UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 19-4197 Caption [use short title]

Motion for: Institute for Free Speech, Competitive Enterprise Institute, Reason Foundation, and Rodney Smolla

Set forth below precise, complete statement of relief sought:

Order allowing amicus brief to be filed in support of Appellant's Motion for Rehearing or Rehearing En Banc

MOVING PARTY: Institute for Free Speech et al. **OPPOSING PARTY:** Securities and Exchange Commission

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Thomas R. Julin **OPPOSING ATTORNEY:** Jeffrey A. Berger

[name of attorney, with firm, address, phone number and e-mail]

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SEC, 100 F Street, N.E.
Washington, D.C. 20549
(202) 551-5112 bergerje@sec.gov

Court- Judge/ Agency appealed from: US District Court S.D.N.Y. - Hon. Denise L. Cote

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☑ Unopposed ☐ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☑ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:

s/Thomas R. Julin **Date:** 11/18/2021 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

Case No. 19-4197

In the
United States Court of Appeals
for the Second Circuit

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

vs.

BARRY D. ROMERIL,
Defendant-Appellant,

PAUL ALLAIRE, G. RICHARD THOMAN, PHILIP D. FISHBACH,
DANIEL S. MARCHIBRODA, AND GREGORY B. TAYLER,
Defendants.

Motion for Leave to File Amicus Curiae Brief of
The Institute for Fee Speech, Competitive Enterprise Institute,
Reason Foundation, and Rodney Smolla in Support of
Defendant-Appellant's Petition for Rehearing or Rehearing En Banc

Movants, The Institute for Free Speech, Competitive Enterprise Institute, and Reason Foundation, and Rodney Smolla move pursuant to Federal Rule of Civil Procedure 29(b) and Second Circuit Rule 29.1 for leave to file the attached amicus brief in support of the petition of Barry D. Romeril for rehearing or rehearing en banc.[1]

[1] Counsel for Amici Curiae certifies that the Institute for Free Speech, Competitive Enterprise Institute, and Reason Foundation are nonprofit corporations, have no parent companies, subsidiaries, or affiliates, and that no publicly held company owns more than 10 percent of their stock.

This motion should be granted because the panel decision is of exceptional importance and conflicts with decisions of the U.S. Supreme Court, others U.S. Courts of Appeals and this Court in allowing the Securities and Exchange Commission (SEC) to condition a settlement on the defendant's willingness to forego First Amendment rights.

The Institute for Free Speech promotes and defends the First Amendment rights to freely speak, assemble, publish, and petition the government through strategic litigation, communication, activism, training, research, and education. Its dedicated professional staff works tirelessly to protect political speech under these freedoms guaranteed by the First Amendment. It is the nation's largest organization dedicated solely to protecting First Amendment political speech rights.

Founded in 1984, the Competitive Enterprise Institute is widely recognized as a leading and effective advocate for freedom on a wide range of critical economic and regulatory policy issues. Each year, its research and analysis are cited thousands of times in major media outlets, relied upon by scholars and advocates, and used by members of Congress, executive branch officials, and other federal and state policymakers as the basis for reform actions and proposals.

Rodney Smolla is Dean and Professor of Law at the Widener University Delaware Law School and a leading American academic regarding freedom of speech.

Reason Foundation ("Reason") is a national, nonpartisan, and nonprofit public policy think tank, founded in 1968. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish, and it advances its mission by publishing Reason magazine, as well as commentary on its websites, and by issuing policy research reports. To further its commitment to "Free Minds and Free Markets," Reason participates as amicus curiae in cases raising significant constitutional, legal, or public policy issues—and it has been a principled defender of First Amendment publication rights and advocate for transparency in governmental regulation. Free political speech guaranteed by the First Amendment is the most important right. It is the right that allows citizens to criticize, challenge, and ultimately improve their government. Despite its importance, the Institute for Free Speech is the only organization with a dedicated professional staff and mission seeking to promote and defend American citizens' First Amendment political speech rights.

The SEC policy at the heart of this case severely restricts not only the right of the Appellant in this case, but also the right of numerous individuals sued by the SEC. The policy prevents meaningful public criticism from being leveled at the SEC

when it bring claims against innocent defendants who do not have the resources need to dispute the claims.

