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.

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)

BRIEF OF AMICUS CURIAE AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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December 22, 2021

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for *amicus curiae* Americans for Prosperity Foundation certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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/s/ Michael Pepson
Dated: December 22, 2021 Michael Pepson

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Americans for Prosperity Foundation ("AFPF") is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those key ideas include the separation of powers and constitutionally limited government, as well as bringing the administrative state in line with the U.S. Constitution. As part of this mission, AFPF appears as *amicus curiae* before state and federal courts.

Tyranny begins where a government silences its critics. AFPF has a particular interest in this case because it believes agency "gag clauses" wrongfully insulate government officials from accountability and deprive the public of information. People and companies—even those that may have violated a securities law—have First Amendment rights, which the government should not be permitted to strip.[2] The First Amendment prohibits the government from imposing prior restraints on

[1]All parties have consented to the filing of this brief. Pursuant to FRAP 29(a)(4)(E), *amicus curiae* states that no counsel for a party other than AFPF authored this brief in whole or in part, and no counsel or party other than AFPF made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

[2] AFPF takes no position as to whether Mr. Novinger, in fact, engaged in the charged conduct. Nor does it take a position as to whether the factual allegations in the SEC complaint are true in this case.

truthful speech about matters of public concern. This prohibition extends to targets of government investigations and enforcement actions, regardless of whether the target did anything actionable. Agency "gag clauses," like the one at issue here, not only violate the First Amendment and due process but also wrongly insulate agency officials from meaningful oversight and shield them from accountability.

AFPF is opposed to agency policies that demand the inclusion of unconstitutional speech bans in agency settlement agreements. Such bans are unenforceable, violate the First Amendment, and are poor public policy that hinders oversight.[3] They are an unjustifiable—and highly successful—muzzling of public criticism of agency action.

SUMMARY OF ARGUMENT

"*E pur si muove*" (and yet it moves). The Securities and Exchange Commission's ("SEC") policy of demanding gag clauses in settlements is reminiscent of Galileo Galilei's fabled mumbled disclaimer after he was forced—on threat of torture—by authorities to publicly recant his discovery that the Earth revolves around the Sun. As with the then-official position that the Sun revolves around the Earth, the simple fact is that not *all* allegations in SEC complaints are

[3] *See* James Valvo, *The CFTC and SEC Are Demanding Unconstitutional Speech Bans in Their Settlement Agreements*, Yale Journal on Regulation (Dec. 4, 2017), https://bit.ly/3a8XDUu.

true—regardless of whether they are ultimately resolved through a settlement agreement with a gag provision.

The SEC gag-clause policy that purports to prevent defendants from ever denying allegations against them suppresses speech critical of the government. The SEC has recognized as much by including what it has described as "escape valves even as to denials of the allegations" such as "[a] defendant '*may testify truthfully* about any matter under oath in connection with a legal or administrative subpoena,' *which could include a denial of an allegation*."[4] If a defendant can *truthfully* deny an allegation in an SEC complaint under oath, then the veracity of the allegation is, at the least, open to interpretation, if not false. By implication, then, the SEC can use the gag provision to suppress truth in the public square, substituting instead its own narrative. And the SEC has in fact admitted to using the gag provision to compel private individuals and companies to "retract" or otherwise change their prior public statements. Agencies should not be permitted to permanently muzzle targets of their investigations with gag provisions forced into settlement agreements memorialized in consent orders and enforced by the courts.

It blinks reality and defies common sense to suggest every allegation in a complaint is true. As one district court put it, "[b]y definition, an allegation is an

[4] Mem. in Supp. of Defs.' Mot. to Dismiss, ECF 12-1, at 29, *Cato Inst. v. SEC*, No. 19-cv-47 (D.D.C. filed May 10, 2019) (emphasis added).

assertion without proof. Plaintiff[s] should heed the legal maxim—innocence until proven guilty."[5] Federal Rule of Civil Procedure 8 makes this pellucidly clear. This maxim holds true even where agencies may have a practice of "negotiating" the content of the complaint with the would-be settling defendant.[6]

Agencies may try to justify their unconstitutional gag orders using a circular "trust us, we're the government" line of reasoning: that is, if the target didn't do what was alleged in the agency's complaint, it would not have settled, therefore the target is a bad actor and allegations in the complaint are true and we can muzzle the target from ever saying otherwise.[7] Not so. Regardless, even those who have engaged in misconduct should not be forced to bargain away their First Amendment rights.

