No. 19-4197-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff – Appellee,
v.
BARRY D. ROMERIL,
Defendant – Appellant,

PAUL A. ALLAIRE, G. RICHARD THOMAN, PHILIP D. FISHBACH,
DANIEL S. MARCHIBRODA, GREGORY B. TAYLER,

Defendants.

On Appeal from the United States District Court
for the Southern District of New York

PETITION FOR REHEARING OR REHEARING *EN BANC*

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CERTIFICATE OF INTERESTED PERSONS

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

Appellant

Barry D. Romeril

Appellees

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RULE 35(b)(1) STATEMENT

This petition raises an issue of exceptional importance: Do courts have power to issue content-based "no-deny" prior restraints on truthful speech as non-negotiable conditions of settlement of SEC allegations? The panel decision in this case was controlled by a prior decision of the Second Circuit in *Crosby v. Bradstreet Co.*, 312 F. 2d 483 (2d Cir. 1963), which held in its entirety:

> We are concerned with the power of a court of the United States to enjoin publication of information about a person without regard to the truth, falsity, or defamatory character of the information. Such an injunction, enforceable through the contempt power, constitutes a prior restraint by the United States against the publication of facts which the community has the 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.

Id. at 485.

Such prior restraints are void in this circuit even where *private parties* agreed to the restraint. This principle applies with far greater force when *the government* imposes a non-negotiable gag in all SEC settlements.

The panel was untroubled by such "consents," reasoning that courts routinely enforce individuals' agreements to waive their constitutional rights. But the panel failed to recognize the salient points here: Whereas waiver of rights to jury trial, to confront witnesses, or to appeal are necessarily part of *settling* cases, truthful free speech is not at issue in any SEC enforcement action, win or lose, and accordingly is not on the bargaining table. Further, the government demands a waiver of future

rights—an impermissible condition in any civil or criminal government enforcement action. The Constitution forbids all branches of government from abridging freedom of speech or the press, and rights of petition protected by the First Amendment. Congress itself lacks this power—as do mere agencies. And courts are without power to enter orders that abridge those rights.

In ruling to the contrary, the panel decision created an intra-circuit split which must be decided *en banc*. Fed. R. App. P. 35(a)(1) provides for "*en banc* consideration [when] necessary to secure or maintain uniformity of the court's decisions." Rather than adhere to the "law of the circuit," the panel distinguished *Crosby* on facts wholly irrelevant to its 1963 decision, positing "likely" facts and possible arguments that never appear in the actual *Crosby* case file. (*See* Special App'x)[1]. In short, the panel decision cannot be squared with *Crosby*.

Because the panel decision distinguishes *Crosby* on grounds never suggested by SEC's briefing nor raised at oral argument, appellant was never able to brief or argue the panel's theory of decision. By straying so far afield, the panel violated the "party presentation principle" recently enforced by a unanimous Supreme Court in

[1] Contemporaneously with this petition, appellant filed a motion to provide the court access to its own archived file in *Crosby*. Alternatively, the court can take judicial notice of its file. *Kramer v. Time Warner, Inc.*, 937 F. 2d 767, 774 (2d Cir. 1991) (courts routinely take judicial notice of their own files and public filings).

United States v. Sineneng-Smith, 140 S. Ct. 1575 (2020) (confining circuit courts to the issues raised by the parties).

The panel decision directly conflicts with numerous controlling Supreme Court First Amendment cases as fully briefed by appellant and *amici*.[2]

The panel decision further conflicts with the Ninth, Fourth and Sixth Circuits which have held that courts lack power to enter unconstitutional prior restraints and content-based speech restrictions as conditions on settlement or agreements with government. *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1399 (9th Cir. 1991) (government's extraction of a waiver of a party's constitutional right to seek public office in the future as a condition to settling the lawsuit was unconstitutional condition that could neither be won nor lost in the litigation.) Similarly, the Fourth Circuit recently invalidated the portion of a consent settlement that required the plaintiff to agree "not to speak to the media" about police misconduct. *Overbey v. Mayor of Balt.*, 930 F.3d 215, 219 (4th Cir. 2019). *G & V*

[2] *See e.g. Near v. Minnesota*, 283 U.S. 697 (1931) (government may not regulate prospective speech); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (judiciary may not enforce unconstitutional contracts); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) (even convicted murderers may speak about their cases); *Bantam Books v. Sullivan*, 372 U.S. 58 (1963) (government coercion, or even exhortation that suppresses "objectionable" speech prohibited). This includes the right of the public to hear speech, *Martin v. City of Struthers*, 319 U.S. 141 (1943) and its progeny. *See Brief Amicus Curiae of First Amendment Scholars*, Dkt.36; *Brief Amicus Curiae of the Competitive Enterprise Institute*, Dkt.49; *Brief Amicus Curiae of Americans for Prosperity Foundation,* Dkt.44.