The attached amicus brief demonstrates that prior restraints affect the rights of both speakers and listeners, that Barry Romeril has standing to assert the rights of those who wish to hear his denial of the claims the SEC made against him; and that the prior restraint imposed Romeril violated the First Amendment by leveraging the SEC's settlement power to suppress Romeril's criticism of the SEC.

Respectfully submitted,

Gunster, Yoakley & Stewart, P.A.
Attorneys for Amici Curiae

By s/ *Thomas R. Julin*

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CERTIFICATION OF COMPLIANCE

This motion complies with the type-volume limitation of the applicable rules in that the motion contains 614 words.

s/ *Thomas R. Julin*

CERTIFICATE OF SERVICE

I hereby certify that I served this amicus brief by filing it with the Court's CM/ECF system on November 18, 2021.

s/ *Thomas R. Julin*

19-4197

In the
United States Court of Appeals
for the Second Circuit

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

vs.

BARRY D. ROMERIL,
Defendant-Appellant,

PAUL ALLAIRE, G. RICHARD THOMAN, PHILIP D. FISHBACH,
DANIEL S. MARCHIBRODA, AND GREGORY B. TAYLER,
Defendants.

On Appeal from the United States District Court
for the Southern District of New York
No. 03-cv-4087-DLC; Hon. Denise L. Cote

BRIEF FOR *AMICUS CURIAE*
THE INSTITUTE FOR FREE SPEECH, COMPETIVE ENTERPRISE INSTITUE, REASON FOUNDATION, and RODNEY SMOLLA IN SUPPORT OF DEFENDANT-APPELLANT'S PETITION FOR REHEARING OR REHEARING EN BANC

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DISCLOSURE STATEMENT

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STATEMENT OF AMICUS
IDENTITY, INTEREST, AND AUTHORITY

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Rodney Smolla is Dean and Professor of Law at the Widener University Delaware Law School and a leading American academic regarding freedom of speech.

Amici's authority to file this brief is the consent of all parties and the filing of a motion pursuant to Federal Rule of Appellate Procedure 29(b)(2).[1]

INTRODUCTION

The condition that the Securities & Exchange Commission imposed on Barry Romeril's settlement of its claims infringes on the First Amendment rights of all who wish to hear Romeril's story. Those persons were not parties to the proceedings below and had no opportunity to oppose imposition of that condition on the settlement. This Court should rehear this case en banc because the panel decision failed to consider this point and departs from prior decisions of this Court, other Circuit Courts of Appeals, and the Supreme Court.

THE STORY BARRY ROMERIL MIGHT TELL

Here is what Barry Romeril might have said if the relief he sought below had been granted:[2]

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[1] No party counsel authored any part of the brief, and no person or entity other than amici contributed money to prepare or file the brief.

[2] The amici claims no knowledge of what Romeril actually might say if he were no longer restrained from telling his side of the story. This hypothetical is extrapolated from publicly available information about Romeril and supposition

I was born in England. I attended the University of Oxford from 1962 to 1966 and received a Philosophy, Politics and Economics degree. After Oxford, I worked at several companies, learning the intricacies of domestic and international finance. I joined British Telecommunications PLC in 1988, one of the largest investor-owned companies in Europe, and became its Finance Director.

On June 30, 1993, I became Chief Financial Officer of Xerox Corporation. On June 4, 2003, I learned the SEC had filed a civil lawsuit against me and other Xerox executives, falsely claiming we had engaged in fraud from 1997 to 2000.

I was shocked and appalled. Nothing could have been further from the truth. I was at the top of my profession. I had held the most senior finance positions in several multi-national companies and my reputation, until then, had been untarnished.

I immediately began assembling the evidence that I felt would clear my name. I worked day and night to put together a response to the complaint that would show that I had done was in full compliance with all laws and regulations.

But I soon learned that I would be putting myself at grave risk if I did not agree to the imposition of a multi-million dollar fine and a court order that would prevent me from ever telling my side of the story publicly or advocating for securities law reforms which would prevent the filing of such factually unsupported claims.

I found out the SEC historically has used its powers to exact thousands of settlements from corporate executives who, like me, insisted they were innocent. I became convinced the SEC felt damaging innocent lives was a necessary cost of fighting securities fraud.

I believed that even if I fought and won, the cost would far exceed the cost of settlement. So I accepted the settlement along with the demanded gag order. It was the only way I could protect myself

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based on Romeril's assertions below that he would like to make public statements that would violate the terms of the consent judgment.

and my family from injustice.

