No. 23-626

IN THE

Supreme Court of the United States

ELON MUSK,

Petitioner,

v.

U.S. SECURITIES AND EXCHANGE COMMISSION,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The SEC does not dispute that the First Amendment would bar it from imposing the sweeping prior restraint on Mr. Musk's speech that the SEC demanded of Mr. Musk in settling its action against him. Instead, the SEC argues that it can avoid any constitutional limitation on its own authority because Mr. Musk agreed to the prior restraint as a condition of settlement. But, for decades, this Court and lower courts have analyzed—and invalidated—unconstitutional conditions attached to a government benefit even when the complaining party accepted the benefit. *See* Pet. 3–4. The same rule should apply here.

In opposing the petition, the SEC argues that the unconstitutional conditions doctrine does not apply to its settlements. That position has no basis in logic or precedent. It would permit the government to mandate broad waivers of constitutional rights far afield from the subject of the settled matter without any prospect of judicial review. Allowing such unchecked agency power is especially unwarranted where (as here) the constitutional right at stake is the First Amendment, which by its express terms limits the authority *of the government*. Yet, under the SEC's view, nothing limits its authority to restrict Mr. Musk's speech—even when truthful and accurate, even when not covered by the securities laws, and even when unrelated to the conduct underlying the SEC's civil action against Mr. Musk—all because Mr. Musk settled the action against him. The unconstitutional conditions doctrine is designed to protect against such governmental overreach by requiring any waiver of a

constitutional right to be germane to and have a close nexus with the benefit the settling party receives.

Unable to defend its position on the merits, the SEC erects a series of strawmen to distract from the straightforward question the petition presents. None of these arguments holds water. Mr. Musk does not contend there exists a categorical bar on the waiver of any constitutional right in a settlement agreement. Nor could Mr. Musk possibly have waived or forfeited the arguments in his petition given that the Second Circuit expressly ruled he could not challenge the SEC's demand of a broad waiver of First Amendment rights because he agreed to the consent decree—exactly the question raised in the petition. And this case, which the SEC admits involves a prior restraint far broader than even the SEC's typical gag rule (BIO 21), is not "similar" to the petition denied in *Romeril v. SEC*, 142 S. Ct. 2836 (2022) (No. 21-1284)—except that both demonstrate the SEC's willingness to extract constitutionally suspect concessions in settlements in disregard of First Amendment rights.

Through his petition, Mr. Musk merely seeks clarification that settling government agencies must comport with the constitutional limits on their power. That the SEC so strongly resists such scrutiny of its settling authority underscores exactly why the Court should grant review.

I. The Court Of Appeals' Decision Conflicts With The Decisions Of This Court

Despite the SEC's blanket statement to the contrary, BIO 17–18, the court of appeals' decision conflicts with decisions of this Court, Pet. 12–18.

Time and again this Court has held that the unconstitutional conditions doctrine limits the government's ability to obtain waivers of constitutional rights in exchange for a government benefit, even when the recipient agreed to the condition. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013) (holding the unconstitutional conditions doctrine applies "regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right"); *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 210–11, 221 (2013) (holding the unconstitutional conditions doctrine applies even though the organization received funding under the challenged act); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 536–39 (2001) (determining acceptance of funds no bar to challenge); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 720–21 (1996) (addressing challenge by independent contractor that accepted employment offer); *FCC v. League of Women Voters*, 468 U.S. 364, 370–73 (1984) (analyzing challenge by public broadcasting stations that accepted and disbursed federal funds); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (holding that unconstitutional conditions doctrine applies "regardless of the public employee's contractual or other claim to a job").

The Second Circuit failed to follow this well-established law, concluding that Mr. Musk either had to forego a settlement with the SEC or give up his right to challenge the constitutionality of the SEC's demands. Pet. 16, Pet. App. 7a.

While the SEC pivots to the argument (at 11, 15–16, 18) that there is no *per se* prohibition on the waiver of constitutional rights, that is a red herring. The question presented does not ask whether the SEC ever may demand a waiver of constitutional rights—it asks whether the SEC must comply with the unconstitutional conditions doctrine in making the demand. In this regard, the petition simply asks this Court to clarify that the test this Court consistently has applied in unconstitutional conditions cases regarding a range of government benefits applies to SEC settlements.

Under that framework (as the SEC seemingly recognizes, BIO 21), a court must apply a germaneness test to determine the constitutionality of a government demand that a party waive a constitutional right and analyze "whether the 'essential nexus' exists between the 'legitimate state interest' and the [] condition exacted" by the government. *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994). That is, "[u]nder the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought *has little or no relationship*" to the forgone constitutional right. *Id.* at 385 (emphasis added); *see also All. for Open Soc'y Int'l*, 570 U.S. at 213–16 (explaining that any relinquishment of speech rights to obtain a benefit conferred by the government must be closely

connected to the benefit received); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1458–68 (1989) (outlining the significance of germaneness to unconstitutional conditions analysis).

