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

BRIEF *AMICUS CURIAE* OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

As a condition of settlement, the Securities and Exchange Commission demanded that petitioner waive his First Amendment rights to speak on matters ranging far beyond the charged violations. Petitioner challenged that requirement as an unconstitutional condition, but the court of appeals held that he could not bring such a challenge because he had acquiesced to the Commission's demands. The question presented is:

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.

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INTEREST OF AMICUS CURIAE[1]

The New Civil Liberties Alliance (NCLA) is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from violations by the administrative state. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, including the First Amendment right to speak freely, without government-imposed constraints, and the concomitant right to hear and learn from the free speech of others. Yet these self-same rights are also very contemporary—and in dire need of renewed vindication—precisely because, in this very context, the Securities and Exchange Commission has been violating them for so long.

NCLA is keenly interested in this case because of its work to end SEC's 50-year practice of requiring its enforcement targets to consent to a gag as a non-negotiable condition of settlement, which effectuates a profound and systematic abridgement of First Amendment rights. *See SEC v. Novinger*, No. 15-cv-00358, 2023 WL 3593254 (N.D. Tex. 2023), *on appeal*, No. 23-10525 (5th Cir. 2023); *SEC v. Romeril*, 15 F.4th 166 (2d Cir. 2021), *cert denied,* 142 S. Ct. 2836 (2022); *SEC v. Novinger*, 40 F.4th 297 (5th Cir. 2022).

In recent years, several federal judges have openly questioned the constitutionality of these gag

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[1] Pursuant to Rule 37.6, no party's counsel authored any part of this brief. No person or entity, other than NCLA and its counsel, paid for the brief's preparation or submission. All parties received timely notice of intent to file this amicus.

orders—and the appropriateness of SEC's enlisting courts to impose and enforce them, thereby making the federal judiciary complicit in muzzling speech.

In *SEC v. Novinger*, 40 F.4th 297 (5th Cir. 2022), NCLA client Christopher Novinger sought relief pursuant to Fed. R. Civ. P. 60(b)(4) that would have effectively amended his consent judgment in SEC's favor by severing a gag provision substantially identical to the one here. After the district court denied Novinger's motion, a Fifth Circuit panel affirmed, holding that relief was not available under Rule 60(b)(4) or Rule 60(b)(5). *Id*. But two of the three judges on the Fifth Circuit panel said:

> [N]othing in the [court's decision] approves of or acquiesces in the SEC's longstanding policy that conditions settlement of any enforcement action on parties' giving up First Amendment rights. … If you want to settle, SEC's policy says, "Hold your tongue, and don't say anything truthful—ever"—or get bankrupted by having to continue litigating with the SEC. A more effective prior restraint is hard to imagine.

Id. at 308 (Jones and Duncan, JJ., concurring) (citation omitted).

In addition, for the past five years, NCLA has had a formal rulemaking request pending before SEC to amend its Gag Rule. NCLA recently renewed the petition considering SEC's unexplained refusal to act. *See* NCLA, Petition for Rulemaking, No. 4-733 (Oct.

30, 2018) and NCLA, Renewed Petition for Rulemaking, No. 4-733 (Dec. 20, 2023).[2]

By this work, NCLA aims to defend civil liberties in the courts. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's concern.

SUMMARY OF THE ARGUMENT

The limitation imposed by SEC on Elon Musk's future speech or ability to criticize SEC is a quintessential prior restraint, described by this Court as "the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). At the same time, the lifetime nature of the ban, its application to wholly truthful speech, and its content- and viewpoint-discrimination rooted in the notion that SEC can do no wrong violates the First Amendment for reasons independent of their embodiment in a prior restraint. The notion that an agency may wield its power to decide what parties it regulates may, may not, or must say in the future is deeply at odds with the First Amendment, including the right of the

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[2] *Available at* https://www.sec.gov/files/rules/petitions/2018/petn4-733.pdf (last visited Jan. 19, 2024) and https://www.sec.gov/files/rules/petitions/2023/petn4-733-renewed-petition-rulemaking-122023.pdf (last visited Jan. 19, 2024).

public and investors to hear what Mr. Musk has to say.

