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

PETITIONER'S REPLY BRIEF

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I. THE LIFETIME BAN ON SPEECH IMPOSED BY THE SEC AS A PRECONDITION FOR SETTLEMENT VIOLATES THE FIRST AMENDMENT

The SEC brief in opposition to this Court's granting a writ of certiorari has little to say about the First Amendment. It does not, since it cannot, maintain that the Order the SEC required Mr. Romeril to sign as a precondition for any settlement with it imposes anything but a lifetime prior restraint on his speech that no American court could constitutionally impose. *See* Petition at 13-17. The Commission does not claim, as it also could not, that since the bar on Mr. Romeril's speech prevents him from publicly criticizing the conduct of the SEC itself in the proceeding it commenced against him, the limitations on his speech could pass any First Amendment test. *See* Petition at 17-23. Nor could or did the SEC dispute the proposition set forth in Mr. Romeril's Petition that even a conviction for the commission of the most egregious criminal conduct—treason or the assassination of a high-ranking official—could not lead constitutionally to a limitation on speech of the nature and extent imposed here. *See*, Petition at 5.

What the SEC and the Court of Appeals for the Second Circuit in this case do say is little more than that Mr. Romeril had agreed to the lifetime limitations on his speech as a required precondition to the settlement itself, an agreement that barred him by its terms from making "any public statement denying, directly or indirectly, any allegation in the

complaint or creating the impression that the complaint is without factual basis." Opp. at 4. That language, duly set forth in the SEC's brief, imposes similar restrictions on the speech of the thousands of individuals and companies with which the SEC has settled since 1972. Unless held unconstitutional, that language and those limitations will silence Mr. Romeril from criticizing the SEC about the proceeding commenced against him until his death (as it already did for one of Romeril's co-defendants).

The notion of permitting the government to decide what may be said about its conduct is anathema to the First Amendment. As the amici curiae brief in this case filed by six distinguished constitutional law and First Amendment scholars put it: "The SEC Gag Rule effectively offers a defendant such as Mr. Romeril an 'offer he can't refuse.' … In silencing defendants such as Mr. Romeril, the SEC shelters itself from critique, using its coercive leverage to manipulate the marketplace of ideas in the government's favor. This illicit motivation exposes the SEC Gag Rule as an unconstitutional condition …" Amici Brief of Rodney A. Smolla, Clay Calvert, Alan E. Garfield, Burt Neuborne, Nadine Strossen and Eugene Volokh at 11-12.

Cases rooted in the First Amendment and due process clauses have repeatedly held that governmental conduct relating to settlements similar to that at issue in this case offended the Constitution because it imposed content- and viewpoint-based speech restrictions. That is the holding of federal cases from around the nation cited

in the Petition. *See Overbey v. Mayor of Balt.*, 930 F. 3d 215, 219 (4th Cir. 2019); *U.S. v. Richards*, 385 F. App'x 691, 694 (9th Cir. 2010); *G & V Lounge, Inc. v. Michigan Liquor Control Comm.*, 23 F. 3d 1071, 1077 (6th Cir. 1994); *Davies v. Grossmont Sch. District*, 930 F.2d 1390 (9th Cir. 1991). It is also the holding of the Supreme Court of Michigan in *People v. Smith*, 502 Mich. 624, 644 (2018).

In all these cases, a governmental entity seeking to enforce provisions of settlements of one sort or another that were inconsistent with First Amendment norms ran into judicial STOP signs mandated by the First Amendment. The SEC's response (pp. 19-20) lumps together other cases cited in the Petition for other purposes—a prior restraint case such as *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), for example, which demonstrates that the effect of the lifetime gag on Mr. Romeril is precisely what the First Amendment most vigorously rejects. It then dismisses cases cited above on irrelevant factual grounds notwithstanding that they all demonstrate that limitations on speech by the government must be tested against well-established First Amendment norms. For example, the SEC attempts to distinguish *Overbey*, but in their recounting of the case they highlight the very factors that make the SEC's no-deny policy so offensive to First Amendment principles. Opp. at 22. *Overbey* and the present case both concern suppression of speech likely to be critical of the government. The Court in *Overbey* was troubled by the government's claim of power to decide unilaterally what speech about itself was permissible, just as the SEC seeks to do here:

"Standing shoulder to shoulder with the citizenry's interest in uninhibited, robust debate on public issues is this nation's cautious 'mistrust of governmental power.' [Citation omitted]. This mistrust is one of the 'premise[s]' of the First Amendment … and we think it well-warranted here, because the non-disparagement clause is a government-defined and government-enforced restriction on government-critical speech." 930 F.3d at 224.

