No. 23-___

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

PETITION FOR A WRIT OF CERTIORARI

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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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PETITION FOR A WRIT OF CERTIORARI

Petitioner Elon Musk respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

INTRODUCTION

As a condition of settling a securities enforcement action, the Securities and Exchange Commission (SEC) required petitioner Elon Musk to agree to a sweeping prior restraint on his speech: he must obtain explicit "preapproval" before engaging in "written communication" on a wide range of subjects. Mr. Musk challenged that restraint as a violation of the unconstitutional conditions doctrine. But the SEC contended, and the courts below accepted, that Mr. Musk's claim failed on the categorical basis that he had accepted the settlement agreement. That holding squarely conflicts with this Court's unconstitutional conditions jurisprudence, and it vests administrative agencies with intolerable power to coerce private parties into relinquishing their constitutional rights. This Court should grant review to clarify the proper scope of the unconstitutional conditions doctrine and to prevent such egregious agency overreach.

This case arises from one aspect of the SEC's ongoing campaign against Mr. Musk and his companies. As part of a consent decree to settle allegations of securities fraud (allegations that a federal jury in a separate case later found did not constitute securities

fraud), the SEC demanded that Mr. Musk refrain indefinitely from making any public statements on a wide range of topics unless he first received approval from a securities lawyer. Only months later, the SEC sought to hold Mr. Musk in contempt of court on the basis that Mr. Musk allegedly had not obtained such approval for a post on Twitter (now X). In effect, the SEC sought contempt sanctions—up to and including imprisonment—for Mr. Musk's exercise of his First Amendment rights.

The pre-approval provision in Mr. Musk's consent decree, as embodied in the amended final judgment, is a quintessential prior restraint that the law forbids. It restricts Mr. Musk's speech even when truthful and accurate. It extends to speech not covered by the securities laws and with no relation to the conduct underlying the SEC's civil action against Mr. Musk. And it chills Mr. Musk's speech through the never-ending threat of contempt, fines, or even imprisonment for otherwise protected speech if not pre-approved to the SEC's or a court's satisfaction.

In the face of this unconstitutional restriction on his speech, Mr. Musk asked the court to declare the provision unenforceable. In response, the SEC contended that the Constitution imposes no limit on what it can demand of settling defendants—so long as the defendant accepts the demand in exchange for resolution of the underlying civil action. Both the district court and the court of appeals seemingly agreed, directing attention not to whether the SEC had complied with the constitutional limits on what it could demand but instead on whether Mr. Musk had waived his constitutional rights in accepting the settlement.

The court of appeals concluded that Mr. Musk either had to forego a settlement with the SEC or give up his right to challenge the constitutionality of the SEC's demands.

Such a result cannot be reconciled with this Court's precedent on unconstitutional conditions, which "forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them." *Koontz v. St. John's River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013). The government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Regardless of any defendant's acquiescence to such a condition, the government's "interference with constitutional rights is impermissible." *Id.*

This Court has long addressed—and invalidated—unconstitutional conditions attached to a government benefit even when the complaining party accepted a benefit in exchange for compliance with the condition. *See, e.g.*, *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996); *FCC v. League of Women Voters*, 468 U.S. 364 (1984); *Perry*, 408 U.S. 593. Consistent with the judiciary's role in ensuring that government agencies comply with the Constitution, this Court's unconstitutional conditions cases do not treat the acceptance of a government benefit as a bar to a challenge to the condition. Rather, time and again this Court has applied the unconstitutional conditions framework to analyze

whether the government has obtained "a result which (it) could not command directly," *id.* at 597 (citation omitted), regardless of whether the benefit was accepted. Particularly in the context of the First Amendment, which serves as a restraint on the government's ability to restrict speech, the Constitution limits what the government may do, and any individual relinquishment of that right cannot grant the government a power denied to it by the Constitution.

