IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. CHRISTOPHER A. NOVINGER, et al., Defendants.	CIVIL ACTION NO: 4:15-cv-358-O AUGUST 23, 2022

BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR DECLARATORY RELIEF

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PRELIMINARY STATEMENT

When agencies, like the Securities and Exchange Commission ("SEC"), self-confer power outside the normal administrative process and beyond that granted to them by Congress, they corrode the rule of law. Such policies may achieve SEC's admitted goal of suppressing speech critical of its enforcement by *in terrorem* means, but by so doing SEC undermines our Constitution. This is especially true when the same instrument that imposes the gag also requires SEC enforcement targets to surrender their access to the courts, thus immunizing SEC's unlawful conduct from judicial review. In *Jones v. SEC*, 298 U.S. 1 (1936), the Supreme Court warned of the dangers of agencies self-conferring arbitrary power to violate Americans' civil liberties under the very statutes at issue here. The Court stated:

> [i]t violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest—that this shall be a government of laws— … [If administrative agencies] are permitted gradually to extend their powers by encroachments … upon the fundamental right, privileges and immunities of the people … the government ceases to be one of laws and becomes an autocracy.

Id. at 23-24 (cleaned up).

Two judges of this Circuit, in a concurrence on appeal of earlier proceedings in this action, have recognized that SEC's gag is a prior restraint, and a particularly "effective" one at that. *SEC v. Novinger*, 40 F.4th 297, 308 (5th Cir. 2022) (Jones, J. concurring). Prior restraints carry with them a heavy presumption against their constitutional validity. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). "It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury v. Madison*, 5 U.S. 137, 147 (1803). Accordingly, pursuant to 28 U.S.C. § 2201 and Fed. R. Civ. P. 57, Christopher A. Novinger and ICAN Investment Group, LLC ("ICAN") ask this Court to declare that the consent (1) incorporates a void and unconstitutional prior restraint and content- and viewpoint-restriction,

unconstitutional condition on speech and a compulsory self-condemnation in violation of the First and Fifth Amendments of the United States Constitution; (2) imposes restrictions on speech that are not among the remedies authorized by Congress under 15 U.S.C. § 77t or 15 U.S.C. § 78u either at trial or upon settlement; and (3) that 17 C.F.R. § 202.5(e) is void *ab initio* because SEC bypassed the Administrative Procedure Act's ("APA") requirement for notice and comment.

FACTS AND PROCEDURAL HISTORY

History of the Rule

SEC's "Gag Rule" is set out in 17 C.F.R. § 202.5(e), a regulation that the agency published in 1972, without notice and comment, 37 Fed. Reg. 25,224 (Nov. 29, 1972). It provides:

> The Commission has adopted the policy that in any civil lawsuit brought by it or in any administrative proceeding of an accusatory nature pending before it, it is important 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. Accordingly, it hereby announces its 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. In this regard, the Commission believes that 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.

17 C.F.R. § 202.5(e).[1] SEC then asserts ipse dixit: "The Commission finds 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. The foregoing amendment is declared to be effective immediately." 37 Fed. Reg. at 25,224. SEC lacked statutory authority to enact such a substantive rule and further did not follow the provisions of the APA, which require notice and comment for any rule that binds (or, in this case, gags) regulated persons or third parties.

[1] The New Civil Liberties Alliance ("NCLA") petitioned SEC to challenge the Gag Rule for violating the APA, in addition to the constitutional infirmities set forth in this motion. New Civil Liberties Alliance, *Petition to Amend* (Oct. 30, 2018), *available at* http://bit.ly/2XfFD3Z. SEC has taken no action on the petition, despite the passage of nearly four years. Even in the unlikely event that SEC were to rescind or amend its Gag Rule, that would not provide retrospective relief to these defendants who may only seek correction of this constitutional harm through this Court.

History of this Case

On May 11, 2015, SEC filed a Complaint against Novinger and ICAN alleging violations of the Securities Act and the Exchange Act. (Dkt. 1). The following year, SEC and defendants reached a settlement and on June 6, 2016, this Court entered a final judgment against Mr. Novinger and ICAN, imposing civil penalties and associational and other bars. (Dkt. 3). Paragraph 12 of the Novinger consent (Dkt. 33-1) and paragraph 10 of the ICAN consent (Dkt. 33-4) imposed a Gag Order, which provides:

> 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.

The SEC-drafted consent terms are non-negotiable and do not permit defendants to settle unless they surrender both their First Amendment and rights to be heard on the terms of the settlement. As SEC acknowledges throughout its briefing in this action, defendants must also waive any hearing on SEC's entry of Final Judgment and agree that SEC may present the Settlement Form and Gag Order to the Court *ex parte*, for signature and entry without further notice, and they must waive their Rule 65(d) protections. This allows SEC to incorporate by reference the Consent's Gag Order which in turn incorporates by reference the Complaint in

double-layered violation of the Federal Rules. Finally, defendants must agree that the court retains jurisdiction to enforce these non-negotiable terms. In short, not only is there no notice and opportunity to be heard, there is never a hearing at all under this scheme.

In a prior proceeding brought in this action pursuant to Fed. R. Civ. P. 60(b)(4) and (5), this Court declined to address Novinger's numerous "First Amendment concerns presented in Defendants' briefing" stating "Federal Rule of Civil Procedure 60 is not an appropriate avenue by which to address those concerns." (Dkt. 45 at 6 n.3). On appeal, the Fifth Circuit unanimously agreed with this Court: Rule 60(b)(4) and (5) provide no relief from this government-imposed prior restraint. *Novinger*, 40 F.4th at 297. Judge Jones's concurrence, joined by Judge Duncan, stated:

> I write to note that nothing in the opinion (or in the district court opinion, for that matter) approves of or acquiesces in the SEC's longstanding policy that conditions settlement of any enforcement action on parties' giving up First Amendment rights. 17 C.F.R. § 202.5(e). 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. The defendants' brief informed us that a petition to review and revoke this SEC policy was filed nearly four years ago. New Civil Liberties Alliance, Petition to Amend (Oct. 30, 2018), available at http://bit.ly/2xfFD3Z. However, SEC never responded to the petition. Given the agency's current activism, I think it will not be long before the courts are called on to fully consider this policy.

