIONS, POWER, AND FREEDOM, 156 (2021). Romeril's consent therefore cannot cure the SEC Gag Rule's abridgement of the freedom of speech.

II. THE SETTLEMENT CONSENT AND GAG ORDER DENY DUE PROCESS OF LAW

There are two due process issues before this Court. The first is a threshold issue: the Court of Appeals concluded that since Mr. Romeril "willfully agreed to the no-deny provision as part of the consent decree," he was thus bound by it. The second, an intimately related issue, is whether Mr. Romeril was denied due process as a result of the substance and vagueness of the content-based restrictions set forth in the agreement presented to him as a *prerequisite* to settling the SEC's case against him.

As to the first, the position of the SEC and the Second Circuit could hardly be clearer yet less rooted in the Constitution. In its first filing in the district court the SEC acknowledged that its no-deny "provision appears in the consent in connection with a 1972 Commission policy, pursuant to which the Commission will accept a settlement *only if* the defendant agrees to such a no-deny provision." Brief for the SEC at 1, SEC v. Allaire, No. 03cv4087 (S.D.N.Y. June 18, 2019), ECF No. 31 (emphasis added). In other words, it is non-negotiable. The SEC acknowledges this precondition has been its non-negotiable policy since 1972.

> The Commission announced that it would not agree to a settlement that would "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." 37 FED. REG. 25224 (Nov. 29, 1972), codified at 17 C.F.R. 202.5(e).

Id. at 3. In other words, the SEC will not permit a defendant to settle unless a defendant surrenders both his First Amendment and his due process rights.

The panel decision dismissed Mr. Romeril's due process claims, observing first that "Romeril has actual notice of the proceedings as well as a full and fair opportunity to litigate on the merits" and adding that "he willingly agreed to the no-deny provision as part of a consent decree." App-18. This is wrong for at least three reasons.

First, Mr. Romeril had no notice and opportunity to be heard on the terms of the consent decree because, as the SEC acknowledges throughout its briefing below, the SEC-drafted "Consent" works in the following fashion. *See* Brief for the SEC at. 6-7, SEC v. Romeril, 15 F.4th 166 (2d Cir. 2021), Doc. 65; *see also* ECF No. 31 at 4-5. Defendants must involuntarily agree that their consent is voluntary. App-39 ¶6. They must waive their Rule 65(d) protections and allow incorporation by reference of both the Gag Order and the Complaint in plain violation of the Federal Rules. App-39 ¶¶7, 14-15. They must waive any hearing on SEC's entry of Final Judgment and agree that SEC may present the Settlement Form and Gag Order to the Court *ex parte*, for signature and entry without further notice. App-39 ¶¶9, 14. And they must agree that the court retains jurisdiction to enforce the terms that systematically eviscerate both their First Amendment and due process rights. App-39 ¶15. In short, the SEC-drafted consent strips SEC defendants of their due process rights one by one.

Not only is there no notice and opportunity to be heard, there is *never any hearing at all* under this pernicious scheme. SEC has already required its enforcement targets to *agree* that there will be no such hearing. App-39 ¶¶9, 14. There can be no "knowing and voluntary" waiver when SEC enforcement targets are told that a regulation requires them to surrender their constitutional and due process rights or there will be no settlement.

The unconstitutional conditions doctrine applies not only when the government requires surrender of First Amendment rights, but when the

government requires surrender of *any* constitutional rights as a condition. That includes due process rights. *G&V*, 23 F.3d at 1077. The panel decision fails to acknowledge, much less tackle, the glaring due process problem that the mandated Consent Form affords enforcement targets no opportunity to be heard on the gag or any other condition on settlement imposed by the government. Official demands that defendants surrender constitutional rights not through genuine bargaining, but instead pursuant to across-the-board policy has long been regarded with suspicion by this Court. *U.S. v. Jackson*, 390 U.S. 570 (1968).

Second, the panel decision likewise fails even to acknowledge, much less grapple with the unconstitutional vagueness of the gag. The "consent" forbids a defendant from even creating "an impression that a decree is being entered or a sanction imposed, when the conduct did not, in fact, occur." Such phrasing confers unlimited discretion on the Commission to decide what future speech is or is not permitted. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations Inc.*, 567 U.S. 239, 253 (2012) (citing *Connolly v. General Constr. Co.*, 269 U.S. 385 391 (1926)).