The Second Circuit's conclusion that Mr. Musk simply could have "*chose[n]*" not to sign the consent decree and "negotiate[d] a different agreement," (Pet. App. 7a (emphasis in original)), contradicts this well-established law. Indeed, such a conclusion highlights the exact problem that the unconstitutional conditions doctrine seeks to address: the government "coercively withholding benefits from those who exercise them." *Koontz*, 570 U.S. at 606.

This case raises questions of exceptional importance. Before the court of appeals, the SEC asserted that the unconstitutional conditions doctrine is "inapplicable" to SEC settlements. *SEC v. Musk*, No. 22-1291, (2d Cir.), Dkt. 44 at 50–51. The startling implication of that position is that the SEC could require as a condition of settlement a waiver of any constitutional right—*e.g.*, to criticize the government, to practice a religion, or to obtain a jury trial in any future action—without any judicial scrutiny of the waiver if the defendant relented to the agency's demands. That position would allow the SEC to do precisely what the unconstitutional doctrine exists to prevent: obtaining "a result which (it) could not command directly." *Perry*, 408 U.S. at 597 (citation omitted).

And the pre-approval provision at issue continues to cast an unconstitutional chill over Mr. Musk's speech whenever he considers making public communications. Given that 98 percent of defendants in SEC actions settle, the implications of the court of appeals' failure to consider whether an administrative agency may demand that settling defendants forego First Amendment rights to resolve actions filed against them extend far beyond Mr. Musk and the pre-approval provision here.

This Court should make clear now that the SEC may not insulate its settlement demands from judicial scrutiny and confirm instead that the judiciary must ensure that the SEC's use of its considerable power to inhibit such speech comports with the Constitution.

OPINION AND ORDER BELOW

The opinion of the court of appeals (Pet. App. 1a–8a) is not published in the Federal Reporter but is available at 2023 WL 3451402. The opinion of the district court denying, *inter alia*, Mr. Musk's motion to modify the amended judgment (Pet. App. 9a–33a) is not published in the Federal Supplement but is available at 2022 WL 1239252.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2023. Mr. Musk timely sought rehearing or rehearing en banc, which the court of appeals denied on July 24, 2023. On October 18, 2023, Justice Sotomayor extended the time for filing a petition for a

writ of certiorari to December 7, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. I: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

STATEMENT

A. The SEC's Suit And Demand That The Consent Decree Contain A Prior Restraint

Mr. Musk is the CEO and co-founder of Tesla, Inc. On September 27, 2018, the SEC filed suit against Mr. Musk alleging that statements that Mr. Musk posted to his Twitter account concerning a potential transaction to take Tesla private violated Section 10(b) of the Exchange Act. A16–38.[1] The SEC alleged that Mr. Musk's tweets concerning the fact that Mr. Musk was considering taking Tesla private and had secured funding were materially false and misleading.[2] *Id.*

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[1] Citations to A, SA, and CA refer to the Joint Appendix (Dkt. 25), Supplemental Appendix (Dkt. 45), and Confidential Appendix (Dkt. 29), respectively, filed in the Second Circuit, No. 22-1291.

[2] More than four years later, following a jury trial, Mr. Musk obtained the judgment of a court in the Northern District of California that the same challenged statements did not constitute a

As the SEC acknowledged in initiating the action against Mr. Musk (and a separate action against Tesla), Tesla was in a precarious financial position at the time, with "stock analysts and investors increasingly beg[inning] to question whether Tesla could meet its previously announced production targets and begin to earn sufficient cash in order to sustain its operations and pay its existing debt load." A20. After the SEC's action jeopardized Tesla's financing, Mr. Musk entered into a consent decree to resolve the suit two days after the SEC filed it. A39–49.

The consent decree permanently restrains and enjoins Mr. Musk from violating Section 10(b) of the Exchange Act and SEC Rule 10b-5. A43. Mr. Musk agreed to pay a civil penalty of $20 million. *Id.* Mr. Musk further agreed to resign from his role as Chairman of the Board of Directors of Tesla and not resume that role for three years. A44–45.

