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

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. CHRISTOPHER A. NOVINGER, et al., Defendants.	CIVIL ACTION NO: 4:15-cv-358-O July 12, 2021

REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO OPEN AND FOR RELIEF FROM JUDGMENT PURSUANT TO Fed. R. Civ. P. 60(b)(4)

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I. THE GAG ORDER IS UNCONSTITUTIONAL UNDER CONTROLLING LAW

The Supreme Court has held that a court order "so far as it imposes prior restraint on speech, constitutes an impermissible restraint on First Amendment rights" and "must be vacated." *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 418-20 (1971); *New York Times Co. v. United States*, 403 U.S. 713, 715 (1971). The First Amendment further prohibits content-based restrictions on speech enforced by threats of prosecution. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68–71 (1963). These doctrines required voiding a consented-to gag under Rule 60(b)(4) 30 years after it was entered. *Crosby v. Bradstreet Co*., 312 F.2d 483, 485 (2d Cir. 1963).[1] The SEC fails to cite a single controlling case that provides this Court with authority to sustain a governmentally imposed lifetime gag enforced through the threat of a reopened prosecution. Not one.[2]

A. Rule 60(b)(4) Is the Proper Procedure to Set Aside an Unconstitutional Order

SEC's contention that a Rule 60(b)(4) motion cannot be used to set aside an unconstitutional order lacks merit. SEC itself recently argued in defending another SEC gag order that "the proper vehicle is review of the consent judgment[] before the court[] that entered [it],"[3] citing *SEC v. Allaire*, a case that sought to set aside SEC's gag order *under Rule 60(b)(4)*. SEC cannot argue in one court that Rule 60(b)(4) is the proper vehicle, and then flip its position elsewhere to argue that 60(b)(4) relief is not available. In so doing, SEC speaks out of both sides of its mouth, while seeking to insulate its rule from any review. As SEC well knows, the collateral

[1] The Tenth Circuit, citing *Crosby*, held that Rule 60 voids judgments "if the court has acted in a manner inconsistent with due process of law … Violations of other fundamental constitutional rights may give rise to voidness as well." *VTA, Inc v. Airco, Inc.*, 597 F. 2d 220, 225 n.11 (10th Cir. 1979). *See also Simer v. Rios*, 661 F. 2d 655, 663 (7th Cir. 1981) (if "error of constitutional dimension occurs, a judgment may be vacated as void" under Rule 60(b)(4)); *accord Sertic v. Cuyahoga Lake, etc. Carpenters Dist. Council*, 459 F. 2d 579, 581 (6th Cir. 1972) (settlement void without due process notice to class). The Fourth Circuit recently held that a settlement provision "not to speak to the media about police conduct" violated the First Amendment. *Overbey v. Mayor of Balt*., 930 F.3d 215, 219 (4th Cir. 2019).

[2] Defendants have cited but a single out-of-circuit case as authority to the contrary, *United States v. Berke*, 170 F.3d 882 (9th Cir. 1999), and even there the court reserved decision on whether the gag could be enforced.

[3] *See Cato Inst. v. SEC*, No. 1:19cv47, Dkt. 12, slip op. at 18 (D.D.C. May 10, 2019), *aff'd on alternate grounds*, 2021 WL 2799921 (D.C. Cir. July 6, 2021) (holding no redressability where relief against SEC did not bind entering court).

bar rule prohibits a defendant from challenging a district court's order by violating it or by collateral attack. Instead, parties must move to vacate or modify in the entering court. *Walker v. City of Birmingham*, 388 U.S. 307, 313-21 (1967). Recently the D.C. Circuit held with respect to the very same gag rule at issue in this case:

> Violations of court orders are punishable by criminal contempt, see *United States v. United Mine Workers*, 330 U.S. 258, 294 (1947), and a court may institute criminal contempt proceedings against an SEC defendant who violates a no-deny provision contained in a consent decree issued by that court *even absent the SEC's consent*, see *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 793–95 (1987); *Morrison v. Olson*, 487 U.S. 654, 676 (1988). (emphasis added).