Moreover, because SEC Gag Orders at issue are by their terms non-negotiable, they are unconstitutional conditions in violation of the First Amendment. A private party's supposed "consent" to a required condition of settlement cannot and does not give the federal government a power of suppression denied it by the First Amendment. Further, the Second Circuit ruling conflicts not only with controlling Supreme Court law, but also that law of at least four appellate courts that forbid government entities from exacting such unconstitutional conditions of settlement. Indeed, the decision conflicts with the law of the very circuit out of which it issued, a precedent that neither of the lower courts even addressed, much less reconciled.

Finally, SEC lacks power to gag anyone—ever. No provision of the securities laws under which the agency has remit to regulate Americans permits such a remedy. The Constitution forbids it. Congress itself could not pass a law requiring Americans who settle their cases with the government to "consent" to be gagged for life. A mere agency cannot arrogate to itself a power Congress lacks! SEC's Gag Rule was lawless and unconstitutional from the very day it was deceitfully slipped into the Federal Register without notice and comment. This Court should grant certiorari and end SEC's 50-year reign of error.

STATEMENT OF THE CASE

> Acquiescence for no length of time can legalize a clear usurpation of power,

> where the people have plainly expressed their will in the constitution[] … . A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period, in violation of the constitutional prohibition, without the mischief which the Constitution was designed to guard against appearing, or without any one being sufficiently interested in the subject to raise the question; but these circumstances cannot be allowed to sanction a clear infraction of the Constitution.

THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 71 (1868) (footnote omitted).

History of the Gag Rule

On November 17, 1972, SEC issued a regulation that requires all defendants who settle with the agency to "consent" to a nonnegotiable provision (Gag Order) that binds and silences from disagreement with SEC's charges *in perpetuity*. *See Consent Decrees in Judicial or Administrative Proceedings*, 37 Fed. Reg. 25,224 (Nov. 29, 1972) (codified at 17 C.F.R. § 202.5(e)) (Gag Rule). In publishing the Gag Rule, SEC asserted that "the foregoing amendment relates only to rules of agency organization, procedure and practice and, therefore, *notice and procedures specified in 5 U.S.C.* [*§*] *553 are unnecessary*." *Id.* (emphasis added). Because the Gag Rule binds others outside the agency, it thus violated

the Administrative Procedure Act (APA) from its inception when SEC slipped it into the Federal Register "effective immediately."

SEC *systematically* demands broad restraints on speech as a condition of settlement. See generally, James Valvo, *The CFTC and SEC Are Demanding Unconstitutional Speech Bans in their Settlement Agreements*, YALE J. ON REG.: NOTICE & COMMENT BLOG (Dec. 4, 2017), https://bit.ly/3IV5oP6.[3]

The Commission's published rationale for this Rule was that SEC wants "to avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur." 17 C.F.R. § 202.5(e). In short, it doesn't like being criticized.

The Context of the Gag in this Case

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[3] *See, e.g.*, Consent of Def. Arthur S. Hoffman at ¶ 11, *SEC v. Hoffman*, No. 2:22-cv-00296-ROS (D. Ariz. Feb. 24, 2022), ECF No. 4; Judgment as to Def. Mark J. Ahn at ¶ 11, SEC v. Ahn, No. 1:21-cv-10203-ADB (D. Mass. Apr. 27, 2021), ECF No. 12-1; Consent of Def. John Kenneth Davidson at ¶ 11, *SEC v. Davidson*, No. 5:19-cv-01153 (W.D. Okla. Dec. 21, 2019), ECF No. 3-1; Consent of Def. Owen H. Naccarato at ¶ 11, *SEC v. Naccarato*, No. 1:17-cv-24682-JLK (S.D. Fla. Dec. 27, 2017), ECF No. 3-1; Consent of Def. Tiger Asia Mgmt., LLC at ¶ 11, *SEC v. Tiger Asia Mgmt., LLC*, No. 2:12-cv-07601-DMC-MF (D.N.J. Dec. 12, 2012), ECF No. 3-1; Consent of Def. Carole D. Argo at ¶ 11, *SEC v. Argo*, No. 1:07-cv-01397-RWR (D.D.C. Sept. 11, 2008), ECF No. 18-1; Consent of Def. Mark J. Lauzon at ¶ 10, *SEC v. Teo*, No. 2:04-cv-01815-WGB-MCA, 2005 WL 287501 (D.N.J. Jan. 3, 2005).