Id. at 308 (Jones, J. concurring).

Mr. Novinger and ICAN continue to be bound by the Gag Order. Mr. Novinger desires to engage in truthful public statements concerning SEC's case against him. However, because those truthful statements might indirectly "creat[e] an impression" that the complaint lacked a factual basis or was otherwise without merit, Mr. Novinger has refrained from exercising his right to speak or petition the government about this matter. (Ex. A). Furthermore, as briefed to this Court and the Fifth Circuit, and as discussed at oral argument in the Circuit, the collateral bar rule prohibits Novinger from speaking without first challenging the gag *in the court that entered it*. *Walker v.*

City of Birmingham, 388 U.S. 307, 320 (1967) (cannot bypass orderly judicial review of the injunction in the court that issued it). *Walker* holds that although

> [a]s a general rule, an unconstitutional statute is an absolute nullity and may not form the basis of any legal right or legal proceedings, yet until its unconstitutionality *has been judicially declared in appropriate proceedings*, no person charged with its observance under an order or decree may disregard or violate the order or the decree with immunity from a charge of contempt of court; and he may not raise the question of its unconstitutionality in collateral proceedings on appeal from a judgment of conviction for contempt of the order or decree.

Id. at 320 (emphasis added). The D.C. Circuit has further observed that speech in violation of the very rule at issue here is subject to the court "institut[ing] criminal contempt proceedings." *Cato Inst. v. SEC*, 4 F.4th 91, 95 (D.C. Cir. 2021).

The SEC-drafted consent and final order both provide that this court retains jurisdiction. In such instances, a consent decree is never final—courts are charged with ensuring that a consent decree does not exceed its appropriate limits. "A decree exceeds its limits if it is aimed at eliminating a condition that does not violate federal law or if it does not flow from such a violation." *Horne v. Flores*, 557 U.S, 433, 450 (2009). Since SEC may move to reopen this case at any time should Mr. Novinger speak critically about his charges, finality should not be an issue of concern for SEC, particularly given that it wrote the consent and judgment to provide for continuing jurisdiction. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 381 (1994) (where judgment incorporates settlement terms that are prospective or includes provision retaining jurisdiction over settlement, district court has jurisdiction to reopen and enforce settlement agreement); *Alberti v. Klevenhagen*, 46 F.3d 1347, 1365 (5th Cir. 1995) ("There is little question that the district court has wide discretion to interpret and modify a forward-looking consent decree."). Nor should the defendants' request for judicial review of the constitutionality of the prior restraint imposed by the consent order pose any concern for the court. *League of United Latin*

Am. Citizens, Council No. 4434 v. Clements, 999 F.2d 831 (5th Cir. 1993) holds that even when the parties consent to its terms, a consent decree is a "judicial act," and, thus, "it does not follow that the court should do their bidding" by employing the power of a federal court to "achieve by consent decree what they can't achieve by their own authority. Consent is not enough when litigants seek to grant themselves powers they do not hold outside of court." *Id.* at 845-46. "Even when it affects only the parties, the court should, therefore, examine [a consent] carefully to ascertain not only that it is a fair settlement but also that it does not put the court's sanction on and power behind a decree that violates Constitution, statute, or jurisprudence." *U.S. v. City of Miami*, 664 F.2d 435, 441 (Former 5th Cir. Dec. 1981) (en banc) (Rubin, J., concurring in the per curiam).

SEC itself has argued that "the proper vehicle is review of the consent judgment[] before the court[] that entered [it]."[2] Finally, even if SEC were to rule on the pending administrative petition—which it is certain to deny given its litigating posture—and even if a court were to review that decision unfavorably, that would not provide retrospective relief for these defendants. Inasmuch as none of these options provides relief for defendants, after much consultation, cogitation and careful consideration, mindful of this district court's instruction that Rule 60 is not the path to challenge this Gag Order, the statement by two judges of this Circuit that the Gag is a prior restraint, and taking a cue from *Walker*'s suggestion of a judicial declaratory proceeding, defendants now bring this motion for declaratory relief.

ARGUMENT

I. STANDARDS RELATING TO DECLARATORY RELIEF

The Declaratory Judgment Act, 28 U.S.C. § 2201, ("DJA") provides:

[2] *See* Memorandum of Points and Authorities In Support of Defendants' Motion to Dismiss at 18, *Cato Inst. v. SEC*, 438 F. Supp. 3d 44 (D.D.C. 2020) (No. 1:19cv47), Dkt. 12.

> In a case of actual controversy within its jurisdiction … any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

The DJA "is a procedural device designed to provide a new remedy to the federal court arsenal." *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 601 (5th Cir. 1983), "a matter for the district court's sound discretion," but cannot be left to a "whim or personal disinclination." *Id.* (quoting *Hollis v. Itawamba Cnty. Loans*, 657 F.2d 746, 750 (5th Cir. 1981)). A declaratory judgment, like other forms of equitable relief, should be granted if "exercised in the public interest." *Eccles v. Peoples Bank of Lakewood Vill., Cal.*, 333 U.S. 426, 431 (1948). Fed. R. Civ. P. 57 provides that "[t]he existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate." Its commentary provides for early hearing, as on a motion.