Cato Inst., 2021 WL 2799921 at *3 (D.C. Cir. July 6, 2021).[4] The Fifth Circuit applies the collateral bar rule; parties must seek to set aside unconstitutional constraints in the entering court.[5]

SEC erroneously argues that the Supreme Court has articulated "only two circumstances where a judgment may be deemed void" in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010)—jurisdiction and due process. *See* SEC Mem. 5. This motion satisfies both, so SEC's argument fails regardless.[6] SEC's last-ditch claim that, because this Court has subject-matter jurisdiction over securities laws (which defendants do not dispute), Novinger cannot challenge the

[4] This holding undermines SEC's statement that defendants are not subject to contempt. SEC Mem.15, 22. The D.C. Circuit recognizes that whether or not SEC seeks contempt, courts can institute contempt proceedings against SEC targets gagged by their settlement consents if they speak publicly in their own defense.

[5] *United States v. CBS, Inc.*, 497 F.2d 102 (5th Cir. 1974) (CBS permitted to challenge a second unconstitutional order because it did not violate it, as it did the first.); *United States v. Dickinson*, 465 F.2d 496, 508 (5th Cir. 1972) (contempt set aside after challenge in original action vindicated "the public's right to know … that elected state officials had trumped up charges against an individual solely because of his race and political civil rights activities.").

[6] The Supreme Court in *Espinosa* expressly says that it is *not* making any such comprehensive ruling. Noting that "the term 'void' describes a result, rather than the conditions that render a judgment unenforceable," *Espinosa*, 559 at 270, it expressly declined "to define the precise circumstances in which a jurisdictional error will render a judgment void." *Id.* at 271. *Espinosa* specifically cited Wright & Miller listing *Crosby* as a type of claim subject to Rule 60(b)(4) relief. *Id.* The law of this Circuit similarly contradicts SEC's construction of *Espinosa*. In *Brumfield v. La. State Bd. of Educ.*, 806 F. 3d 289, 298 (5th Cir. 2015) (Jones, J.), this Circuit held that "*Espinosa* presented no opportunity to review lower courts' assertions construing Rule 60(b)(4) that a judgment is void because of a jurisdictional defect only in the exceptional case 'in which the court that rendered judgment lacked even an arguable basis' for jurisdiction. The Supreme Court, in sum, has not definitively interpreted this rule." *Id.* SEC's views are further disproved by *Carter v. Fenner*, 136 F. 3d 1000 (5th Cir. 1998), where the court set aside a settlement of a minor's claim for failure to secure prior probate court approval as required by state law, making SEC's citation of *Congregation Mischknois Lavier Yakov, Inc. v. Bd. of Trs. for Vill. of Airmont*, 301 F. App'x 14 (2d Cir. 2008) inapposite. SEC Mem. 9 n. 1.

gag is specious and refuted by every case voiding a judgment under Rule 60(b)(4). Courts must have jurisdiction to rule.[7] Novinger's motion must be heard on the merits.

B. A Rule 60(b)(4) Motion May Be Brought at Any Time

SEC similarly misreads the law of this circuit when it argues that defendants did not file their motion within a reasonable time. *Compare* SEC Mem.13 *with New York Life Ins. Co. v. Brown*, 84 F.3d 137 (5th Cir. 1996). (no time limit on FRCP 60(b)(4) motion). This is why the Fifth Circuit reviews Rule 60(b)(4) motions *de novo* "because it is 'a per se abuse of discretion for a district court to deny a motion to vacate a void judgment.'" *Jackson v. FIE Corp.*, 302 F. 3d 515, 522 (5th Cir. 2002). "Rule 60(b)(4) motions leave no margin for consideration of the district court's discretion as the judgments themselves are by definition either legal nullities or not." *Carter v. Fenner*, 136 F.3d 1000, 1005 (5th Cir. 1998).[8]

C. Rule 60(b) Is Consistently Applied to Allow Partial Relief.

SEC objects that defendants "seek to alter a small part of the judgment, but do not identify any court that has partially voided a judgment under Rule 60(b)(4)." SEC Mem.21. Not so. *Crosby* let stand a monetary settlement, and only vacated the portion of the settlement that imposed a prior restraint. 312 F.2d at 485. *Brumfield*, like *Crosby*, vacated only the part of a consent that expanded

[7] As the court said in *May v. Hummingbird Aviation, LLC*, No. CV 08-1190, 2009 WL 10679749, at *3 (E.D. La Dec. 16, 2009): "A judgment is void even though a court has subject matter jurisdiction if the court that rendered the judgment or order did so 'outside its legal powers.'" (quoting *Carter* at 1007). SEC gains no support from the Sixth Circuit's decision in *Northridge Church v. Charter Twp. of Plymouth*, 647 F.3d 606 (6th Cir. 2011). There the court denied Rule 60 relief to a consent settlement that neither violated the Constitution nor due process when entered. *Id.* at 608. Novinger's order, by contrast, was void and violated due process when entered.