The SEC primarily relies in its submission on *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987), which concluded that a contractual "promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement[.]" The public policy harmed in this case is nothing less than the subordination of core principles of freedom of speech via the government's enforcement of (a) a lifetime prior restraint on speech (b) whether it is truthful or not, that (c) by its nature will likely be critical of the government.

The SEC's only stated interest in enforcing the no-denial policy is to avoid creating the impression that the SEC's allegations are in any way insupportable. Opp. at 19. Fostering public trust in the government's enforcement actions is an important aim. But it may not be achieved by suppressing criticism of its conduct, a self-evident First Amendment proposition that should hardly require additional caselaw citation.

The SEC tepidly acknowledges that "the government's ability to obtain and enforce waivers of First Amendment rights is not unlimited" and incorrectly attributes to Mr. Romeril the absolutist position that an agreed-upon waiver of any First Amendment right "can never be a valid term of a settlement agreement." Opp. at 23. If the agreement that the SEC drafted and insisted on were not one that imposed a prior restraint, if the prior restraint were not lifetime in scope, if it did not include within its scope truthful speech, if it did not effectively ban criticism of the SEC itself, if it did not ban speech in a vague way to be determined subjectively by the agency itself—if all that were true, the case might well be different. But that is not the case before this Court. What the SEC did draft—and what it insisted Mr. Romeril agree to in order to avoid further litigation—violates the First Amendment.

II. THE SETTLEMENT CONSENT AND GAG ORDER DENY DUE PROCESS OF LAW

The SEC's brief also fails to address Mr. Romeril's due process claims by asserting without any factual support that Mr. Romeril "had the opportunity to raise his constitutional objections contemporaneously but chose not to do so." Opp. at 8. But the SEC-drafted "consent" systematically strips defendants of the right to have any hearing at all. *See* App-39 ¶¶ 6-7, 9, 14-15; *See* Amicus Brief of Due Process Institute at 4-14 setting forth massive due process deficits of the SEC's consent judgments, deficits that the SEC has admitted throughout this case it requires as conditions of settlement. There can be no "knowing and voluntary" waiver when the

SEC tells enforcement targets that a regulation requires surrender of their constitutional and due process rights or else no settlement.

The gag is also unconstitutionally vague, Petition 29-30, yet the SEC fails to engage at all on the question of a gag order so vague that it forbids Mr. Romeril "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." App-37 (emphases added). This Court's precedents require clarity regarding future conduct and forbid such a vague and indeterminate provision that reaches the speech of other persons ("cause to be made") and that operates in perpetuity.[1] Petition 29.

Because the Gag Rule allows the SEC to obtain something it could never win at trial—the coerced silence of the thousands of defendants it charges and with whom it settles contrary to this Court's opinion in *Simon & Schuster, Inc. v. N.Y.*

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[1] Just as parties cannot stipulate to subject-matter jurisdiction, parties cannot stipulate to an injunction that violates the law. *See*, *e.g.*, *Stovall v. City of Cocoa, Fla.*, 117 F. 3d 1238 (11th Cir. 1997); *League of United Latin Amer. Citizens Council No. 4434 v. Clements*, 999 F.2d 831, 845 (5th Cir. 1993) (en banc); *U.S. v. City of Miami, Fla.*, 664 F.2d 435, 440-41 (5th Cir. 1981) (en banc). Defendants have cited but a single authority to the contrary, *U.S. v. Berke*, 170 F.3d 882 (9th Cir. 1999), and even there the court reserved decision on whether the gag could be enforced.