> Now that the gag order has been lifted, almost two decades later, here is my story and why it is imperative to enact new laws to prevent this from ever happening to anyone else . . . .

ARGUMENT

The panel erred, and departed from decisions of this Court, other Circuits, and the Supreme Court, when it held that the notice and opportunity Romeril had to decline the settlement satisfied due process of law. In fact, (I) the condition sought a prior restraint which would impact the First Amendment rights of others not before the District Court, (II) Romeril had standing to protect those rights, and (III) Romeril established that the prior restraint violated the rights of others because it restricted his speech beyond the settlement's scope.

I.

Prior Restraints Impact Both the Speaker and the Listener

Prior restraints restrict not only the rights of those who are gagged, but also the rights of those who wish to hear what the gagged party has to say. *See, e.g., Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 756-57 (1976) ("where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both") (footnote omitted); *Lamont v. Postmaster General*, 381 U. S. 301 (1965) (upholding rights of citizens to receive political publications sent from abroad). This Court recognized this principle in *Crosby v.*

Bradstreet Co., 312 F. 2d 483, 485 (2d Cir. 1963), invalidating an agreed "prior restraint . . . against the publication of facts which the community has a right to know," and observing "that the parties may have agreed to it is immaterial." *See also Application of Dow Jones & Co.*, 842 F.2d 603, 607 (2d Cir. 1988) (citing Supreme Court cases on the right to receive information). Other federal circuits have recognized this principle and applied it to settlement agreements. *See, e.g., Overbey v. Mayor of Baltimore,* 930 F. 3d 215 (4th Cir. 2019) (nondisparagement agreement in settlement of police misconduct suit violated First Amendment rights of journalists).

II.

Romeril Had Standing to Assert the Rights of Listeners

The Supreme Court has "permitted plaintiffs to assert third-party rights in cases where the '"enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights."'" *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2119 (2020) (*quoting Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004)); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 237 (1990); *Warth v. Seldin*, 422 U.S. 490, 510 (1975).

Romeril asserted neither his own First Amendment rights nor those of third parties at the time that he settled the claims against him, but that does not preclude him from asserting the rights of third parties now that he wants to call public and

press attention to what he contends is his plight, even if the settlement is a practical obstacle to assertion of his own rights.[3] At this time, he is injured by the continuing gag and he can reasonably be expected to advocate for those who wish to hear what he has to say. *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984) ("Where practical obstacles prevent a party from asserting rights on behalf of itself, . . . the Court considers whether the third party has sufficient injury-in-fact to satisfy the Art. III case-or-controversy requirement, and whether, as a prudential matter, the third party can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal").

III.

The Prior Restraint Violated Listeners' Rights by Leveraging Settlement Power to Suppress Romeril's Criticism of the SEC

What rights, then, do others have to hear what Romeril has to say?

Start with the principle that "The First Amendment requires heightened scrutiny whenever the government creates 'a regulation of speech because of disagreement with the message it conveys.'" *Sorrell v. IMS Health Inc.*, 564 U.S.

[3] *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010), does not prevent Romeril from invoking Rule 60(b)(4) to assert his own rights. Although a line in the decision states that the Rule 60(b)(4) may be used *only* to attack judgments entered without jurisdiction or without notice or an opportunity to be heard, *id.* at 261, that line is dicta and Rule 60(b)(4) is not, on its face, so limited. But even if it were so limited, Romeril can rely on it to assert the rights of those who were not before the court and had no opportunity to be heard.

552, 566 (2011) (*quoting Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Strict scrutiny applies when the regulation is based on the content of speech. *Reed v. Town of Gilbert*, 576 U.S. 175 (2015). Thus, if the SEC had ordered Romeril not to deny the claims it made against him *after* he had settled those claims, the order would have violated the First Amendment unless it survived strict scrutiny and it almost assuredly could not have done so.

But the SEC policy did not simply order Romeril not to deny the claims he settled. Instead, it conditioned settlement on Romeril's agreement not to deny its claims. So, the central question which the panel should have addressed was whether the SEC had imposed an unconstitutional condition on the settlement. The parties expressly called this question to the panel's attention, Initial Brief at 39; Answer Brief at 39; Reply Brief at 21; as did all three sets of *amici curiae*. Brief of Allan Garfield et al. at 14; Brief of Americans for Prosperity Foundation at 8; Brief of Competitive Enterprise Institute at 14.The panel never reached the issue due to its conclusion that Romeril lost his own right to object to the condition. Because Romeril also had standing to assert the rights of those who wish to hear what he has to say, the panel should have gone on to consider whether the condition violated the First Amendment rights of others. If it had done so, it would have found that it did.

