No. 21-10985

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Securities and Exchange Commission,
Plaintiff-Appellee,

v.

Christopher A. Novinger and ICAN Investment Group, LLC
Defendants-Appellants.

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

APPELLANTS' OPENING BRIEF AND SPECIAL APPENDIX

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CERTIFICATE OF INTERESTED PERSONS

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

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STATEMENT REGARDING ORAL ARGUMENT

Appellants Christopher A. Novinger (Novinger) and ICAN Investment Group, LLC (ICAN) respectfully request oral argument. This case involves important constitutional questions regarding First Amendment and due process of law arising from government suppression of speech for decades by the Securities and Exchange Commission (SEC), an agency that brings—and settles—many of its cases in this circuit. It also involves important concerns with adherence to the rule of law in this circuit because the district court disregarded clear and controlling Supreme Court and Fifth Circuit precedent. The order below threatens to make federal district courts complicit in perpetuating and enforcing an outlier practice unique to two federal agencies—SEC and CFTC—which unconstitutionally requires settling defendants to never publicly question the charges SEC brought against them. Prompt correction by this circuit is warranted. Oral argument will help the Court more fully develop the record to do so.

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JURISDICTIONAL STATEMENT

Novinger and ICAN appeal from the district court's Order denying their Rule 60(b) Motion for Relief from Judgment by opinion and order dated August 10, 2021. ROA.508; RE.27. The basis for jurisdiction in the district court was 28 U.S.C. § 1331. This court has jurisdiction over the appeal under 28 U.S.C. § 1291.

Appellants filed a timely notice of appeal on September 29, 2021 pursuant to Fed. R. App. P. 4. This appeal is from a final order that disposed of all appellants' claims raised in their Motion for Relief from Judgment.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did the district court err in failing to follow controlling Supreme Court and circuit court authority when it denied appellants' constitutional challenge to SEC's 2016 gag order? More specifically,

1. Does Federal Rule of Civil Procedure 60 provide a basis to find a gag void as violating the First Amendment and Due Process of Law?

2. Does a gag order violate the First Amendment when it operates as a prior restraint in perpetuity, suppresses speech based on its content, gives an agency unbridled enforcement discretion, forbids truthful speech, compels speech, suppresses information the public has a right to hear, and infringes on rights of petition?

3. Is the gag order an unconstitutional condition forbidden by controlling Supreme Court authority?

4. Does the gag order violate Novinger and ICAN's due process rights?

5. Does the gag order violate due process because SEC issued it without statutory authority and cannot bind appellants by a housekeeping rule?

6. Do gag orders violate due process because they implicate the judiciary in violating the Constitution?

STATEMENT OF THE CASE

On November 17, 1972, the SEC published its Gag Rule, codified at 17 C.F.R. § 202.5(e).[1] In that publication, 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." 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

[1] The full text of the 1972 regulation 17 C.F.R. § 202.5 under which SEC initiated the practice of inserting gag orders in its settlement documents is in an addendum to this brief. The statutory provisions 15 U.S.C. §§ 77s, 78w(a), 79t (now repealed), 80a-37, 80b-11 that SEC erroneously claimed to have authorized the Gag Rule's promulgation without notice and comment, are also set forth therein.

publication, notice and comment before enacting any rule that binds regulated persons or entities.[2]

On May 11, 2015, SEC filed a Complaint against all defendants in this action, including Novinger and ICAN. Subsequently, SEC, Novinger, and ICAN reached a settlement agreement and submitted a proposed final judgment to the district court below. As a condition of settlement with SEC, Novinger and ICAN were required to sign a consent order (Consent) to be incorporated by reference into a proposed final judgment. Paragraph 12 of Novinger's Consent and paragraph 10 of ICAN's Consent provided, in relevant part:

> Defendant understands and agrees to comply with the terms of 17 C.F.R. § 202.5(e), which provides in part that it is the Commission's policy "not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings," and "a refusal to admit the allegations is equivalent to a denial, unless the defendant or respondent states that he neither admits nor denies the allegations." As part of Defendant's agreement to comply with the terms of Section 202.5(e), Defendant: (i) will not take any action or make or permit to be made any public statement denying, directly or indirectly, any allegation in the complaint or creating the impression that the complaint is without factual basis; (ii) will not make or permit to be made any public statement to the effect that Defendant does not admit the allegations of the complaint, or that this Consent contains no admission of the

[2] The New Civil Liberties Alliance, counsel for appellants, has petitioned the SEC to amend its Gag Rule because it violates the First Amendment, due process of law, and the APA. New Civil Liberties Alliance, *Petition to Amend* (Oct. 30, 2018), *available at* http://bit.ly/2XfFD3Z. SEC has taken no action on the petition, despite the passage of over three years.

> allegations, without also stating that Defendant does not deny the allegations; (iii) upon the filing of this Consent, Defendant hereby withdraws any papers filed in this action to the extent that they deny any allegation in the complaint.… If Defendant breaches this agreement, the Commission may petition the Court to vacate the Final Judgment and restore this action to its active docket. Nothing in this paragraph affects Defendant's: (i) testimonial obligations; or (ii) right to take legal or factual positions in litigation or other legal proceedings in which the Commission is not a party.

ROA.310, 330.

The district court did not hold a hearing or allocution concerning the execution of the Consent Order, and on June 6, 2016, the district court entered judgments against Novinger and ICAN. ROA.1 (*see* DKT36-37). Novinger and ICAN continue to be bound by the Gag Order provision.

Novinger desires to engage in truthful public statements concerning SEC's case against him and ICAN. However, because Novinger does not want to violate the Consent Order or risk the consequences, which include reopening the case against him, he has refrained from making truthful statements that might indirectly "creat[e] an impression" that the complaint lacked a factual basis or was otherwise without merit. Furthermore, such action on his part would deny him relief under the collateral bar rule set forth below. For those reasons, on June 17, 2021, he and ICAN moved before Judge O'Connor for relief from judgment under Rule 60(b) and subsections (4) and (5) in the civil action in which the Order had been entered, No. 4:15-cv-358-O.

The issues were fully briefed to the district court by appellants and SEC. The district court denied relief on August 10, 2021.

The District Court denied appellants' motion for several reasons including "Defendant's reliance on … out-of-circuit precedent without any mention of the Supreme Court's recent holding in [*United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010)]." It further held that appellants "consented willingly" to the mandatory gag, and thus "failed to meet their threshold burden under Rule 60(b)(4)" to establish a due process violation, and finally that appellants failed to establish grounds for relief under Rule 60(b)(5). The court further asserted in a final footnote that "[w]hile the court is mindful of the litany of First Amendment concerns presented in Defendants' briefing, Rule 60 is not an appropriate avenue by which to address those concerns."

Appellants filed a timely notice of appeal on September 29, 2021.

SUMMARY OF THE ARGUMENT

The First Amendment of the Constitution provides that "Congress shall make no law … abridging the freedom of speech, or of the press; or the right of the people … to petition the Government for a redress of grievances." U.S. Const. amend. I. The First Amendment applies to court action. *Shelley v. Kraemer*, 334 U.S. 1 (1948). As recognized by law treatises and as followed by the Second Circuit in *Crosby v. Bradstreet*, 312 F. 2d 483 (1963), *cert. denied*, 373 U.S. 911 (1963), a party subject

to a judicially imposed unconstitutional prior restraint on his speech may move under Fed. R. Civ. P. 60(b)(4) to have such an order vacated. Such a motion may be made at any time under the controlling law of this and other circuits construing Rule 60(b)(4). *Briley v. Hidalgo*, 981 F.2d 246, 249 (5th Cir. 1993).

The district court erred in not following this factually indistinguishable and well-reasoned precedent for no better reason than that it was "out-of-circuit." The district court also failed to adhere to this circuit's holding in *Brumfield v. La. State Bd. of Educ.*, 806 F. 3d 289, 301 (5th Cir. 2015) (Jones, J.), which recognized that "*Espinosa* ... [did] not definitively interpret[] [Rule 60(b)(4)]." *Id.* at 298.

Appellants' due process claims which hinge on the non-voluntariness of an "agreement" to an SEC-mandated gag and that due process consists of more than just notice and an opportunity to be heard were not addressed by the court. It is a fundamental due process violation when the government attaches a penalty for doing what the law plainly allows Appellants to do—speak truthfully. *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). The SEC gag further violates due process because it is vague and applies to speech that even gives the "impression" that the government charges were unfounded. A gag that is neither authorized by Congress nor lawfully promulgated by SEC violates due process.

The gag order violates the First Amendment because it is a forbidden prior restraint and a content-based viewpoint restriction on speech that suppresses criticism of government impermissibly favoring the government's view of the case.