In addition, as part of the consent decree, the SEC required Mr. Musk to agree to certain restrictions on his ability to communicate about a broad category of information regarding Tesla. Specifically, the consent decree requires Mr. Musk to obtain "the pre-approval of any such written communications that contain, or reasonably could contain, information material to the Company or its shareholders." A45. This requirement extends beyond the topic of the 2018 tweets at issue in the SEC's underlying lawsuit.

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fraud under Section 10(b). *In re Tesla, Inc. Sec. Litig.*, No. 3:18-cv-04865-EMC (N.D. Cal.), Dkt. 698.

Separately, the consent decree contains the SEC's so-called gag rule set forth in 17 C.F.R. § 202.5(e) (the "gag rule"). A47. The consent decree requires Mr. Musk to comply with the gag rule, and refrain from denying the allegations in the SEC's complaint, with an exception for certain legal proceedings. *Id.*

The district court entered the consent decree as a final judgment. A50–54

B. The SEC's Contempt Motion And The Amended Final Judgment

Only months after the district court entered final judgment, the SEC sought to hold Mr. Musk in contempt of court for a tweet it believed violated the pre-approval provision. As the SEC's own guidance to the public advises, "[a] person who violates the court's order may be found in contempt and be subject to additional fines or imprisonment."[3]

The SEC sought contempt solely based on its view that Mr. Musk had failed to comply with the pre-approval provision in the consent decree and final judgment related to a single tweet. In the tweet, Mr. Musk repeated information that previously had been disclosed in Tesla's SEC filings and that Mr. Musk did not believe would be "material to Tesla or its shareholders." A90–92.

Faced with the possibility of being held in contempt of court for publishing a tweet, Mr. Musk

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[3] *How Investigations Work*, SEC (last modified Jan. 27, 2017), https://www.sec.gov/enforcement/how-investigations-work.

agreed to amendments to the initial consent decree, which replaced the materiality standard of the pre-approval provision with wide-ranging categories of information. A225–26. In lieu of a materiality standard, the amended consent decree requires pre-approval "of any written communication that contains information" on an expansive list of topics, including "the Company's financial condition, statements, or results, including earnings or guidance," "production numbers or sales or delivery numbers (whether actual, forecasted, or projected) that have not been previously published via pre-approved written communications issued by the Company," "events regarding the Company's securities," and "new or proposed business lines that are unrelated to then-existing business lines." *Id.* The amended judgment directly requires Mr. Musk to "obtain the pre-approval of an experienced securities lawyer employed by the Company." A225. The pre-approval provision in the amended judgment has no sunset provision, conditions precedent to its dissolution, or any other contemplation of cessation.

The district court entered an amended judgment, the terms of which subject Mr. Musk to the possibility of being held in contempt of court even for publishing truthful, non-material information about Tesla. A231–32.

C. The SEC's Use Of The Pre-Approval Provision To Chill Mr. Musk's Protected Speech

Following entry of the amended judgment, the SEC continued to inquire whether Mr. Musk's tweets

had been submitted for pre-approval. A253–54; SA33. In November 2021, the SEC launched an investigation into Mr. Musk's compliance with the consent decree and amended judgment. CA24–25.

The investigation related to a pair of November 6, 2021 tweets that Mr. Musk posted in response to well-publicized proposals for revising the federal tax code and criticism that unrealized capital gains are not subject to income tax, asking the question: "Much is made lately of unrealized gains being a means of tax avoidance, so I propose selling 10% of my Tesla stock. Do you support this?" SA18. Six minutes later, he tweeted, "I will abide by the results of this poll, whichever way it goes." *Id.* Ultimately, 57.9% of the votes (3,519,252 in total) voted "yes." *Id.*

The SEC first sent a letter and then subpoenaed Tesla, directing it to produce documents and information concerning these tweets and Mr. Musk's compliance with the consent decree. CA15–25. The SEC next subpoenaed Mr. Musk, demanding he produce "[a]ll Documents and Communications Concerning" the tweets and "submission of the 12:17 tweet and/or the 12:23 tweet to Tesla's General Counsel or Securities Counsel, or any counsel acting in either capacity, for *pre-approval or review before they were published*." CA12 (emphasis added). The subpoena and accompanying cover letter that the SEC sent to Mr. Musk both noted that a failure to comply with the subpoena could result in fines and/or imprisonment. CA3, CA8.