Contrary to the SEC's suggestion (at 11, 15–16, 18), this Court's decision in *Town of Newton v. Rumery*, 480 U.S. 386 (1987), did not remove government settlements from the unconstitutional conditions doctrine framework. Instead, *Rumery* (which concerned the waiver of a statutory right and thus did not even squarely implicate the unconstitutional conditions doctrine) expressly requires a "case-by-case" approach and applies a similar nexus test to analyze whether the waiver was permissible, as the SEC acknowledges. BIO 12. *See, e.g.*, *Davies* v. *Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1399 (9th Cir. 1991) ("[I]n *Rumery* the interests the government sought to advance in the underlying litigation were closely related to the underlying interest waived."). Mr. Musk is not seeking a categorical prohibition against restrictions on constitutional rights in settlements, as the SEC contends (at 11, 18), but only for SEC settlements to be treated no differently than other government benefits subject to analysis under the unconstitutional conditions framework. If anything, it is the SEC that is seeking a categorical rule—*i.e.*, that acceptance of settlement offers is categorically exempt from the unconstitutional conditions doc-

trine—but that rule is foreclosed by the SEC's own account of *Rumery* as requiring "case by case" review of settlements.[1]

Likewise ineffective is the SEC's attempt to distinguish a whole swath of applicable unconstitutional conditions cases on the ground that they originated in the federal funding context. BIO 15. The SEC offers no reason why a settlement is anything other than another form of government benefit that may be properly subject to judicial review. *See* Pet. 17 n.5 (citing *Cato Inst. v. SEC*, 4 F.4th 91, 93 (D.C. Cir. 2021).[2] And the SEC has no response to the notion that defendants presented with a settlement offer may be in a *more* coercive position than entities seeking funding. Pet. 20–22. The result does not "depriv[e] courts, agencies, and defendants of the benefits of waivers in settlement agreements," BIO 16, or impose an "*arbitrary* limit[] on [the SEC's] bargaining chips," BIO 13 (emphasis added). Rather, the nexus requirement imposes a sensible check on agency action to ensure the agency complies with constitutional limits on government authority.

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[1] That the settlement in this case resembles a plea bargain, *see* BIO 11, 15, poses no hurdle. A plea bargain in which a criminal defendant gives up his right to trial easily passes muster under the nexus test because the right exchanged for the benefit is closely tied to it. That is not the case here, where the pre-approval provision applies to a broad range of future speech entirely unrelated to the underlying alleged securities violation.

[2] Indeed, administrative settlements are conceptually similar to development exactions: benefits in the form of exemptions from otherwise applicable regulations.

Here, the Second Circuit did not address the nexus requirement simply because, it stated, Mr. Musk had "*chose[n]*" to settle. Pet. App. 7a. Precedent demands that courts analyze whether the condition the government seeks to impose is closely tied to the benefit. Here, the pre-approval provision lacks the required nexus to the alleged securities law violation because it indefinitely restricts Mr. Musk's speech on a broad range of topics unrelated to the 2018 tweet that led to the consent decree. *See, e.g.*, *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 162 (2021) (regulation lacked essential nexus where, "unlike standard health and safety inspections, the access regulation is not germane to any benefit provided to agricultural employers or any risk posed to the public").

II. The SEC's Arguments Highlight The Need For Review

In effect, the SEC argues that the Constitution imposes no limits on its authority to extract demands in its settlements. *See supra*, at 4–6. It does nothing to contest Mr. Musk's argument that it seeks carte blanche to exceed the constitutional limits on its authority via settlements. That admission underscores why review is warranted.

In seeking to defend the overbroad and indefinite prior restraint in Mr. Musk's consent decree, the SEC argues that the desire to protect against false and misleading statements justifies the pre-approval provision here. BIO 17. But the pre-approval provision extends to speech well beyond the confines of any possible enforcement action and indefinitely subjects Mr. Musk's speech to a prior restraint—and the power

of contempt—even when his speech is truthful and accurate. Under the SEC's view, nothing would prevent it from gagging Mr. Musk entirely so long as he agreed. For that matter, under the SEC's logic, a party could obtain no judicial scrutiny of a waiver of any constitutional right—*e.g.*, to criticize the government, to practice a religion, or to obtain a jury trial in a future action—so long as the defendant relented to the agency's demands requiring such waiver as a condition of settlement. The SEC's position would allow the SEC to do precisely what the unconstitutional doctrine exists to prevent: obtaining "a result which (it) could not command directly." *Perry*, 408 U.S. at 597 (citation omitted).

The SEC waves away (at 16–19), the importance of First Amendment rights because the SEC often demands their waiver in settlements, Pet. 19–21. As detailed in the *amicus* brief filed in support of petitioner, the SEC systematically demands broad restraints on speech by requiring defendants sign, as a non-negotiable condition of settlement, a gag order "that binds and silences from disagreement with SEC's charges *in perpetuity*." New Civil Liberties Alliance Amicus Br. at 5–6. Because the SEC settles 98% of its cases, the SEC's clearly wrong position threatens the constitutional rights of nearly every person who faces an SEC enforcement action.[3] Pet. 21. This Court should grant

[3] The SEC also seeks (at 21) to minimize the breadth and burden of the pre-approval provision by suggesting that some companies have procedures to monitor executive communications. But nowhere do the securities laws require such a disclosure control, and a company's voluntary adoption of communications policies could never subject an executive to the contempt powers of the court.

review to dispel confusion and concern by delineating the boundaries of this highly controversial practice.