It is also imposed as an unconstitutional condition upon defendants making the difficult decision to settle with a powerful government agency, which forever damages reputations and livelihoods and shields SEC's enforcement activity from balanced public view, in violation of the public's "listener" interest protected by the First Amendment.

Congress itself could not enact a law imposing such a condition on settlement with the government; a mere administrative agency *a fortiori* lacks any such authority. Finally, the district court admits that it declined to address the bulk of Novinger's arguments in a footnote dismissing Rule 60 as an appropriate avenue to address the numerous "First Amendment concerns addressed in Defendants' briefing." But the collateral bar rule prohibits Novinger from speaking without first challenging the gag in the court that entered it. *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995); *In re Reno*, 2003 Bankr. LEXIS 2315 (Tex. N. Bkr. July 1, 2003) (person subject to court order must comply or seek relief from the court that entered the order.) SEC itself recently argued that "the proper vehicle is review of the consent

judgment[] before the court[] that entered [it].[3] Accordingly, the district court's cryptic surmise that "Rule … 60 is not an appropriate avenue by which to address" First Amendment concerns runs counter to this authority, *Crosby*, and treatises such as Wright & Miller, which recognize that Rule 60 is indeed the proper vehicle to void all or part of a judgment that is unconstitutional.

Section I of this brief will focus on the opinion's failure to follow controlling Supreme Court and circuit precedent. Sections II-VII will address the constitutional doctrines that were not addressed by the district court but were fully raised and preserved below.

ARGUMENT

I. RULE 60(b)(4) IS A PROPER VEHICLE FOR RAISING A CONSTITUTIONAL CHALLENGE TO A COURT JUDGMENT ENJOINING SPEECH IN PERPETUITY

A. Standard of Review

In this circuit and across the circuits, denials of Rule 60(b)(4) motions are reviewed *de novo* because a judgment is either void or it is not. *Rec'l Props., Inc. v. Southwest Mortg. Serv. Corp.*, 804 F.2d 311, 314 (5th Cir. 1986). This Court reviews district courts' Rule 60 (b)(4) rulings "*de novo* because it is 'a per se abuse of

[3] *See* Br. for SEC at 18, Cato Institute v. SEC, No. 1:19cv47, Dkt. 12 (D.D.C. May 10, 2019).

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). And "the rule should be construed in order to do substantial justice." *Carter v. Fenner*, 136 F.3d 1000, 1007 (5th Cir. 1998).

B. An Unconstitutional Order—Even Entered on Consent—Is Void and Must Be Set Aside Under Rule 60(b)(4)

Crosby v. Bradstreet is the seminal case on Rule 60(b)(4) voidness for violation of the First Amendment and should not be denied that status because it arose in another circuit. *Crosby* holds 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 truth…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 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.
>
> The order dated July 8, 1933 was in violation of the First Amendment to the Constitution….[] the First Amendment limits court action. The order was void, and under Rule 60(b)(4) … the parties must be granted relief therefrom.

Crosby, 312 F.2d at 485 (citing *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931) (striking down a prior restraint on First Amendment grounds)) (also citing *Shelley*, 334 U.S. 1 (judicial enforcement of racially restrictive covenants violates the Fourteenth Amendment)).

For this reason, appellants' gags may also be set aside as violating the public interest under Rule 60(b)(5). The Supreme Court recognizes that Rule 60(b)(5) permits consent decrees "detrimental to the public interest," to be modified. *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 384 (1992). "District courts must take a flexible approach to motions to modify consent decrees." *LULAC v. City of Boerne*, 659 F.3d 421, 437 (5th Cir. 2011) (quoting *Rufo*, 502 U.S. at 379-80, 381).

Gag Orders harm the public interest for two reasons. As discussed, they prohibit healthy criticism of the prosecutorial targets and tactics of SEC, cloak SEC's expansion of powers, and how that bears on pressure to settle. Novinger's voice could add to the public discourse, but for a Gag Order that silences him.

Second, the Gag Order harms the public interest by approving of provisions that violate an individual's constitutional rights. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). This prior restraint on speech unconstitutionally bars Mr. Novinger from publicly denying the Commission's allegations against him. And SEC has not only silenced one individual, but many others. *See SEC v. Allaire*, No. 03cv4087 (DLC), 2019 U.S. Dist. LEXIS 199887 (S.D.N.Y. Nov. 18, 2019); *see generally State St. Bank & Tr. Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158 (2d Cir. 2004); *Flannery v. SEC*, 810 F.3d 1 (1st Cir. 2015).

Further, this order is *not* on consent. Appellants were not gagged pursuant to a "give-and-take" contractual negotiation; they were strong-armed to surrender their

First Amendment rights through a codified agency policy, a systematic scheme prohibited by the Supreme Court. *See United States v. Jackson*, 390 U.S. 570, 582 (1968) (invalidating 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 calling these "consent agreements" must not deceive this court that they represent actual consent. The Supreme Court has admonished that "state labels cannot be dispositive of degrees of First Amendment protection." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988). While SEC is under no obligation to settle with targets, government may not make its decision to settle "dependent upon the surrender … of a privilege secured … by the constitution … of the United States." *Barron v. Burnside*, 121 U.S. 186, 200 (1887).

SEC's own data show that 98% of persons charged by SEC settle. *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). The *Wall Street Journal* reports that a 2015 study by the U.S. Chamber shows that a mere SEC investigation imposes $4.6 million in average direct costs (ignoring indirect ones) and, even when no wrongdoing is found, some investigations exceed $100 million. *See* William R. Baker III and Joel H. Trotter, *Nothing to Fear from the SEC*, Wall Street Journal

(Oct. 28, 2015). Thus, there are not three alternatives for settling defendants as would be true if this were truly on consent where they could A. choose to not settle, B. settle with a gag order, or C. settle without a gag order. Their choice is constrained by SEC to A or B only. The gag order thus piggybacks for free on the overriding pressure to settle, eviscerating any notion that this is a choice.

The Supreme Court has held that void judgments are legal nullities that are "so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final." *Espinosa*, 559 U.S. at 270. *Crosby*'s rationale applies with even greater force when *the government* is the party imposing it in contrast to the private party settlement at issue in *Crosby*. Any "prior restraint on expression comes to [the Supreme] Court with a heavy presumption against its constitutional validity." *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

The facts of this case are indistinguishable from *Crosby* except that here it is a government agency imposing a prior restraint, something the First Amendment prohibits, whereas *Crosby* involved a voluntary agreement between private parties nonetheless held unconstitutional because it impermissibly involved a *court* in the constitutional violation.

Crosby represents the prevailing law in the circuits that a judgment violating the First Amendment is void under Rule 60(b)(4). As a leading legal encyclopedia explains, "[s]ince a consent order is enforceable as a judicial decree, it is subject to

a motion for relief from judgment like other judgments and decrees …. [A] judgment allegedly void[4] on constitutional grounds is subject to attack at any time." 47 Am. Jur. 2d *Judgments* § 653; *see* 49 C.J.S. *Judgments* § 506 ("A consent judgment may be set aside where it is void on constitutional grounds").[5]

C. The District Court Decision Does Not Withstand Close Analysis

The district court opinion creates the impression that *Espinosa* limited Rule 60(b)(4) relief to just two kinds of error—lack of jurisdiction or due process. Yet

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[4] The Supreme Court in *Espinosa* noted that "the term 'void' describes a result, rather than the conditions that render a judgment unenforceable." *Espinosa*, 559 U.S. at 270. Appellants here challenge a portion of their "judgment … so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final" as *Espinosa* recognizes he may do under existing law of the lower circuit courts. *Id. Espinosa* expressly declined "to define the precise circumstances in which a jurisdictional error will render a judgment void," *id.* at 271., but specifically cited in its analysis sections of Wright & Miller that list *Crosby* as a type of claim subject to Rule 60(b)(4) relief. *See, e.g.,* 11 Charles A. Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice & Procedure* § 2862, p. 331 (2d ed.1995 and Supp. 2009).

[5] New Civil Liberties Alliance has also challenged the SEC's gag provision in the Second Circuit. A panel of that court denied relief, based upon a plain misreading of *Crosby* which is the law of the circuit binding subsequent panels. *SEC v. Romeril*, 15 F.4th 166 (2d Cir. 2021). The panel's unusual refusal to be bound by the law of the circuit is now the subject of a pending petition for review en banc, Pet. for Reh'g or Reh'g En Banc, SEC v. Romeril, No.19-4197 (filed Nov. 12, 2021), supplemented by the case file in *Crosby v. Bradstreet* which demonstrates the court's misreading of that 1963 holding.

Espinosa does not so restrict the Rule. It merely describes those as examples of two of the instances in which it is *per se* abuse of discretion for a court to deny a Rule 60(b)(4) motion, and it *expressly declines* "to define the precise circumstances in which a jurisdictional error will render a judgment void." 559 U.S. at 270-71.

