No. 21-1284

IN THE
Supreme Court of the United States

BARRY D. ROMERIL,
Petitioner,
v.
SECURITIES AND EXCHANGE COMMISSION,
Respondent.

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

BRIEF FOR AMICUS CURIAE DUE PROCESS INSTITUTE IN SUPPORT OF PETITIONER

SHANA-TARA O'TOOLE
COUNSEL OF RECORD
DUE PROCESS INSTITUTE
700 Pennsylvania Ave., SE
Suite 560
Washington, D.C. 20003
(202) 558-6683
shana@idueprocess.org

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QUESTION PRESENTED

1. Does it violate the First Amendment for the Securities and Exchange Commission to impose a requirement that any party with whom it settles must agree to a lifelong prior restraint barring any statement, however truthful and whenever and however expressed, that even suggests that any allegation in a Securities and Exchange Commission Complaint is insupportable?
2. Does the Securities and Exchange Commission violate the Due Process Clause when it requires that any party with whom it settles must sign an SEC-drafted Consent Form waiving his due process rights and agree to a lifelong prior restraint barring any statement, however truthful and whenever and however expressed, that even suggests that any allegation in a Securities and Exchange Commission Complaint is insupportable?
3. Is a final judgment entered by a United States District Court which includes an unconstitutional lifetime ban on any statement, however truthful and whenever and however expressed, that even suggests that any allegation in a Securities and Exchange Commission Complaint is insupportable, void, and therefore subject to review under Rule 60(b)(4)?

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Amicus curiae is a national organization dedicated to protecting the constitutional rights of criminal defendants and ensuring the fair administration of the criminal legal system. Due Process Institute is a nonprofit, bipartisan, public interest organization that works to honor, preserve, and restore procedural fairness in the criminal legal system because due process is the guiding principle that underlies the Constitution's solemn promises to "establish justice" and to "secure the blessings of liberty." U.S. Const. pmbl. It is interested in the outcome of this case because of its concern that administrative agencies seek settlements with coercive terms (like gag rules) to avoid meaningful judicial review of the agencies' abuse of power.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case illustrates the egregiousness of agency-imposed settlements. SEC-drafted regulation, 17 C.F.R. §202.5(e), requires each

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[1] Pursuant to Supreme Court Rule 37, amicus states that no counsel for any party authored this brief in whole or in part, and that no entity or person other than amicus and its counsel made any monetary contribution toward the preparation and submission of this brief. Under Supreme Court Rule 37.2(a), counsel of record avers that all parties received timely notice of the intent to file this amicus brief from prior counsel and further that both of the parties have consented to the filing of this brief: Petitioner via electronic mail and Respondent by a blanket consent letter filed with the Court.

settling party to agree to a lifetime gag on any speech suggesting that any factual allegation in SEC's administrative complaint is unsupportable. The gag provision is nonnegotiable. It is a precondition to a no-deny, pre-adjudication settlement. Petition-27.

Administrative adjudications, with certain separation-of-powers and due-process concerns inherently within them, are concerning enough. But at least these in-house adjudications require both the prosecuting party and the prosecuted party to follow some defined procedural process that serves to help check prosecutorial intimidation or overreach. Importantly, these adjudications are also subject to Article III appeals, which offer some additional—though in our view overly deferential—review of agency decisions.

Yet even these imperfect procedural checks are absent in SEC settlement settings. SEC seeks settlement before it even files an administrative complaint with its in-house adjudicator. No SEC administrative law judge, and no Article III judge, ever reviews the propriety of the terms of the settlement.

This settlement process is deeply concerning because it short-circuits both agency adjudication and Article III judicial review. The agency obtains a settlement not after hauling a party in front of a neutral adjudicator and proving its case, but instead amidst the agency's own investigation. As a result, nongovernmental litigants face contracts of adhesion, drafted by the agency, containing

provisions like a lifetime ban on speech that, were this an Article III case, a court would never impose.

The only way to get an Article III court to lift the speech ban is to file a Rule 60 motion for relief from judgment under the Federal Rules of Civil Procedure. However, even that avenue was closed for Barry Romeril by the lower court's decision. Bookended between no agency or court adjudication on one side and no meaningful judicial review on the other, Romeril's case illustrates the serious due-process deficits in SEC's investigate-and-settle procedure.