In 2018, Musk signed a "consent" decree "without admitting or denying" wrongdoing relative to SEC's claims that his tweets about taking Tesla private constituted a violation of § 10(b) of the Exchange Act. Believing that protracted litigation was not in the interests of the company and its shareholders, Musk and Tesla immediately acceded to SEC's demands that each surrender $20 million to SEC for distribution to Tesla shareholders within 60 days of the Order. By settling the case just days after the SEC brought charges, they paid the $40 million and signed SEC's standard "consent" which put a court, not SEC alone, in charge of any compliance issues going forward. *See* Letter of 2-17-2022 Dkt.61, (seeking a court hearing because four years later SEC had still failed to distribute the $40 million to Tesla's shareholders.).

The Standard Gag

As a non-negotiable condition of his settlement, Musk had to sign the SEC-drafted and euphemistically entitled "Consent" that was incorporated by reference into the final judgment. Paragraph 13 states in relevant part:

> Defendant understands and agrees to comply with the terms of 17 C.F.R. § 202.5(e), which provides in part that it is the Commission's policy "not to 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," and "a refusal to admit the allegations is equivalent to a denial,

> unless the defendant or respondent states that he neither admits nor denies the allegations." As part of Defendant's agreement to comply with the terms of Section 202.5(e), 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; (iii) upon the filing of this Consent, Defendant hereby withdraws any papers filed in this action to the extent that they deny any allegation in the complaint[] … If Defendant breaches this agreement, the Commission may petition the Court to vacate the Final Judgment and restore this action to its active docket. Nothing in this paragraph affects Defendant's: (i) testimonial obligations; or (ii) right to take legal or factual positions in litigation or other legal proceedings in which the Commission is not a party.

Pet.App.47a–48a.

In other words, the Gag admits that an exception must be made for testimony under oath, except when the Commission is the beneficiary of the petitioner's coerced silence. This means that Mr. Musk may tell the truth when under oath, even if it conflicts with SEC's charges, but must not contradict SEC when he is in proceedings to which SEC is a party. Four years later, after Musk testified before a jury, it unanimously returned a judgment that Mr. Musk's 2018 tweets about his plans to take Tesla private did not defraud investors or violate Section 10(b). *See* Clerk's Judgment, *In re Tesla, Inc. Secs. Litig.*, No. 3:18-cv-04865-EMC (N.D. Cal. Jul. 11, 2023), Dkt. 698.

The Pre-Clearance Gag

Emboldened by its long-standing power to gag, SEC also required Musk and Tesla to separately agree to pre-clear his communications and/or tweets with a securities lawyer as a term of settlement—in perpetuity. Musk and Tesla also separately agreed to a provision that is not in the standard SEC "Consent" to pre-clear his communications and/or tweets with a securities lawyer. Musk objects to this pre-clearance requirement on First Amendment grounds as a quintessential prior restraint and because it extends to future speech not covered by the securities laws; does not relate to the original civil action against him; and is enforced through threats of contempt, fines, and even imprisonment. SEC's gag also chills otherwise protected speech. Pet. 2. That aspect of the pre-clearance gag is also inconsistent with ¶12 of the SEC-drafted consent which provides "[c]onsistent with 17 C.F.R. § 202.5(f) this Consent resolves only

the claims asserted against Defendant in this civil proceeding." Pet.App.46a. The pre-clearance Gag was later amended after SEC initiated contempt proceedings against Musk. *Id*. at 37a–39a.

The district court did not hold a hearing or allocution concerning the representations in and execution of the Consent. SEC's Consent Form requires defendants to waive notice and an opportunity to be heard on these waivers of their First Amendment and due process rights.[4] By such devices, SEC rewrites the Federal Rules to benefit the agency while stripping due process and procedural protections from those it charges.