The jurisdiction argument is also a straw man. Novinger does not contest the court's jurisdiction for SEC's prosecution of him under the securities laws. Or the court's jurisdiction to set aside its own unconstitutional order. Knocking down his constitutional challenge on this basis fails to fairly state the nature of his claims.

Novinger does indeed identify violations of due process at stake in this appeal. Def. Mem. of Law 6/17/2021 §§III, V, VI. The district court just dismisses them without acknowledging that the gag is a *mandatory condition* of settlement, that it is unconstitutionally vague, that it was unlawfully promulgated, that it operates in perpetuity and that it makes courts complicit in constitutional violations.

Finally, the district court's suggestion that Rule 60(b)(4) relief may only be secured for these two reasons, and only these two reasons, is just wrong. Both *Crosby* and this circuit's decision in *Carter* involved neither a jurisdictional defect nor a due process claim. In fact, neither the word "jurisdiction" nor the term "due process" appears anywhere in *Crosby*'s or *Carter*'s rationale. Instead, *Crosby* held that part of a judgment was an unconstitutional prior restraint and *Carter* held that an agreed-upon settlement had to be set aside for lack of statutorily required state

probate court approval of the deal. Such orders were void *ab initio*, and must be set aside whether 3 months, 3 years or 30 years after entry, because the court was "without power to make such an order." *Crosby*, 312 F.2d at 485.

In sum, Rule 60 relief is not limited by its terms to the two categories isolated by the district court. This was recognized, for example, in the Tenth Circuit which noted that "[v]iolations of other fundamental constitutional rights may give rise to voidness as well." *VTA, Inc. v. Airco*, 597 F.2d 220, 225 n. 11 (10th Cir. 1979) (citing *Crosby*, 312 F.3d 483) (Voidness may also arise if the court action involves *a plain usurpation of power* or if the court has acted in a manner inconsistent with due process of law.)

D. *Espinosa* Neither Questioned nor Overruled *Crosby*

Espinosa does not in any way affect the force of the reasoning in either *Crosby* or *Carter* and thus cannot foreclose the relief sought. In dicta, the *Espinosa* Court addressed the question of relief under Rule 60(b)(4) based on lack of jurisdiction. *See* 550 U.S. at 271.. The Court noted that such relief is generally reserved for exceptional cases where "the court that rendered judgment lacked even an 'arguable basis' for jurisdiction." *Id.* The *Espinosa* Court determined that the "case present[ed] no occasion to engage in such an 'arguable basis' inquiry or to define the precise circumstances in which a jurisdictional error will render a judgment void because" the Petitioner did not claim the court's error was jurisdictional. *Id.* . Here,

by contrast, Novinger argues that his gag violates his constitutional and due process rights, and therefore is void under *Crosby*. "[C]ases cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality opinion). *Espinosa* did not address in any way a voidness challenge for a violation of the First Amendment, nor did it purport to overrule *Crosby*.

This circuit recently rejected such an inaccurate reading of *Espinosa* in *Brumfield*. The majority opinion "cordially" disagreed with the dissent that Rule 60(b)(4) was limited to lack of jurisdiction of the subject matter or the parties, noting the Fifth Circuit's own precedent allowed 60(b)(4) relief where, as here, the court "acted in a manner inconsistent with due process of law." 806 F.3d at 301. Indeed, *Espinosa* expressly said that the case "presented no opportunity to review lower courts' assertions construing Rule 60(b)(4) …. The Supreme Court, in sum, has not definitively interpreted this rule." *Brumfield*, 806 F.3d at 298 (citing *Espinosa*, 559 U.S. at 271.).

II. THE GAG ORDER VIOLATES THE FIRST AMENDMENT

A. The Gag Order Is a Forbidden Prior Restraint

1. Prior Restraints Are Forbidden

Prior restraints on speech and publication "are the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n*, 427 U.S. at 559. "A prior restraint … has an immediate and irreversible sanction," while "a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint

'freezes it,'" and it is therefore presumptively impermissible. *Id*. at 559. An injunction against future expression issued because of prior acts is incompatible with the First Amendment. *Gayety Theatres, Inc. v. City of Miami*, 719 F.2d 1550, 1551-52 (11th Cir. 1983)..

2. The Gag Order Is a Prior Restraint

The consent states that each Defendant "agrees not to take any action or to make or cause 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 consent further provides that if Defendants breach that agreement to restrain their future speech, "the Commission may petition the Court to vacate the Final Judgment and restore this action to its active docket." ROA. 310, 330. This consent permanently forbids Novinger from contesting allegations in the Commission's complaint, regardless of their accuracy or the truth of the forbidden speech, on pain of reopened and renewed prosecution.

That the defendant or respondent "consented" to the ban on his future speech does not make the practice lawful. The rule established by *Crosby* represents the prevailing law in the circuits. *Simer v. Rios*, 661 F.2d 655, 663 (7th Cir. 1981) ("where an error of constitutional dimension occurs, a judgment may be vacated as void."); *VTA*, 597 F.2d at 225, n.11 (Rule 60 may void a consent order inconsistent with due process of law or that violates other fundamental constitutional rights);

CBS Inc. v. Young, 522 F.2d 234, 241 (6th Cir. 1975) ("a prior restraint upon First Amendment freedoms is presumptively void.").

This constitutional infirmity with gag orders was recognized as an obvious infirmity by a district court reviewing an SEC consent order, noting: "On its face, the SEC's no-denial policy raises a potential First Amendment problem," *SEC v. Citigroup Global Markets Inc*., 827 F. Supp. 2d 328, 333 n. 5 (S.D.N.Y. 2011), *vacated and remanded on other grounds*, 752 F.3d 285 (2d Cir. 2014), noting that *Crosby* forbade "a prior restraint by the United States against the publication of facts which the community has a right to know." *Id.* (quoting *Crosby*, 312 F.2d at 485). Indeed, the district court admitted it was "mindful" of First Amendment concerns with the SEC's practice. ROA.508.

The consent order also attempts to put Novinger in the position of "authorizing" future judicial proceedings against him if he speaks, a situation analogous to that in *Near*, 283 U.S. at 716. In *Near*, because of past conduct, a publisher was subjected to active state intervention that controlled his future speech. The Supreme Court has found that such state intervention is a prior restraint, because it embodies "the essence of censorship." *Alexander v. United States*, 509 U.S. 544, 570 (1993) (quoting *Near*, 283 U.S. at 713). The First Circuit similarly invalidated a judicially imposed order prohibiting future speech, even when past conduct suggested that future defamatory conduct was likely to continue. *Sindi v. El-*

Moslimany, 896 F.3d 1, 21-22, 30-32 (1st Cir. 2018). Simply put, the Constitution forbids the kind of censorship the Gag Rule enforces. An injunction against Novinger's future expression whether based on prior acts or the content of later speech is incompatible with the First Amendment under the law of this circuit and the Supreme Court. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67-71 (1963); *Universal Amusement Co. v. Vance*, 559 F.2d 1286 (5th Cir. 1977), *on reh'g*, 587 F.2d 159 (5th Cir. 1978) (en banc), *aff'd*, 445 U.S. 308 (1980).

3. The Gag Order Gives SEC Unbridled Enforcement Discretion

There are "two evils" that will not be tolerated in governmental prior restraints. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990), *overruled on other grounds by City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004). First, no system of prior restraint may place "'unbridled discretion in the hands of a government official or agency.'" *Id.* at 225-26 (quoting *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988)). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics … or other matters of opinion." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Appellants' order forces them to agree "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"—a formulation that leaves a party speechless under threat of further prosecution forever and a reader unable to define any discernible limits on what is prohibited.

Such a broad, all-encompassing, and impressionistic prohibition fails to provide clear notice of what speech is forbidden or to articulate any limits on the reach of the speech ban. Such a prohibition confers impermissible discretion on SEC to reopen cases if it does not like the "impressions" created by a settling defendant's subsequent statements.

4. The Gag Order Silences Plaintiff in Perpetuity

The second evil arises when "a prior restraint that fails to place limits on the time within which the decisionmaker must issue the license" which is "impermissible." *FW/PBS, Inc.*, 493 U.S. at 226 (citing *Freedman v. Maryland*, 380 U.S. 51, 59 (1965)); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 (1980). The Gag Order never expires. The ban is longer even than a criminal sentence would be for the charged violation, something especially relevant here as Novinger was never criminally charged. Appellants' consent orders require them to restrict their speech forever and without end—a restriction that cannot be justified under any level of constitutional precedent. *See FW/PBS, Inc.*, 493 U.S. at 226-27. Such perpetually mandated silence is unconstitutional.

> The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand.

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-59 (1975). Prior restraints are particularly impermissible because "[e]ven if they are ultimately lifted they cause irremediable loss, a loss in the immediacy, the impact of speech." *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 467–69 (5th Cir. 1980), *aff'd*, 452 U.S. 89 (1981) (quoting Alexander Bickel, *The Morality of Consent* 61 (1975)).

