

Oral Argument Held November 12, 2020
No. 20-5054

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

CATO INSTITUTE,
Appellant,

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of
Columbia, No. 1:19-cv-00047

**BRIEF OF INSTITUTE FOR FREE SPEECH AS *AMICUS CURIAE*
IN SUPPORT OF PETITION FOR PANEL REHEARING**

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Dated: August 27, 2021

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

The undersigned attorney of record, in accordance with D.C. Cir. R. 28(a)(1), hereby certifies as follows:

A. Parties and *Amici*

Except for *amicus curiae*, all parties who appeared before the district court are listed in Appellant's brief.

B. Rulings Under Review

An accurate reference to the ruling at issue below appears in Appellant's brief. The ruling under review in Cato's petition for panel rehearing is the panel's decision dated July 6, 2021.

C. Related Cases

Amicus curiae is not aware of any related cases.

/s/ William S. Consovoy

CERTIFICATE PURSUANT TO CIRCUIT RULE 29(D)

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amicus curiae* Institute for Free Speech certifies that no other party (to counsel's knowledge) intends to file an amicus brief in support of the petition for panel rehearing.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c) of the Federal Rules of Appellate Procedure, *amicus curiae* states as follows:

The Institute for Free Speech has no parent company. No publicly held company owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE¹

The Institute for Free Speech is a nonpartisan, nonprofit organization that works to protect and defend the rights to free speech, assembly, press, and petition. In addition to scholarly and educational work, the Institute represents individuals and civil society organizations in litigation securing their First Amendment liberties.

The Institute has a significant interest in the outcome of this case. Protecting the right of every individual to engage in protected speech—especially speech critical of the government—is a core aspect of the Institute’s organizational mission. Through its Gag Regulation, 17 C.F.R. § 202.5(e), the Securities & Exchange Commission is imposing *lifetime* gag orders that prohibit settling defendants from ever denying the allegations the Commission made against them. The Gag Regulation is an unconstitutional prior restraint, restricts speech on the basis of content, and serves no compelling public interest. The Institute urges the panel to grant the petition and reverse the decision below so the district

¹ No party’s counsel authored this brief in whole or in part, and no person other than *amicus* and their counsel contributed money intended to fund the preparation or submission of this brief.

court can determine the constitutionality of the Gag Regulation in the first instance.

SUMMARY OF ARGUMENT

The petition for panel rehearing should be granted because the panel's opinion made errors of fact and law that warrant correction. Fed R. App. P. 40(a)(2).

The panel opinion made an error of fact because Cato never alleged that every settling defendant with whom it wishes to speak entered a judicially enforceable consent decree. Nor can the complaint be read that way. Thus, a ruling prohibiting the Commission from enforcing the Gag Regulation would mean that settling defendants whose agreements are not judicially enforceable could speak freely with Cato without fear of punishment. This relief would redress Cato's First Amendment injury.

The panel opinion also made an error of law because, regardless of whether the consent decrees at issue are judicially enforceable, a ruling for Cato would significantly increase the likelihood that Cato would obtain relief that directly redresses the injury it suffered. If the Gag Regulation is declared unlawful and the Commission is prohibited from

enforcing it, a settling defendant need only file an unopposed motion with the relevant district court to modify the consent decree. In such a circumstance, it is highly unlikely that the district court would deny the motion. A ruling for Cato here thus would ultimately lead to relief fully redressing Cato's injury. The Court should grant the petition.

ARGUMENT

I. Cato has alleged a redressable injury.

A plaintiff must meet three requirements to have Article III standing: injury in fact, causation, and redressability. *Teton Historic Aviation Found. v. U.S. Dep't of Def.*, 785 F.3d 719, 724 (D.C. Cir. 2015). A plaintiff satisfies the redressability requirement when it alleges a "substantial likelihood" that the requested relief will remedy the alleged injury. *Id.* The relief need not be immediate nor certain. "A significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered' will suffice for standing." *Nat'l Parks Conservation Ass'n v. Manson*, 414 F.3d 1, 7 (D.C. Cir. 2005) (quoting *Utah v. Evans*, 536 U.S. 452, 464 (2002)); *Shalom Pentecostal Church v. Acting Sec'y U.S. Dep't of Homeland Sec.*, 783 F.3d 156, 162

(3d Cir. 2015) (“[R]edressability hinges on the availability and likelihood of relief, rather than the immediacy of relief.”).

Here, Cato challenges the constitutionality of the Commission’s Gag Regulation. Under that regulation, it is the Commission’s “policy that in any civil lawsuit brought by [the SEC] or in any administrative proceeding of an accusatory nature pending before it,” the Commission will not “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.” 17 C.F.R. § 202.5(e). Cato alleges that the Commission, acting pursuant to the Gag Regulation, “uses its extraordinary leverage in civil litigation to extract from settling defendants a promise to never tell their side of the story.” JA 6-7, ¶1. Cato further alleges that the Commission “actually enforces the gag orders it obtains under its interpretation of the Gag Regulation.” JA12, ¶30.

Cato is being injured by the Gag Regulation. JA 18-19, ¶¶66-68. According to the complaint, Cato wants to write a book and host a public discussion with and about individuals who “have settled enforcement

actions with the SEC” and who “would like to speak publicly” about the Commission’s allegations. JA 18-19. ¶¶66-68, JA7, ¶3. Cato cannot engage in this speech, however, because the settling defendants “are prohibited from [speaking publicly] because of gag orders” that they agreed to pursuant to the Gag Regulation. JA7, ¶3. Cato seeks, among other things, a declaratory judgment that the Gag Regulation is unconstitutional and a permanent injunction prohibiting the Commission from enforcing the regulation. JA 21, Prayer for Relief.