"Even though the decree is predicated on consent of the parties, the judge must not give it perfunctory approval." *Eccles*, 333 U.S. at 441. By virtue of its injunctive provisions, a consent decree "reaches into the future and has continuing effect." *Id*. Because a consent order is enforceable as a judicial decree and, if allegedly void on constitutional grounds, it "is subject to attack at any time." 47 Am. Jur. 2d *Judgments* § 653, Westlaw (database updated Aug. 2022). If a judgment is void, "it is as though such proceedings had never occurred; the judgment is a mere nullity and the parties are in the same position as if there had been no judgment." 46 Am. Jur. 2d *Judgments* § 25, Westlaw (database updated Aug. 2022). And because "a court's power to vacate a void judgment is inherent, there is no deadline for it to exercise that power." *Id*. (citing *Groveport Madison Loc. Schs. Bd. of Educ. v. Franklin Cnty. Bd. of Revision*, 77 N.E.3d 957 (Ohio 2017)).

"When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed." *U.S. v. Playboy Ent. Grp., Inc.*,

529 U.S. 803, 817 (2000). This burden shift must attach even more forcefully to an unlawfully enacted regulation issued by a mere administrative agency. "It is rare that a regulation restricting speech because of its content will ever be permissible … were we to give the Government the benefit of the doubt when it attempted to restrict speech, we would risk leaving regulations in place that sought to shape our unique personalities or to silence dissenting ideas." *Id.* at 818.

A party bringing a pre-enforcement First Amendment challenge to government action need not demonstrate to a certainty that it will be prosecuted to show injury, but only that it has "an actual and well-founded fear that the law will be enforced against" it. *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988). SEC's public threats[3] to reopen proceedings if statements that it doesn't like are not retracted easily meets this standard.

II. THE GAG ORDER VIOLATES THE FIRST AMENDMENT

A. The Gag Order Is a Forbidden Prior Restraint

Prior restraints on speech and publication "are the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). "A prior restraint … has an immediate and irreversible sanction…[although] a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it," and it is therefore presumptively impermissible. *Id*. Restraints against future expression because of prior acts are incompatible with the First Amendment. *Universal Amusement Co. v. Vance*, 587 F.2d 159, 166 (5th Cir. 1978); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) ("[A] free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand.").

[3] *Examining the Settlement Practices of U.S. Financial Regulators*, Hearing Before H. Comm. On Fin. Servs., 112th Cong. (2012) (statement of Robert Khuzami, Dir., Div. of Enforcement, Secs. & Exchange Comm'n) (SEC demands retractions or corrections); Secs. & Exchange Comm'n, Litigation Release No. 14886 (Apr. 22, 1996), *available at* https://bit.ly/34hrh84 (regarding *SEC v. Michael P. Angelos*, No. B96-834 (D. Md.)).

The Gag Orders permanently forbid Mr. Novinger and his company from contesting allegations in SEC's complaint, regardless of their accuracy or the truth of the forbidden speech, on pain of reopened and renewed prosecution. It is a textbook example of a prior restraint. Indeed, in the appeal in this case, two judges of the Fifth Circuit concurred that "[a] more effective prior restraint is hard to imagine." *Novinger*, 40 F.4th at 308 (Jones, J. concurring). The Consent Agreement also attempts to put Mr. Novinger and his company in the position of "authorizing" future judicial proceedings against them if he or someone on his behalf speaks, a situation prohibited by the Supreme Court in *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931).

Other courts have readily identified the constitutional infirmity with SEC's Gag: "On its face, SEC's no-denial policy raises a potential First Amendment problem." *SEC v. Citigroup Glob. Mkts. Inc.*, 827 F. Supp. 2d 328, 333 n.5 (S.D.N.Y. 2011), *vacated and remanded on other grounds*, 752 F.3d 285 (2d Cir. 2014); *see also FTC v. Circa Direct LLC,* No. 11-2172 RMB/AMD, 2012 WL 2178705, at *7 (D.N.J. June 13, 2012) (no-deny policy deprives the public of knowing the truth of the allegations). Prior restraints are particularly impermissible because "'[e]ven if they are ultimately lifted they cause irremediable loss a loss in the immediacy, the impact, of speech.'" *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 467-69 (5th Cir. 1980), *aff'd*, 452 U.S. 89 (1981) (quoting Alexander Bickel, *The Morality of Consent* 61 (1975)).

There are "two evils" that will not be tolerated in governmental prior restraints. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990), *modified on other grounds by City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004). The Gag Order embodies both. First, no system of prior restraint may place "unbridled discretion in the hands of a government official or agency." *Id.* (quoting *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988)). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe

what shall be orthodox in politics … or other matters of opinion." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Instead, prior restraints "must contain neutral criteria sufficient to prevent (1) censorship that is unreasonable in light of the purpose served by the forum *and* (2) viewpoint-based censorship," otherwise known as content-based restriction. *Freedom from Religion Found., Inc. v. Abbott*, 955 F.3d 417, 429 (5th Cir. 2020). Here, the gag prohibits only speech or impressions that are critical of SEC or its allegations, an obvious content- and viewpoint-based restriction.

The second evil arises when "a prior restraint … fails to place limits on the time within which the decisionmaker must issue the license," which is "impermissible." *FW/PBS*, 493 U.S. at 226 (first citing *Freedman v. Maryland*, 380 U.S. 51, 59 (1965); and then citing *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 (1980)). The Gag Order never expires. The speech ban is longer than a criminal sentence would be for the charged violation, something especially relevant here as Mr. Novinger was never criminally charged. Perpetual mandated silence cannot be justified under any level of constitutional precedent. *Id.* at 226-27.