[8] *Carter* further held "[w]hile Rule (60(b)(1) motions must be brought within one year … motions brought pursuant to subsection (4) of the rule have no set time limit." *Carter*, 136 F.3d at 1006. *Briley v. Hidalgo*, 981 F.2d 246, 249 (5th Cir. 1993) also holds "[t]here is no time limit on an attack on a judgment as void. The one-year limit applicable to some Rule 60(b) motions is expressly inapplicable, and even the requirement that the motion be made within a 'reasonable time,' which seems literally to apply to motions under Rule 60(b)(4), cannot be enforced with regard to this class of motion. A void judgment cannot acquire validity because of laches …." *See also* Wright & Miller, *supra* (There is no time limit to a Rule 60(b) motion under clause (4)); 12 James Wm. Moore, *et al.*, *Moore's Federal Practice* § 60.44(5)(c)) (3d ed. 1999); 47 Am. Jur. 2d Judgments § 653; 49 C.J.S. Judgments § 506.

a private school consent to public schools. The Supreme Court has invalidated restrictive covenant provisions of otherwise enforceable conveyances. *Barrows v. Jackson*, 346 U.S. 249, 258 (1953).[9]

II. THE GAG ORDER VIOLATES DUE PROCESS

The SEC resists Novinger's due process claims, first by claiming he had notice and an opportunity to be heard. SEC Mem. 8. But the settlement context provides *no opportunity* to challenge the gag, as it is nonnegotiable—SEC will not settle without a gag. Defendants who lack resources for a prolonged administrative adjudication must either fight the SEC to the bitter end to preserve their free speech rights or settle.[10] Because SEC settles 98% of its cases, this effectively silences nearly everyone charged by SEC. Worse, it silences them in perpetuity with enforcement at the unbridled discretion of SEC, both of which are forbidden by the law applicable to prior restraints. The SEC cannot wholly insulate its blanket gag policy from any and all judicial scrutiny.

Thankfully, the unconstitutional conditions doctrine and First Amendment precedents spare defendants a life sentence under that baleful bargain by permitting a later challenge. Further, due process is not just notice and an opportunity to be heard. To attach a penalty for doing what the law plainly allows Novinger to do—speak truthfully now and in perpetuity—is a due process violation of the most basic sort. *North Carolina v. Pearce*, 395 U.S. 711, 723-26 (1969), *overruled on other grounds by, Alabama v. Smith*, 400 U.S. 794, 795 (1989). Even convicted murderers—and federal judges—retain their post-proceeding free speech rights. (Def. Mem. at 8-9 and 24).

SEC discounts Novinger's claim that the gag's vagueness gives the Commission unfettered

[9] *See also Overbey*, 930 F.3d at 219 (invalidating portion of settlement agreeing "not to speak to the media" about police brutality), *Anderson v. Dean*, 354 F. Supp. 639, 645 (N.D. Ga. 1973) (speech ban provision unconstitutional). *People v. Smith*, 502 Mich. 624 (2018) (invalidating portion of settlement restricting seeking public office).

[10] "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 … ending sanctions. The private party must incur the costs, distress, and adverse publicity associated with a defense or succumb … the pressure to settle is overwhelming even when the SEC case lacks merit." Andrew N. Vollmer, *Four Ways to Improve SEC Enforcement*, 43 SEC. REG. L. J. 333, 336 (2015). Vollmer is a former Deputy General Counsel and Acting General Counsel at SEC (2006-09).

discretion to reprosecute him by proffering the tepid assurance that a court might not grant SEC's motion to reopen. That still leaves Novinger under the threat of prosecution—which alone establishes a First Amendment violation. *See PHE, Inc. v. Dep't of Justice*, 743 F. Supp. 15, 26 (D.D.C. 1990) (threats of prosecution for constitutionally protected activity invalid). Moreover, as noted above, *Cato Institute* held that contempt can attach whether or not SEC moves to reopen, thereby vitiating SEC's arguments, SEC Mem. 15 and 22, that Novinger faces no contempt risk.