Mr. Musk and Tesla produced to the SEC a privilege log addressing these requests and providing documentation that Mr. Musk and Tesla's acting head of

legal had a conversation regarding Mr. Musk's public pre-announcement of his intent to sell Tesla stock. A250. The SEC nevertheless continued to press its investigation.

Mr. Musk moved in the district court not only to quash the subpoena issued to him, but also for relief from the amended judgment. A243. Mr. Musk explained that the pre-approval provision constitutes an unconstitutional prior restraint that the SEC has abused to police Mr. Musk's constitutionally protected speech. SA36–39. Mr. Musk thus sought to terminate the consent decree or modify the final judgment to remove the unlawful and unenforceable pre-approval provision, which had a chilling effect on this speech. In support of his arguments, Mr. Musk cited to *Crosby v. Bradstreet Co.*, 312 F.2d 483 (2d Cir. 1963), in which the Second Circuit vacated a consent decree on First Amendment grounds, and which remains the controlling law in the Second Circuit. SA54. Mr. Musk quoted from *Crosby* the proposition that a court may not enforce a prior restraint even if the parties consented to it because "that the parties may have agreed to it is immaterial." *Id.* (citing *Crosby*, 312 F.2d at 485). Mr. Musk expressly requested that "the Court should modify the consent decree to remove the prior restraint on Mr. Musk's speech," which "impermissibly infringes on First Amendment rights." SA38.

The district court denied the motion to modify or terminate the consent decree, citing to the Second Circuit's holding in *SEC v. Romeril*, 15 F.4th 166, 172 (2d Cir. 2021), related to the enforceability of the SEC's gag rule requirement. Pet. App. 28a–29a. The district court reasoned that "parties can waive their First

Amendment rights in consent decrees and other settlements of judicial proceedings." *Id.* at 28a. Based on this logic, the court declined to reach the question of whether the pre-approval provision "would pass muster under the First Amendment," *id.* at 27a n.5, or was enforceable notwithstanding any waiver.

D. The Decision Below

The court of appeals affirmed in an unpublished decision. Pet. App. 1a–8a. Like the district court, it declined to "express [any] view as to the substance of [the] underlying First Amendment claims" because Mr. Musk had agreed to the consent decree. *Id.* at 7a–8a. The court reasoned as a categorical matter that "[p]arties entering into consent decrees may voluntarily waive their First Amendment and other rights," and that the mechanism for parties to avoid such waivers is not to agree to them in the first place. *Id.* at 7a (citing *Romeril*, 15 F.4th at 172).[4]

REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts With This Court's Authority On The Unconstitutional Conditions Doctrine

As this Court has long recognized, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry*, 408

[4] While the Second Circuit deemed Mr. Musk unable to challenge the SEC's demand that he agree to the prior restraint, it did not address Mr. Musk's arguments as to the enforceability of the waiver. Pet. App. 7a–8a.

U.S. at 597; *see also All. for Open Soc'y Int'l*, 570 U.S. at 214. This doctrine, known as the unconstitutional conditions doctrine, limits the government's ability to condition benefits on the relinquishment of constitutional rights. *See Koontz*, 570 U.S. at 608 ("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."). In effect, the unconstitutional conditions doctrine serves to prevent the government from coercing from a party what the government could not otherwise legally obtain. *Perry*, 408 U.S. at 597.