Under SEC's gag, only the Commission may determine what speech, if any, violates the Consent triggering its invocation of judicial contempt power. And the collateral bar rule forbids a speak-first-defend-later challenge. *Walker v. City of Birmingham*, 388 U.S. 307 (1967).[5] Instead, Musk "must move to

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[4] The final judgment incorporates the Consent by reference in violation of Federal Rule of Civil Procedure 65(d). Even though Rule 65(d)'s prohibition of such incorporations is generally considered mandatory, *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (Rule 65(d)'s provisions "are no mere technical requirements;" "[I]njunctions that do not satisfy the requirements of Rule 65(d) 'will not withstand appellate scrutiny,'" *Corning Inc. v. PicVue Elecs., Ltd.*, 365 F.3d 156, 158 (2d Cir. 2004) (per curiam), Musk was required in the standard form to consent to not bring any challenge under Rule 65(d). *See* Pet.App.45a–48a, ¶¶ 9–15.

[5] A district court holding a judicial gag unconstitutional described the collateral bar rule as an "immediate menace" "'[f]or if a person must pursue his judicial remedy … before he may

vacate or modify the order, or seek relief in this court." *United States v. Cutler*, 58 F.3d 825, 832 (2d Cir. 1995).

Musk moved for relief from the First Amendment-violative gag provisions imposed by the judgment under Fed. R. Civ. P. 60(b)(5) in the civil action in which the order had been entered. Pet.App.25a. On April 27, 2022, the district court denied relief under Rule 60(b)(5). Though the district court conceded that "it is undisputed in this case that Musk's tweets are at least presumptively 'protected speech,'" Pet.App.27a (quoting Dkt. No. 78 at 21), inexplicably, the district court dodged the question saying, "the Court need not reach the question whether the [preclearance requirement] would pass muster under the First Amendment." Pet.App.27a, n.5. By unpublished summary order dated May 15, 2023, the Second Circuit affirmed the district court and later dismissed Musk's appeal in an order that closed with the statement: "We express no view as to the substance of his underlying First Amendment claims." *Id*. at 8a. Both courts held that Musk waived

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speak, parade, or assemble … [the reason therefor] will have become history and any later speech … will be fruitless or pointless.'" *McBryde v. Comm. to Rev. Cir. Council Conduct*, 83 F. Supp. 2d 135, 174 (D.D.C. 1999) *aff'd in part, vacated in part by* 264 F.3d 52 (D.C. Cir. 2001), *reh'g den'd by* 278 F.3d 29 (D.C. Cir. 2002), *cert. denied by* 537 U.S. 821 (2002) (quoting *Walker*, 388 U.S. at 336 (Douglas, J. dissenting)); *Id.* at 140 (confidentiality provision for judicial discipline "operates as an impermissible prior restraint[;]" a disciplined judge "must enjoy the opportunity to speak openly and freely about [the] proceedings" against him).

his First Amendment rights under SEC's settlement regime.

Both the public and Tesla shareholders have the right to hear what Musk has to say—the gag thus suppresses critical market information. Musk is one of the most prominent, important, and closely watched public figures in the world. Any restriction on his speech is profoundly disturbing, if not absurd—and speech and preclearance restrictions in perpetuity cannot pass constitutional muster.

Once called to the judiciary's attention, federal courts have an unflagging duty to enforce the Constitution and prohibit the government's unconstitutional exaction of silence. *See Marbury v. Madison*, 5 U.S. 137, 180 (1803) ("[A] law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument."); *First Nat'l. Bank of Bos. v. Bellotti*, 435 U.S. 765, 795 (1978) ("Because [the statute] challenged by appellants prohibits protected speech in a manner unjustified by a compelling state interest, it must be invalidated.").

Neither court below even reached the constitutional question. This abhorrent practice must end—whether under Rule 60(b) (4) and/or (5), federal courts' statutory power to render declaratory relief, or federal courts' inherent judicial power to set aside an order a court lacked power to enter in the first place.