III. DEFENDANTS CANNOT WAIVE THE LISTENER'S RIGHT TO HEAR, NOR MAY SEC DICTATE THE CONTENT OF DEFENDANTS' SPEECH

The *Crosby* court recognized the public's First Amendment interest to *hear* free expression, holding that the United States (through a court decree) could not put the predecessor to Dun & Bradstreet under "a prior restraint … against the publication of facts which the community has a right to know." *Crosby*, 312 F.2d at 485. The First Amendment has long protected the right to receive information, *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 143 (1943), *citing Lovell v. Griffin*, 303 U.S. 444, 452 (1938). "It would be a barren marketplace of ideas that had only sellers and no buyers." *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965).[11]

SEC asserts iron-fisted control over what Novinger can say to the public or in petition to the government. SEC Mem.19 n.4. But no arm of the U.S. can impose this noxious brew of *verboten* and compelled speech under the First Amendment. Furthermore, Novinger has no capacity to waive the public's interest in hearing the truth. Nor does SEC have the power to predetermine speech content. This gag violates both the First and Fifth Amendments.

[11] *See also In Re Express-News Corp.*, 695 F. 2d 807, 809 (5th Cir. 1982) ("The public has no less a right under the First Amendment to receive information about the operation of the nation's courts than it has to know how other governmental agencies work and to receive other ideas and information.").

IV. THE GAG ORDER VIOLATES THE FIRST AMENDMENT

A. A Prior Restraint Is Void and Unconstitutional, Even with Consent

Defendants have not waived their First Amendment rights. The many cases cited by SEC involve gags upheld between *private* parties and are therefore inapposite, for the free speech clause is "a guarantee only against abridgment by government." *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976).[12] Governments, by contrast, may not penalize First Amendment rights by withholding a privilege or benefit. *See Speiser v. Randall*, 357 U.S. 513, 518 (1958) ("[A] discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech."); *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 211 (2013); *Anobile v. Pelligrino*, 303 F.3d 107, 124-25 (2d Cir. 2002). When government conditions its benefits or privileges on surrender of a constitutional right, those who accepted the "deal" may challenge the condition in court.[13] *Stephens v. County of Albermarle*, 2005 WL 3533428 at *10 (W.D. Va. Dec. 22, 2005) (court refused a waiver safe haven to settlement's gag provision as it would "vitiate the unconstitutional conditions doctrine to conclude that it cannot apply to an offer of settlement.").

SEC contends that consent judgments, which embody compromises, include defendants' waiver of their "right to a trial, findings of fact, and to an appeal." SEC Mem.17. But this argument provides no justification for the suppression of defendants' speech! Agreements with governmental actors to settle ongoing or imminent legal disputes have been held constitutional

[12] *Democratic Nat'l Comm. v. RNC*, 673 F.3d 192 (3d Cir 2012), is thus readily distinguishable; no government body there demanded surrender of First Amendment rights. *Cf. Malem Med., Ltd. v. Theos Med. Sys.*, 761 F. Appx. 762 (9th Cir. 2019) (private non-disparagement agreement between commercial parties settling a disparagement suit); *In re George F. Nord Bldg. Corp.*, 129 F.2d 173 (7th Cir. 1942) (private agreement that required court pre-approval of communications to creditors before final decree enforced). *Paragould Cablevision, Inc. v. City of Paragould, Ark.* 930 F. 2d 1310 (8th Cir. 1991), is inapposite because it involved bargained-for commercial speech limitations by cable company involving consideration, not unilateral non-negotiable conditions imposed by the government.).

[13] *See Elrod v. Burns*, 427 U.S. 347, 360 n.13 (1976) (plurality) (The argument that an unconstitutional condition is waived by accepting the benefit "swallows the rule … [T]o accept the waiver argument is to say that the government may do what it may not do."); *Agency for Int'l Dev.*, 570 U.S. at 211 (striking down content-based speech condition attached to federal funds even where plaintiffs had accepted such funds before commencing litigation).

only where the right surrendered was one necessary to effectuate the finality that is the practical object of settlement.[14] Rights to jury trial, appellate review, counterclaim and cross-suit may be waived because they are inextricably intertwined with the dispute; cessation of legal process is essential to a negotiated settlement's goal of purchasing—or selling—peace. Thus, in *Town of Newton v. Rumery*, 480 U.S. 386 (1987), the Court held that a knowing and voluntary waiver of a right that might be raised in looming proceedings *arising out of the dispute* to be settled was valid. But a constitutional right surrendered as part of a settlement must have "a close nexus—a tight fit—between the specific interest the government seeks to advance in the dispute … and the specific right waived."[15] *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1399 (9th Cir. 1991) (invalidating the "waiver" of a settling party's constitutional right to run for or serve in elective office extracted by a school district as a settlement condition). Courts applying *Davies* have thus rejected conditions of settlement with government entities demanding a greater surrender of constitutional liberty than is necessary to terminate litigation.[16]