As noted in Judge Jones's concurrence, SEC's gag orders are content- and viewpoint-based in the most threatening fashion: "'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." *Novinger*, 40 F.4th at 308. They exist for the very purpose and effect of permanently cementing *only* SEC's narrative in the public arena. "We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority." *Barnette*, 319 U.S. at 642. Doing so not only favors one side, suppressing all information about the agency's own behavior, it also effectively bars shared public articulation of

criticism of SEC. Indeed, it goes so far as to bar speech capable of even "giving the impression" that the agency's allegations may be questioned at all.

This speech ban has real consequences. In March 2008, SEC alleged that a public technology company had backdated options and secured settlements with the company and employees, including a civil $1.4 million judgment of penalties and disgorgement against its vice president of human resources, who was accordingly gagged and so could not speak about why she settled, nor speak about any ambiguity in the government's legal theory, nor say what her defenses were. *SEC v. Tullos*, No. SACV 08-242-AG (MLGx) (C.D. Cal. Mar. 10, 2008), Dkt. 6. Over a year later, the parallel criminal case against those who did not settle was halted when the district court judge presiding over the civil and criminal cases made a stunning announcement, finding egregious prosecutorial misconduct, including that SEC had grilled the Human Resources VP "on 26 separate occasions … subject[ing] her to grueling interrogation during which the government interjected its views of the evidence and, at least on one occasion, told her that she would not receive the benefits of cooperation unless she testified differently than she had initially in an earlier session." Tr. of Proceedings at 5196-97, *United States v. Ruehle*, No. SACR 08-00139-CJC (C.D. Cal. Dec. 15, 2009). The judge dismissed the criminal cases and "discourage[d] the SEC from proceeding further with the case … The accounting standards and guidelines were not clear, and there was considerable debate in the high-tech industry as to the proper accounting treatment for stock option grants." *Id.* at 5201. Two years of coerced silence later, SEC eliminated the $1.4 million in penalties and disgorgement against the settling VP. *See SEC v. Tullos*, No. SACV 08-242-CJC (MLGx) (C.D. Cal. Nov. 10, 2010), Dkt. 11. If the judge presiding over the non-settling defendants' proceedings had not uncovered the prosecutorial misconduct, Ms. Tullos would have

remained silenced (and $1.4 million poorer, not counting costs of defense) and, *critically*, the public never would have learned of SEC's aggressive and questionable enforcement tactics.

While the *Tullos* case represents a compelling example of how gags work to suppress justice, the collective impact of this unconstitutional policy is even more disturbing. Because 98% of SEC enforcement actions are settled,[4] the only information available to the public about SEC enforcement actions are SEC-drafted complaints and press releases. This produces a shocking asymmetry of information about how this agency exercises its power, and further renders defendants defenseless to correct this one-sided and permanent public view of their case.

Elevated "judicial scrutiny is warranted" any time a "content-based burden" is placed "on protected expression." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011). For example, under the "Son of Sam" laws—which seek to prohibit criminals from profiting from accounts of their crimes—courts have held that the content of the publication may not be restrained. *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) If murderers are free to publish books about their crimes and prosecutions—as they must be in a free society—*a fortiori*, SEC cannot silence SEC targets from speaking about their cases. Indeed, two convicted securities law violators who served time in prison have recently published books highly critical of SEC's cases against them, even broadcasting those weaknesses on CNBC's *Squawk Box*. Raj Rajaratnam expressed his profound gratitude to be an American citizen: "How lucky I am to live in this country … because you can speak out without being penalized." Interviews by Andrew Ross Sorkin, CNBC, with Raj Rajaratnam (Dec. 5, 2021)[5] and Rajat Gupta (Mar. 22, 2019).[6]

[4] SEC's own data show that 98% of persons charged by SEC settle. *See* Priyah Kaul, Note, *Admit or Deny: A Call for Reform of the SEC's "Neither-Admit-Nor-Deny" Policy*, 48 U. Mich. J.L. Reform 535, 536 (2015).
[5] *Available at* https://www.youtube.com/watch?v=bqrrOyQh38A at 18:43-19:10.
[6] *Available at* https://www.youtube.com/watch?v=COzlQzkhCoQ.

1. The Speech Ban Serves No Compelling Government Interest

To pass constitutional muster, speech bans must be narrowly tailored, serve a compelling government interest, and regulate speech by the least restrictive means. *Playboy*, 529 U.S. at 813. "[T]he government must demonstrate that (1) the activity restrained poses a clear and present danger or a serious and imminent threat to a compelling government interest; (2) less restrictive means to protect that interest are unavailable; and (3) the restraint is narrowly-tailored to achieve its legitimate goal." *In re Sealing & Non-Disclosure*, 562 F. Supp. 2d 876, 882 (S.D. Tex. 2008).

The Gag Rule was enacted in 1972 "to avoid the perception that SEC had entered into a settlement when there was not in fact a violation" of the securities laws. 17 C.F.R. § 202.5(e). In other words, SEC will not tolerate its targets criticizing its prosecutions. Later, the 2008 financial crisis "gave way to a new concern that the public might believe that the agency was acting collusively with wrongdoers and allowing them to escape serious punishment." David Rosenfeld, *Admissions in SEC Enforcement Cases*, 103 Iowa L. Rev. 113, 119-120 (2017). As memorably articulated in *SEC v. Bank of America Corp.*, 653 F. Supp. 2d 507, 508-12 (S.D.N.Y. 2009):

> The proposed Consent Judgment in this case suggests a rather cynical relationship between the parties: the SEC gets to claim that it is exposing wrongdoing on the part of the Bank of America in a high-profile merger; the Bank's management gets to claim that they have been coerced into an onerous settlement by overzealous regulators … at the expense, not only of the shareholders, but also of the truth.