State Crime Victims Bd., 502 U.S. 105 (1991)—it is an impermissible condition of settlement. The constitutional guarantee of free expression was never at stake under the SEC's lawful enforcement powers.

III. RULE 60(b)(4) PROVIDES RELIEF FOR MR. ROMERIL

The SEC—and the panel decision—misread *United Student Aid Funds, Inv. v. Espinosa*, 559 U.S. 260 (2010), to limit Rule 60(b)(4) to "only two circumstances: jurisdiction or a due process violation." The SEC compounds that error by asserting that petitioner's challenge to the gag "does not fall within either of those categories." Opp. at 7-8.

First, even under the SEC's more limited reading, relief under Rule 60(b)(4) is available to Mr. Romeril because the court lacked power—that is, *jurisdiction*—to enter a prior restraint. That is the teaching of *Crosby v. Bradstreet*, 312 F. 2d 483 (2d Cir.), *cert. denied*, 373 U.S. 911 (1963) with which the panel decision created a deep intra-circuit split.[2] The Sixth Circuit recognized in *Northridge Church v. Charter Twp. of Plymouth*, 647 F. 3d 606, 612 (6th Cir. 2011) that the lack of power to enter the prior restraint in *Crosby* was "*jurisdictional*" (emphasis in

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[2] This intra-circuit split, though starkly present here, is not the ground for this petition; instead, those grounds are that the panel decision is in conflict with the law of other circuits and with controlling Supreme Court precedent.

original) so that "Rule 60(b)(4) would be the proper vehicle." Treatises specifically recognize that 60(b)(4) voidness applies to constitutional claims: "A consent judgment may be set aside where it is void on constitutional grounds, *on the theory that such a judgment exceeds the court's jurisdiction and is subject to attack at any time.*" 49 C.J.S. Judgments § 510 (2022) (emphasis added).[3]

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[3] The SEC falsely asserts at footnote 3: "every regional circuit has recognized this Court's clear holding in *Espinosa* that Rule 60(b)(4) 'applies only in the rare instances where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process.'" Opp. at 14. To the contrary, the circuits split on what claims may be brought under Rule 60(b)(4) and the extent of jurisdictional error required by the rule. Two cases cited by the SEC, *Carrasquillo-Serrano v. Canovanas*, 991 F. 3d 32, 39 (1st Cir. 2021) and *U.S. v. Welsh*, 879 F. 3d 530, 534 (4th Cir. 2018) reference *Espinosa's* holding that a court's "clear usurpation of power" opens the door to a 60(b)(4) claim. On the other hand, the Eighth and D.C. Circuits do not mention that language. *Bell v. Pulmosan Safety Equip. Corp.*, 906 F.3d 711, 714 (8th Cir. 2018); *U.S. v. Philip Morris USA Inc.*, 840 F.3d 844, 847 (D.C. Cir 2016). The SEC's cherry-picked authority not only conspicuously omits *Crosby*, but also *Brumfield v. La. State Bd. of Educ.*, 806 F. 2d 289, 298 (5th Cir. 2015), likely because it says that *Espinosa* does not define 60(b)(4) so narrowly. Taken together, these cases paint a picture where the circuits disagree or are silent on the reach of Rule 60(b)(4) and on the extent of the jurisdictional error required to invoke Rule 60(b)(4), with some circuits referencing a lack of "even an arguable basis for jurisdiction," while *Brumfield* states that such a strict standard is not required by *Espinosa.* 806 F. 3d at 301. This split of authority is all the more reason for this Court to grant certiorari.

The SEC further errs when it argues that Rule 60(b)(4) provides just two grounds for relief because (1) it excises *Espinosa*'s express language that the rule applies to "a clear usurpation of power,"[4] and (2) such a restrictive reading of *Espinosa* would mean that this Court overruled *sub silentio Klapprott v. U.S.*, 335 U.S. 601, 614-5 (1949); *Wilson v. Walker*, 109 U.S. 258, 266 (1883), *superseded by Rule as stated in Espinosa*, 559 U.S. at 271, and *Ex Parte Lange*, 85 U.S. 163, 176-77 (1873).