Third, by reducing due process to the simple formula of "notice and opportunity to be heard," the panel disregards this Court's precedents that hold that the threat to "punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort[.]" *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1982)

(citing *North Carolina v. Pearce*, 395 U.S. 711 (1969), *overruled on other grounds by Alabama v. Smith*, 400 U.S. 794 (1989)). SEC targets who have settled cannot communicate, share, publish and advocate about potential agency abuses of power. The Gag Rule not only chills speech critical of the agency, but also directly subjects those who have settled with the SEC to potential criminal contempt and a reopened case for a violation of a court order. Congress itself could not pass such post-enforcement settlement gags as a law.[14] The Gag Rule allows SEC to obtain something it could never win at trial—the coerced silence of the thousands of defendants it charges and with whom it settles.

Those Supreme Court holdings are precisely what the Second Circuit rejected in this case, a ruling with major consequences for the preservation of First Amendment and due process rights in the future. Suppose, for example, that a future SEC demanded that those who settle with it must agree not to appeal from any future ruling of the Commission. Or that the settling party must offer public praise to the SEC for being willing to settle.[15]

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[14] *See McBryde*, where a Congressionally enacted gag on disciplined federal judges was summarily vacated as an unconstitutional prior restraint. 83 F. Supp. 2d at 140.

[15] *See* Nelson Obus, Opinion, *Refusing to Buckle to SEC Intimidation*, Wall St. J. (June 24, 2014), https://www.wsj.com/articles/nelson-obus-refusing-to-buckle-to-sec-intimidation-1403651178 (describing 12-year legal battle of small company costing $12 million to defend against SEC charges).

Doubtless there are individuals or corporations desirous enough to settle on almost any terms proffered by the government that they do so simply to avoid further economic and reputational damage or worse by those in power. That would hardly transform the unconstitutional conduct of the government into behavior consistent with the First Amendment.

III. THIS COURT HAS LONG PROVIDED RELIEF FOR UNCONSTITUTIONAL COURT ORDERS

The panel decision held that Mr. Romeril cannot obtain relief under Rule 60(b)(4) because it read *Espinosa*, 559 U.S. 260, to limit the rule's application to "only two circumstances:" a jurisdictional error or a due process violation. App-23. Even under that limited reading, relief under Rule 60(b)(4) would be available to Mr. Romeril because the court lacked power—that is, *jurisdiction*—to enter a prior restraint. Further, the SEC scheme violates Mr. Romeril's due process rights by requiring him to waive notice and an opportunity to be heard, by the Gag Order's vagueness and by prohibiting him from doing what he has every right to do—speak truthfully and voice his opinions.

But the panel cannot be right about *Espinosa*'s purported limitations. Accepting the panel's interpretation that Rule 60(b)(4) provides just two grounds for relief would mean that this Court overruled *sub silentio* at least three prior precedents of this Court: *Klapprott v. U.S.*, 335 U.S. 601, 614-5 (1949); *Wilson v. Walker*, 109 U.S. 258, 266 (1883), *superseded by Rule as stated in Espinosa*, 559 U.S. at 271; *Ex Parte Lange*, 85 U.S. 163, 176-77 (1873). The panel's reading of *Espinosa* further conflicts with the

Fifth Circuit's interpretation of *Espinosa* in *Brumfield v. La. State Bd. of Educ.*, 806 F. 2d 289, 298 (5th Cir. 2015).

A. The Panel's Interpretation Misreads *Espinosa* and Is in Conflict with the Fifth Circuit

Espinosa involved no constitutional claims at all. Jurisdiction was not at issue in the case—"United does not argue that the … error was jurisdictional" *Espinosa*, 559 U.S. at 271—nor was due process. Further, the opinion expressly stated that a judgment would be "void" under Rule 60(b)(4) where there was, for example, "a clear usurpation of power[.]" *Id.* Usurpation of power is the basis of Mr. Romeril's appeal. *See Crosby*, 312 F.2d at 485: "The court was without power to make such an order; that the parties may have agreed to it is immaterial."