Neither of these policy justifications are a legitimate basis for extracting silence from SEC targets, let alone a compelling one. Indeed, other regulatory agencies and the Department of Justice routinely settle matters without ever extracting a defendant's silence.

If SEC in 1972 was extracting settlements when there had been no proven violation of the securities laws, *it is important for the American public to know that*. By the same token, if post-2008 SEC was letting powerful defendants off lightly, or even striking collusive deals, *it is equally*

important to shed light on those practices. The government is institutionally highly unlikely to admit to either discrediting practice. Silencing the only other parties to the arrangements with a government-enforced muzzle allows the government to act with impunity. Indeed, it is hard to imagine a policy better designed to suppress truth about these important matters than SEC's sweeping gag orders. Law professor John Coffee describes these consents as an "artifact": "The SEC is premised on the idea that sunlight is the best disinfectant." Zachary A. Goldfarb, *SEC May Require More Details of Wrongdoing to Be Disclosed in Settlements*, Wash. Post (Apr. 1, 2010), https://wapo.st/3xcPFVu.

The fact that SEC *systematically* demands gag orders as a condition of its settlements is profoundly dangerous. *See generally* James Valvo, *The CFTC and SEC Are Demanding Unconstitutional Speech Bans in Their Settlement Agreements*, Yale J. on Regul., Notice & Comment (Dec. 4, 2017), https://bit.ly/3gvpa8b. Shielding such an important exercise of government power from oversight and scrutiny prevents lawmakers from knowing when to rein in—or unleash—SEC authority and engage in course correction.

Furthermore, the interests protected by the First Amendment are not only the right of the speaker to free expression, but also the right of those *hearing* him to receive information. By systematically silencing the very people best placed and motivated to expose wrongdoing, over-aggressive prosecutions, and/or flawed enforcement policies, the gag "insulate[s] … [government actions] from constitutional scrutiny … implicating central First Amendment concerns." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001).

2. The Gag Order Does Not Operate by the Least Restrictive Means

The Gag Order's sweeping and perpetual speech restriction is far from the least restrictive means of achieving any compelling interest the government may claim. If SEC believes specific

allegations of the complaint should be admitted by the defendant, specific admissions that allow fair opportunity to defendants to truthfully qualify them can always be negotiated in settlement. If a settling party later untruthfully asserts innocence, SEC need only issue a press release to the contrary, a remedy far preferable and less restrictive than a lifetime ban on the defendant's speech procured under the government's boot and enforced by the threat of renewed prosecution.

B. The Gag Order Forbids Truthful Speech

Novinger's and ICAN's Gag Orders are also unconstitutional because they forbid true speech just the same as false speech. The Orders end with a provision that "lifts" the Gag—and its substantive commands about admissions and denials—for testimonial obligations or their "rights" to take legal or factual positions in judicial proceedings in which the Commission is not a party. SEC's "lift" is a tacit admission that the Gag Order *must* contain an exception where it conflicts with a defendant's obligation to speak the truth under oath. This telling exception is fatal to any defense of the Gag Order by SEC because it concedes that defendants' obligations to tell the truth under oath may be at odds with SEC's command that defendants may not deny any allegations in SEC's settled but unproven complaint. SEC's self-favoring exemption from the exception—"in which the Commission is not a party"—also disturbingly puts SEC's thumb on the scales of justice in any subsequent Commission proceeding.

This "lift" of the ban in testimonial situations appears to be designed to avoid a gag order coming to the attention of a judge in later proceedings, who might invalidate such a disturbing and unconstitutional speech ban that is unheard of in lawful state or federal settlements. But this exception is much too parsimonious. The government doesn't get to decide *when* defendants may speak the truth, by carving out an exception calculated to shield the ban from scrutiny in subsequent sworn proceedings, but otherwise silencing defendants for life. The statement of the proposition suffices to expose its raw unconstitutionality.

C. The Gag Order Compels Speech in Violation of the First and Fifth Amendments

Defendants' Consent Orders provide that they "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*." (emphasis added). That "script" is a raw assertion by SEC of power to compel future speech by those with whom it settles. But the First Amendment prohibits the government from compelling persons to express beliefs they do not hold. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Barnette*, 319 U.S. at 642.

Government-compelled speech is subject to strict scrutiny. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796–97 (1988). "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Id.* at 795. The Supreme Court in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018) held that public employees could not be compelled to subsidize speech on matters with which they disagreed. Likewise, *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) stopped the State of California from forcing faith-based pregnancy centers to propound government-scripted speech. The Defendants' consent decrees require them to call into question *their own integrity* by requiring them to spit out words that infer their own guilt as to *all* aspects of a complaint in a settled matter, a form of state-forced self-condemnation violative of the Fifth Amendment. *Boyd v. United States*, 116 U.S. 616, 633-35 (1886) (prohibiting compulsory self-accusation). The First and Fifth Amendment stakes here pose an even graver threat to individual liberty than the speech in *Janus* or *Becerra*.

In *National Association of Manufacturers v. SEC*, 800 F. 3d 518 (D.C. Cir. 2015), the court held that an SEC-mandated publication that minerals used by companies were not conflict-free was impermissible: "It requires an issuer to tell consumers that its products are ethically tainted … [b]y compelling an issuer to confess blood on its hands, the statute interferes with that exercise of

the freedom of speech under the First Amendment." *Id.* at 530 (holding both Congress's *statute* and SEC's rule requiring disclosure of "conflict minerals" unconstitutional); *see also Associated Builders & Contractors of Se. Tex. v. Rung*, No. 1:16-CV-425, 2016 U.S. Dist. LEXIS 155232, at *28-30 (E.D. Tex. Oct. 24, 2016) (determining that an Executive Order and agency implementing rule and guidance were constitutionally defective because they compelled speech).