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

1. The Gag Order Mandates the Content of Speech

The Gag Order regulates the content of speech by mandating that enforcement targets completely accept SEC's perspective on the complaint that led to the consent order (even if some or all of the original complaint would not be provable in court), further threatening penalties should any speech create even an impression of a forbidden view of the complaint. Such restrictions are "presumptively invalid" and subject to the highest level of judicial scrutiny. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992). The Constitution "forbid[s] the State to exercise viewpoint discrimination" which is "an egregious" and "blatant" "violation of the First Amendment." *Rosenberger v. Rector & Visitors of the Univ. 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.* The gag applies to all who settle and is not subject to negotiation. The rationale for regulating the enforcement target's opinion is the illegitimate concern that the target might criticize the SEC and its enforcement theories and methods. A government cannot justify "'the most serious and the least tolerable infringement'" on a defendant's freedom of speech and the press. *United States v. Quattrone*, 402 F. 3d 304, 309 (2d Cir. 2005) (quoting *Neb. Press Ass'n*, 427 U.S. at 559).

Furthermore, appellants are only exposed to re-prosecution if they criticize the government's case against them. The gag order leaves Novinger free to speak favorably about the substance or conduct of SEC enforcement against him. By gagging only the government-disfavoring side of the debate, SEC bakes unconstitutional viewpoint discrimination into the Gag Order. Such speech suppression is forbidden. *R.A.V.*, 505 U.S. at 392.

In *SEC v. Vitesse Semiconductor Corp.*, 771. F. Supp. 2d 304, 308–9 (S.D.N.Y. 2011), the court took a hard look at the one-sided and internally contradictory provisions of SEC's "standard" consent orders and concluded:

> The result is a stew of confusion and hypocrisy unworthy of such a proud agency as the S.E.C. The defendant is free to proclaim that he has never remotely admitted the terrible wrongs alleged by the S.E.C.; but, by gosh, he had better be careful not to deny them either …
> … here an agency of the United States is saying, in effect, "Although we claim that these defendants have done terrible things, they refuse to

> admit it and we do not propose to prove it but will simply resort to gagging their right to deny it."
>
> The disservice to the public inherent in such a practice is palpable.

771 F. Supp. 2d at 309.

In short, to secure a consent order, SEC simultaneously assures defendants that they are not admitting or denying guilt yet promises to punish any who might later create the impression of denying any part of the complaint against them with a reopened civil enforcement proceeding. To put it another way, what SEC giveth with one hand, it taketh away with a gloved fist.

Elevated "judicial scrutiny is warranted" any time a "content-based burden" is placed "on protected expression." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011). As an example, under the "Son of Sam" laws—which seek to prohibit criminals from profiting from accounts of their crimes—courts have held that the content of the publication may not be restrained. *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

If murderers are free to publish books about their crimes and their prosecutions—as they must be in a free society—*a fortiori*, SEC ought not to be able to silence SEC targets from speaking about their enforcement proceedings. *Id.* Even Congress cannot deny disciplined federal judges their First Amendment rights. *McBryde v. Comm. to Review Circuit Council Conduct*, 83 F. Supp. 2d 135 (D.D.C. 1999), *judgment affirmed in part, vacated in part by McBryde v. Comm. to Review*

Circuit Council Conduct, 264 F.3d 52, 55 (D.C. Cir. 2001). A mere federal agency does not have power to suppress speech that Congress itself lacks.

2. The Speech Ban Serves No Compelling Government Interest

To pass constitutional muster, speech bans must be narrowly tailored and serve a compelling government interest by the least restrictive means. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000); *see also Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1255 (11th Cir. 2004).

The Gag Rule was enacted in 1972 "to avoid the perception that the SEC had entered into a settlement when there was not in fact a violation" of the securities laws. *See* 17 C.F.R. § 202.5(e).

It is hard to imagine a policy better designed to suppress truth about these important matters than the Gag Rule as enforced by SEC in its sweeping gag orders. Securities law professor John Coffee describes these consent settlements as an "artifact," noting the contradiction with SEC professed goal "that sunlight is the best disinfectant, and a nontransparent settlement harms the SEC's reputation." Zachary A. Goldfarb, *SEC May Require More Details of Wrongdoing to Be Disclosed in Settlements*, Wash. Post (Apr. 1, 2010), https://www.washingtonpost.com/wp-dyn/content/article/2010/03/31/AR2010033103674.html.

If SEC in 1972 was extracting settlements when there had been no violation of the securities laws, *it is important for the American public to know that*. By the

same token, if the post-2008 SEC was letting powerful defendants off lightly, or even entering collusive deals, *it is equally important to shed light on those practices.* The government is institutionally highly unlikely to admit to either practice. Silencing the only other parties to the arrangements with a government-enforced muzzle allows the government to act with impunity.

The government has no compelling interest in suppressing speech or suppressing complaints about government regulation and enforcement. The fact that SEC *systematically* demands gag orders as a condition of its settlements is profoundly dangerous. *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), http://bit.ly/2UJ410S. Such a practice prevents the public, Congress, courts, and policymakers from learning the specifics of how SEC conducts its enforcement actions. Shielding such an important exercise of government power from oversight and scrutiny prevents lawmakers from knowing when to rein in or unleash SEC authority and engage in course correction.

3. The First Amendment Protects the Public's Right to Hear Speech

Far from there being a compelling government interest in a permanent gag, there is a compelling constitutional interest in freedom to discuss government. If government can silence Americans whom it regulates, it can evade public scrutiny and avoid being held accountable. "In the United States, [where] the executive

magistrates are not held to be infallible," there is "a freedom in canvassing the merits and measures of public men, of every description." James Madison, *Report of the Committee … Relative to the Resolutions of the Last General Assembly of this State, Concerning the Alien and Sedition Laws* (1799). This is why the interests protected by the First Amendment include the right of the public to hear such criticism.

Furthermore, the interests protected by the First Amendment are not only the right of the speaker to free expression, but also the right of those *hearing* him to receive information unfettered by any government constraints. The First Amendment "necessarily protects the right to receive [information]." *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943). The U.S. Supreme Court recognizes the "listener's stake," for example, in the context of prior restraints on government employees: "Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions." *Waters*, 511 U.S. at 674 (plurality opinion); *see also United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 470 (1995). This circuit agrees, especially, as here, in the context of court proceedings:

> Government-imposed secrecy denies the free flow of information and ideas not only to the press but also to the public. The public right to receive information has been repeatedly recognized and applied to a vast variety of information. 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.

In re Express-News Corp., 695 F.2d 807, 809 (5th Cir. 1982).

Because the 98% of defendants who settle with SEC are likewise among the most knowledgeable about its enforcement practices, "it is essential that they be able to speak out freely on such questions." *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cty.*, 391 U.S. 563, 572 (1968). In *Harman v. City of New York*, 140 F.3d. 111 (2d Cir. 1998), the Second Circuit affirmed that the rights of both the speaker and the public were violated by a city policy requiring its employees to pre-clear any contacts with the press, noting "free and open debate is vital … [from those] most likely to have informed and definite opinions" about government activity. *Id.* at 119 (quoting *Pickering*, 391 U.S. at 571-72). *Crosby* was explicit that a prior restraint "against the publication of facts which the community has a right to know" violated the Constitution, declaring that a district court is "without power to make such an order" and "that the parties may have agreed to it is *immaterial*." 312 F.2d at 485 (emphasis added). As a judge hearing repeated SEC cases in the Southern District of New York observed, "these [SEC] settlements do not always take adequate account of another interest ordinarily at stake as well: that of the public and its interest in knowing the truth in matters of major public concern." *SEC v. CR Intrinsic Investors, LLC*, 939 F. Supp. 2d. 431, 443 (S.D.N.Y. 2013) (Marrero, J.), *abrogated by SEC v. Citigroup Global Markets, Inc.*, 752 F.3d 285 (2d Cir. 2014). Novinger's and ICAN's gags, which forbid even truthful speech, are unenforceable.

A 2017 article repeated these concerns noting that a complaint "which largely consists of unproven allegations" filed by SEC suggests that when "very serious misconduct is being alleged … [t]he public … has an obvious interest in knowing whether such serious allegations made by a government agency are true or untrue." Hon. Jed S. Rakoff, *AGAINST: Neither Admit Nor Deny*, Compliance Week (Sept. 6, 2017, 8:00 AM), https://www.complianceweek.com/against-neither-admit-nor-deny/2539.article. The article notes the self-serving expedience created by the Gag Rule, which

> in addition to impeding transparency and accountability—also means that wrongly accused parties are incentivized not to prove their innocence if they can get a cheap settlement without admitting anything. By the same token, the SEC can avoid having to litigate questionable cases by the simple expedient of offering a cheap settlement. And to make matters worse, the SEC hides the flimsiness of such cases from the public by imposing a "gag" order that prohibits the settling defendants from contesting the SEC's allegations in the media.