This Court should be sensitive to the tremendous disparity in bargaining power and resources between governmental and private parties. It should also consider that many agencies sometimes force targets into settling on unfair terms. Companies may be coerced into settlement because the time, monetary, and

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[5] *Rottmund v. Cont'l Assurance Co*., 761 F. Supp. 1203, 1207 (E.D. Pa. 1990).

[6] Settling defendants "often seek and receive concessions concerning the violations to be alleged in the complaint, the language and factual allegations in the complaint, and the collateral, administrative consequences of the consent decree." *SEC v. Clifton*, 700 F.2d 744, 748 (D.C. Cir. 1983).

[7] *Cf. Cochran v. SEC*, No. 19-10396, 2021 U.S. App. LEXIS 36687, at *64-65 (5th Cir. Dec. 13, 2021) (en banc) (Oldham, J., concurring) ("The SEC's litigation position is a combination of 'trust us, we're the experts' and 'there will be time for judicial review when we're good and ready, thank you.'").

reputational costs of fighting are simply too high, or to avoid the uncertainty of litigation. Gag clauses prevent the public from learning the extent to which agencies may pursue meritless, unjustified investigations and enforcement actions, as the subjects of such actions are gagged from speaking.

In practice, this means the gag provisions may operate to suppress truthful speech critical of the government, while enshrining in perpetuity a false or misleading government-propagated narrative. Worse, the SEC has shown a willingness to invoke the gag clause to *compel* pro-government speech. That is profoundly unconstitutional. The SEC has no legitimate interest in suppressing the truth about its actions. The First Amendment flatly prohibits it.

SEC gag provisions have two more flaws. *First*, they cannot satisfy the most basic requirement of due process—fair notice of prohibited or required conduct—or comply with Rule 65(d)'s specificity requirements. *Second*, the agency's wrongful practice of chilling the exercise of First Amendment rights prevents Congress from performing its core Article I oversight function, as well as inhibits Executive branch efforts to address and prevent agency overreach.

This Court should hold the gag clause violates the First Amendment and is unenforceably vague.

ARGUMENT

I. The SEC Gag Clause Violates the First Amendment.

Consent judgments have "attributes both of contracts and of judicial decrees." *United States v. ITT Cont'l Baking Co*., 420 U.S. 223, 236 & n.10 (1975). Consent judgments should be interpreted and construed as a contract. *Id.* at 238. To be enforceable, they must not be illegal, including when the government is a party. *See also Overbey v. Mayor of Balt*., 930 F.3d 215, 223–25 (4th Cir. 2019). *Cf. In re CFTC*, 941 F.3d 869, 873 (7th Cir. 2019) ("So if we understand the consent decree as an effort to silence individual members of the Commission, it is ineffectual[.]"). The SEC's gag provision does not meet this test.

A. The SEC Gag Clause is an Unconstitutional Content-Based Prior Restraint on Speech.

"On its face, the SEC's no-denial policy raises a potential First Amendment problem." *SEC v. Citigroup Glob. Mkts. Inc*., 827 F. Supp. 2d 328, 333 n. 5 (S.D.N.Y. 2011) (Rakoff, J.), *vacated and remanded on other grounds*, 752 F.3d 285 (2d Cir. 2014).[8] *Cf. SEC v. Novinger*, C.A. No. 4:15-cv-00358-O, 2021 U.S. Dist. LEXIS 190434, at *8 n.3 (N.D. Tex. Aug. 10, 2021) (R.E.38) ("[T]he Court is

[8] "This might be defensible if all that were involved was a private dispute between private parties. But 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.'" *SEC v. Vitesse Semiconductor Corp*., 771 F. Supp. 2d 304, 309 (S.D.N.Y. 2011).

mindful of the litany of First Amendment concerns presented in Defendants' briefing[.]"). A provision in a consent order that is a prior restraint on truthful speech violates the First Amendment. *See Crosby v. Bradstreet Co*., 312 F.2d 483, 485 (2d Cir. 1963). *See also Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) ("[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."). That is exactly what the gag provision here does. *See generally* James Valvo, *The CFTC and SEC Are Demanding Unconstitutional Speech Bans in Their Settlement Agreements*, Yale Journal on Regulation (Dec. 4, 2017), https://bit.ly/3a8XDUu.