Application of the doctrine, however, does not depend upon whether the challenging party accepts or rejects the benefit. Rather, "*regardless 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." *Koontz*, 570 U.S. at 606 (emphasis added). In this regard, the doctrine focuses just as much on the need to ensure that government actors stay within the bounds of their constitutional authority as it does on the rights of the challenging party.

This Court therefore has long addressed—and invalidated if warranted—unconstitutional conditions attached to a government benefit regardless of whether the complaining party accepted the benefit in exchange for relinquishing a constitutional right. *See, e.g.*, *All. for Open Soc'y Int'l*, 570 U.S. 205 (considering challenge by domestic organization received funding under the challenged act); *Velazquez*, 531 U.S. at 539

(acceptance of funds no bar to challenge); *O'Hare Truck Serv.*, 518 U.S. at 720–21 (addressing challenge by independent contractor that accepted employment offer); *League of Women Voters*, 468 U.S. at 370–73 (analyzing challenge by public broadcasting stations that accepted and disbursed federal funds); *Perry*, 408 U.S. at 597 (holding that unconstitutional conditions doctrine applies "regardless of the public employee's contractual or other claim to a job"); *see also Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 59–60 (2006) (addressing challenge by law schools that received federal funding and holding funding condition did not violate unconstitutional conditions doctrine).

That is because the analysis turns on whether the government has conditioned the benefit on an agreement to forego constitutional protections. For instance, in *FCC v. League of Women Voters of California*, the Court addressed a challenge to an act of Congress in which federal funds for noncommercial television and radio stations directed toward station operations and education programming prohibited "any 'noncommercial educational broadcasting station which receives a grant from the Corporation [for Public Broadcasting]' to 'engage in editorializing.'" 468 U.S. at 366. Among the challengers to the law was a nonprofit corporation whose licensees had "received and w[ere] presently receiving grants from the Corporation." *Id.* at 370. That the challengers accepted the grant presented no bar to the challenge. Ultimately, the Court held that the funding condition violated the First Amendment. *Id.* at 402.

More recently, in *Alliance for Open Society International*, a group of domestic organizations engaged in combating HIV/AIDS overseas "receive[d] billions annually in financial assistance from the United States, including under the Leadership Act," which imposed a funding condition that funds could not be used by an organization "that does not have a policy explicitly opposing prostitution and sex trafficking." 570 U.S. at 208, 210–11 (quotation marks omitted). That the organization had received the funding did not waive its right to seek a declaratory judgment that the policy violated their First Amendment rights. *Id.* at 211. The Court thus applied the unconstitutional conditions doctrine in analyzing the challenge, *id.* at 214, and held that the funding condition "violates the First Amendment and cannot be sustained," *id.* at 221.

While "[a]s a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds," *id.* at 214, "[p]ursuant to this 'unconstitutional conditions' doctrine, as it has come to be known, the government may not place a condition on the receipt of a benefit or subsidy that infringes upon the recipient's constitutionally protected rights, even if the government has no obligation to offer the benefit in the first instance." *All. for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218, 231 (2d Cir. 2011), *aff'd sub nom. All. for Open Soc'y Int'l*, 570 U.S. 205.

That accepting the government benefit does not foreclose a challenge to the constitutionality of a condition makes sense because otherwise the government would succeed in obtaining "a result which (it) could

not command directly," *Perry*, 408 U.S. at 597 (citation omitted)—exactly what the doctrine seeks to prevent. *See, e.g.*, Philip Hamburger, *Unconstitutional Conditions: The Irrelevance Of Consent*, 98 Va. L. Rev. 479, 480 (2012) ("Consent is irrelevant for conditions that go beyond the government's power.").

The court of appeals' decision conflicts with this well-settled authority. The Second Circuit concluded as a categorical matter that "[p]arties entering into consent decrees may voluntarily waive their First Amendment and other rights" and that the mechanism to avoid such waivers is not to agree to them in the first place. Pet. App. 7a (reasoning that Mr. Musk had "'the right to litigate and defend against the [SEC's] charges' or to negotiate a different agreement—but he chose not to do so").