Government efforts to compel citizens to utter speech with which they disagree deeply offends the fundamental "principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Agency for Int'l Dev. v. All. For Open Soc'y, Int'l, Inc.*, 570 U.S. 205, 213 (2013). This Court must accordingly declare that these Gag Orders unconstitutionally compel speech.

D. The Gag Order Is an Unconstitutional Condition

SEC cannot condition a person's ability to settle with the government upon the surrender of his First Amendment rights. *Velazquez*, 531 U.S. at 547; *accord Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) (government cannot "deny a benefit to a person because he exercises a constitutional right"). This overarching principle—the unconstitutional conditions doctrine—"vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz*, 570 U.S. at 604. "[R]egardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them." *Id.* at 606.

Nor does it make a difference that the government could have refused to settle at all. Virtually all unconstitutional conditions cases involve an optional governmental action of some kind. As *Koontz* holds, "we have 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." *Id.* at 608; *see, e.g., United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 210 (2003) ("[T]he 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*." (emphasis added, cleaned up)). Indeed, the Fourth Circuit recently held that a settlement condition which required a plaintiff to agree "not to speak to the media" about police misconduct violated the First Amendment. *Overbey v. Mayor of Balt.*, 930 F.3d 215 (4th Cir. 2019).

III. THE GAG ORDER VIOLATES DUE PROCESS AND THE FEDERAL RULES

Defendants acknowledge that for purposes of Rule 60 relief, both this Court and the Fifth Circuit have denied relief for their Due Process claims. They are reasserted here to preserve them.

As set forth above, the text of SEC-drafted consents is not subject to negotiation and requires defendants to surrender their right to a hearing on entry of their consent judgment. The Gag Order is also unconstitutionally vague, requiring a settling defendant to navigate at his peril what he can say about his own prosecution. The Supreme Court has recognized that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at [the law's] meaning and differ as to its application violates the first essential of due process of law." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

"[L]aws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (citing *Connally*, 269 U.S. at 391). "When speech is involved," it is particularly important "to ensure that ambiguity does not chill protected speech." *Id.* at 253-54. But SEC's Gag Order has no limiting principle. The order forbids a defendant from even creating "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)

(emphasis added). This phrasing confers unlimited discretion on SEC to decide what future speech is or is not permissible and is therefore unconstitutionally vague and must be declared invalid.

Further, judicial orders enforceable by contempt proceedings must be specific. *Scott v. Schedler*, 826 F.3d 207, 211-12 (5th Cir. 2016); Fed. R. Civ. P. 65(d). The judicial contempt power is a potent weapon; those subject to court decrees must know with specificity what actions are restrained. *LabMD, Inc. v. FTC*, 894 F.3d 1221, 1235-37 (11th Cir. 2018). Rule 65(d) expressly proscribes court orders that incorporate other documents to define the forbidden conduct—"*and not by referring to the complaint or other documents.*" Fed. R. Civ. P. 65(d) (emphasis added).[7] Because the Final Judgment here incorporates *both* the Consent *and* the Complaint (the Consent incorporates the Complaint) by reference, the Gag Order violates Rule 65(d). *See State Indus. Prods. Corp. v. Beta Tech. Inc.*, 575 F.3d 450, 457 (5th Cir. 2009) (Rule 65 governs consent judgments that are "clearly injunctive in nature" as evidenced by requirements to abide by set terms and district court retaining jurisdiction to enforce them). Compliance with Rule 65(d) "is mandatory." 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2955 (3d ed. 2013); *Seattle-First Nat'l Bank v. Manges*, 900 F.2d 795, 799-800 (5th Cir. 1990) ("[The] no-reference requirement [of Rule 65(d)] has been strictly construed in this circuit.")

Just recently, this Circuit vacated an injunction where the court of appeals could not ascertain with specificity the enjoined conduct. *Louisiana v. Biden*, No. 21-30505, 2022 WL 3405854, at *3 (5th Cir. Aug. 17, 2022). The specificity requirement is required not only because due process requires it for the parties. It also "performs a second important function…[of making

[7] The SEC appears to recognize that its "Consent" violates this rule because the consent states that "Defendant will not oppose the enforcement of the Final Judgment on the ground … that it fails to comply with Rule 65(d) … and hereby waives any objection based thereon." (Dkt. 33-1 ¶ 9); (Dkt. 31-5 ¶ 7). This purported waiver is inconsistent with cases in the Supreme Court and this circuit finding that Rule 65(d)'s requirements are mandatory in order, not only to preserve due process for defendants, but also the independent interest of clear judicial administration, something no party can waive.

possible] for an appellate tribunal to know precisely what it is reviewing." *Schmidt v. Lessard*, 414 U.S. 473, 477 (1974). The Gag Order, in sum, requires surrender of all of defendants' procedural and due process protections, including notice and opportunity to be heard, compliance with Rule 65(d), or any hearing at all before a judge.

IV. THE GAG ORDER VIOLATES PUBLIC POLICY AND RIGHT TO PETITION

The First Amendment provides that "Congress shall make no law … abridging … the right of the people … to petition the Government for a redress of grievances." U.S. Const. amend. I. Its protections include the right of petition by defendants "with respect to the passage and enforcement of laws." *E. R. R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961). The Gag Rule offends our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). Speech on public concern … "is at the heart of the First Amendment's protection. … [it is] more than self-expression; it is the essence of self-government …[and] occupies the highest rung of the hierarchy of First Amendment values." *Id.* (cleaned up).