Espinosa's unanimous opinion expressly *declined* to "define the precise circumstances in which a jurisdictional error will render a judgment void" under Rule 60(b)(4). *Espinosa*, 559 U.S. at 271. Yet the panel inexplicably asserts that *Espinosa* has done what it disclaims. This reading of *Espinosa* also conflicts with the Fifth Circuit's holding in *Brumfield*, 806 F.2d at 298. The *Brumfield* majority, noting that *Espinosa* had "presented no opportunity to review lower courts' assertions construing Rule 60(b)(4)," concluded that in *Espinosa*, the "Supreme Court, in sum, has not definitively interpreted this rule." *Id.*

B. The Panel Opinion Contradicts this Court's Jurisprudence on Void Judgments

Well before this Court adopted the Federal Rules of Civil Procedure, this Court recognized that a judgment that exceeded the powers or constitutional constraints that bind the judiciary was void ab initio and must be vacated. *Wilson*, 109 U.S. at 266 ("Although a court may have jurisdiction over the parties and the subject-matter, yet if it makes a decree which is not within the powers granted to it by the law of its organization its decree is void.").

In *Ex Parte Lange*, 85 U.S. at 176–77, the Court expanded upon the necessity for a remedy when courts exceed their powers:

> It is no answer to this to say that the court had jurisdiction of the person of the prisoner, and of the offence under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case. If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment. So, if a court of general jurisdiction should, on an indictment for libel, render a judgment of death, or confiscation of property, it would, for the same reason, be void. Or if on an

> indictment for treason the court should render a judgment of attaint, whereby the heirs of the criminal could not inherit his property, which should by the judgment of the court be confiscated to the State, it would be void as to the attainder, because in excess of the authority of the court, and forbidden by the Constitution."

Id.

This Court adopted the Federal Rules of Civil Procedure in 1938, and later amended them in 1947 to codify these common law rules and "dramatic[ally]" expand the ability of courts to remedy prior incorrect judgments. *See* Comment, *The Temporal Aspects of the Finality of Judgments: The Significance of Federal Rule 60(b)*, 17 U. Chi. L. Rev. 664, 668 (1950).

Only one year after the current Rule 60(b)(4) became effective, this Court granted relief from judgment under Rule 60(b)(4) in *Klapprott*, 335 U.S. at 609–10, 616–620, because the district court had failed to conduct a statutorily required hearing for denaturalization. Justice Black's opinion relied exclusively upon the district court's failure to conform with the statutory requirement. The decision never mentioned lack of personal jurisdiction, subject matter jurisdiction, or a due process violation.

Espinosa cannot be read fairly to have defined the only two grounds where relief is justified under Rule 60(b)(4) without overruling what five justices agreed upon in *Klapprott*. Given that "[the Supreme] Court does not normally overturn, or so dramatically

limit, earlier authority *sub silentio*," *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000), *Espinosa* should not be read to overturn *Klapprott*'s Rule 60(b)(4) holding.

Moreover, *Klapprott* was decided shortly after the current version of Federal Rule 60(b)(4) was adopted. Contemporaneous interpretation of a statute or rule has long been deemed strong evidence of its original public meaning. *See*, *e.g.*, *Boyd v. U.S.*, 116 U.S. 616, 622 (1886). Courts rely upon this principle because interpreters closer to the time of enactment had a better grasp on the language and purpose of the rule than courts do many decades later. *Id.* It is even more unlikely that *Espinosa* narrowed *Klapprott*—much less overturned it—because this Court has cited *Klapprott* as recently as 2005, only five years before *Espinosa*. *See Gonzales v. Crosby*, 545 U.S. 524, 534, 542 (2005).[16]

The paucity of reported Rule 60(b)(4) cases, and its limited application—it is unavailable in criminal or