Not only does such logic undermine the entire purpose of the unconstitutional conditions doctrine, but, in *Alliance for Open Society International*, this Court expressly rejected the idea that a condition must have been "actually coercive, in the sense of an offer that cannot be refused," for the unconstitutional conditions doctrine to apply. 570 U.S. at 214. "It is perhaps the worst mistake in [an] unconstitutional conditions analysis" to "immunize" "flagrant instances of rights-pressuring intent . . . on the theory that government has committed no coercive act." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1501 (1989).

To be sure, if a condition withstands scrutiny under the unconstitutional conditions doctrine, the party can avoid the condition only by electing not to receive

the benefit. But the scrutiny attaches to the government's condition—not to the action of the benefitting party. "The problem of unconstitutional conditions arises whenever a government seeks to achieve its desired result by obtaining bargained-for *consent* of the party whose conduct is to be restricted." Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 7 (1988). Thus, while there exists "an ordinary first amendment issue when the government seeks to impose prior restraints on publication[,] [t]hat question is transformed into an unconstitutional conditions issue when a government benefit is conditioned upon acceptance of prior restraint." *Id.*

Here, the SEC conditioned the settlement of the underlying action and contempt motion on Mr. Musk's agreement to a provision requiring pre-approval of statements on a range of topics subject to SEC oversight and the court's contempt powers, with no expiration date.[5] This prior restraint on Mr. Musk's speech extends beyond the statements that the SEC had alleged in the settled 2018 action violated the securities laws (statements that a nine-member jury unanimously determined did not violate Section 10(b) of the Exchange Act, *see In re Tesla, Inc. Sec. Litig.*,

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[5] There is little doubt that "[d]efendants who enter into consent decrees with the SEC gain certain benefits: they may settle the complaint against them without admitting the SEC's allegations, and often 'seek and receive concessions concerning the violations to be alleged in the complaint, the language and factual allegations in the complaint, and the collateral, administrative consequences of the consent decree.'" *Cato Inst. v. SEC*, 4 F.4th 91, 93 (D.C. Cir. 2021) (quoting *SEC v. Clifton*, 700 F.2d 744, 748 (D.C. Cir. 1983)).

No. 3:18-cv-04865-EMC (N.D. Cal.), Dkt. 671). The court of appeals' conclusion that Mr. Musk was free to negotiate or litigate the underlying action—but not challenge the constitutionality of the SEC's condition of settlement—cannot be reconciled with this Court's precedent on unconstitutional conditions, which seeks to prevent the government from obtaining via agreement what it could not otherwise legally obtain.

II. The Decision Below Raises Issues Of Exceptional Importance As To The Government's Ability To Avoid Judicial Scrutiny Of Its Settlement Demands

This case presents a question of exceptional importance—whether the government can insulate its demands that settling defendants waive constitutional rights from judicial scrutiny.

The unconstitutional conditions doctrine is intended to serve as an important safeguard on constitutional rights. In the context of SEC settlements, however, the SEC routinely demands constitutionally suspect concessions from defendants who generally are ill-suited to resist government overreach.

A prior restraint is among "the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). It does not just "chill" speech, it effectively "freezes" it. *Id.* Because "[t]he threat of sanctions may deter" the exercise of First Amendment rights "almost as potently as the actual application of sanctions," the "government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S.

415, 433 (1963) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940)).

Notwithstanding this Court's view that prior restraints are one of "the least tolerable infringement[s] on First Amendment rights," *Neb. Press Ass'n*, 427 U.S. at 559, the SEC historically has engaged in a pattern of chilling and restricting the constitutionally protected speech of settling defendants. *See, e.g.*, *Romeril*, 15 F.4th 166. The SEC's standard gag rule threatens settling defendants that any public refutation of the SEC's allegations—even if truthful—is punishable with contempt. The SEC therefore prevents criticism of its official decisions because settling defendants who so much as "create the impression the SEC got something wrong," face "the risk of enormous financial and professional penalties, if not imprisonment." *SEC v. Moraes*, No. 22-CV-8343 (RA), 2022 WL 15774011, at *1 (S.D.N.Y. Oct. 28, 2022) (quotation marks omitted).