Id.

By systematically silencing all defendants, such gag provisions insulate SEC from criticism by the very people best placed and motivated to expose wrongdoing, over-aggressive prosecutions, and flawed enforcement policies or practices. *Pickering*, 391 U.S. at 572 (recognizing the "public interest in having free and unhindered debate on matters of public interest—the core value of the Free Speech Clause of the First Amendment"). Such a restriction "operates to insulate … [government laws] from constitutional scrutiny and … other legal challenges, a

condition implicating central First Amendment concerns." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001).

For just this reason, the Fourth Circuit recently invalidated the City of Baltimore's unconstitutional practice of requiring gag orders in settlements of police brutality case. *Overbey v. Mayor of Baltimore*, 930 F. 3d 215 (4th Cir. 2019). That court's trenchant analysis recognized that "Overbey agreed, on pain of contractual liability to the City, to curb her voluntary speech to meet the City's specifications." *Id.* at 223. That decision also holds that parties may make a clause-specific challenge without having to otherwise challenge the jurisdiction of the court. *Overbey* recognized that this was a challenge to a "waiver of a constitutional right" even though it "appears in an otherwise valid contract." *Id.*

4. The Gag Order Does Not Operate by the Least Restrictive Means

The Gag Order's sweeping and perpetual speech restriction is far from the least restrictive means of achieving any compelling interest the government may claim. If SEC believes specific allegations of the complaint or order should be admitted by the defendant, those specific admissions, with the opportunity provided to defendants to truthfully qualify them, can always be negotiated as part of the settlement. If a settling party asserts his innocence untruthfully, SEC need only issue a press release to the contrary, a remedy far preferable and less restrictive than the

lifetime ban on the defendant's speech procured under the government's boot and enforced by the threat of renewed prosecution.

C. The Gag Order Compels Speech

Defendants' Consent Orders provide at part (ii) that defendants "will not make or permit to be made any public statement to the effect that Defendant does not admit the allegations of the complaint, or that this Consent contains no admission of the allegations, *without also stating that Defendant does not deny the allegations*" (emphasis added). That "script" is a raw assertion by SEC of power to compel future speech by those with whom it settles. But the First Amendment prohibits the government from compelling persons to express beliefs they do not hold. "[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943).

Government-compelled speech is subject to strict scrutiny. *Riley*, 487 U.S. at 796–97. "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Id.* at 795. The Supreme Court in *Janus v. AFSCME*, 148 S.C. 2448 (2018), held that public employees could not be compelled to subsidize speech on matters with which they disagreed. Likewise, *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), stopped

the State of California from forcing faith-based pregnancy centers to propound government-scripted speech.

The defendants' consent decrees require them to call into question *their own integrity* by requiring them to spit out words that infer their own guilt as to *all* aspects of a complaint in a settled matter, a form of state-forced self-condemnation. The First and Fifth Amendment interests at stake are thus even more intrusive to individual liberty than those presented in *Janus* or *NIFLA*. This circuit recently noted sitting *en banc* that courts must be vigilant against administrative "'encroachments … upon the fundamental right[s] … of the people[.]'" *Cochran v. SEC*, No. 19-10396, 2021 WL 5876747, at *22 (5th Cir. Dec. 13, 2021) (Oldham, J. concurring) (quoting *Jones v. SEC*, 298 U.S. 1, 24-25 (1936)); *see id.* (citing *Boyd v. United States*, 116 U.S. 616 (1886) (prohibiting compulsory self-accusation)).

In *Nat'l Ass'n of Mfrs. v. SEC*, 800 F. 3d 518, 522 (D.C. Cir. 2015), the court held that an SEC-mandated publication that minerals used by companies were not conflict-free was held impermissible: "It requires an issuer to tell consumers that its products are ethically tainted … [b]y compelling an issuer to confess blood on its hands, the statute interferes with that exercise of the freedom of speech under the First Amendment." 800 F.3d at 530 (holding both Congress's *statute* and SEC's rule requiring disclosure of "conflict minerals" unconstitutional); *see also Associated Builders & Contractors of Se. Tex. v. Rung*, No. 1:16-CV-425, 2016 U.S. Dist.

LEXIS 155232, *28-30 (E.D. Tex. Oct. 24, 2016) (discussing *Nat'l Ass'n of Mfrs.* in determining that an Executive Order and agency implementing rule and guidance were constitutionally defective because they compelled speech).

Government efforts to compel citizens to utter speech with which they disagree deeply offends the fundamental "principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Agency for Int'l Dev. v. All. For Open Soc'y, Int'l, Inc.*, 570 U.S. 205, 213 (2013). Such efforts are routinely struck down. *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996) (Dairy manufacturers may not be compelled to "warn" consumers about their methods for producing milk.). This court must accordingly set aside these Gag Orders because they compel speech.

D. The Gag Order Forbids Truthful Speech

Appellants' Gag Orders are also unconstitutional because they forbid true speech just the same as false speech. Each order ends with a provision that "lifts" the Gag Order—and its substantive commands about admissions and denials—for testimonial obligations or their "rights" to take legal or factual positions in judicial proceedings in which the Commission is not a party. The SEC's "lift" is a tacit admission that the Gag Order *must* contain an exception where it conflicts with a defendant's obligation to speak the truth under oath. This telling exception is fatal to any defense of the Gag Order by the Commission because it concedes that

defendants' obligations to tell the truth under oath may be at odds with SEC's command that defendants may not deny any allegations in SEC's settled but unproven complaint. This exception would not be necessary unless SEC knows that the gag policy would otherwise lead to false impressions or even perjury. SEC's self-favoring exemption from the exception— "in which the Commission is not a party"—also disturbingly places SEC's thumb on the scales of justice in any subsequent proceeding in which the Commission is a party.

Indeed, the Gag Rule's original justification when it was adopted in 1972 was that it was "important to avoid creating … an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur." 17 C.F.R. § 202.5(e). Yet the Gag Rule as implemented in consent orders itself creates the false impression that every fact in the complaint or order is accurate, when that is seldom, if ever, the case. Complaints consist of "largely … of unproven allegations." Hon. Jed S. Rakoff, *supra*, *AGAINST*. Thus, the text of SEC's original justification for the Gag Rule argues *against* having a rule that creates the false impression that the complaint is completely true.

This "lift" of the ban in testimonial situations appears to be a strategic exception designed to avoid a gag order's coming to the attention of a judge in subsequent judicial proceedings who might well invalidate such a disturbing and

unconstitutional speech ban unheard of in normal state or federal judicial settlements or consent decrees.

But this exception is much too parsimonious. The government doesn't get to decide *when* defendants may speak the truth, by carving out a caveat calculated to shield the ban from scrutiny in subsequent judicial or testimonial proceedings, but otherwise silencing defendants for life. The statement of the proposition suffices to expose its raw unconstitutionality.

E. The Gag Order Is an Unconstitutional Condition

The SEC cannot condition a person's ability to settle with the government upon the surrender of his First Amendment rights. *Legal Servs. Corp.*, 531 U.S. at 533; *accord Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) (quoting *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983) ("'the government may not deny a benefit to a person because he exercises a constitutional right'")). The Supreme Court has long held that the government may not make its decision to refrain from its adverse exercise of power "dependent upon the surrender … of a privilege secured … by the constitution … of the United States." *Barron*, 121 U.S. at 200. Indeed, the U.S. Supreme Court declared in 1963 that it was by then "too late in the day to doubt that the libert[y] of … expression may be infringed by the denial of or placing of conditions upon a … 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. Moreover, "regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them." *Id.* The SEC's demand as a condition of settlement that the targets of its enforcement action never publicly question their validity "necessarily … ha[s] 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 at all. Virtually all unconstitutional conditions cases involve an optional governmental action of some kind. 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., United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 210 (2003) ("[T]he government may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech *even if he has no entitlement to that benefit*." (emphasis added and internal quotation marks omitted)).

Even if SEC would have been entirely within its rights in refusing to settle, that greater authority does not imply a "lesser" power to condition the settlement upon defendant's forfeiture of his constitutional rights. *See Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825, 836-837 (1987). Just as Congress cannot condition its funding "lest the First Amendment be reduced to a simple semantic exercise," *Legal Servs. Corp.*, 531 U.S. at 547, similarly here, SEC cannot condition the benefit of a conclusively settled case on eternal silence about the merits of the case by those whom it prosecutes. A city's contract that attempted to condition a benefit on the waiver of a party's right to free expression is unenforceable. *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1077 (6th Cir. 1994). Simply put, public officials "may not deny a benefit to a person on a basis the infringes his constitutionally protected freedom of speech even if he has no entitlement to that benefit." *Agency for Int'l Dev.*, 570 U.S. at 214. The demand as a condition of settlement that targets agree to never publicly question the SEC's allegations "necessarily … ha[s] 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).