The First Amendment bars the government from imposing content-based prior restraints on speech enforced by threats of prosecution. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68–71 (1963). An "injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights." *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971).

The SEC gag clause is exactly that.[9] Worse, the SEC uses the gag provision to *compel* pro-government speech through forced "retractions."

B. The SEC Has a Long History of Suppressing Speech.

Since 1972, the SEC has systematically muzzled settling defendants and respondents, announcing it would not "permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings." 17 C.F.R. § 202.5(e). *See Cato Inst. v. SEC*, No. 20-5054, 2021 U.S. App. LEXIS 19954, at *2-3 (D.C. Cir. July 6, 2021). According to the SEC, "in any civil lawsuit brought by [the SEC] 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 conducted alleged did not, in fact, occur." 17 C.F.R. § 202.5(e). Under this policy, "[s]ilence was not allowed. The SEC announced that it would treat 'refusal to admit the allegations' as 'equivalent to a

[9] In an effort to excuse the SEC's First Amendment violations, the SEC argued below that "if the defendants breach [the no-deny provisions] by denying allegations, the Commission *cannot* seek contempt." SEC Mem. in Opp. to Mot. to Reopen and For Relief From Judgment, ECF 43 at 15. That assertion—critical to the SEC's argument as to why the gag provision complies with the First Amendment—may not wash even on its own terms. More fundamentally, however, it ignores that "a court may institute criminal contempt proceedings against an SEC defendant who violates a no-deny provision contained in a consent decree issued by that court even absent the SEC's consent." *Cato Inst. v. SEC*, No. 20-5054, 2021 U.S. App. LEXIS 19954, at *7-8 (D.C. Cir. July 6, 2021) (citations omitted)).

denial' unless the settling target explicitly stated that 'he neither admits nor denies the allegations.'" Verity Winship & Jennifer K. Robbennolt, *An Empirical Study of Admissions in SEC Settlements*, 60 Ariz. L. Rev. 1, 5 (2018).

Consistent with this policy, the gag provision here states:

> Defendant understands and agrees to comply with the terms of 17 C.F.R. § 202.5, which provides in part that it is the Commission's policy 'not to permit a defendant . . . to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint . . . .' 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 allegations, without also stating that Defendant does not deny the allegations[.]

Consent of Defendant Christopher A. Novinger, ECF 33-1, ¶ 12 (R.E. 11–12.).

Notably, it contains two exemptions, which underscore its truth-suppressing functions: "Nothing in this paragraph affects Defendant's: (i) testimonial obligations; or (ii) right to take legal or factual positions in litigation in which the Commission is not a party." *Id.* (R.E. 12). Why? One explanation is that the SEC wishes to avoid judicial scrutiny of its efforts to silence settling targets.[10] Another

[10] "These are strategic exemptions for the agencies to include because they prevent the settlement agreements from coming to the attention of a judge in a future proceeding who would have the power to object to and invalidate the restraint on speech." James Valvo, *The CFTC and SEC Are Demanding Unconstitutional Speech Bans in Their Settlement Agreements*, Yale Journal on Regulation (Dec. 4, 2017), https://bit.ly/3a8XDUu.

related explanation may be that the absence of the exemption would interfere with the defendant's or respondent's ability to testify truthfully, in essence requiring them to lie under oath—a compelled crime that would open a Pandora's Box of constitutional violations. In other words, sometimes the allegations in the complaint are not true[11]—a reality the SEC acknowledges.

Senator Tom Cotton has explained this "wrinkle in the rule . . . implies [the SEC gag rule] might require [a settling defendant] to say something untruthful" in public. Sen. Tom Cotton Q&A During Banking Comm. Hearing at 1:53–2:08 (Dec. 11, 2018), *available at* https://bit.ly/3dZEIxL. In response, the then-SEC Chairman did not attempt to refute the argument, replying instead: "It's a result of the unique nature of testifying in those types of situations." *Id.* at 2:16–22. Senator Cotton then inquired: "So it's okay to have defendants that have reached a settlement with the SEC say things to the public that might be untruthful but not to say them in court? We're talking about a prior restraint on speech that is also content-based." *Id.* at 2:23–35. The then-Chairman did not address the point, a troubling red flag.