The SEC has employed this approach even though it is well-established that the government may not "place limitations upon the freedom of speech which if directly attempted would be unconstitutional." *Speiser v. Randall*, 357 U.S. 513, 518 (1958). The federal judiciary's frequent "complicit[y]" in approving the SEC's "lifetime gag orders" is at odds with the "growing chorus of circuits" that have concluded that, in other contexts, "the Constitution prevents courts from enforcing the waiver of First Amendment rights as a condition of settlements." *Moraes*, 2022 WL 15774011, at *1, *4; *see also SEC v. Novinger*, 40 F.4th 297, 308 (5th Cir. 2022) (Jones, J. and Duncan, J., con-

curring) (questioning SEC's policy of conditioning settlement of enforcement actions on parties giving up their First Amendment rights).

At the same time, defendants in SEC actions may be particularly vulnerable to government coercion. Current SEC Commissioner Hester Peirce has acknowledged that, "[o]ften, given the time and costs of enforcement investigations, it is easier for a private party just to settle than to litigate a matter." Hester Peirce, Comm'r, SEC, *The Why Behind the No: Remarks at the 50th Annual Rocky Mountain Securities Conference*, (May 11, 2018), https://www.sec.gov/news/speech/peirce-why-behind-no-051118.

SEC defendants either "must incur the costs, distress, and adverse publicity associated with a defense or succumb and settle, and the pressure to settle is overwhelming even when the SEC case lacks merit." Andrew N. Vollmer, *Four Ways to Improve SEC Enforcement*, 43 Sec. Reg. L.J. 333, 336 (2015). "Defendants settle because their business, job, or personal relationships will not survive sustained adverse publicity repeating the SEC's allegations over and over during the long life of litigation, because they cannot be at odds with their main regulator, because they want the matter behind them, or because they do not have the financial resources to fight the government." Comments of Andrew N. Vollmer, Office of Mgmt. & Budget, Request for Information on Improving and Reforming Regulatory Enforcement and Adjudication, OMB-2019-0006, 4–5 (Mar. 9, 2020), https://downloads.regulations.gov/OMB-2019-0006-0404/attachment_1.pdf.

Indeed, the SEC routinely settles the actions it brings—by its own estimate, it settles 98 percent of enforcement actions. *Moraes*, 2022 WL 15774011, at *2 & n.5 ((citing Luis A. Aguilar, Comm'r, SEC, Remarks Before the 20th Annual Securities and Regulatory Enforcement Seminar (Oct. 25, 2013) ("The SEC currently settles approximately 98% of its Enforcement cases.")).[6] Yet the SEC has asserted that the unconstitutional conditions doctrine is "inapplicable" to SEC settlements. *SEC v. Musk*, No. 22-1291 (2d Cir.), Dkt. 44 at 50–51.

Likewise, the government settles cases every day—via settlement, consent decree, and plea deals. If the SEC's view prevails, then such logic would extend to all government settlements, which would be immune from review under the unconstitutional conditions doctrine.

The implications of the SEC's position are particularly severe because the pre-approval provision imposed upon Mr. Musk extends to future speech not at issue in the underlying case. Under the SEC's approach, there is no limit on what it can demand of settling defendants. If the SEC has the right to require a defendant to waive the right to speak in the future on a wide-range of topics, that same logic would permit the SEC to require a settling party to waive the

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[6] "Since 2002, the SEC's settlement rate has remained constant at about ninety-eight percent." Priyah Kaul, *Admit or Deny: A Call for Reform of the SEC's 'Neither-Admit-Nor-Deny' Policy*, 48 U. Mich. J.L. Ref. 535, 536 (2015); *see also Clifton*, 700 F.2d at 748 ("SEC has traditionally entered into consent decrees to settle most of its injunctive actions.").

right to a jury trial in any future action—even based on completely different conduct.