SEC's gag policy demands permanent surrender of First Amendment speech rights. That is forbidden by our Constitution. *See United States v. Goodwin*, 457 U.S. 368, 372–78 (1982) ("while an individual certainly may be penalized for violating the law, he … certainly may not be punished for exercising a protected statutory or constitutional right."). Such a condition is far from

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[14] *Leonard v. Clark*, 12 F.3d 885, 891 (9th Cir. 1993), cited at SEC Mem.17, is of no support to its view that government may condition the surrender of a First Amendment right upon settlement. The waiver was proposed by the settling party, not a condition imposed by the city. *United States v. Int'l Brotherhood of Teamsters*, 931 F. 2d 177 (2d Cir. 1991), is similar to *Leonard*.

[15] In *Berry v. Peterson*, 887 F.2d 635 (5th Cir. 1989), the court found that the waived § 1983 claim arose out of the dispute being settled. *Lake James Commun. Volunteer Fire Dep't v. Burke County*, 149 F. 3d 277 (4th Cir. 1998) similarly involved a government-as-contractor (not enforcer) term that required a fire department that had ignored fire-service calls to agree not to contest petitions from districts seeking dependable fire service. The waiver was limited in time and narrowly tailored to its past conduct and the public interest in choosing dependable fire protection.

[16] *Compare, e.g., Lil' Man In The Boat, Inc. v. City & Cty. of San Francisco*, 2017 WL 3129913, at *9–10 (N.D. Cal. July 24, 2017) (waiver of future disputes fails the close nexus test) *with Louisiana Pac. Corp. v. Beazer Materials & Servs., Inc.*, 842 F. Supp. 1243, 1253–54 (E.D. Cal. 1994) (waiving right of judicial review is integral to termination of litigation); *Emmert Indus. Corp. v. City of Milwaukie*, 307 F. App'x 65, 67 (9th Cir. 2009) (similar).

necessary to effectuate the cessation of proceedings and flagrantly violates the Constitution.[17]

The final nail in the coffin burying SEC's waiver arguments comes from a case cited in its own brief, *United States v. ITT Continental Baking Co*., 420 U.S. 223, 235 (1975), where the Supreme Court said consent judgments are "compromises in which the parties give up something they might have won in litigation and waive their rights to litigation." Indeed. The right to publicly question SEC's allegations was not a right, win or lose, that defendants could have lost if SEC had taken them to trial. Thus, as SEC unwittingly admits by citing *ITT Continental Baking*, the no-public-denial provision is not a properly negotiable term of a settlement agreement.[18]

In sum, when SEC equates one constitutional right with another, it ignores core First Amendment doctrine as well as controlling case law that requires that the surrendered right be one that might have been won in the litigation with a close nexus to the dispute being settled.

SEC admits that the "consent" it requires stems from a 1972 Commission policy, pursuant to which the Commission "would not agree to settlements where defendants 'consent to a judgment or order that imposes a sanction while denying the allegations in the complaint.'" SEC Mem. 3. The SEC's later sly intimation that defendants' surrender of First Amendment rights "are the product of voluntary agreement," SEC Mem. 15, is thus belied by that binding admission.[19] Novinger was not gagged pursuant to a "give-and-take" negotiation; he was strong-armed to surrender his First Amendment rights through a codified agency policy, a systematic scheme prohibited by the Supreme Court. *United States v. Jackson*, 390 U.S. 570, 582 (1968). (invalidating

[17]Unconstitutional conditions apply to plea agreements. *United States v. Saltzman*, 537 F.3d 353, 359 (5th Cir. 2008) (charges may not be increased as a penalty for invoking a right); *Warner v. Orange Cty. Dep't of Prob*., 968 F. Supp. 917, 923 (S.D.N.Y. 1997), *aff'd*, 173 F.3d 120 (2d Cir. 1999) (free exercise rights cannot be waived).