ARGUMENT

I. THE PROBLEM IS IN THE ASK: SEC'S GAG IS AN UNCONSTITUTIONAL CONDITION WHICH THIS COURT'S PRECEDENTS FORBID

Last term, a concurring opinion of this Court expressed grave concern about the tendency of agencies to regulate outside their authority to obtain objectives they could never win in court: "Aware, too, that few can outlast or outspend the federal government, agencies sometimes use this as leverage to extract settlement terms they could not lawfully obtain any other way." *Axon v. FTC* and *Cochran v. SEC*, 589 U.S. 175, 216 (2023) ("*Axon/Cochran*") (Gorsuch, J., concurring) (citing a dissent from a case that decision reversed, *Tilton v. SEC*, 824 F.3d 276, 298, n.5 (2d Cir. 2016) (Droney, J., dissenting)) ("Given that the vast majority of all SEC administrative proceedings end in settlements rather than in actual decisions, it might well be that choosing to litigate is, in fact, equivalent to 'betting the farm.') (*rev'd by Axon/Cochran*).[6]

This case is a textbook example of abuse of that power described as "regulatory extortion." Philip Hamburger, *Purchasing Submission: Conditions,*

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[6] *See* Brian Mahoney, *SEC Could Bring More Insider Trading Cases In-House*, LAW360 (June 11, 2014) (quoting Andrew Ceresney, the head of SEC's Division of Enforcement, as explaining that the 'vast majority of our cases settle,' and stating, "I will tell you that there have been a number of cases in recent months where we have threatened administrative proceedings, it was something we told the other side we were going to do and they settled.').

Power, and Freedom 223 (2021); D. Ginsburg & J. Wright, *Antitrust Settlement*; *The Culture of Consent*, in 1 W. Kovacic: *An Antitrust Tribute* 177 ("Consent decrees create potential for an enforcement agency to extract from parties under investigation commitments well beyond what the agency could obtain in litigation."). Both the Second Circuit panel (and the district court, for that matter) completely ignored this Court's unconstitutional conditions precedents and focused solely on Petitioner's alleged "consent." But "consent is irrelevant for conditions that go beyond the government's power." Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479, 480 (2012). Shockingly, SEC also argued that Supreme Court unconstitutional conditions precedents are "inapplicable." SEC Br. CA2, pp.39–41.

A useful way to examine the question presented here is to ask whether Congress could enact such a statute conditioning settlement of government prosecutions on "consents" to never make any public statement that even creates the impression of criticism of the government's case. All filed denials must be immediately withdrawn and sent down the memory hole of erased history inconsistent with this flex of government power. Settling parties are told by the government what they must say and what they cannot say about their prosecution. Does anyone think such a statute would survive a constitutional challenge? This Court has already held that such a sanction cannot be imposed even on someone convicted of treason or of serial murders. *See Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

And if there is any remaining doubt, in the only instance known to *amicus* where Congress enacted a gag, it was summarily held unconstitutional. *McBryde v. Comm. to Rev. Cir. Council Conduct,* 83 F. Supp. 2d 135, 140 (D.D.C. 1999) (confidentiality provision for judicial discipline "operates as an impermissible prior restraint[;]" disciplined judge "must enjoy the opportunity to speak openly and freely about [the] proceedings" against him). Unless certiorari is granted, federal judges will continue to enjoy First Amendment rights that they are prepared to deny to the public at large.

Of the hundreds of federal agencies, only two outliers—SEC and CFTC—have adopted such a rule. The Department of Justice itself imposes no such requirement. Nor could it. "[When] a condition confines speech more severely than the government could do directly, then it is clear that the condition is abridging the freedom of speech." Hamburger, *Purchasing Submission*, *supra* p. 13, at 169, About 98 percent of SEC filed cases are settled.[7] In fiscal year 2021, SEC commenced actions against 649 defendants. Hence, SEC has gagged thousands of Americans.

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[7] Luis A. Aguilar, Commissioner, U.S. Sec. & Exch. Comm'n, Remarks Before the 20th Annual Securities and Regulatory Enforcement Seminar (Oct. 25, 2013), https://www.sec.gov/news/speech/2013-spch102513laa (last visited Jan. 19, 2024) ("While going to trial is always an option, it remains infrequent at the SEC. The SEC currently settles approximately 98% of its Enforcement cases and, in 2012, we went to trial in only 22 out of the 734 cases we brought.").