Lounge, Inc. v. Michigan Liquor Control Comm'n, 23 F. 3d 1071, 1077 (6th Cir. 1994) (contract that conditioned a government benefit on waiver of right to free expression unenforceable).[3]

Finally, the question raised in this appeal has enormous individual, collective, and decades-long impact on Americans' civil liberties and transparency in SEC's regulation, which settles 98% of its cases. The panel decision, if not reheard, will make this Circuit complicit in hiding nearly all SEC agency enforcement practices from public scrutiny—in perpetuity. In Romeril's case, the First Amendment violation occurred 18 years ago and every day since, and it will occur tomorrow and every day in the future. A court's institutional discomfort in addressing this far-too-long entrenched practice that violates the Constitution and its own Circuit precedent should not outweigh this Court's duty to uphold and defend the Constitution.

/s/ Margaret A. Little
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[3] *See also* Remarks by Justice Ginsburg, Judicial Conf. Second Circuit, 221 F.R.D. 38, 223 (2002) (suggesting Second Circuit is "a bit too resistant to en banc rehearing" where it is the outlier in a circuit split).

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STATEMENT OF FACTS AND DISPOSITION OF CASE

A. SEC's Requirement of No-Deny as a Condition of Settlement

SEC's opening brief at the district court admits that "the Commission will accept a settlement *only if* the defendant agrees to such a no-deny provision." SEC Br.1. No. 03-cv-4087-DLC (emphasis added). SEC's own data show that 98% of persons charged by SEC settle.[4] The *Wall Street Journal* reports that a 2015 study by the U.S. Chamber shows that just an investigation by SEC imposes $4.6 million in average direct costs and, even when no wrongdoing is found, some investigations exceed $100 million. (Neither figure includes indirect costs in productivity and reputational harm.) *See* William R. Baker III and Joel H. Trotter, *Nothing to Fear from the SEC*, WALL STREET JOURNAL (Oct. 28, 2015).

Current SEC Commissioner Hester Peirce has warned about the dangers of regulation-by-settlement:

> Often, given the time and costs of enforcement investigations, it is easier for a private party just to settle than to litigate a matter. The private party likely is motivated by its own circumstances, rather than concern about whether the SEC is creating new legal precedent. However, the decision made by that party about whether to accede to SEC's proposed order can have far-reaching effects. Settlements—whether appropriately or not—become precedent for future enforcement actions and are cited within and outside the Commission as a purported basis for the state of the law.

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[4] *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).

Hester M. Peirce, Commissioner, Sec. & Exchange Comm'n, *The Why Behind the No* (May 11, 2018) https://bit.ly/3H5oxNM. By such means, nearly all SEC enforcement activity is shielded from balanced public view, in violation of the public's "listener" interest protected by the First Amendment. Because all settlements impose a gag, SEC's press releases are the last public word, allowing the government a monopoly on information about its cases as the price of all settlements, something it could never win at trial.

No act of Congress imposes such a requirement as a condition of settlement of government cases— it is hard to envision such a law ever being enacted.[5] Of the hundreds of federal agencies, only two, SEC and CFTC, have this outlier rule, both slipped into the Federal Register as "housekeeping" rules without prior notice and comment. These rules that bind thousands are *not* housekeeping rules. *See* Sp. App'x to App.'s Op. Br. SA02-11. Other agencies manage to robustly regulate Americans without imposing a gag about the process as the price of peace.

[5] In the only instance known to appellant where Congress enacted a gag, it was summarily held unconstitutional. *McBryde v. Committee to Review Circuit Council Conduct,* 83 F. Supp. 2d 135 (D.D.C. 1999), *judgment affirmed in part, vacated in part by McBryde v. Committee to Review Circuit Council Conduct*, 264 F.3d 52, 55 (D.C. Cir. 2001) (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). If the panel decision is not reheard, this will mean that federal judges enjoy First Amendment rights that they are prepared to deny to the public.