The SEC's gag-clause policy stands in tension with our "profound national commitment to the principle that debate on public issues should be uninhibited,

[11] The SEC has acknowledged as much: "A defendant 'may testify truthfully about any matter under oath in connection with a legal or administrative subpoena,' which could include a denial of an allegation[.]" Mem. in Supp. Def. Mot. to Dismiss at 3, Dkt. No. 12-1, *Cato Inst. v. SEC et al.*, No. 19-47 (D.D.C. filed May 10, 2019).

robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). As Judge Jed Rakoff explained: "[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 SEC . . . has a duty . . . to see that the truth emerges[.]" *Citigroup Global Mkts.*, 827 F. Supp. 2d at 335. The SEC has not lived up to this ideal.

C. The SEC Uses the Gag Clause to Actively Censor Speech and Compel Pro-Government Speech.

The SEC uses the gag clause not only to censor speech but to compel settling defendants and respondents to make pro-government statements. As a former Director of the SEC's Division of Enforcement has candidly advised, "the SEC goes one step further [than other agencies] and not only prohibits defendants from denying wrongdoing in a settlement, but has demanded a retraction or correction on those occasions when a defendant's post-settlement statements are tantamount to a denial." *Examining the Settlement Practices of U.S. Financial Regulators*, Hearing Before H. Comm. On Fin. Servs., 112th Cong. (2012) (statement of Robert Khuzami, Dir., Div. of Enforcement, Secs. & Exchange Comm'n).

Take, for example, the case of Michael Angelos. The SEC "construed" "[s]tatements made on behalf of" him "as denials of the allegations in the

Complaint," filing a motion to vacate the settlement. *See* Secs. & Exchange Comm'n, Litigation Release No. 14886 (Apr. 22, 1996), *available at* https://bit.ly/34hrh84 (regarding *SEC v. Michael P. Angelos*, No. B96-834 (D. Md.)). The SEC conditioned withdrawal of its motion on a statement from Mr. Angelos:

> I settled this case without admitting or denying the allegations of the complaint. To comply with my settlement with the [SEC], I withdraw any statement made on my behalf that may have been inconsistent therewith. I am pleased that this settlement resolves the SEC's lawsuit against me. I will have no further comment other than any sworn testimony I may give in this or any other matter.

Id.

More recently, the SEC weaponized the gag clause in a public dispute with Morgan Stanley. In 2003, "the day after the details of the settlement were announced" Morgan Stanley's CEO reportedly told investors at a conference: "'I don't see anything in the settlement that will concern the retail investor about Morgan Stanley. Not one thing.' A reporter from *The New York Times* attended the conference" and published an article the next day. Floyd Norris, *Morgan Stanley Draws S.E.C.'s Ire*, N.Y. Times (May 2, 2003), https://bit.ly/2wWt5Hj. Immediately thereafter, the SEC Chairman wrote a scathing letter to the CEO; apparently, according to agency officials, the CEO's "remarks had been regarded as cavalier and had provoked anger at the agency." *Id*.

The SEC Chairman's "letter began with a reference to the *Times* article." *Id*. Although the CEO had merely expressed his opinion that the settlement itself should

not concern investors, and did not even purport to comment on or deny the allegations in the SEC's complaint, the SEC felt that Morgan Stanley did not express sufficient "contrition" for the agency's purposes. The Chairman wrote:

> I am deeply troubled that you would suggest that Morgan Stanley's conduct, *as described in the Commission's complaint,* was not a matter of concern to retail investors. My concerns are two-fold. First, your statements reflect a disturbing and misguided perspective on Morgan Stanley's *alleged* misconduct. *The allegations in the Commission's complaint* against Morgan Stanley are extremely serious. . . . In light of these charges, your reported comments evidence a troubling lack of contrition[.]
>
> Second, I wish to remind you that among the terms of the settlement to which Morgan Stanley agreed is a requirement that the firm . . . do[es] not deny the Commission's allegations. Like every term of the settlement, this is a legal obligation assumed by the firm (and certainly applicable to you as CEO), that is enforceable by the court. I caution you that the Commission would regard a violation of that obligation as seriously as a failure to comply with any other term of the settlement[.]

Excerpts from Exchange of Letters, N.Y. Times (May 2, 2003) (emphasis added), https://nyti.ms/2V6sZoj.