The very demand that those who wish to settle with SEC must abandon their constitutional rights is itself unconstitutional. The problem is in the ask and neither "consent" nor waiver affords a solution. The government may not condition anyone's ability to receive a benefit on the surrender of their constitutional rights. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001); *accord Koontz v. St. John's River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). This Court has long held that the government may not make its decision to refrain from its exercise of power "dependent upon the surrender … of a privilege secured … by the Constitution and laws of the United States." *Barron v. Burnside*, 121 U.S. 186, 200 (1887). Indeed, the Court declared in 1963 it was by then "too late in the day to doubt that the libert[y] of religion and expression may be infringed by the denial of or placing of conditions upon a benefit *or privilege*." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (emphasis added).

SEC's demand—its admitted requirement as a condition of settlement that the targets of its enforcement activity never publicly question their complaint's validity and, in this case secure pre-clearance of public statements "necessarily [has] the effect of coercing" settling parties into surrendering their freedom to "engag[e] in certain speech" protected by the First Amendment. *Speiser v. Randall*, 357 U.S. 513, 519 (1958). *Accord Crosby v. Bradstreet Co.*, 312 F.2d 483 (2d Cir. 1963).

Nor does it make a difference that SEC could have refused to settle. Virtually all unconstitutional

conditions cases involve an optional governmental action of some sort. As *Koontz* states, this Court has "repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional rights." 570 U.S. at 608; *see, e.g.*, *United States v. Am. Libr. Ass'n*, 539 U.S. 194, 210 (2003). In *Sherbert*, 374 U.S. at 405-06, this Court held that even a gratuitous benefit could not be conditioned upon a loyalty oath because it "inevitably deterred or discouraged the exercise of First Amendment rights of expression and thereby threatened to 'produce a result which the State could not command directly.'" (quoting *Speiser*, 357 U.S. at 526). Thus, even if SEC would have been within its rights in refusing to settle, that greater authority does not imply a "lesser" power to condition settlement upon the forfeiture of constitutional rights.

The same is true in this case. It is perfectly understandable that, to avoid the expense and risk of litigating further with SEC, Musk would yield to SEC's demand that he agree to say nothing that might antagonize this powerful agency in the future. One could easily imagine other such demands—surrender of future Seventh or Fourth Amendment rights—as preconditions to settlements with SEC. But as the court in *Crosby* correctly held, such an agreement is constitutionally void, and his agreement to the provision is "immaterial." 312 F.2d at 485. This is all the more true when, unlike the agreement between private parties in *Crosby,* it is the *government* setting the preconditions and banning future speech in perpetuity.

Nor does the panel decision's logic on waiver hold water. Citing *SEC v. Romeril*, the panel concludes that because "every consent decree by definition involves waiver of the right to trial," Pet.App.7a, it therefore follows that Musk can be required to waive any constitutional right, even future rights of free speech, as a condition of settlement. The very statement of the proposition exposes its absurdity.

The only constitutional rights that are "waived" in settlement are the ones logically bundled with trial of that particular case: right to trial, right to jury, right to appeal, and right to confront witnesses *in the case at issue.* The panel's deployment of such flawed logic to justify coercive government demands that Musk and others like him surrender future free speech rights, or preclearance on same, taken to its logical conclusion, would justify agency demands that parties agree to future warrantless searches, or waivers of jury or confrontation rights in future prosecutions. Or, as here, a disturbing perpetual government monitoring of speech by a known critic of government suppression of speech.

Suppose, for example, that a future SEC demanded that those who sought to settle with it must agree not to appeal from any future ruling of the Commission. Or that the settling party must offer public praise to SEC for being willing to settle. Doubtless there are individuals or corporations desperate enough to sign on to almost any terms required by the government that they do so simply to avoid further economic and reputational damage or worse by those in power. *See* Nelson Obus, Opinion,

Refusing to Buckle to SEC Intimidation, WALL ST. J. (June 24, 2014),[8] (describing 12-year legal battle of small company costing $12 million to defend against SEC charges). By dismissing such concerns for Mr. Musk, the courts below failed to treat him equally before the law. Such power to bankrupt enforcement targets should be of equal concern to courts, for all petitioners before them, no matter their perceived wealth. A party's wealth does not license the government to "extract settlement terms they could not lawfully obtain any other way." *Axon/Cochran*, 598 U.S. at 216 (Gorsuch J. concurring).