B. Statement of Facts—*SEC v. Allaire*

On June 5, 2003, SEC charged defendants with fraud and accounting violations of the federal securities laws; defendants settled without admitting or denying SEC's allegations. SEC's required "consent" (commonly denoted a "gag" by courts and commentators) provided that the content of Romeril's future speech may not create even an *impression* of denial:

> 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 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.

JA70, at ¶ 11.

The collateral bar rule prohibits Romeril from speaking without first challenging the gag in the court that entered it, so in May of 2019, Romeril moved pursuant to Rule 60(b)(4) for relief from this provision. Judge Cote denied relief saying: 1) the motion was not timely and 2) Romeril had not identified a jurisdictional defect or violation of due process that voided the judgment. On appeal, the panel decision did not address timeliness, holding that Romeril must establish "a

total want of jurisdiction" and may not complain "that the provision violates his right to due process" because he agreed to SEC's condition on settlement. Op.11, 14, 19.

ARGUMENT

I. THE CONSTITUTION, SUPREME COURT AND SECOND CIRCUIT PRECEDENTS REQUIRE THAT THIS COURT VACATE ROMERIL'S GAG

A. SEC's Gag Rule, a Prior Restraint on Speech, Violates the Constitution

The Constitution binds every branch of government. When Congress enacts a law that exceeds its enumerated powers or otherwise violates the Constitution, the law is "void." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). All three branches are so bound; any unconstitutional exercise of power is "void." *Montgomery v. Louisiana*, 577 U.S. 190, 203 (2016). The panel opinion contravenes the Supreme Court's holding that a judgment may be void if the court entered "a decree which is not within the powers granted to it by the law." *United States v. Walker*, 109 U.S. 258, 265-67(1883), *distinguished in United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2018) ("…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, … its decree is void."). *Ronnie Van Zant, Inc. v. Cleopatra Records, Inc*, 906 F.3d 253, 257 (2d Cir. 2018) (prior restraint by private parties unenforceable.)

B. Panels in This Circuit Must Follow Earlier Panel Precedent

"It is a longstanding rule of our Circuit that a three-judge panel is bound by a prior panel's decision until it is overruled either by this Court sitting *en banc* or by the Supreme Court." *Doscher v. Sea Port Grp. Sec.*, LLC, 832 F. 3d 372, 378 (2d Cir. 2016); *Adams v. Zarnel*, 619 F. 3d 156, 168 (2d Cir. 2010). "The overruling by one panel of … the Second Circuit of the holding of a case decided by a previous panel is perilous. It tends to degrade the expectations of litigants, who routinely rely on the authoritative stature of the Court's panel opinions. It also diminishes respect for the authority of three-judge panel decisions and opinions by which the overwhelming majority of the Court's work is accomplished." *In re Arab Bank*, 808 F 3d 144, 157 (2d Cir. 2015).

Following precedent is a base-line attribute of justice:

> If a group of cases involves the same point, the parties expect the same decision. It would be a gross injustice to decide alternate cases on opposite principles … Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts.

Benjamin A. Cardozo, *The Nature of the Judicial Process*, 33-34 (22nd ed. Yale University Press, 1964) (1921).

C. The Panel Decision, Relying on Irrelevant, Uncertain, and Unbriefed Facts, Misconstrues *Crosby* and Creates an Intra-Circuit Split

Two brothers, Stanford and Lloyd Crosby were indicted for mail fraud in 1928. Stanford was acquitted by a jury that hung for Lloyd. Lloyd subsequently

pleaded guilty. Bradstreet Co. ("D&B") reported that both brothers were guilty of fraud. Stanford sued for libel; that case was later settled in 1933 for $300, a release, and an injunction that forbade D&B from ever publishing anything about the business activities of the brothers and others, "whether present, past or future."

Thirty years later, Stanford needed a D&B rating and so moved under Rule 60 to terminate the injunction. Lloyd objected, arguing that D&B was bound by contract; Stanford said Lloyd lacked party standing. D&B initially opposed termination, unless it could rate both brothers. SA28-29. D&B's later brief (SA57-68) directly challenged the injunction under both federal and New York constitutions, admitted it "was improvident" for D&B to have agreed to an unconstitutional prior restraint, and that it had never since agreed to one. SA64.