Indeed in 2011, SEC adopted Rule 21F-17 that bars companies from gagging employees using confidentiality agreements that might impede whistleblowing to SEC. Steven Pearlman et al., *Be Ready for SEC Scrutiny of Employee Confidentiality Pacts*, Law 360 (Aug. 9, 2022).[8] SEC thus makes gag provisions between private parties not constrained by the First Amendment a regulatory violation, and yet insists that its non-negotiable, *government-imposed* gag is lawful.

[8] Congress also recently prohibited the use of "gag clauses" in certain private contracts, whether or not the drafters enforce them. *See* 15 U.S.C. § 45b(b). Thus federal regulatory policy treats gag clauses in consumer contracts or employment agreements as unlawful even when those are entered into by private parties engaged in freedom of contract, with neither subject to the First Amendment. Where, as here, a government agency bound by the First Amendment imposes a gag on all who settle, the same logic extends with even greater force to SEC.

Regulation by enforcement and settlement has drawn the concern and attention of judges and even SEC Commissioners. In a May 2018 speech, SEC Commissioner Hester Peirce noted:

> The practice of attempting to stretch the law is a particular concern … in settled enforcement actions. Often, given the time and costs of enforcement investigations, it is easier for a private party just to settle than to litigate … The private party likely is motivated by its own circumstances, rather than concern about whether the SEC is creating new legal precedent. However, the decision made by that party about whether to accede to an SEC's [*sic*] proposed order can have far-reaching effects. Settlements—whether appropriately or not—become precedent for future enforcement actions and are cited within and outside the Commission as a purported basis for the state of the law. Quite simply, a settlement negotiated by someone desperate to end an investigation that is disrupting or destroying her life should not form the basis on which the law applicable to others is based.

Hester M. Peirce, *The Why Behind the No*: *Remarks at the 50th Annual Rocky Mountain Securities Conference* (May 11, 2018).[9] Consent agreements may well represent either SEC's failure to make a case when put to its burden of proof or a settling target's guilt—or some combination thereof. Any person who waves the white flag to end the process should not be forever silenced on the topic of the merits of his prosecution—most especially not by the prosecutor.

When prosecutors abuse their considerable powers beyond lawful and ethical bounds, or a prosecution is based on weak or compromised evidence, their targets should be free to say so and petition appropriate government bodies for change. When agencies regulate through enforcement,

[9] As a former Democrat-appointed SEC commissioner explained over twenty years ago, compelling policy concerns demand more transparency in the settlement process:

> I was particularly troubled by the frequent use of settlements to announce Commission policy in borderline cases. Many of my dissents involved the use of [the securities laws] to settle cases which, in my view, would not have succeeded in the courts … The Commission has considerable latitude in choosing its enforcement targets and theories. The Commission therefore has a serious obligation to restrain the enforcement staff from overzealous prosecutions. Generally, the Commission takes this obligation seriously, but political and time constraints sometimes permit the prosecutors to create the law.

Roberta S. Karmel, *Creating Law at the Securities and Exchange Commission: The Lawyer As Prosecutor*, Law & Contemp. Probs. at 33, 42, 45 (Winter 1998), *available at* https://bit.ly/2TGFEBe.

Similarly, a former General Counsel to SEC observed in his experience that "the agency seeks to expand liability to the greatest extent possible and well beyond statutory language or established precedent." Andrew N. Vollmer, *Four Ways to Improve SEC Enforcement*, 43 Sec. Reg. L.J. 333, 334 (2015), *available at* https://bit.ly/3q2i2TZ.

guidance, or other legislatively unauthorized means, the persons affected should never be silenced by the regulator. Any healthy nation should encourage such self-examination. A constitutional republic requires it.

Gag Orders stifle informed public debate on these matters. They require defendants to make a difficult choice: surrender their constitutional rights to speak freely or forgo consent settlements with the Commission and face the potentially ruinous costs and risks of contesting the proceedings to the bitter end. Our Constitution does not permit that baleful bargain.

V. SEC LACKS POWER TO DEMAND A GAG

A. The Penalties Enumerated Under the Securities Laws Do Not Permit a Gag

No agency has any inherent power to make law. Article I, § 1 of the U.S. Constitution vests "[a]ll legislative powers" 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). 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, 357 (1986). Thus, even if an independent agency could constitutionally exercise the legislative power to write a Gag Rule—which it cannot—it certainly cannot purport to bind anyone without congressional authorization, which is utterly lacking here. Congress has not given SEC any authority to impose additional restrictions on the constitutional rights of persons they prosecute, either in court or administratively.[10] Nor is this surprising, as the First Amendment and the unconstitutional conditions doctrine, among others, forbid it.

[10] A Gag Rule, binding upon parties brought before SEC in "any civil lawsuit brought by it or in any administrative proceeding of an accusatory nature" is anything but a rule that "relates only to rules of agency organization, procedure and practice." 17 C.F.R. § 202.5(e); 37 Fed. Reg. 25,224. An agency's *ad hoc* promulgation of a self-protective rule by which SEC not only seeks to bind private parties with the force of law and penalty of re-prosecution, but to silence them on the topic of their prosecution clearly binds SEC targets. Nor is it an "interpretive" rule exempt from the APA. There is no authorizing statute to interpret. An agency regulation is not interpretive if it has "the force and effect of

Congress has delineated the remedies SEC could have sought against the defendants for the violations of the Securities Act and Exchange Act it alleged in the Complaint. *See* 15 U.S.C. §§ 77t, 78u. Section 77t permits SEC to bring an action in federal district court to enjoin violations of the Securities Act. It expressly limits any injunction to "such acts or practices" that "constitute a violation of the [Securities Act or the rules promulgated thereunder.]" *Id.* § 77t(b). Likewise, SEC is permitted to bring an action in federal district court to enjoin violations of the Exchange Act. *See id.* § 78u(d). An injunction sought pursuant to section 78u(d) can only "enjoin such acts or practices" that "constitut[e] a violation of the [Exchange Act or the rules promulgated thereunder]." Truthful speech is not a violation of any law, let alone a violation of the Securities Act or Exchange Act. Thus, even if this case proceeded to trial and Defendants were found liable, SEC could not seek an injunction restricting defendants' truthful speech. It should not be permitted to do so through non-negotiable gag provisions either.