SEC's novel theories and allegations that often form the basis of no-deny settlements are not necessarily true, nor based on concrete legal precedent.[2] But the settling nongovernmental party is forbidden from saying that. While judicial review is available in theory, Romeril's case demonstrates the deep chasm between theory and practice. Imposing a lifetime ban on speech without any meaningful mechanism for judicial review violates the Fifth Amendment's Due Process Clause and Article III's Vesting Clause.

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

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[2] For example, recently, a federal jury returned a resounding verdict against SEC on all but one count in SEC's 14-count prosecution of Spartan Securities Group, Ltd., et al. Judgment in *SEC v. Spartan Securities Group. Inc.*, No. 8:19-cv-448-VMC-CPT (M.D. Fla. Aug. 9, 2021), https://bit.ly/3DBQtYm.

ARGUMENT

Anyone who has experienced a swarm of federal agents investigating their workplace for suspected securities law violations could tell how inherently intimidating and one-sided an SEC investigation can feel. Now imagine a foreman of that posse essentially proposes that their investigators will end their work in exchange for a financial settlement and execution of a promise never to speak of the circumstances or raise concerns about it to a federal judge. Under such circumstances, an entity like SEC has every incentive to propose settlement as early as possible after conducting even a cursory investigation but its blitz has increased its chances of collecting a large sum of money.[3]

Barry Romeril has paid the millions SEC demanded in its investigation of Romeril's then-employer, Xerox Corp. Petition-9–11. He now wants only to speak about what transpired. Yet, he signed the SEC-drafted agreement (under circumstances he is forbidden to speak about) that prevents him from telling his story. App-37 ¶11. Via that contract, he authorized SEC to obtain an *ex parte* judgment from a federal court, App-39 ¶14, and gave up his right to oppose the enforcement of such a federal-court judgment, App-36 ¶8.

But such invited judgments are unconstitutional cognovits because they bar reasoned, meaningful judicial review. Party consent

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[3] According to SEC-issued press releases, SEC collects tens of millions of dollars through settlements each year. SEC Press Releases, https://bit.ly/3O5DTW2.

does not cure the due-process and separation-of-powers constitutional defects. Consent to entry of judgment is also immaterial under Federal Rule of Civil Procedure 60(b)(4).

The Second Circuit's unfamiliarity with the realities of SEC's settlement practices is perhaps excusable. After all, due to the lifetime gags, parties like Romeril are precluded from shedding light on any inequities. The imposed silence undercuts the lower court's giving controlling weight to Romeril's coerced acquiescence to SEC's unconstitutional condition of settlement. Unfortunately, the court simply assumed that "[a] defendant in a civil enforcement action is not obliged to enter into a consent decree; consent decrees are normally compromises in which the parties give up something they might have won in litigation and waive their rights to litigation." App-12 (simplified). That assumption, along with the analysis pegged to it, is deeply flawed, for it fails to address the constitutional deficiencies in SEC's settlement regime. This Court should take the case and decide to give those like Romeril the chance to speak.

I. INVITED JUDGMENTS ARE UNCONSTITUTIONAL COGNOVITS UNDER FIFTH AMENDMENT'S DUE PROCESS CLAUSE AND ARTICLE III'S VESTING CLAUSE.

Two cases—*Schor* and *Swarb*—provide insight into the weighty constitutional problems with SEC's investigate-and-settle practice. At what point do

invited judgments that bar reasoned meaningful judicial review violate the Constitution? That is, in essence, the question Romeril asks this Court to answer.

Decisions regarding whether and whom to investigate "are all made outside the supervision of the court." *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807 (1987). Deciding to (1) investigate and (2) prosecute are "core executive constitutional function[s]." *United States v. Armstrong*, 517 U.S. 456, 465 (1996). No administrative law judge, and no Article III judge, supervises the agency's decision-making on these two questions. As a result, settlement agreements like the one at issue are signed before SEC files even an administrative complaint with its in-house adjudicators. SEC has every incentive to use strong-arm negotiating tactics to procure a settlement and no incentive to protect the nongovernmental party's constitutional rights, including due-process rights. The Article III judge who signs off on the settlement is essentially relegated to the status of a glorified notary public. App-36 ¶7–9; App-39 ¶14. SEC's settlement regime ill-serves both the due-process and separation-of-powers guarantees of the Constitution. *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672 (2012) (discussing due process as a particular instantiation of separation of powers).