The SEC's threatening letter had its intended effect, leading Morgan Stanley not only to retract its statement of opinion but publicly *praise the SEC for its efforts*:

> I deeply regret any public impression that the Commission's complaint was not a matter of concern to retail investors. Morgan Stanley views seriously the allegations that the SEC and other regulators have made in their complaints and agrees the allegations are a matter of concern to retail investors[.]
>
> *The reforms, established through the leadership of the SEC and other regulators, are a positive for retail investors, not a concern for retail investors*. We will go forward in the spirit of our agreement to make

> research and markets better for all investors. I appreciate your reminder on the terms of the settlement and can assure you that no one at Morgan Stanley will violate the settlement agreement's prohibition against denying the Commission's allegations.

Id. (Philip J. Purcell, Morgan Stanley CEO) (emphasis added).

This government-compelled pro-SEC speech is unconstitutional. *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943); *see also Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 16 (1986) (corporations are protected against compelled speech). Moreover, to the extent the Morgan Stanley CEO's initial remarks were truthful and accurate, it raises the troubling specter that the SEC's sensitivity to its public image is more pressing than its mission to ensure that shareholders have access to reliable information. The SEC should not be able to strongarm companies into publicly praising it whenever it thinks that there was insufficient "contrition."

II. The Gag Clause Violates Due Process for Vagueness and Rule 65(d).

The gag provision also violates due process for vagueness. As relevant here, paragraph 12 of the consent states: "Defendant . . . 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[.]" Consent of Defendant Christopher A. Novinger, ECF 33-1, ¶ 12 (R.E. 12). That is meaningless. For example, what does it mean to "take any action" to "permit to be made any public statement" that "indirectly" denies an allegation in

the complaint or "creates the impression that the complaint is without factual basis"? How is Mr. Novinger to know what "impressions" or "indirect denials" the SEC may later claim to be prohibited? Does it include, for example, attempting to vindicate his rights through this lawsuit? As demonstrated by the Angelos and Morgan Stanley examples above, this concern is well founded.

Due process requires judicial orders, enforceable by contempt proceedings, be sufficiently specific to provide fair notice of required or prohibited conduct. *See Scott v. Schedler,* 826 F.3d 207, 211–12 (5th Cir. 2016); *LabMD, Inc. v. FTC*, 894 F.3d 1221, 1235–37 (11th Cir. 2018); Fed. R. Civ. P. 65(d). "The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. . . . [T]hose who must obey them . . . [should] know what the court intends to require and what it means to forbid." *Int'l Longshoremen's Ass'n v. Phila. Marine Trade Ass'n*, 389 U.S. 64, 76 (1967). *See also Cato Inst.,* 2021 U.S. App. LEXIS 19954, at *7–8 ("Violations of court orders are punishable by criminal contempt, and a court may institute criminal contempt proceedings against an SEC defendant who violates a no-deny provision contained in a consent decree issued by that court even absent the SEC's consent." (citations omitted)). The consent order here fails the test.

The gag provision also violates Rule 65(d) for failure to adequately describe required or prohibited conduct.[12] "Federal Rule of Civil Procedure 65(d)(1) contains three requirements: an order granting an injunction must '(A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.'" *Schedler*, 826 F.3d at 211 (quoting Fed. R. Civ. P. 65(d)(1)); *see also LabMD*, 894 F.3d at 1235. Rule 65(d)'s specificity requirements "are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974).

Under Rule 65(d), injunctions "must" "describe in reasonable detail—*and not by referring to the complaint* or other document—the act or acts restrained or required[.]" Fed. R. Civ. P. 65(d)(1)(C) (emphasis added). Rule 65(d) "is phrased in mandatory language. '[It] expressly proscribes the issuance of an injunction which describes the enjoined conduct by referring to another document."

[12] The SEC appears to recognize as much. The Consent states: "Defendant will not oppose the enforcement of the Final Judgment on the ground, if any exists, that it fails to comply with Rule 65(d) of the Federal Rules of Civil Procedure, and hereby waives any objection based thereon." Novinger Consent, ECF 33-1, ¶ 9 (R.E. 10).

Consumers Gas & Oil v. Farmland Indus., 84 F.3d 367, 370–71 (10th Cir. 1996) (cleaned up).

But here the gag provision refers to the complaint on its face. Thus, it is unenforceable. *See Hartford-Empire Co. v. United States*, 323 U.S. 386, 410 (1945) (noting the elimination of provision "generally enjoins . . . violations 'as charged in the complaint' . . . is required by statute, by the Rules of Civil Procedure, and by our decisions"); *see also Schedler,* 826 F.3d at 213 ("The district court . . . may not issue an injunction that references other documents[.]").