Gag Orders stifle informed public debate on these matters. They require defendants to make a difficult choice: surrender their constitutional rights to speak freely or forgo consent settlements with the Commission and face the potentially

ruinous costs and risks of contesting the proceedings to the bitter end. Under the orders insisted upon by SEC, the only way for a defendant to settle an enforcement proceeding is to surrender forever his future First Amendment rights of speech and petition with respect to the government's prosecution. Our Constitution does not permit that baleful bargain.

III. THE GAG ORDER VIOLATES APPELLANTS' FIRST AMENDMENT RIGHTS TO SPEAK ABOUT MATTERS OF PUBLIC CONCERN

The First Amendment "'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). The Gag Rule, as implemented by SEC in its orders, offends our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times*, 376 U.S. at 270. Speech on matters of public concern is at "the heart of … First Amendment [] protection." *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978). And it "occupies the highest rung of the hierarchy of First Amendment values." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985). Speech concerning political change "trenches upon an area in which the importance of First Amendment protections *is at its zenith.*" *Meyer v. Grant*, 486 U.S. 414, 425 (1988) (emphasis added) (internal quotation marks

omitted). "[S]peech critical of the exercise of the State's power lies at the very center of the First Amendment." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034 (1991).

For these reasons, Congress itself cannot pass a statute that gags people from speaking about government action against them. In *McBryde*, a district court judge disciplined under Congress' Judicial Council and Disability Act challenged its confidentiality provision. The court held that confidentiality provision of an Act of Congress "operates as an unconstitutional prior restraint" and ruled that the disciplined judge "must enjoy the opportunity to speak openly and freely about [the] proceedings" against him. *Id*. at 140, 177-78. The government did not appeal the district court's First Amendment ruling. *McBryde v. Comm. to Review Circuit Council Conduct*, 264 F. 3d 52, 55 (D. C. Cir. 2001).[6] If judges are free to speak about their proceedings, *all* Americans should enjoy that same right. Affirming the district court will mean that the federal judiciary possess rights they are prepared to deny to the public.

Congress recently prohibited the use of "gag clauses" in certain private contracts, whether or not the drafters enforce them. *See* 15 U.S.C. § 45b(b). If

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[6] *McBryde*, 264 F.3d 52, 55 ("On cross motions for summary judgment, the district court agreed with Judge McBryde's First Amendment argument, ... , but rejected the rest. Only Judge McBryde appealed[.]" (internal citation omitted)).

federal regulatory policy treats gag clauses in consumer contracts as unlawful even when those are between private parties not subject to the First Amendment engaged in freedom of contract, not a government subject to the prohibitions of the First Amendment, the same logic extends *a fortiori* to SEC.

Gag Orders prohibit Appellants from ever questioning the merits of their own prosecution. But history is replete with compelling accounts of prosecutorial abuse of power, including prosecutors who deny their targets access to exculpatory evidence, who engage in misconduct, sharp practice or intimidation, tactics that can and have brought defendants or respondents to their knees. Other prosecutions, brought in good faith, have later been shown to have been based upon perjured or compromised evidence. In addition, once-disfavored practices subjected to enforcement actions may move into the mainstream and become standard industry practices or standard industry practices may later be deemed problematic. Further, the prospect of potentially ruinous costs, crippling time demands, and collateral damage mean that even innocent people may find settling with the government preferable to hazarding a full-fledged prosecution.

Regulation by enforcement and settlement has drawn the concern and attention of judges and even SEC Commissioners. In a May 2018 speech, SEC Commissioner Hester Peirce noted:

> The practice of attempting to stretch the law is a particular concern when it occurs in settled enforcement actions. Often, given the time and

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

Hester M. Peirce, Commissioner, Sec. & Exchange Comm'n, *The Why Behind the No*: *Remarks at the 50th Annual Rocky Mountain Securities Conference* (May 11, 2018) *available at* https://www.sec.gov/news/speech/peirce-why-behind-no-051118. Consent settlements may well represent either SEC's failure to make a case when put to its burden of proof or a settling target's guilt—or some combination thereof. Any person who waves the white flag to end the process should not be forever silenced on the topic of the merits of his prosecution—most especially, not by the prosecutor.

Speech focused on public concern is "'more than self-expression; it is the essence of self-government.'" *Snyder*, 562 U.S. at 451-52 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964)). Thus, this speech is indispensable to the First Amendment's values and deserves "special protection." *Snyder*, 562 U.S. at 452 (quoting *Connick*, 461 U.S. at 145). When prosecutors abuse their considerable powers beyond lawful and ethical bounds, or a prosecution is based on weak or

compromised evidence, their targets must be free to say so and petition government for change. When agencies regulate through enforcement, guidance, or other legislatively unauthorized means, the persons affected should never be silenced by the regulator. Any healthy nation should encourage such self-examination. A constitutional democratic republic requires it.

IV. THE GAG ORDER VIOLATES DUE PROCESS BECAUSE SEC LACKED STATUTORY AUTHORITY TO ISSUE IT AND CANNOT BIND DEFENDANTS TO A HOUSEKEEPING RULE

No agency has any inherent power to make law. Article I, § 1 of the U.S. Constitution vests "[a]ll legislative powers" in the Congress, and "the lawmaking function belongs to Congress … and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996). This constitutional barrier means "an agency literally has no power to act … unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 357 (1986). Thus, even if an independent agency could constitutionally exercise the legislative power to write a Gag Rule, it cannot purport to bind anyone without congressional authorization, which is utterly lacking here.

None of the statutes cited by SEC conferred authority upon it to issue a Gag Rule, nor did they exempt the agency from using notice-and-comment rulemaking. *See* Addendum. The SEC's assertion that publication, notice and comment were not required for a binding rule is flatly wrong. Congress has not given SEC any authority

to impose additional restrictions on the constitutional rights of persons they prosecute, either in court or administratively.[7] Nor is this surprising, as the First Amendment and the unconstitutional conditions doctrine would forbid it.

Given the "stinging criticism" of the Gag Rule that has emerged from federal judges and in law journals, it is fair to assume that a proposed rule giving the agency power to gag its targets as to how regulations have been enforced against them would attract vigorous negative comments if published for notice and comment. We have no record of such public objection because SEC chose to push this through in the guise of a "housekeeping rule" that bypassed APA requirements.

Gag Rules that bind persons outside the agency who make the difficult decision to settle a case are not "housekeeping" rules. *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251-52 (D.C. Cir. 2014). Such binding rules require notice and comment and violate the APA when they are promulgated without it. *Id.* at 252.

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[7] A Gag Rule, binding upon parties brought before SEC in "any civil lawsuit brought by it or in any administrative proceeding of an accusatory nature" is anything but a rule that "relates only to rules of agency organization, procedure and practice." 17 C.F.R. § 202.5(e); 37 Fed. Reg. 25,224 (Nov. 28, 1972). An agency's *ad hoc* promulgation of a self-protective rule by which SEC not only seeks to bind private parties with the force of law and penalty of re-prosecution, but to silence them on the topic of their prosecution is a wholly illegitimate exercise of government power. Nor is it an "interpretive" rule exempt from the APA. There is no authorizing statute to interpret. An agency regulation is not interpretive if it has "the force and effect of law" or is one "affecting individual rights and obligations." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979).

In this instance, they also exceed any power Congress granted to SEC in enabling statutes. Thus, in addition to the Gag Rule's fatal constitutional infirmities, it also is unlawful because it lacks statutory authority.

V. THE GAG ORDER VIOLATES DUE PROCESS BECAUSE IT IS UNCONSTITUTIONALLY VAGUE

The Gag Order is also unconstitutionally vague. A settling defendant had better stay mum altogether, rather than navigate at his peril what he can say about his own prosecution under the terms of the Gag Order. The Supreme Court has recognized that a penal law:

> must be sufficiently explicit to inform those who are subject to it what conduct … will render them liable to its penalties … a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at [the law's] meaning and differ as to its application violates the first essential of due process of law.

Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

"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 *Connally*, 269 U.S. at 391). "When speech is involved," it is particularly important "to ensure that ambiguity does not chill protected speech." *Id.* at 253-54. The Gag Order has no limiting principle. The order forbids a defendant from even creating "an *impression* that a decree is being entered or a sanction imposed, when the conduct

alleged did not, in fact, occur." 17 C.F.R. § 202.5(e). This phrasing confers unlimited discretion on the Commission to decide what future speech is or is not permissible and is therefore unconstitutionally vague.