In civil cases, Federal Rule of Civil Procedure 65(d)(1) requires that an Article III judge enjoining or restraining a party must "state the reasons" for the order, "state its terms specifically," and "describe

in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." SEC's settlement regime, in contrast, ignores each of these requirements; the judgment incorporates by reference the settlement agreement, and the Article III court gives neither reasons for, nor the terms of, Romeril's restraint. As the Notes of Advisory Committee on Rules—1937 state, F.R.C.P. 65(d) did not appear out of the blue; it "is substantially" the former 28 U.S.C. § 383.[4] That is, even Congress recognized the deficiencies that inhere in agreed-to injunctions and outlawed that practice. This Court did the same by issuing the Federal Rules of Civil Procedure. The Second Circuit, by affirming the denial of Romeril's Rule 60(b) motion for relief from judgment, has now allowed SEC to resurrect the barred practice.

The court's assertion that its injunction was invited by agreement of the parties raises separation-of-powers concerns. Looking at the fundamental fairness of SEC's settlement practice only through the lens of whether Romeril waived rights knowingly, voluntarily, and intelligently, App-13 & n.4, does not begin to scrutinize its inherent constitutional problems.

In *CFTC v. Schor*, 478 U.S. 833, 850–51 (1986), the Court described the due-process and separation-of-powers problems inherent in the settlement practice at issue here. While *Schor* dealt

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[4] The text of Rule 65(d) tracks the former 28 U.S.C. § 383. For the text of 28 U.S.C. § 383, since repealed, see Act of Oct. 15, 1914, ch. 323, § 19, Pub. L. 63-212, 38 Stat. 738.

with an appeal from an executive adjudication, unlike here, the constitutional concerns *Schor* highlights are even more sobering in the settle-amidst-investigation context.[5]

As *Schor* explains, Article III, § 1, "not only preserves to litigants their interest in an impartial and independent federal adjudication of claims within the judicial power of the United States, but also serves as an inseparable element of the constitutional system of checks and balances." 478 U.S. at 850 (simplified). SEC's settlement regime, in the words of *Schor*, "transfer[s] jurisdiction to non-Article III tribunals for the purpose of emasculating constitutional courts," and thereby leads to "the encroachment or aggrandizement of one branch at the expense of the other." *Id.* (simplified).

Where, as in Romeril's case, "this structural principle is implicated in a given case, the parties

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[5] Agency adjudication has at least some separation between the agency's prosecuting arm and the adjudicating arm. Agency adjudicators are, at least in theory, separated from agency prosecutors. But even that distinction is blurred at SEC. It recently admitted that SEC's prosecutors accessed memos prepared by the adjudicating arm. David Michaels, *SEC Says Employees Improperly Accessed Privileged Legal Records* (Wall Street Journal April 6, 2022), https://on.wsj.com/3xoHglj ("Employees at the Securities and Exchange Commission improperly accessed documents prepared for cases being litigated in the agency's administrative court system, according to an agency notice Tuesday."); Commission Statement Relating to Certain Administrative Adjudications, https://bit.ly/3JIzFR7 (April 5, 2022).

cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2." *Id.* at 850–51. Where, as here, "Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect." *Id.* at 851. Thus, judicial gag orders have been described as an "immediate menace." *McBryde v. Committee on Review Circuit Council Conduct*, 83 F. Supp. 2d 135, 174 (D.D.C. 1999), *affirmed in part, vacated in part by* 264 F.3d 52 (D.C. Cir. 2001). Settlement gags that are in essence merely notarized by an Article III judge sans analysis are that much more menacing and violative of the Fifth Amendment Due Process Clause and the Article III Vesting Clause.