At stake is not only the freedom of speech but also one of the highest of constitutional principles, that a private party's consent—even if truly voluntary—cannot give the federal government a power that the Constitution denies to it. "The Constitution is a law enacted by the people and therefore is not variable with the consent of any state or private person. No such consent can relieve the federal government of the Constitution's limits." Hamburger, *Purchasing Submission*, *supra* p. 13, at 156.

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[8] *Available at*: https://www.wsj.com/articles/nelson-obus-refusing-to-buckle-to-sec-intimidation-1403651178 (last visited Jan. 19, 2024). The *Wall Street Journal* reports that a 2015 study by the U.S. Chamber shows that just an investigation by SEC imposes $4.6 million in average direct costs and, even when no wrongdoing is found, some investigations exceed $100 million. (Neither figure includes indirect costs in productivity and reputational harm.) *See* William R. Baker III and Joel H. Trotter, *Nothing to Fear from the SEC*, WALL ST. J. (Oct. 28, 2015).

II. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THE LAW OF AT LEAST THREE CIRCUITS

The Second Circuit's cavalier conclusion that Musk voluntarily waived his First Amendment rights—or should have "negotiate[d] a different agreement—but he chose not to do so"—and thus cannot challenge the gag is inconsistent with its own and at least three other circuits' First Amendment precedents. SEC consistently *admits* that the Gag is non-negotiable: "the Commission will accept a settlement *only if* the defendant agrees to such a no-deny provision." *See, e.g.,* SEC Br. 1, *SEC v. Romeril*, No. 03-cv-4087-DLC Dkt. 31 (S.D.N.Y. June 18, 2019) (emphasis added). And no mandated "consent" can endow SEC and federal courts with power to abridge and suppress speech that the First Amendment forbids.

Three circuits and the Michigan Supreme Court have concluded with clarity that courts lack power to enforce unconstitutional prior restraints and content- and viewpoint-based speech restrictions as conditions on settlements—even when entered on consent. *See Overbey v. Mayor of Balt.*, 930 F.3d 215, 219 (4th Cir. 2019) (invalidating waiver of First Amendment rights demanded by city as a condition of police brutality settlement); *United States v. Richards*, 385 F. App'x 691, 693 (9th Cir. 2010) (invalidating term of plea agreement forbidding defendant from making public comments about county commissioner); *G&V Lounge, Inc., v. Mich. Liquor Control Comm'n.*, 23 F.3d 1071, 1077 (6th Cir. 1994) (agreement to restrain free expression invalidated as violative of First Amendment); *Davies*

v. Grossmont Union High Sch. Dist., 930 F.2d 1390, 1399 (9th Cir. 1991) (invalidating the portion of a settlement agreement in which a party waived his right to run for public office); *People v. Smith*, 502 Mich. 624, 644 (2018) (same).

Furthermore, the panel decision conflicts with this Court's long-standing jurisprudence prohibiting such prior restraints, content- and viewpoint-based discrimination, and unconstitutional conditions which violate the First Amendment and due process of law. All else aside, that direct conflict amongst circuit courts warrants plenary review by this Court.

The Second Circuit's opinion is not only contrary to *Koontz*'s articulation of the unconstitutional conditions principle, but it is also flatly contrary to the unanimous determination of the Second Circuit in *Crosby*, 312 F.2d 483 (Lumbard, C.J., Moore and Hays, JJ.). The parties in that case stipulated to a settlement court order that a credit reporting agency would not publish anything about the Crosbys. When challenged three decades later, the Second Circuit unanimously concluded that "[s]uch an injunction, enforceable through the contempt power, constitutes a prior restraint by the United States against the publication of facts which the community has a right to know and which Dun & Bradstreet had and has the right to publish. The Court was without power to make such an order; that the parties may have agreed to it is immaterial." 312 F.2d at 485. As in *Crosby*, the Musk gags abridge public discourse affecting non-parties to the consent. *Romeril*, 15 F.4th at 173.