VI. THE GAG ORDER SILENCES PLAINTIFF IN PERPETUITY WHICH CANNOT BE A KNOWN AND VOLUNTARY WAIVER AND VIOLATES DUE PROCESS

Novinger and ICAN must retain their freedom to speak about their SEC settlements because the law which formed the basis of his charges may change to permit what was previously prohibited, and it may do so 16 days or 16 years after the date of settlement. For example, SEC itself has enacted such a revision: in 2008, SEC changed the rules governing its public offering process to allow companies to forecast expected performance. 17 C.F.R. §§ 229.10(b), 229.303(a)(3)(ii). The SEC's original policy was to discourage companies from publicizing these predictions because "the Commission ha[d] taken the position that any such … prediction might be interpreted as an 'offer to sell' forthcoming securities before the registration statement bec[ame] effective, which constitute[d] a violation of the Securities Act of 1933." Harry H. III Wise, *Fearless Forecasts: Corporate Liability for Earnings Forecasts that Miss the Mark*, 18 B.C. L. Rev. 115, 117 (1934). That policy has evolved over the years not only to permit such forecasts, *but to encourage them*. 17 C.F.R. §§ 229.10(b), 229.303(a)(3)(ii); Press Release, Sec. & Exchange Comm'n, News Digest (Aug. 16, 1971). The SEC now "encourages the use … of management's projections of future economic performance" and requires disclosure

of "any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." 17 C.F.R. §§ 229.10(b), 229.303(a)(3)(ii). Thus, what was once a violation of the Securities Act of 1933 is now a practice which SEC requires. Yet under the terms of SEC's Gag Order, Novinger, had he been charged for issuing public forecasts, would be forever bound to his initial conviction in the court of public opinion for violating a law that is no longer in place. Worse yet, he would be left completely without the power to defend himself by speaking on the subject later or to advocate before Congress or SEC for policy and enforcement changes. In *Simon & Schuster*, the Supreme Court recognized that "[i]n 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.

The shifting sands of SEC regulation are well known and have been acknowledged (and denounced) by former high-ranking SEC officials.[8] Hence, the

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[8] As a former SEC commissioner explains, compelling policy concerns demand more transparency in the settlement process:

> As a Commissioner, I was particularly troubled by the frequent use of settlements to announce Commission policy in borderline cases. Many of my dissents involved the use of [the securities laws] to settle cases

negative consequences of silencing 98% of those directly affected by SEC's enforcement activities is tremendously detrimental to the public's interest in transparency, particularly given the heightened risk of abuses of government power in this context. This is especially a concern when Commission "[s]ettlements—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." Karmel, *supra* at n. 10.

> which, in my view, would not have succeeded in the courts …. The case-by-case development of regulatory law and policy produces many problems, especially when the policy involves law enforcement actions against regulated persons and businesses that have serious adverse consequences. The SEC is an independent agency that represents itself in the lower courts and can bring a wide variety of enforcement actions, including cease-and-desist cases, without even going to court. Enforcement attorneys can assist and encourage U.S. Attorneys to bring criminal cases. The Commission has considerable latitude in choosing its enforcement targets and theories. The Commission therefore has a serious obligation to restrain the enforcement staff from overzealous prosecutions. Generally, the Commission takes this obligation seriously, but political and time constraints sometimes permit the prosecutors to create the law.

Roberta S. Karmel, *Creating Law at the Securities and Exchange Commission: The Lawyer As Prosecutor*, Law & Contemp. Probs. at 33, 42, 45 (Winter 1998) *available at* https://scholarship.law.duke.edu/lcp/vol61/iss1/4. Similarly, a former General Counsel to the SEC observed in his experience that "the agency seeks to expand liability to the greatest extent possible and well beyond statutory language or established precedent." Andrew N. Vollmer, *Four Ways to Improve SEC Enforcement*, 43 Sec. Reg. L. J. 333, 334 (2015).

In addition, reputations and livelihoods that were damaged or destroyed at the time of an initial SEC press release are sullied in perpetuity by this rule, because it strips defendants of the opportunity for correction or self-defense. When SEC pushes beyond the bounds of its lawful authority and secures a settlement of a claim for which there was no fair notice of illegality, gagging the besieged target means that this form of regulation will have no check, no sunlight will expose it, and it will fester in the dark.

VII. THE GAG ORDER VIOLATES DUE PROCESS BECAUSE IT IMPLICATES THE JUDICIARY IN VIOLATING THE CONSTITUTION

Agencies that settle charges with their targets are not just acting under their own power. They have harnessed the machinery of the state, whether a court or an administrative tribunal, and they thereby imperil the livelihood, resources, and liberty of defendants. Consent orders impose injunctive prohibitions and fines enforceable by judicial contempt power. Such applications of judicial power by administrative agencies are "inherently dangerous" and implicate a coordinate branch in the constitutional breach:

> The injunctive power of the judiciary is not a free-roving remedy to be invoked at the whim of a regulatory agency, even with the consent of the regulated. . . . .
> …[T]here is an overriding public interest in knowing the truth. In much of the world, propaganda reigns, and truth is confined to secretive, fearful whispers. Even in our nation, apologists for suppressing or obscuring the truth may always be found. But the S.E.C., of all agencies, has a duty, inherent in its statutory mission, to see that the truth emerges; and if it fails to do so, this Court must not, in the name

> of deference or convenience, grant judicial enforcement to the agency's contrivances.

Citigroup Global Markets, 827 F. Supp. 2d at 335.

As the Second Circuit has noted, prior restraints are "particularly abhorrent to the First Amendment in part because they vest in government agencies the power to determine important constitutional questions properly vested in the judiciary." *New York Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 131 (2d Cir. 1998) (citing Laurence H. Tribe, *American Constitutional Law,* § 12-38, at 1056-57 (2d ed. 1988)).

The First Amendment was *designed* to protect the interests of free and robust speech, including speech critical of government, as noted in 1803:

> those who administer the government … are the … servants of the people, not their rulers or tyrants …. [T]o enforce this responsibility, it is indispensably [*sic*] necessary that the people should inquire into the conduct of their agents; that in this inquiry, they must, or ought to scrutinize their motives, sift their intentions, and penetrate their designs; and that it [is] therefore, an unimpeachable right in them to censure as well as to applaud; to condemn or to acquit …, as the most severe scrutiny might advise.

1 Tucker, Blackstone's Commentaries, appendix to vol. 1, part 2, note G, at 14 (1803).

All judges have a duty to follow the law of the land, and they should not be the enforcers of that which they know to be against the law, even though the parties themselves may have agreed to the conditions.

SEC's contrivance of a power to fashion a Gag Order out of 17 C.F.R. § 202.5(e)'s "policy" works to suppress truth, oppress defendants, and insulate the agency from public understanding and criticism. The value of the free flow of information far outweighs such illegitimate "policies" as bureaucratic discomfort with the appearance of over-reaching or underenforcement, which serves solely the Commission's inherent aversion to criticism. Agencies do not have some special grant of power to shield themselves from public scrutiny, a power Congress, actual courts, prosecutors, and lawmakers all lack under well-established law.

Sanctioning this practice will only invite agencies to concoct new and draconian terms and conditions of settlement that allow them to secure by dint of their power to drain targets' resource, results they could never obtain from trial. The stakes could not be higher.

The Gag Rule violates an impressive array of constitutional doctrines, including infringement of First Amendment rights to freedom of speech and the press, unconstitutional conditions, prior restraint, void-for-vagueness, and violation of due process. Any rule that racks up a list of constitutional and legal violations that lengthy compels the conclusion that some fundamental tenet of our constitutional republic has been violated.

CONCLUSION

Because "[f]ragile First Amendment rights are often lost or prejudiced by delay," *Gulf Oil*, 619 F.2d at 470, appellants respectfully request that this Court reverse the district court's order and directly grant their motion for relief from judgment.

New Civil Liberties Alliance

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Date: December 15, 2021

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: December 15, 2021.

New Civil Liberties Alliance

/s/ Margaret A. Little
Margaret A. Little
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Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

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

This brief complies with the type-volume limitation of 5th Cir. R. 32(a)(7)(B) because this brief contains 12,383 words out of 13,000, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word for Office365 Times New Roman 14-point font.

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Addendum

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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.

15 U.S.C. § 77s (1970)

§ 77s. Special powers of Commission.

(a) The Commission shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this subchapter, including rules and regulations governing registration statements and prospectuses for various classes of securities and issuers, and defining accounting, technical, and trade terms used in this subchapter. Among other things, the Commission shall have authority, for the purposes of this subchapter, to prescribe the form or forms in which required information shall be set forth, the items or details to be shown in the balance sheet and earning statement, and the methods to be followed in the preparation of accounts, in the appraisal or valuation of assets and liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the preparation, where the Commission deems it necessary or desirable, of consolidated balance sheets or income accounts of any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer; but insofar as they relate to any common carrier subject to the provisions of section 20 of Title 49, the rules and regulations of the Commission with respect to accounts shall not be inconsistent with the requirements imposed by the Interstate Commerce Commission under authority of such section. The rules and regulations of the Commission shall be effective upon publication in the manner which the Commission shall prescribe. No provision of this subchapter imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the Commission, notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or be determined by Judicial or other authority to be invalid for any reason.