Courts have accordingly invalidated these kinds of review-free settlements. For example, this Court affirmed a decision by a three-judge district court declaring unconstitutional Pennsylvania's cognovit (or confession-of-judgment) procedure through which the defendant waives its rights and authorizes the plaintiff to obtain an *ex parte* judgment from the court. *Swarb v. Lennox*, 314 F. Supp. 1091 (E.D. Pa. 1970), *affirmed by* 405 U.S. 191, 193 (1972); *see also* Black's Law Dictionary 327 (11th ed. 2019) (defining "cognovit"). Because this procedure failed to provide for judicial evaluation of the underlying contract inviting the entry of judgment, the court held that the procedure violated

the Due Process Clause. That describes SEC's settlement practice:

- Defendant waives his rights, App-37 ¶11 ("In compliance with [17 C.F.R. § 202.5], Defendant agrees not to take any action or to make or permit to be made any public statement denying, directly or indirectly, any allegation in the complaint or creating the impression that the complaint is without factual basis.");
- Defendant authorizes the Plaintiff to obtain an *ex parte* judgment from a federal court, App-39 ¶14 ("Defendant agrees that the Commission may present the Final Judgment to the Court for signature and entry without further notice"); and
- Defendant agrees not to oppose the enforcement of the judgment, and no court evaluates the propriety of entering judgment, App-36 ¶8 ("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) … and hereby waives any objection based thereon.").

SEC's court-endorsed settlement agreements are, therefore, unconstitutional cognovit judgments. They violate the Fifth Amendment's Due Process Clause. And, as *Schor* notes, they violate Article III's Vesting Clause too. The Court should take the case and so hold.

II. THE DUE PROCESS CLAUSE FORECLOSES READING RULE 60(b) NARROWLY.

The Rule 60(b) mechanism for obtaining relief from prior judgment is an important due-process guarantee. The lower court diluted the Due Process Clause by restricting the categories of cases in which Rule 60(b) relief is available.

Article III judges, when they enter judgments, even default judgments under Federal Rules of Civil Procedure 54 and 55, have to ensure such judgments satisfy basic due-process requirements. Major treatises on federal practice and several circuits have set forth factors that district courts consider before entering judgment. *See* 10A Wright & Miller, Federal Practice & Procedure § 2685 (4th ed. 2020) (giving eight non-exhaustive factors); 6 James Wm. Moore, *el al.*, Moore's Federal Practice § 55-20[2][b] (3d ed. 1999) (giving seven non-exhaustive factors); *Hill v. Williamsport Police Dept.*, 69 Fed. Appx. 49, 51–52 (3d Cir. 2003) (giving three factors; quoting *Chamberlain v. Giampapa*, 210 F.3d 154, 164 (3d Cir. 2000)); *Russell v. City of Farmington Hills*, 34 Fed. Appx. 196, 198 (6th Cir. 2002) (giving seven factors); *Eitel v. McCool*, 782 F.2d 1470, 1471–72 (9th Cir. 1986) (giving seven non-exhaustive factors; citing Moore's Federal Practice). These factors ensure that Article III Courts provide meaningful judicial review in all actions, including agreed-to demands for judgment like SEC's against Romeril.

At bottom, "Rule 60 is to be liberally construed in order that judgments will reflect the *true merits of a case*." 11 Wright & Miller, Federal

Practice & Procedure § 2582 (3d ed. 2022) (emphasis added). Here, the district court did not evaluate the merits of the case at all. It went from complaint to final judgment in eight days. *SEC v. Allaire, et al.*, No. 1:03-cv-04087-DLC (S.D.N.Y.) (Complaint, ECF No. 1 (June 5, 2003); Final Judgment as to Barry D. Romeril, ECF No. 4 (June 13, 2003)).

The Second Circuit acted under the premise that the "list of … infirmities" that can be raised under Rule 60(b)(4) "is exceedingly short" since the rule applies "only in two situations: … jurisdictional error or on a violation of due process." App-9 (quoting *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 (2010); 12 Moore's Federal Practice § 60.44[1][a] (3d ed. 2007)). On this point, the two leading treatises do not agree. Wright & Miller's treatise states that Rule 60(b) "is broadly phrased and many of the itemized grounds are overlapping, freeing courts to do justice in hard cases when the circumstances generally measure up to one or more of the itemized grounds." 11 Wright & Miller, Federal Practice & Procedure § 2582 n.1 (3d ed. 2022). Even under the stricter rule given in Moore's treatise, Romeril should prevail. But to the extent that Moore's rule does not agree with Wright & Miller's, this Court should take the case to resolve the confusion.