The panel distinguishes *Crosby*'s holding with this rationale:

> Although the Court did not explicitly frame its reasoning in these terms, the disputed provision barred D&B from making statements not only about Stanford (the only plaintiff in the case), but also about Lloyd and other individuals who were not parties to the litigation that led to the order. In that sense, the district court lacked jurisdiction over these other persons, who were not before the court and likely had not had notice of the proceedings or an opportunity to be heard.

Op.16.

The *Crosby* decision engaged in no such reasoning. *Crosby* did not reach the question the panel posits because its *disposition* was that the injunction was a void prior restraint that no court could enter. SA108

The "other individuals" were Stanford and Lloyd's brother Bernard, their father Henry Grossberg, and two related entities long since defunct by 1963. SA62-63. The 1933 district court file is not available, but what we *do* know is that the 1963 motion to terminate the injunction at the district court was served on *all* individual parties with proof provided to the court that the entities were defunct. SA25-30.[6] Brother Bernard agreed to vacatur; Grossberg, though served, ignored the order to show cause. SA27-28.

The panel incorrectly states that Romeril must establish "a total want of jurisdiction" to void the order under Rule 60. Jurisdiction was fully briefed (SA64-68) to the *Crosby* court by D&B:

> While the Court in making the order of July 8, 1933 may have had jurisdiction over the parties and the claim set forth in the complaint, the fact is that in granting an injunction the court acted in excess of its jurisdiction and power which, it is submitted, makes that order a nullity.

SA68. The *Crosby* court agreed. SA108

Appellant and *amici* briefed a wealth of cases where courts with personal and subject-matter jurisdiction have voided unconstitutional terms of settlements. *See*

[6] All parties likely knew *all* about the 1933 injunction that protected them from credit reporting of Lloyd's conviction that Lloyd averred had harmed them all. ("Prejudice to any one of us was prejudice to all." SA31-33. *Van Zant* recognizes an injunction may bind an entity that acts "in active concert or participation" with a party to the injunction. If so, all had notice of the injunction. *Espinosa* holds that actual notice won't disturb a judgment under Rule 60. This undermines the panel's speculative alternate rationale for *Crosby*.

e.g. Davies, 930 F.2d at 1399; *Overbey*, 930 F.3d at 219; *SEC v. Bolla*, 550 F. Supp. 2d 54 (D.D.C 1983) (holding void under Rule 60(b)(4) a penalty Congress lacked power to assess) and where grounds other than jurisdiction or due process void a judgment, *e.g., Carter v. Fenner*, 136 F. 3d 1000 (5th Cir. 1998).

Since appellant's position is that the court has no power (power=jurisdiction) to gag him and that it violates due process to do so, Romeril amply established both criteria, *points evaded by the panel altogether*.

The panel's reasoning fails when it asserts consent decrees may be upheld "in which the parties give up something they might have won in litigation and waive their rights" thereto. Op.12.[7] Romeril's right to speak truthfully about his case was never at stake. The panel decision allows SEC to use mere allegations to assert powers the agency could not win at trial. "By virtue of [mere] allegations of past wrongs, the agencies are trying to assert active control over the defendants' future speech." J. Valvo, *The CFTC and SEC Are Demanding Unconstitutional Speech Bans in Their Settlement Agreements*, YALE J. REG. (2017), https://bit.ly/3wJVbzf.

[7] The panel's waiver cases are off the mark. *United States v. Int'l Bhd. of Teamsters*, 931 F.2d 177, 187 (2d Cir. 1991) (agreement not a forced government condition); *Leonard v. Clark*, 12 F.3d 885, 891 (9th Cir. 1993) (waiver proposed by settling party, not a government condition); *In re George F. Nord Bldg. Corp.*, 129 F.2d 173 (7th Cir. 1942) (privately negotiated agreement); *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (CIA agent's pre-employment government secrets agreement). The panel's reliance on *Van Zant* is wholly misplaced since this Court refused to enforce a speech suppressing injunction under *private* contract. *See Brief Amicus Curiae of First Amendment Scholars* at 5, 9.

Why did the *Crosby* court reject both Lloyd's claim that D&B was bound by its deal (these were private parties, after all) and Stanford's claim that Lloyd was not a party to the 1933 case? Because of the public's interest in the truth: it "constitute[d] a prior restraint by the United States against the publication *of facts which the community has the right to know* and which Dun & Bradstreet had and has the right to publish." *Crosby*, at 485 (emphasis added). This court should not reverse *Crosby*, but celebrate it, and on rehearing, vindicate its holding that courts may not collude in judgments that suppress a party's right to speak or publish, and deny public access to the truth.[8]

The panel opinion further erroneously interprets due process as limited to notice and opportunity to be heard. To attach a penalty for doing what the First Amendment protects and which Romeril has every right to do—speak truthfully now and in the future—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).