Ultimately, the SEC concedes that the cases petitioner and *amicus* cite stand for the proposition that "the government's ability to obtain and enforce waivers of First Amendment rights is not unlimited." BIO 20. That is precisely Mr. Musk's point: the government's ability to obtain and enforce waivers of First Amendment rights is limited by the requirement that the government operate with a legitimate reason for seeking the waiver—including a close nexus between the government interest and the right to be waived. The SEC's wholly inaccurate recasting of Mr. Musk's argument as one asking this Court to hold "that a defendant's promise not to engage in activities that otherwise would be protected by the First Amendment can *never* be a valid term of a settlement agreement," BIO 20, is pure misdirection.

III. This Case Presents A Clean Vehicle To Review The Question Presented

The Court likewise should not accept the SEC's invitation to avoid addressing the serious constitutional defect of the consent decree based on arguments about matters outside the scope of the question presented.

First, the SEC posits (at 20–21) that this Court should not address whether the SEC's demand comported with the constitutional limitations on its power because the SEC also required that Tesla include an obligation to enforce the pre-approval provision in its consent decree. Such an argument ignores the scope of the question presented, which inquires as to the

constitutional limits on the SEC's authority. As petitioner explained (at 18–22), the answer to that question could have far-reaching effects, which necessarily would encompass what the SEC could demand of any settling party. The Court should reject the idea that this petition presents an improper vehicle simply because the SEC demanded the same constitutionally suspect concession of another settling party. Indeed, the SEC's argument confirms exactly why this Court should grant review: The SEC suggests it will try to enforce the provision against Mr. Musk through the Tesla consent decree *even if* the provision in Mr. Musk's decree is deemed unconstitutional. Beyond that, the SEC cannot dispute that, if the pre-approval provision is excised from Mr. Musk's consent decree, then the SEC no longer could threaten Mr. Musk with contempt—a threat it previously invoked and one that serves to chill Mr. Musk's speech. *See* Pet. 24.

Second, the SEC is wrong to contend (at 13–15) that this petition presents a less-than-ideal vehicle for review under its view that the Second Circuit deemed waived or forfeited Mr. Musk's challenge to the pre-approval provision. The SEC's interpretation of the Second Circuit's waiver footnote cannot be squared with the fact that the Second Circuit *expressly addressed* the question presented here: "Whether a party's acceptance of a benefit prevents that party from contending that the government violated the unconstitutional conditions doctrine in requiring a waiver of constitutional rights in exchange for that benefit." Pet. *i*. On this question, the court of appeals determined—contrary to well-established prece-

dent—that, as a categorical matter, "[p]arties entering into consent decrees may voluntarily waive their First Amendment and other rights" and that the mechanism to avoid such waivers is not to agree to them in the first place. Pet. App. 7a (reasoning that Musk could have "*chose[n]*" not to sign the consent decree and "negotiate[d] a different agreement"). The SEC recognizes that the Second Circuit held as much. BIO 9–10 (quoting Pet. App. 7a–8a). Because the Second Circuit addressed the very question presented in this petition, the SEC's cited authorities indicating that the Court may decline to grant a petition when a court has not addressed an issue have no application here.

In any event, Mr. Musk specifically argued below that courts lack the power to enforce agreements such as the pre-approval provision, relying upon *Crosby v. Bradstreet Co.*, 312 F.2d 483 (2d Cir. 1963), in which the Second Circuit vacated a consent decree because courts do not have power to enforce settlements that violate the First Amendment. SA 53–55. Mr. Musk also referred the district court to the *Romeril* petition for certiorari, which described cases "holding courts lack power to enforce prior restraints and content and viewpoint-based speech restrictions as settlement conditions, even when entered with consent." SA 54. While the SEC suggests (at 14) that Mr. Musk did not cite any unconstitutional conditions cases in the district court, the SEC itself relies on both *Crosby* and *Romeril* in its unconstitutional condition argument.[4]

[4] Of course, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not

Accordingly, not only is the SEC wrong to say Mr. Musk waived his First Amendment claim by not using the words "unconstitutional condition" in the district court—for there is no magic-words test—but the Second Circuit addressed the question presented here, answering in a manner inconsistent with this Court's precedent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534–35 (1992). Mr. Musk challenged the constitutionality of his consent decree before the district court and the Second Circuit. That is enough. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 330–31 (2010) (citation omitted) (relying on "a new argument to support what has been [a] consistent claim that [the government] did not accord [petitioner] the rights it was obliged to provide by the First Amendment").