The SEC represents to the court (at 10) that *Espinosa* "explained that cases like *Wilson* and *Lange* 'are not controlling because they predate Rule 60(b)(4)'s enactment' in 1947." That statement both inaccurately characterizes and selectively quotes footnote 12 of *Espinosa*, which also distinguishes *Wilson* because its claim was jurisdictional, unlike United's, 559 U.S. at 275 n.12, and so did not control. There would be no reason to bother distinguishing *Wilson* as a jurisdictional case if *Wilson* was overruled. As Mr. Romeril has argued all along, *Espinosa* is neither a jurisdictional nor

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[4] "For purposes of a Fed. R. Civ. P. 60(b)(4) motion for relief from a judgment, judgments are void only if the court lacked jurisdiction of either the parties or the subject matter, or if the judgment was entered in violation of due process of law; or, as is sometimes stated, if the court's action in rendering judgment beyond its scope of authority amounts to a plain usurpation of power…" 21A Fed. Proc., L. Ed. § 51:150 (2022).

constitutional case—and thus is *wholly irrelevant* to his claim.

To the extent that the SEC takes the position that *Espinosa* undertook to overrule every Supreme Court case that operated to void a judgment pre-adoption of the Federal Rules, that stance places far more weight upon this *dicta* than it can carry. Far from overruling the older cases, the advisory committee notes to the 1946 adoption of Rule 60 *explicitly* state that the new rule codified and expanded existing common law remedies. *See* Fed. R. Civ. P. 60(b) advisory committee's note to 1946 amendment (noting that Rule 60(b) maintains the forms of "relief from judgments which were permitted in the federal courts prior to the adoption of these rules" and "dramatic[ally]" expands the ability of courts to remedy prior incorrect judgments. *See C*omment, *The Temporal Aspects of the Finality of Judgments: The Significance of Federal Rule 60(b)*, 17 U. Chi. L. Rev. 664, 668 (1950). The amended Rule 60(b) still stands today, and courts should interpret it consistent with its original public meaning and purpose. *See Wis. Cent. Ltd. v. U.S.*, 138 S. Ct. 2067, 2074–75 (2018).

The SEC suggests in its first question presented that this Court should determine whether a party may challenge an unconstitutional judgment "more than fifteen years after the judgment was entered." Opp. at (I). Federal circuit courts overwhelmingly hold "there are no time limits with regards to a challenge to a void judgment because of its status as a nullity." *U.S. v. One Toshiba Color Television*, 213 F.3d 147, 157 (3d Cir. 2000) (collecting cases from

the Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits). The First and Second Circuits hold likewise. *"R" Best Produce, Inc. v. DiSapio*, 540 F.3d 115, 123–24 (2d Cir. 2008); *Sea-Land Service, Inc. v. Ceramica Europa II, Inc.*, 160 F.3d 849, 852 (1st Cir. 1998) (recognizing the "any time" rule). This near universal approach is underscored by relevant treatises. "Although Rule 60(c)(1) purports to require all motions under Rule 60(b) to be made 'within a reasonable time,' this limitation does not apply to a motion under clause (4) attacking a judgment as void. There is no time limit on a motion of that kind." 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2866 (3d ed. 2002 & Supp. 2019); "[A] judgment allegedly void on constitutional grounds is subject to attack at any time." 47 Am. Jur. 2d *Judgments* § 653. Indeed, the SEC concedes that "courts have allowed Rule 60(b)(4) motions to be filed at almost any time despite the requirement that a 'motion under Rule 60(b) must be made within a reasonable time.'" Opp. at 13.

Finally, far from being a "fractured" decision, *Klapprott* refutes the SEC's arguments limiting the rule to jurisdictional and due process claims because it voided a judgment that failed to comply with an act of Congress. *Klapprott* not only shows that *Espinosa* did not chart the universe of allowable Rule 60(b)(4) claims (nor did it claim to) but stands for the proposition that district courts may reopen judgments they had no power to enter in the first place. 335 U.S. at 609. The district court here lacked jurisdiction to enter a judgment that violated the First Amendment and due process of law. When

courts act so far beyond their authority, Rule 60(b)(4) provides a remedy.

CONCLUSION

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

Respectfully submitted,

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