[8] The public wants to know what Romeril has to say. Stephen Quinlivan, *Are SEC Gag Orders Unconstitutional?*, JDSupra (May 8, 2019), https://bit.ly/3knqVpp ("Left unsaid is what Mr. Romeril has to say after lo, these many years.").

II. *ESPINOSA* DOES NOT ADDRESS THE FIRST AMENDMENT OR DEFINE THE UNIVERSE OF GROUNDS FOR RULE 60(b)(4) VOIDNESS

The panel decision misreads *Espinosa*. That case did *not* purport to define the universe of Rule 60(b)(4) relief,[9] nor how Rule 60(b)(4) applies to court orders violating the First Amendment. Both *Espinosa* and this Circuit's decision in *In re Texlon Corp.*, 596 F. 2d 1092, 1099-1100 (2d Cir. 1979) cited by the panel, acknowledge that "rare instances of a clear usurpation of power will render a judgment void." *Espinosa*, 559 U.S. at 271 (citation omitted). Usurpation of power is precisely what grounds this appeal.

III. THE PANEL DECISION VIOLATES THE PARTY PRESENTATION PRINCIPLE

The panel violated the "party presentation principle" recently enforced by a unanimous Supreme Court in *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). The Supreme Court vacated the Ninth Circuit's decision and ordered "reconsideration shorn of the overbreadth inquiry interjected by the appellate panel and bearing a fair resemblance to the case shaped by the parties." *Sineneng-Smith*, at 1582. In *Sineneng-Smith,* the Ninth Circuit permitted supplemental briefs on the court's newly-introduced theories. Absent rehearing, the parties here will lack any opportunity to address the panel's novel construction of *Crosby*. When the *Crosby*

[9] *Brumfield v. Louisiana State Board of Education* recognized "*Espinosa* presented no opportunity to review lower courts' assertions construing Rule 60(b)(4) … The Supreme Court, in sum, has not definitively interpreted this rule." 806 F. 3d 289, 298 (5th Cir. 2015).

file itself refutes the court's speculative recasting of its grounds for decision, rehearing is essential.

IV. THE ENORMOUS IMPACT OF SEC'S OUTLIER PRACTICE CALLS FOR REHEARING

The problem of unconstitutional gags is a recurring one of vital importance to anyone faced with defending themselves in SEC enforcement proceedings. Whether brought administratively or in court, SEC's enforcement regime exacts a personal and financial toll so high that 98% of respondents settle. Denying rehearing only perpetuates SEC's systematic First Amendment violations, which have already had a 50-year unconstitutional reign. "Acquiescence for no length of time can legalize a clear usurpation of power … frequently yielded to merely because it is claimed." Thomas Cooley, *A Treatise on Constitutional Limitations*, 71 (1868). "The construction given to the laws by … the executive government is necessarily *ex parte*, without the benefit of an opposing argument … [but] the judicial department … is not at liberty to surrender or waive [constitutional rights]." *United States v. Dickson*, 40 U.S. 141, 161-62 (1841) (Story, J.).

A final word about age. The panel states that "*Crosby* does not control this case … it was decided more than fifty years ago." Op.15. *Marbury v. Madison*, which retains as much force today as when issued over two hundred years ago, holds that it is "emphatically" the duty of judges "to say what the law is," *Marbury* at 177, not what the law might have been.

CONCLUSION

This Court should grant rehearing or rehearing *en banc*.

Respectfully submitted,

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November 12, 2021

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this document complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(ii). It is printed in Times New Roman, a proportionately spaced font, and includes 3883 words, excluding items enumerated in Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). I relied on my word processor, Microsoft Word, to obtain the count.

/s/ Margaret A. Little

CERTIFICATE OF ELECTRONIC COMPLIANCE

I hereby certify that in the foregoing brief, filed using the Second Circuit CM/EFC filing system, all required privacy redactions have been made, any required paper copies to be submitted to the Court are exact copies of the version submitted electronically, and the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program, and is free of viruses.

/s/ Margaret A. Little

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2021, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Second Circuit using the appellate CM/EFC filing system and that service will be accomplished using the appellate CM/ECF system.

/s/ Margaret A. Little