III. The Gag Clause Impairs Oversight and Transparency.

Further still, the gag provision insulates the SEC from criticism by those who are uniquely positioned to expose agency wrongdoing and abuse by virtue of their firsthand experience. Defendants who have been through an agency's enforcement process are often the most informed and best positioned to identify areas in need of reform in that process. By ensuring those who settle enforcement actions are unable to provide information that would aid oversight, the SEC insulates itself from criticism and the scrutiny accountability demands. That is wrong and nonsensical.

By way of example, in January 2020, the Office of Management and Budget ("OMB") issued a request for information on Improving and/or Reforming Regulatory Enforcement or Adjudication (the "RFI"). *See* 85 Fed. Reg. 5,483. The RFI requested "specific, concrete examples of current due process shortfalls" with

agency adjudications and investigations, including on topics such as "When do regulatory investigations and/or adjudications coerce Americans into resolutions/settlements?" *Id.* at 5,484. The gag provision bars settling defendants from providing critical factual information to inform this type of important administrative reform process. Likewise, the gag provision, on its face, prevents settling defendants from providing critical information to congressional committees tasked with conducting oversight of the SEC's enforcement activities.

IV. Allegations in SEC Complaints are Not Always True.

This Court should reject the all-too-common trope that defendants would not settle if the SEC's case was weak on the facts or law, or if the defendant had a decent chance of prevailing. The reality is few companies and individuals are brave enough to take on a federal agency, especially their own regulator. "Since 2002, the SEC's settlement rate has remained constant at about ninety-eight percent." Priyah Kaul, *Admit or Deny: A Call for Reform of the SEC's 'Neither-Admit-Nor-Deny' Policy*, 48 U. Mich. J. L. Ref. 535, 536 (2015); *see also SEC v. Clifton*, 700 F.2d 744, 748 (D.C. Cir. 1983) ("SEC has traditionally entered into consent decrees to settle most of its injunctive actions."). This means in the vast majority of cases the SEC's allegations are never tested in court, and the agency is never required to prove its case. Does this mean that in every case the SEC settles, the allegations are true, and the defendant has done something wrong? The short answer is no.

As the Supreme Court has explained, consent decrees "are arrived at by negotiation between the parties and often admit no violation of law[.]" *ITT Cont'l Baking Co.*, 420 U.S. at 236 n.10. And for good reason. "A settlement is by definition a compromise." *SEC v. Citigroup Glob. Mkts., Inc*., 673 F.3d 158, 166 (2d Cir. 2012). Permitting the defendant to deny liability is entirely consistent with the public interest. *See United States v. Google Inc*., No. 12-04177, 2012 U.S. Dist. LEXIS 164401, at *14–17 (N.D. Cal. Nov. 16, 2012).

Indeed, it "is customary" for consent decrees to "explicitly state[] that '[n]othing in [the] Consent Decree is intended to constitute an admission of fault by either party to this action.'" *Maher v. Gagne*, 448 U.S. 122, 126 n.8 (1980). This custom reflects an important reality: "A defendant may settle a case for a variety of reasons. He may have committed the conduct alleged in the complaint or he may not have[.]" *United States v. Bailey*, 696 F.3d 794, 800 (9th Cir. 2012). For instance, settlement "may be motivated by a desire for peace rather than from any concession of weakness of position." Fed. R. Evid. 408, Advisory Comm. Note; *see also SEC v. Citigroup Glob. Mkts*., 752 F.3d 285, 295 (2d Cir. 2014) ("Consent decrees provide parties with a means to manage risk."). "[J]ust because a party agrees to settle does not mean that it is actually liable[.]" *In re Initial Pub. Offering Sec. Litig*., No. 21-92, 2003 U.S. Dist. LEXIS 23102, at *18 (S.D.N.Y. Dec. 24, 2003).

The reality is companies often settle with agencies even when the allegations in the complaint are untrue. Not because they did anything wrong but because the time, monetary, and reputational cost of fighting the agency is too great, or to avoid the uncertainty of litigation. As the ABA Section of Antitrust Law has explained:

> Government investigations and enforcement actions are inherently different from private disputes. They are not contests between equals—federal agencies have enormous advantages in terms of resources and power. Businesses, especially smaller companies and their principals, simply cannot afford in many cases to take on the risks and costs of defending themselves during an investigation or when confronted with a complaint and order.