The leading Supreme Court case regarding the constitutionality of conditions affecting First Amendment rights is *Agency for Int'l Dev. v. Alliance for an Open*

Soc'y, 570 U.S. 205 (2013). There, Chief Justice Roberts, writing for the majority, examined a federal law which required organizations accepting government funds for fighting HIV/AIDS to adopt a policy "explicitly opposing prostitution and sex trafficking." Several organizations challenged this requirement due to fear that it would make it more difficult to work with prostitutes in the fight against HIV/AIDS. *Id.* at 210-11. The Chief Justice's opinion recognized that the requirement implicated the First Amendment rights of the challengers because it conditioned funding on engaging in speech mandated by the government. *Id.* at 213.

The opinion surveyed the Court's prior precedents that distinguished between permitted and forbidden speech conditions and found the line drawn by the cases was "hardly clear." *Id.* at 213-14. It explained that "the definition of a particular program can always be manipulated to subsume the challenged condition," but cautioned that "'Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise.'" *Id.* at 215 (*quoting Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001)). "[C]onditions that define the limits" of a program are constitutional, while those that "seek to leverage funding to regulate speech outside the contours of the program itself" are not. *Id.* at 214-15. The speech restriction at issue fell in the latter category because a "recipient cannot avow the belief dictated by the Policy Requirement when spending . . . funds, and then turn around and assert

a contrary belief, or claim neutrality, when participating in activities on its own time and dime." *Id.* at 218.

The SEC's condition on settlement of its claims operates exactly in the same way. A lawsuit is similar to a government program in that it targets and attempts to resolve a problem. The lawsuit seeks fines on the alleged violator to punish the defendant. But conditioning the settlement of the lawsuit on the defendant's agreement not to deny the claims made against him, runs well beyond the contours of the lawsuit itself. It leverages the agency's power to prosecute claims to obtain a restriction on the settling defendant's speech which could not be obtained through the lawsuit itself. That restriction infringes not only on the rights of the defendant, but also the right of others to hear the defendant's denial of the claims which resulted in the settlement.

Post-settlement disavowal of claims may call into question the legitimacy of the prosecution. They can impugn the integrity of the officials who decided to bring the claims. They can suggest that legislative reforms are needed to protect others from overreaching authorities. All such speech falls within the core of communications protected by the First Amendment. *See, e.g., N.Y. Times v. Sullivan*, 76 U.S. 254, 276 (1964) (referencing the "broad consensus that . . . restraint . . . upon criticism of government and public officials [is] inconsistent with the First Amendment"); *Ragbir v. Homan*, 923 F. 3d 53, 69-70 (2d Cir. 2019) ("advocacy for

reform of . . . policies and practices is at the heart of current political debate among American citizens and other residents . . . .[It is] 'core political speech' and thus 'trenches upon an area in which the importance of First Amendment protections is at its zenith.' . . . Indeed, . . . 'speech critical of the exercise of the State's power lies at the very center of the First Amendment'") (citations omitted).

Of course, the credibility of public disavowals by a settling defendant may be undermined by the fact that the defendant settled. But in some circumstances, a defendant may be able to show that settlement was a product of something other than guilt. For example, the defendant might be able to show he lacked resources needed to defend, lacked access to evidence needed to disprove claims, or wanted to avoid subjecting family and friends to the trauma inflicted by an extended prosecution and the public attention it might engender.

The defendant who could make a case on the basis of such factors might persuade the public and press that the SEC improperly or even unlawfully advanced the claims. But the one thing that post-settlement disavowals cannot achieve is undermining of the settlement itself and this is why conditioning settlement on agreement not to deny the claims asserted must be regarded as an unconstitutional condition on speech outside the scope of the settlement.

CONCLUSION

The Court should rehear this case en banc and direct the District Court to vacate that part of the judgment below which prohibits Romeril from denying the allegations of the claims the SEC made against him.

Respectfully submitted,

Gunster, Yoakley & Stewart, P.A.
Attorneys for Amici Curiae

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s/ *Thomas R. Julin*

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s/ *Thomas R. Julin*