(b) For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this subchapter, any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States or any Territory at any designated place of hearing.

(May 27, 1933, ch. 38, title I, § 19, 48 Stat. 85; June 6, 1934, ch. 404, § 209, 48 Stat. 908.)

15 U.S.C. § 78w (1970)

§ 78w. Rules and regulations; annual reports.

(a) The Commission and the Board of Governors of the Federal Reserve System shall each have power to make such rules and regulations as may be necessary for the execution of the functions vested in them by this chapter, and may for such purpose classify issuers, securities, exchanges, and other persons or matters within their respective jurisdictions. No provision of this chapter imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the Commission or the Board of Governors of the Federal Reserve System, notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

(b) The Commission and the Board of Governors of the Federal Reserve System, respectively, shall include in their annual reports to Congress such information, data, and recommendation for further legislation as they may deem advisable with regard to matters within their respective jurisdictions under this chapter. The Commission shall include in its annual reports to the Congress for the fiscal years ended on June 30 of 1965, 1966, and 1967 information, data, and recommendations specifically related to the operation of the amendments to this chapter made by the Securities Acts Amendments of 1964.

(June 6, 1934, ch. 404, § 23, 48 Stat. 901; Aug. 23, 1935, ch. 614, § 203(a), 49 Stat. 704; May 27, 1936, ch. 462, § 8, 49 Stat. 1379; Aug. 20, 1964, Pub. L. 88-467, § 10, 78 Stat. 580.)

15 U.S.C. § 79t (1970)

§ 79t. Rules, regulations, and orders.

(Repealed. Pub. L. 109–58, title XII, § 1263, Aug. 8, 2005, 119 Stat. 974)

(a) Authority of Commission to make.

The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as it may deem necessary or appropriate to carry out the provisions of this chapter, including rules and regulations defining accounting, technical, and trade terms used in this chapter. Among other things, the Commission shall have authority, for the purposes of this chapter, to prescribe the form or forms in which information required in any statement, declaration, application, report, or other document filed with the Commission shall be set forth, the items or details to be shown in balance sheets, profit and loss statements, and surplus accounts, the manner in which the cost of ail assets, whenever determinable, shall be shown in regard to such statements, declarations, applications, reports, and other documents filed with the Commission, or accounts required to be kept by the rules, regulations, or orders of the Commission, and the methods to be followed in the keeping of accounts and cost-accounting procedures and the preparation of reports, in the segregation and allocation of costs, in the determination of liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the keeping or preparation, where the Commission deems it necessary or appropriate, of separate or consolidated balance sheets or profit and loss statements for any companies in the same holding-company system.

(b) Consistency with laws of United States or States.

In the case of the accounts of any company whose methods of accounting are prescribed under the provisions of any law of the United States or of any State, the rules and regulations or orders of the Commission in respect of accounts shall not be inconsistent with the requirements imposed by such law or any rule or regulation thereunder; nor shall anything in this chapter relieve any public-utility company from the duty to keep the accounts, books, records, or memoranda which may be Required to be kept by the law of any State in which it operates or by the State Commission of any such State. But this provision shall not prevent the Commission from imposing such additional requirements regarding reports or accounts as it may deem necessary or appropriate in the public interest or for the protection of investors or consumers.

(c) Effective date; classification of persons and matters; hearings.

The rules and regulations of the Commission shall be effective upon publication in the manner which the Commission shall prescribe. For the purpose of its rules, regulations, or orders the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. Orders of the Commission under this chapter shall be issued only after opportunity for hearing.

(d) Filing information or documents by reference.

The Commission, by such rules and regulations or order as it deems necessary or appropriate in the public interest or for the protection of investors or consumers, may authorize the filing of any information or documents required to be filed with the Commission under this chapter, or under the Securities Act of 1933, as amended, or under the Securities Exchange Act of 1934, by incorporating by reference any information or documents theretofore or concurrently filed with the Commission under this chapter or either of such Acts. No provision of this chapter imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or order of the Commission, notwithstanding that such rule, regulation, or order may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

(Aug. 26, 1935, ch. 687, title I, § 20. 49 stat. 833.)

15 U.S.C. § 80a-37 (1970)

§ 80a-37. Rules, regulations, and orders; general powers of Commission.

(a) The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as are necessary or appropriate to the exercise of the powers conferred upon the Commission elsewhere in this subchapter, including rules and regulations defining accounting, technical, and trade terms used in this subchapter, and prescribing the form or forms in which information required in registration statements, applications, and reports to the Commission shall be set forth. For the purposes of its rules or regulations the Commission may classify persons, securities, and other matters within its jurisdiction and prescribe different requirements for different classes of persons, securities, or matters.

(b) The Commission, by such rules and regulations or order as it deems necessary or appropriate in the public interest or for the protection of investors, may authorize the filing of any information or documents required to be filed with the Commission under this subchapter, subchapter II of this chapter, the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, or the Trust Indenture Act of 1939, by incorporating by reference any information or documents theretofore or concurrently filed with the Commission under this subchapter or any of such Acts.

(c) No provision of this subchapter imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or order of the Commission, notwithstanding that such rule, regulation, or order may, after such act or omission, by amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

(Aug. 22, 1940, ch. 686, title I, § 38, 54 Stat. 841.)

15 U.S.C. § 80b-11 (1970)

§80b-11. Rules, regulations, and orders of Commission.

(a) The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as are necessary or appropriate to the exercise of the functions and powers conferred upon the Commission elsewhere in this subchapter. For the purposes of its rules or regulations the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters.

(b) Subject to the provisions of the Federal Register Act and regulations prescribed under the authority thereof, the rules and regulations of the Commission under this subchapter, and amendments thereof, shall be effective upon publication in the manner which the Commission shall prescribe, or upon such later date as may be provided in such rules and regulations.

(c) Orders of the Commission under this sub- chapter shall be issued only after appropriate notice and opportunity for hearing. Notice to the parties to a proceeding before the Commission shall be given by personal service upon each party or by registered mail or certified mail or confirmed telegraphic notice to the party's last known business address. Notice to interested persons, if any, other than parties may be given in the same manner or by publication in the Federal Register.

(d) No provision of this subchapter imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or order of the Commission, notwithstanding that such rule, regulation, or order may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

(Aug. 22, 1940, ch. 686, title II, § 211, 54 Stat. 855; June 11, 1960, Pub. L. 86-507, § 1(16), 74 Stat. 201; Sept. 13, 1960, Pub. L. 86-750, § 14, 74 Stat. 888.)

7 C.F.R. § 202.5(e) (2020)

§ 202.5 Enforcement activities.

(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.

37 Fed. Reg. 25,224

Title 17-COMMODITY AND SECURITIES EXCHANGES
Chapter II-Securities and Exchange Commission
[Release Nos. 33-5337, 34-9882, 35-17781, IC-7526, IA-352.]

PART 202-INFORMAL AND OTHER PROCEDURES
Consent Decrees in Judicial or Administrative Proceedings

The Securities and Exchange Commission today announced adoption of a policy with respect to consent decrees in judicial or administrative proceedings under the laws which it administers. In this connection it has amended § 202.5 of Part 202 of the Code of Federal Regulations relating to informal and other proceedings, as indicated below.

COMMISSION ACTION

Pursuant to the authority granted in section 19 of the Securities Act of 1933, section 23 (a) of the Securities Exchange Act of 1934, section 20 of the Public Utility Holding Company Act of 1935, section 38 of the Investment Company Act of 1940 and section 211 of the Investment Advisers Act of 1940, the Securities and Exchange Commission hereby amends § 202.5 of Chapter II of Title 17 of the Code of Federal Regulations by adding thereunder a new paragraph (c) reading as follows:

§ 202.5 Enforcement activities.

* * * * * *

(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.

(Secs. 19, 209, 48 Stat. 85, 908, 15 U.S.C. 77s; sec. 23(a), 48 Stat. 901, sec. 8, 49

Stat. 1379, 15 U.S.C. 78w(a); sec. 20, 49 Stat. 833, 15 U.S.C. 79t; sec. 38, 54 Stat. 841, 15 U.S.C. 80a-37; sec. 211, 54 Stat. 855, sec. 14, 74 Stat. 888, 15 U.S.C. 80b-11)

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.

By the Commission.

RONALD F. HUNT, Secretary.

NOVEMBER 28, 1972.

[FR Doc.72-20559 Filed 11-28-72; 8:54 am]