ABA Section of Antitrust Law, Presidential Transition Report: The State of Antitrust Enforcement, 29 (Jan. 2017). This places enormous pressure on targets to settle.

As an SEC Commissioner explained, "[o]ften, given the time and costs of enforcement investigations, it is easier for a private party just to settle than to litigate a matter." Hester Peirce, Comm'r, SEC, The Why Behind the No: Remarks at the 50th Annual Rocky Mountain Securities Conference, *available at* https://bit.ly/34ghu1I.

This Court should not blind itself to the practical reality that, at times, the SEC gag clause prohibits truthful speech and enshrines the SEC's narrative in perpetuity. That is the antithesis of the rights guaranteed by the First Amendment, and this Court should reject the SEC's decades-long project to silence criticism of its actions.

V. This Court Should, At the Least, Issue a Clarification or Construction on Whether the Gag Provision Complies with the Constitution.

As explained above, there are serious First Amendment and due process problems with the SEC's "gag" provision in the Consent incorporated into the district court's Final Judgment.[13] *See* Final Judgment as to Christopher A. Novinger, ECF 37, § VIII (R.E. 31). The district court "retain[s] jurisdiction" over the case "for the purposes of enforcing the terms of this Final Judgment." *Id.* § 10 (R.E. 32). Therefore, regardless of whether this Court finds Rule 60(b) allows *modification*, this Court can and should issue a decision *clarifying and construing* the "gag" provision's meaning and enforceability.

"If defendants enter upon transactions which raise doubts as to the applicability of the injunction, they may petition the court granting it for a modification *or construction* of the order." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 15 (1945) (emphasis added); *see also Gulf King Shrimp Co. v. Wirtz,* 407 F.2d 508, 517 (5th Cir. 1969) ("If for some reason Gulf King had doubts about the meaning of any part of the injunction, it could have sought district court clarification." (citing *McComb v. Jacksonville Paper C*o., 336 U.S. 187 (1949)).

[13] The district court acknowledged "the litany of First Amendment concerns presented in Defendants' briefing," but found Rule 60 "is not an appropriate avenue by which to address those concerns." *Novinger*, 2021 U.S. Dist. LEXIS 190434, at *8 n.3 (R.E.38).

Here, Mr. Novinger has clearly expressed a desire to take actions raising doubts about the meaning of the injunction, stating: "I wish to speak, write and/or publish about my prosecution by the SEC. . . . The gag orders are worded so vaguely and reach so broadly, that I am unable to speak without fear of a reopened prosecution[.]" Affidavit of Christopher A. Novinger in Support of Defendants' Motion for Relief from Judgment, ECF 40-1, ¶¶ 4–5.[14] Accordingly, at the least, Mr. Novinger should receive a clarification on the gag provision's precise contours, including what truthful speech it lawfully operates to prohibit and the extent to which it is enforceable.[15]

CONCLUSION

For these reasons, the decision below should be reversed.

[14] *Cf. Daniels Health Scis., LLC v. Vascular Health Scis., LLC*, 710 F.3d 579, 586 (5th Cir. 2013) ("VHS has not alleged an intent to enter into such transactions. And it is impossible for courts to craft injunctions that address all hypotheticals. Nevertheless, because the injunction is quite broad relative to the 'reasonably detailed and sufficiently specific to the underlying action' standard, we instruct the district court on remand to try to narrow the scope of its injunction.").

[15] *Cf. SEC v. Am. Int'l Grp., Inc.*, 944 F. Supp. 2d 109, 111 (D.D.C. 2013) ("[T]he SEC and AIG filed a Joint Motion for Clarification of Consent of American International Group, Inc. . . . [T]he SEC and AIG requested that the Court 'clarify' the Consent Order by adding a provision[.] . . . The Court granted the Joint Motion for Clarification[.]").

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief contains 5,620 words. This brief also complies with the typeface and type-style requirements of FRAP 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Times New Roman 14-point font.

/s/ Michael Pepson
Michael Pepson

Dated: December 22, 2021

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2021, I electronically filed the above Brief of Amicus Curiae Americans for Prosperity Foundation in Support of Defendants-Appellants and Reversal with the Clerk of the Court by using the appellate CM/ECF system. I further certify that service will be accomplished by the appellate CM/ECF system.

/s/ Michael Pepson
Michael Pepson

Dated: December 22, 2021