Wright & Miller's is the better rule because it better protects the Fifth Amendment due process rights of litigants like Romeril. Rule 60 is specifically designed to permit relief from judgment. This Court must step in to protect that judicial decision from annulment. The same constitutional

concerns that animated *Schor* and *Swarb* necessitate broadly reading Rule 60(b). Allowing incorrect or unconstitutional judgments to stand "injures … the law as an institution, … and … the democratic ideal reflected in the processes of our courts." *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (simplified). Whether "the parties may have agreed to [the entry of judgment] is immaterial" under Rule 60(b). *Crosby v. Bradstreet Co.*, 312 F.2d 483, 485 (2d Cir. 1963). Consent to the entry of judgment is likewise irrelevant under *Schor*, 478 U.S. at 850–51, and *Swarb*, 405 U.S. at 193.

In 1946, Rule 60 was re-written to expand the courts' ability to remedy prior incorrect judgments beyond what was available under the English writs of "*coram nobis*, bills of review, and so forth." Rule 60, *Notes of Advisory Committee on Rules—1946 Amendment to Federal Rules of Civil Procedure*; *see also* James Wm. Moore & Elizabeth B.A. Rodgers, *Federal Relief from Civil Judgments*, 55 Yale L.J. 623, 626–27, 653, 659–70 (1946) (collecting historical sources showing that parties could reopen judgments through writs of *audita querela*, *coram nobis*, *coram vobis*, bills of review, and bills in the nature of a bill of review, or through direct action in equity to reopen the case); *Klapprott v. United States*, 335 U.S. 601, 614–15 (1949) ("[Rule 60(b)] vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.").

The Advisory Committee that drafted the 1946 amendment called the earlier relief-from-judgment procedure "shrouded in ancient lore and

mystery." Rule 60, *Notes of Advisory Committee on Rules—1946 Amendment to Federal Rules of Civil Procedure*; *see also* Comment, *The Temporal Aspects of the Finality of Judgments: The Significance of Federal Rule 60(b)*, 17 U. Chi. L. Rev. 664, 668 (1950) (explaining the "dramatic[ally]" expanded ability of courts to remedy prior incorrect judgments). To ensure that litigants and judges would not miss the message, the 1946 amendment added subsection (e) to Rule 60 abolishing the old writs that had sown much confusion. F.R.C.P. § 60(e) ("The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.").

The court below erroneously relied on Moore's rule and narrowly construed Rule 60. App-9. But the old writs that James Moore, author of the treatise, himself discussed elsewhere, 55 Yale L.J. at 626–27, 653, 659–70, were specifically abolished by the 1946 amendments to Rule 60(b), and an expanded relief-from-judgment remedy was installed in its place. The Rule 60(b) mechanism for seeking relief from judgments remains a vital protection of Romeril's due process rights and must be preserved. The Court should take the case and subject SEC's settlement practice to meaningful judicial scrutiny.

CONCLUSION

Obviously, there are persons and entities that are guilty of what SEC has alleged against them, but the law cannot countenance a rule that essentially memorializes every allegation they make in a way that makes it appear they are always right and

every one accused is guilty. It belies the truth of a mainstay of settlement negotiation—that frequently *both* sides understand that the government cannot carry its burden as to every allegation. And it is particularly pernicious in light of a sobering truth—hardly any individual, and even most corporate entities—cannot afford protracted litigation. SEC should not be allowed to bargain for something that is wholly outside of what it could receive in a prosecution, even if it won every facet of its case, since win or lose, the accused could speak post-prosecution. *See Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991). Therefore, and for the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

SHANA-TARA O'TOOLE
COUNSEL OF RECORD
DUE PROCESS INSTITUTE
700 PENNSYLVANIA AVENUE SE
Suite 560
Washington, D.C. 20003
(202) 558-6683
Shana@idueprocess.org

Counsel for Amicus Curiae

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