

No. 23A_____

In The

Supreme Court of the United States

Elon Musk,

Applicant,

v.

Securities & Exchange Commission,

Respondent.

APPLICATION TO EXTEND TIME TO
FILE PETITION FOR A WRIT OF CERTIORARI

TABLE OF CONTENTS

	Page
Background.....	1
Reasons for Granting An Extension Of Time	4
Conclusion.....	6

TABLE OF AUTHORITIES

	Page(s)
<u>Cases</u>	
<i>Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.</i> , 570 U.S. 205 (2013)	3, 4
<i>F.C.C. v. League of Women Voters of Cal.</i> , 468 U.S. 364 (1984)	3
<i>Koontz v. St. Johns River Water Mgmt. Dist.</i> , 570 U.S. 595 (2013)	6
<i>Legal Servs. Corp. v. Velazquez</i> , 531 U.S. 533 (2001)	3
<i>O’Hare Truck Serv., Inc. v. City of Northlake</i> , 518 U.S. 712 (1996)	3
<i>Perry v. Sindermann</i> , 408 U.S. 593 (1972)	3
<i>Rumsfeld v. F. for Acad. & Inst’l Rts., Inc.</i> , 547 U.S. 47 (2006)	3
<u>Statutes</u>	
28 U.S.C. § 1254(1)	1
<u>Rules and Regulations</u>	
S. Ct. R. 13.5	1
S. Ct. R. 30.2	1
S. Ct. R. 30.3	1

To the Honorable Justice Sonia Sotomayor, as Circuit Justice for the United States Court of Appeals for the Second Circuit:

Pursuant to Rules 13.5 and 30.3 of this Court, Applicant Elon Musk respectfully requests that the time to file a Petition for a Writ of Certiorari be extended forty-five days, from October 23, 2023, to and including December 7, 2023. The court of appeals entered its judgment on May 15, 2023 (*see* Appendix A), and denied Applicant's timely petition for rehearing *en banc* on July 24, 2023 (*see* Appendix B), placing the current due date for a petition for a writ of certiorari at October 23, 2023. This application is being filed at least ten days before that date. *See* S. Ct. R. 13.5, 30.2. This Court would have jurisdiction pursuant to 28 U.S.C. § 1254(1).

Background

This case concerns whether the Securities and Exchange Commission (SEC) may demand a broad First Amendment waiver in a settlement consistent with the unconstitutional conditions doctrine.

In 2018, Mr. Musk and the SEC entered into a consent decree to resolve charges brought by the SEC alleging Mr. Musk violated Exchange Act Section 10(b) by posting certain statements on Twitter regarding a potential transaction to take Tesla private. The court entered a judgment in accordance with the terms of the consent decree, which, in relevant part, contained a prior restraint that required Mr. Musk to obtain pre-approval for written communications that contain, or reasonably could contain, information material to Tesla or its shareholders.

In February 2019, the SEC sought to hold Mr. Musk in contempt of court for a tweet it believed violated the pre-approval provision. To avoid the risk of being held in contempt of court, Mr. Musk agreed to amendments to the initial consent decree, which replaced the materiality standard of the pre-approval provision with wide-ranging categories of information. The district court entered an amended judgment.

Following entry of the amended judgment, the SEC continued to inquire whether Mr. Musk's tweets have been submitted for pre-approval. In March 2022, Mr. Musk moved to quash a subpoena issued to him and for relief from the amended judgment on the basis that the pre-approval provision is an unconstitutional prior restraint that cannot be enforced. The district court denied Mr. Musk's motion, concluding that it did not need to address the constitutionality of the pre-approval provision because Mr. Musk had waived his First Amendment rights in agreeing to the terms of the settlement. As a result, the district court did not address Mr. Musk's arguments regarding the enforceability of the pre-approval provision.

Mr. Musk appealed the district court's denial of his motion to modify the amended judgment. On May 15, 2023, the United States Court of Appeals for the Second Circuit issued a summary order affirming the district court. The court of appeals concluded that, because Mr. Musk had agreed to the consent decree, he had waived his First Amendment rights. Appendix A at 6. The court of appeals declined to address Mr. Musk's argument that the pre-approval provision—as an unconstitutional prior restraint extracted as a condition of settlement with the SEC—

cannot be enforced, reasoning that Mr. Musk could have “*chose[n]*” not to sign the consent decree and “negotiate[d] a different agreement.” Appendix A at 6.