The SEC advocates for an abdication of the Court's duty to safeguard the constitutional rights of settling defendants. This Court should not "turn a blind eye to First Amendment rights being used as a bargaining chip." *Moraes*, 2022 WL 15774011, at *1.

III. The Court Should Take This Opportunity To Clarify Whether The Government May Insulate Its Settlement Demands From Scrutiny

This petition presents an apt opportunity for the Court to clarify that government settlements are not immune from constitutional scrutiny, to the immediate benefit of the hundreds of defendants who settle cases with the SEC each year.

First, the amended final judgment here contains a quintessential prior restraint—restraining speech that extends far beyond the conduct giving rise to the settlement. And the SEC has sought to hold Mr. Musk in contempt for an alleged violation of this provision. This case thus presents a prime example of the exact harm that results from the SEC's practice of suppressing speech through settlements. In other contexts, courts have recognized that restrictions like the one at issue here are contrary to the Constitution. *See, e.g.*, *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 222 (4th Cir. 2019) (addressing waiver of constitutional rights in settlement in light of the "strong public interests rooted in the First Amendment").

Second, the instant case presents a rare opportunity to ensure that the conditions the government demands in settlements do not evade judicial review. Many defendants against whom the government brings actions settle because they cannot afford to litigate. Under such circumstances, they are unlikely to challenge the conditions imposed on a settlement.

In the typical case, the party settling the action does not appeal the settlement. As a result, although consent decrees are embodied in final judgments that subject settling defendants to the courts' contempt powers, such judgments are rarely subject to review on appeal or by this court. That means the Court will be presented with few opportunities to weigh in on the question that this petition presents of whether the government may insulate its settlement demands from scrutiny.

Third, granting review will provide meaningful guidance to not only the SEC—which currently maintains that the Constitution imposes no limitation on the concessions it may seek in settlements—but also to the 98 percent of defendants who settle enforcement actions with the SEC, who may lack the resources to fight the SEC's charge or challenge the SEC's practice of mandating constitutionally suspect concessions in settlements. Such guidance will extend beyond SEC settlements to all instances in which the government settles.

Finally, the ever-present chilling effect that results from the pre-approval provision here counsels in favor of granting review now. The SEC argued below that Mr. Musk may seek relief from the prior restraint

only when it seeks to enforce the consent decree. But the prospect of a future contempt motion underscores the importance of granting review now.[7] What the government seeks is to control when—and if ever—its demand for the broad and indefinite prior restraint in the amended final judgment is subject to review. In the meantime, the SEC will opt for a never-ending investigative campaign that violates Mr. Musk's freedom of speech through "the chilling effect of governmental action." *Zieper v. Metzinger*, 474 F.3d 60, 65–66 (2d Cir. 2007).

In the past three years, the SEC has at all times kept at least one investigation open regarding Mr. Musk or Tesla. The SEC's actions—in seeking contempt and then maintaining a steady stream of investigations—chills Mr. Musk's speech. Mr. Musk should not have to "[h]old [his] tongue" and refrain from making truthful statements to avoid the risk of unending "litigati[on] with the SEC." *Moraes*, 2022 WL 15774011, at *2 (quoting *Novinger*, 40 F.4th at 308 (Jones, J. and Duncan, J., concurring)).

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[7] "'A consent decree . . . [is] a judicial decree that is subject to the rules generally applicable to other judgments and decrees.' Violations of court orders are punishable by criminal contempt, and a court may institute criminal contempt proceedings against an SEC defendant who violates a . . . provision contained in a consent decree issued by that court even absent the SEC's consent." *Cato Inst.*, 4 F.4th at 95 (citations omitted) (quoting *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 378 (1992)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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