[18]Consent decrees are treated as contracts, *ITT Cont'l Baking*, *supra* at 238, and courts will not enforce contractual provisions that violate public policy. *Fomby-Denson v. Dep't of the Army*, 247 F.3d 1366, 1377-78 (Fed. Cir. 2001) (settlement agreement cannot silence defendant from making a truthful report about plaintiff to authorities.)

[19]*See also* James Valvo, *The CFTC and SEC Are Demanding Unconstitutional Speech Bans in Their Settlement Agreements*, Yale J. Reg. Blog (2017) (SEC enforcers say the provision is non-negotiable).

programmatic, across-the-board government policies that infringe constitutional rights); *Bordenkircher v. Hayes*, 434 U.S. 357, 362–63 (1978) ("[F]or an agent of the state to pursue a course of action whose objective is to penalize … legal rights is patently unconstitutional.").

SEC press releases are notorious for their high visibility and inflammatory rhetoric. They forever alter lives within moments, destroy reputations, and put businesses and their employees on the road to ruin. What is less understood—though widely known to securities insiders, is that sometimes SEC charges are flimsy, uncorroborated, based on compromised evidence and so warrant swift settlement when it becomes clear that SEC cannot carry its burden. In addition, the government can and does overcharge violations hoping something will stick. Many Americans also do not know going into the process that settlement requires a lifetime gag—and if you later talk, the agency can reopen the case. What this means in practice is that the devastating, career-ending SEC publicity is the final word. Through this device, the agency locks in a complete and enduring win in the court of public opinion. Targets who settle their cases to stanch the costs of federal prosecution are left forever unable to defend themselves in the media. This is profoundly dangerous, as it blocks the sunlight of speech that keeps our Republic free.

SEC's assertion that Novinger freely agreed is untenable; he submitted but did not consent. Indeed, Novinger's "waiver" of constitutional rights would not be upheld even under the relaxed standards governing such waivers in agreements between *private* parties unconstrained by the First Amendment, because "courts indulge every reasonable presumption against waiver" of constitutional rights. *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937).

B. The Gag Order Is a Content-Based Restriction Contrary to the Public Interest

The Gag Order's sweeping and perpetual speech restriction is far from the least restrictive means of achieving any claimed government interest. SEC can require specific admissions as part

of the settlement. Its blanket gag now overwhelmingly works *against* the public interest. *Waters v. Churchill*, 511 U.S. 661, 674 (1994). *See* Def. Mem. at §IV.

C. The Gag Order Forbids Truthful Speech

Novinger seeks to speak the truth but cannot. His gag order not only puts the SEC in a constitutionally infirm position, but an ethically compromised one. As the *Overbey* court put it, "it is difficult to see what distinguishes [the gag] from hush money." 930 F.3d at 226. The SEC has even selectively stacked the deck in the exception it created to lift its one-size-fits-all gag order. For SEC permits a defendant to speak the truth under oath in other proceedings but not to speak up truthfully in his own defense in future *SEC proceedings*. This serves only to cripple SEC targets for life from fully defending themselves in future SEC enforcement matters. Few people would understand that by settling, they will be thus disarmed and defenseless in any future SEC proceeding. The judiciary should not become complicit in such ongoing constitutional error.

CONCLUSION

Congress itself could not pass a blanket statute gagging all persons who settle cases with the U.S. without violating the plain terms of the First Amendment. Of the thousands of state and federal agencies regulating the lives of Americans, SEC is one of only two that thinks it has the power (via a devious *de facto* rule issued without notice and comment) to do what is forbidden to an elected and thus far more accountable Congress.[20] This Court should grant defendants' motion.

[20]NCLA has also filed a *Petition to Amend* with the CFTC, the only other agency known to have a gag rule, that CFTC slipped into the *Federal Register* in 1998 with no provision for notice and comment. "Acquiescence for no length of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the constitution .... A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period, in violation of the constitutional prohibition, without the mischief which the Constitution was designed to guard against appearing, or without any one being sufficiently interested in the subject to raise the question; but these circumstances cannot be allowed to sanction a clear infraction of the Constitution." Thomas M. Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 71 (1868).

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CERTIFICATE OF COMPLIANCE

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

/s/ Margaret A. Little_____
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CERTIFICATE OF SERVICE

I certify that on this 12th day of July 2021, I have served a copy of the above and foregoing on all counsel of record through the Court's CM/ECF system.

/s/ Margaret A. Little_____
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