The panel held that Cato had not alleged a redressable injury because “the no-deny provisions that bind the SEC defendants whose speech Cato wishes to publish are contained in consent decrees” and “a court may institute criminal contempt proceedings against an SEC defendant who violates a no-deny provision contained in a consent decree issued by that court even absent the SEC’s consent.” Slip op. 6. Thus, per the panel, even if “the SEC is enjoined from seeking to enforce the no-deny provisions in its consent decrees,” Cato’s injury will not be redressed because “the SEC defendants would remain unable to allow Cato to publish their speech.” Slip op. 7.

This holding is factually and legally wrong. As a factual matter, as Cato explains in its petition for panel rehearing, the panel erroneously concluded that every settling defendant whose speech Cato wants to publicize has had his or her gag order incorporated into a final judgment that is judicially enforceable. Pet. 3. Cato's complaint never makes this allegation. Pet. 3-7. Nor can these facts be inferred, especially because this case is still at the motion to dismiss stage. *See Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011) ("On review of a district court's dismissal of a complaint for lack of subject matter jurisdiction, . . . 'we construe the complaint liberally, granting plaintiff the benefit of all inferences that can be derived from the facts alleged.'").

Hence, if Cato prevails, its injury would be redressable as it relates to those settling defendants whose agreements are not judicially enforceable. "When the settlement agreement is not made part of a court order, it is merely a private contract arising out of a case in federal court." *Anago Franchising, Inc. v. Shaz, LLC*, 677 F.3d 1272, 1281 (11th Cir. 2012). No court can enforce a private contract sua sponte. The Commission would have to file a breach of contract action in a "court[]

with jurisdiction over the contract.” *Id.* But because this Court’s order would prohibit the Commission from enforcing these agreements, the settling defendants’ contracts with the Commission would be unenforceable and Cato would be free to engage in its desired speech.

While this factual mistake is grounds to grant the petition, the panel’s opinion is incorrect regardless of whether the gag orders were contained in judicially enforceable consent decrees. An injury is redressable if “the relief requested will produce tangible, meaningful results in the real world.” *Duberry v. District of Columbia*, 924 F.3d 570, 584 (D.C. Cir. 2019) (citation omitted). Cato would achieve that “real world” result here.

If Cato prevails, a settling defendant who wishes to speak with Cato can simply file a motion asking the relevant district court to modify the consent decree to eliminate the provision preventing the defendant from speaking publicly about the Commission’s allegations. The district court would almost certainly grant the motion.

First, the motion to modify the consent decree would be unopposed because this Court would enjoin the Commission from seeking to enforce

the gag order. JA 21, Prayer for Relief. And no third party would have any standing to oppose the motion. *SEC v. Prudential Sec. Inc.*, 136 F.3d 153, 157 (D.C. Cir. 1998) (“Only the Government can seek enforcement of its consent decrees.”). Second, the motion to modify the consent decree would be justified, even if the Commission could oppose it. A consent decree can be altered if there has been “a significant change either in factual conditions or in law.” *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992) (citation omitted). In particular, a consent decree must be modified when the “law has changed to make legal what the decree was designed to prevent.” *Id.* at 388; *see Agostini v. Felton*, 521 U.S. 203, 238 (1997).

In these circumstances, it is highly unlikely that a court—acting sua sponte—would deny an unopposed motion where the underlying regulation has been declared unconstitutional and the only consequence is that the individual can speak publicly about allegations made against him. *See, e.g., United States v. Hyundai Constr. Equip. Americas, Inc.*, No. 19-cv-724 (D.D.C. Nov. 7, 2019) (granting unopposed motion to terminate consent decree); *United States v. The Premcor Refining Grp.*,

Inc., No. 07-cv-683 (W.D. Tex. Feb. 1, 2018) (Dkt 48) (same); *United States v. City of Great Falls*, No. 14-cv-16 (D. Mont. Jan. 9, 2018) (Dkt. 8) (same). Nor is it speculative that the settling defendants would file such a motion, given that they “want to publicly contest the SEC’s allegations against them as unfounded or unfair but are prohibited from doing so because of their gag orders,” JA 15, ¶42, and doing so is “in [their] . . . interests,” *Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 135 (D.C. Cir. 2006); see *Teton Historic Aviation Found.*, 785 F.3d at 725.

Because a ruling for Cato would “significant[ly] increase . . . the likelihood” that Cato would “obtain relief that directly redresses the injury [it] suffered,” Cato has alleged a redressable injury. *Nat’l Parks Conservation Ass’n*, 414 F.3d at 7 (cleaned up); see *Power Co. of America, L.P. v. FERC*, 245 F.3d 839, 842 (D.C. Cir. 2001) (a declaratory ruling that an agency acted unlawfully redresses an injury when it is a “necessary first step on a path that could ultimately lead to relief fully redressing the injury” (citation omitted)).

CONCLUSION

The petition for panel rehearing should be granted, and this case should be remanded for further proceedings.

Respectfully submitted,

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Dated: August 27, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2021, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the District of Columbia Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

/s/ William S. Consovoy

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because it contains 1,734 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Century 14-point font.

/s/ William S. Consovoy