The Fifth Circuit, sitting en banc, recently had occasion to review the history of administrative power in *Cochran v. SEC*, 20 F.4th 194 (5th Cir. 2021) (en banc). Judge Oldham's concurrence discusses, at length, the Supreme Court's decision in *Jones v. SEC*, 298 U.S. 1 (1936), which warned of the dangers associated with agencies self-conferring power to violate Americans' civil liberties and expanding their powers beyond their remit. *See Cochran*, 20 F.4th at 221-23 (Oldham, J., concurring).

B. The Gag Rule Was Slipped into the Federal Register Without Notice and Comment and Accordingly Binds No One Outside the Agency

A regulation that bypasses notice and comment is no regulation at all. *See Chrysler Corp.*, 441 U.S. at 312-14 (finding that a "procedural defect" is a "lack of strict compliance with the

law" or is one "affecting individual rights and obligations." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979). SEC has admitted in its papers and at oral argument to the Fifth Circuit that the Commission will accept a settlement *only if* the defendant agrees to such a Gag Order.

APA" and such a defect "precludes courts from affording [procedurally defective regulations] the force and effect of law"); *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 630 (5th Cir. 2001) (holding that plaintiff "cannot lawfully be affected" by regulations that did not undergo notice and comment when such procedure was required under the APA); *Phillips Petrol. Co. v. Johnson*, 22 F.3d 616, 620-21 (5th Cir. 1994) (holding that the Department of Interior's "Procedure Paper" had a "substantial impact" on regulated entities, should have been published for notice and comment, and is unenforceable due to this procedural defect); *see also W&T Offshore, Inc. v. Bernhardt*, 946 F.3d 227, 237-39 (5th Cir. 2019) (finding that a new "rule" born out of adjudication and "uniform[ly] appli[ed]" is a substantive rule and "may not be enforced against a party" if it was "not subjected to notice and comment").

Gag Rules that bind persons charged by the agency who make the difficult decision to settle are not "housekeeping" rules, *Phillips Petrol.*, 22 F.3d at 620, nor statements of policy goals exempt from the APA, *Brown Express, Inc. v. United States*, 607 F.2d 695, 701 (5th Cir. 1979). This rule binds outside parties because SEC will not even come to the negotiating table unless it can extract a defendant's silence and waive any hearing on the settlement.

VI. EVEN CONGRESS CANNOT IMPOSE A GAG ON DEFENDANTS WHO SETTLE THEIR CASES WITH THE GOVERNMENT

Congress itself cannot pass a statute that gags people from speaking about government action against them. In *McBryde v. Committee to Review Circuit Council Conduct*, 83 F. Supp. 2d 135 (D.D.C. 1999), *judgment aff'd in part, vacated in part by* 264 F.3d 52, 55 (D.C. Cir. 2001), a Texas federal district court judge disciplined under Congress's then-recently passed Judicial Council and Disability Act challenged its confidentiality provision. The court held that such a gag "operates as an impermissible prior restraint" and ruled that the disciplined judge "must enjoy the opportunity to speak openly and freely about [the] proceedings" against him. *Id*. at 140, 177-78.

The government, wisely, did not appeal the district court's First Amendment holding.[11] *Id*. State legislation is likewise bound by the First Amendment. *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829 (1978) (reversing Virginia Supreme Court's enforcement of a law that forbade and criminalized disclosure of confidential judicial misconduct proceedings). These decisions rest on the *public*'s right to information, something no defendant in SEC proceedings has power to waive. If legislative bodies cannot pass laws that shield judicial discipline from public scrutiny, a topic which lies at the core of First Amendment interests, it is axiomatic that a mere agency may not self-confer such power by rule. All Americans, not just judges, must be free to speak about governmental proceedings against them.

CONCLUSION

SEC's contrivance of a power to fashion a Gag Order out of rule 202.5(e)'s "policy" works to suppress truth, oppress defendants, and insulate the agency from public understanding and criticism. The value of the free flow of information far outweighs such illegitimate "policies" as bureaucratic discomfort with the appearance of over-reaching or underenforcement, which solely serves the Commission's self-interested aversion to criticism.

Defendants respectfully request that this Court declare that these gag provisions are unconstitutional and void, are beyond the powers of the SEC to demand at trial or settlement, and that its Gag Rule is void *ab initio* for failure to comply with law at the time of its publication.

Respectfully submitted,

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[11] *McBryde*, 264 F.3d at 55 ("[T]he district court agreed with Judge McBryde's First Amendment argument but rejected the rest. Only Judge McBryde appealed." (citations omitted)).

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CERTIFICATE OF SERVICE

I certify that on this 23rd day of August 2022, I have served a copy of the above and foregoing on all counsel of record through the Court's CM/ECF system.

/s/ Margaret A. Little_____
Margaret A. Little, N.D. Tex. Bar No. 303494CT

CERTIFICATE OF COMPLIANCE

I certify that the body of this brief is 25 pages in 12-point Times New Roman typeface, except for footnotes which are in 10-point Times New Roman.

/s/ Margaret A. Little_____
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