III. SEC'S GAG RULE IS AN OUTLIER THAT VIOLATES THE FIRST AMENDMENT AND REGULATES BEYOND ANY POWER CONGRESS CONFERRED UPON THE AGENCY

No agency has any inherent power to make law. Article I, § 1 of the U.S. Constitution vests "[a]ll [l]egislative [p]owers" in the Congress, and "the lawmaking function belongs to Congress … and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996) (citing *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892)). This constitutional barrier means "an agency literally has no power to act[] … unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Thus, even if an independent agency could constitutionally exercise the legislative power to write a Gag Rule, it cannot purport to bind anyone without congressional authorization, which is utterly lacking here.

Putting aside the First Amendment rights these SEC gag orders infringe, the securities laws simply do not authorize SEC to seek this type of relief from federal courts. Nor do they authorize courts to order it. The relevant statute empowers SEC to seek injunctions, and courts to grant them, but only to stop "acts or practices constituting a violation" of the securities laws or rules. 15 U.S.C. § 78u(d)(1). There is no plausible argument that criticizing or questioning the merits of SEC's cases violates any securities law or rule, or that silence about SEC's cases is required by any such law or rule. Likewise, although the relevant statute further empowers SEC to seek, and courts to grant, "any equitable relief that may be appropriate or necessary for the benefit of

investors[,]" *see id.* § 78u(d)(5)—and although SEC gag provisions clearly benefit SEC itself—there is no plausible argument that silencing SEC's most knowledgeable critics is an appropriate or necessary means of benefitting investors. Stated otherwise, if the present case were to proceed to trial (again), there is *zero* possibility that SEC could win a judgment that included a gag order like those now before the Court.

Recently, U.S. District Judge Ronnie Abrams questioned SEC's gag as abhorrent to basic First Amendment principles:

> In its normal practice of settling enforcement actions, the SEC routinely demands that defendants sacrifice the ability to ever deny the allegations against them—indefinitely silencing them from speech otherwise protected by the First Amendment. The threat held over the head of defendants by this [demand] is not easily overstated. Should they ever publicly refute the accusations against them, or even so much as "create the impression" that the SEC got something wrong, the Commission may reopen their cases or seek to hold them in contempt, thereby subjecting them to the risk of enormous financial and professional penalties, if not imprisonment. Truth is no defense. No matter how weak, or strong, the allegations in the [SEC] complaint may be—indeed, even if the testimony of key witnesses proves to be false—if

> defendants ever consider publicly defending themselves, the [Gag] prevents them from doing so.

SEC v. Moraes, No. 22-cv-8343, 2022 WL 15774011, at *1 (S.D.N.Y. Oct. 28, 2022); *see also SEC v. Goel*, No. 22-cv-06282, at *4 (S.D.N.Y. Oct. 31, 2022) (citing and quoting *Moraes*, 2022 WL 15774011, at *5).

Judge Abrams did not limit her criticism to SEC. She also called out the federal judiciary for its "troubling" complicity in this routine violation of civil liberties, because SEC settlements require a federal judge's sign-off:

> Perhaps most concerning, the federal judiciary is made complicit in this practice—normalizing lifetime gag orders in the process. Courts are called upon to turn a blind eye to First Amendment rights being used as a bargaining chip; to endorse consent decrees, giving No-Admit-No-Deny Provisions the imprimatur of judicial sanction; and to enforce them should defendants ever step out of line. This is troubling indeed.

Moraes, 2022 WL 15774011, at *1. Despite her misgivings, Judge Abrams approved the settlements in *Moraes* and *Goel* because she felt constrained by the Second Circuit's flawed decision in *Romeril*, *id.* at *5, a decision that stands in direct conflict with *Crosby*, which remains the law of the Second Circuit.

CONCLUSION

This case involves free speech and due process questions of the highest importance. SEC has never maintained (nor could it) that had it prevailed at trial, its judgment could have included a lifetime ban prohibiting Musk from calling into question SEC's case against him. Nor, of course, could it have obtained *any* speech constraint had Musk prevailed—as he later did when a jury held that those same tweets did not establish securities fraud. There is, in fact, no basis for concluding that the gags on Musk serve any purpose but privileging SEC to arrogate power to suppress criticism of its exercise of administrative power, a purpose at odds with the core purpose of the First Amendment itself.

Five years have passed since Musk was first silenced. SEC's Gag was never constitutional, and it remains unconstitutional today. We urge the Court to grant the petition.

Respectfully submitted,

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