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[16] Rule 60(b)(4)'s protection against unconstitutional judgments is long recognized. *See* 11 Charles Allen Wright & Arthur Miller, Fed. Prac. & Proc. Civ. § 2862 (3d ed.) (citing *Crosby*); *see also* 47 Am. Jur. 2d Judgments § 653 ("[A] judgment allegedly void on constitutional grounds is subject to attack at any time."); 49 C.J.S. Judgments § 506 ("A consent judgment may be set aside where it is void on constitutional grounds"). It would be odd for *Espinosa*, a Supreme Court case that did not address a constitutional claim at all, to summarily wipe out relief for constitutional voidness without any discussion of that momentous change to the law in the opinion. These cyclopedias compile a mere handful of cases held void for unconstitutionality proving it both a rare and an *essential* remedy.

state cases, *Sherratt v. Friel*, 275 F. App'x 763, 767 n.1 (10th Cir. 2008)—demonstrates that courts post-*Klapprott* and *Crosby* have sparingly exercised Rule 60's vacating power, limiting it to rare instances of default judgments that denied due process, or where the court lacked jurisdiction or where, as here, there has been a clear usurpation of power.

Klapprott not only shows that *Espinosa* did not chart the universe of allowable Rule 60(b)(4) claims, it stands for the proposition that district courts may reopen judgments they had no power to enter in the first place. 335 U.S. at 609. The district court lacked power to enter its judgment because the judgment violated the First Amendment and due process of law. When courts act so far beyond their authority, Rule 60(b)(4) provides a remedy.

CONCLUSION

This case involves free speech and due process questions of the highest importance. From the day the case began, there has always been a Catch-22 quality to the position of the SEC. The SEC has never maintained (nor could it) that had it prevailed at trial, its judgment could have included a lifetime ban prohibiting Mr. Romeril from calling into question the propriety of the SEC's case. Nor, of course, could it have obtained *any* speech constraint had Mr. Romeril prevailed. This Court has recognized consent judgments are "compromises in which the parties "give up something they might have won in litigation[.]" *U.S. v. ITT Cont'l Baking Co.*, 420 U.S. 223, 235 (1985). First Amendment rights are and never can be on the table in a settlement with the government. That is the meaning of a constitutional

right, and also the teaching of the three circuits and Michigan Supreme Court case with which the panel opinion conflicts. Yet this SEC-drafted settlement imposes a sweepingly overbroad lifetime prior restraint notwithstanding the clarity of this Court's repeated admonitions that such flagrant restraints on speech are all but unthinkable in a First Amendment-governed society.

There has been no quarrel between the parties that prior restraints on speech are the harshest, most intrusive and hence most constitutionally suspect limitations on First Amendment rights. The extraordinary scope of this Court's language in *Nebraska Press Ass'n*—that prior restraints are "the most serious and the least tolerable infringement on First Amendment rights"—is not juridical hyperbole but a straightforward statement of First Amendment law. 427 U.S. at 559.

The prohibition may be most immediately evident in situations, as here, in which prior restraints are involved. But the law is just as clear that the government may neither demand the surrender of constitutional rights in return for the settlement of claims it is asserting, nor impose unconstitutional conditions on the exercise of *any* constitutionally protected rights, let alone those protected by the First Amendment. And that is precisely what the SEC has done.

In doing so, it has acted as an outlier in the regulatory sphere, all but alone amongst the hundreds of federal regulatory agencies only one of which—the CFTC—has deemed it necessary to bar speech as a

precondition of settlement. There is, in fact, no basis for concluding that such a provision serves any purpose but avoiding public criticism of the SEC itself, a purpose at odds with a major purpose of the First Amendment itself.

Eighteen years have passed since Mr. Romeril was first silenced by the SEC. The SEC's Restraint Order was never constitutional, and it remains unconstitutional today. We urge the Court to hear this case and to decide if any governmental body can so act.

This Court should grant Mr. Romeril's petition for a writ of certiorari.

Respectfully submitted,

Margaret A. Little
Kara M. Rollins
Mark S. Chenoweth
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW
Suite 450
Washington, DC 20036
(202) 869-5210
peggy.little@NCLA.legal

Floyd Abrams
Counsel of Record
Michael B. Weiss
Cahill Gordon & Reindel LLP
32 Old Slip
New York, NY 10005
(212) 701-3621
fabrams@cahill.com

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