The decision of the court of appeals conflicts with this Court’s precedents on the unconstitutional conditions doctrine, which prohibit the government from denying a benefit to an individual “on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.” *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). This Court has long addressed—and invalidated—unconstitutional conditions attached to a government benefit even when the complaining party agreed to accept the benefit in exchange for the condition. *See, e.g., id.* at 597 (holding that unconstitutional conditions doctrine applies “regardless of the public employee’s contractual or other claim to a job”); *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 210–11 (2013) (considering challenge by domestic organizations that received funding under the challenged act); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 539 (2001) (acceptance of funds no bar to challenge); *O’Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 721 (1996) (addressing challenge by independent contractor that accepted employment offer); *F.C.C. v. League of Women Voters of Cal.*, 468 U.S. 364, 364 (1984) (analyzing challenge of public broadcasting stations that accepted and disbursed federal funds). Even when ultimately holding a condition constitutional, this Court has engaged in complete analysis under the doctrine, regardless of whether the challenger had accepted the government benefit. *See, e.g., Rumsfeld v. F. for Acad. & Inst’l Rts., Inc.*, 547 U.S. 47, 59 (2006) (law schools received federal funding).

In elaborating the scope of the unconstitutional conditions doctrine, this Court has held that “the 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.’” *All. for Open Soc’y Int’l, Inc.*, 570 U.S. at 214 (citation omitted). Yet the SEC here conditioned settlement of the underlying action on Mr. Musk’s agreement to a provision requiring pre-approval of statements on a range of topics, subject to SEC oversight and the court’s contempt powers, with no expiration date. This prior restraint on Mr. Musk’s speech extends beyond the statements that the SEC had alleged in the settled 2018 action violated the securities laws (statements that a nine-member jury in a civil action unanimously determined did not violate Section 10(b) of the Exchange Act). Rather, the prior restraint is so broad that the SEC did not even argue it bears a close relationship to the settled action. The court of appeals’ conclusion that Mr. Musk was free to negotiate or litigate the underlying action—but not challenge the constitutionality of the SEC’s condition of settlement—cannot be reconciled with this Court’s precedent on unconstitutional conditions, which seeks to prevent the government from obtaining via agreement what it could not otherwise legally obtain.

Reasons for Granting An Extension Of Time

The time to file a Petition for a Writ of Certiorari should be extended by forty-five days for multiple reasons.

First, although counsel for Applicant has been working diligently, the press of other matters will make preparation of a complete and concise petition difficult

absent an extension of time. Among other matters, counsel of record was lead counsel for a confidential week-long arbitration hearing before the American Arbitration Association that took place in September 2023 in Los Angeles, California. Counsel of record is preparing the post-hearing brief in that matter, which is due October 27, 2023, and for closing arguments scheduled for November 21, 2023. Counsel of record also prepared post-trial briefing filed on September 11, 2023, in *CPI Sec. Sys., Inc. v. Vivint Smart Home, Inc.*, No. 3:20-CV-504-MOC-WCM (W.D. N.C.), and is preparing for argument scheduled for October 30, 2023. In addition, counsel of record has been supervising motion practice in *RoadSync, Inc. v. Relay Payments, Inc.*, No. 1:21-cv-03420-MLB (N.D. Ga.), with a court appearance scheduled for October 23, 2023; motion practice and argument preparation for *Avadel CNS Pharms., LLC v. Jazz Pharms., Inc.*, No. 1:22-cv-00487-GBW (D. Del.), with a court appearance scheduled for November 1, 2023; and intensive discovery efforts and motion practice in *La. Pub. Serv. Comm'n v. Sys. Energy Res., Inc.*, No. EL21-56-002 (FERC).

In addition, there is a reasonable probability that this Court will grant the petition. This case presents an exceptionally important question as to whether the SEC may demand broad waivers of constitutional rights from a settling defendant and then insulate such demands from constitutional scrutiny if the defendant agrees to settle. This Court has recognized that acceptance of a government benefit is no impediment to an unconstitutional conditions challenge. Because the unconstitutional conditions doctrine is designed to prevent the government from indirectly achieving restrictions on constitutional rights that it could not implement

directly, this Court has recognized that it is irrelevant “whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right” for a challenge to be brought. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013).

In the decision below, the court of appeals held that Mr. Musk could not raise a First Amendment argument because Mr. Musk “*chose* not to” negotiate a different agreement and as such waived his right to litigate the First Amendment issue. Appendix A at 6 (emphasis in original). The court of appeals summarily concluded that “[p]arties entering into consent decrees may voluntarily waive their First Amendment and other rights.” Appendix A at 6. That result conflicts with the rulings of this Court on the contours of the unconstitutional conditions doctrine. Additional time is warranted so that counsel may prepare a complete and concise petition for this Court’s consideration of this important question.

Conclusion

For these reasons, the time to file a Petition for a Writ of Certiorari in this matter should be extended by forty-five days, to and including December 7, 2023.

Dated: October 12, 2023

Respectfully submitted,

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