No. _____

IN THE

Supreme Court of the United States

DAVID L. SMITH,

Petitioner,

—v.—

UNITED STATES 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 WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is Petitioner entitled to collateral relief from an extra-legal "disgorgement" order, which the SEC had no power to obtain, and the district court had no power to impose?

PARTIES TO THE PROCEEDING

All parties to the proceeding are contained in the caption. The underlying district court enforcement action by the United States Securities and Exchange Commission included the following parties:

United States Securities and Exchange Commission, *plaintiff in the District Court, appellee in the Second Circuit, and respondent here*;

David L. Smith, *defendant in the District Court, appellant in the Second Circuit, and petitioner here*;

McGinn, Smith & Company, Inc., McGinn, Smith Advisors, LLC, McGinn, Smith Capital Holdings Corp., First Advisory Income Notes, LLC, First Excelsior Income Notes, LLC, First Independent Income Notes, LLC, Third Albany Income Notes, LLC, Timothy M. McGinn, Geoffrey R. Smith, Lauren T. Smith, and Nancy McGinn, *defendants in the District Court*;

Lynn A. Smith and Nancy McGinn, *relief defendants in the District Court*;

United States Attorney's Office for the Northern District of New York, and David M. Wojeski, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04, *intervenors in the District Court*;

LIST OF RELATED PROCEEDINGS

United States v. Timothy M. McGinn and David L. Smith, No. 12 Cr. 28 (DNH), U.S. District Court for the Northern District of New York. Judgment of

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JURISDICTIONAL STATEMENT

The court of appeals issued its judgment on April 7, 2023. Petitioner timely sought rehearing en banc, which was denied by order dated June 12, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

United States Constitution Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fed. R. Civ. P. 60(b):

Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

STATEMENT OF THE CASE

This petition presents the question of whether a federal agency—the United States Securities and Exchange Commission ("SEC")—with the blessing and participation of federal courts, can continue to enforce a judgment that was void because it constituted an extra-legal penalty far beyond those permitted by statute. The judgment against Petitioner David Smith, which was called "disgorgement" but, in reality, was an extra-legal penalty, requires him to pay approximately $99 million, even though it is beyond dispute that he only received approximately $1.7 million from wrongdoing (an amount that has already been taken from him and his family members more than three times over). Congress prohibited the SEC from seeking, and the courts from ordering, such a penalty, but the Second Circuit nevertheless denied relief from the judgment based on a restrictive reading of Federal Rule of Criminal Procedure 60(b)(4).

In contrast to the result in the Second Circuit, Smith would have received relief under this Court's precedents, the text of the Rule, and principles articulated by other Circuits regarding judgments that are void—i.e., judgments that exceed the court's power to issue them, that constitute a clear usurpation of authority, or that otherwise constitute a violation of due process of law, such as by violating separation of powers principles. The Court should grant review to resolve this conflict, and to ensure that agency

overreach is not perpetuated by an overly restrictive reading of the grounds for relief from void judgments.

Courts may not simply accrete to themselves powers never bestowed on them, such as the power to impose unauthorized penalties. "'It is a fundamental precept that federal courts are courts of limited jurisdiction' and lack the power to disregard such limits as have been imposed by the Constitution or Congress." *Durant, Nichols, Houston, Hodgson & Cortese-Costa P.C. v. Dupont*, 565 F.3d 56, 62 (2d Cir. 2009) (quoting *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978)). Similarly, an executive agency, such as the SEC, is a statutory creature, and absent a conferral of power upon it by Congress, "an agency literally has no power to act." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

Here, plain as day, the SEC and district court, respectively, obtained and imposed a $99 million "disgorgement" order against Smith even though, by the SEC's own accounting, he received only about $1.7 million in proceeds of securities fraud.[1] But because, in 2016, the Second Circuit affirmed that extra-legal penalty on direct appeal, that court and the SEC now maintain that Smith may *never* obtain relief from the

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[1] Smith, of course, was additionally subjected to *authorized* penalties that are not at issue here, including a lengthy prison sentence (he served seven years' imprisonment) and about $6 million in restitution following his conviction in a related criminal prosecution.

unauthorized disgorgement order, and instead the SEC—with the blessing of the courts—can continue to hang the unlawful penalty around Smith's neck, or attempt to seize additional money from him, if he ever earns or obtains any assets.[2] In fact, according to the logic of the SEC's argument, had the district court in the underlying civil securities fraud proceeding imposed *any unlawful* penalty on Smith—$99 billion in disgorgement instead of $99 million, or ordering him to "stand upon the pillory" four times a year[3], or ordering him to serve additional time in prison[4]—the

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[2] Smith is now an impecunious 78-year old who has served his prison term and—together with his family—has satisfied the criminal restitution order and surrendered approximately $6 million in assets. The receiver acknowledged below that there was no meaningful prospect of further recovery from Smith, *SEC v. McGinn*, No. 10-CV-457, Sixth Written Status Report of the Receiver (ECF 1236), at 3 (N.D.N.Y Dec. 2, 2022) (receiver stating that he "does not anticipate any further distributions in this case" after proposed final distribution of already-collected funds), thus confirming that the continuing enforcement of the judgment is nothing more than an effort to ensure that he stays impecunious—a current and future punishment.

[3] *See Weems v. United States*, 217 U.S. 349, 391 n.† (1910) (White, J., dissenting) (discussing the punishment imposed against Titus Oates for perjury); *Furman v. Georgia*, 408 U.S. 238, 318 & n.13 (1972) (discussing one historian's theory that the punishments on Titus Oates were the impetus behind the adoption of the prohibition on cruel and unusual punishments in the English Bill of Rights of 1689).

[4] *Windsor v. McVeigh*, 93 U.S. 274, 282 (1876) (stating: "If, for instance, the action be upon a money demand, the court,

courts should continue to enforce that judgment against him forever.

That cannot be, and is not, the law. The courts and the executive may not seize the power to impose an unauthorized penalty on a civil defendant, then hold that order impervious to collateral challenge by virtue of the fact that the court had jurisdiction over the underlying subject matter (here, a civil SEC enforcement action for violation of the securities laws). Conversely, Smith could not have conferred on the district court and the SEC—by failing to preserve the correct arguments for direct appellate review—a power that Congress has withheld from, and prohibited to, the court and the agency.

That is, however, precisely what the Second Circuit's decision below has allowed. The decision endorses the SEC's decades-long overreach in "disgorgement" cases even though this Court put an end to that practice (or presumably thought it had) in *Liu v. SEC*, 140 S. Ct. 1936 (2020). And it carries that practice *into the future* by allowing the continued enforcement of an order the SEC and the court had no power, respectively, to seek and impose.

One would expect Federal Rule of Civil Procedure 60(b)(4), which provides relief from a "judgment [that]

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notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant.").

is void," to apply to just such an unauthorized, extra-legal penalty as the $99 million order entered against Smith. The text of the Rules confirms that initial expectation—it authorizes relief from a void judgment and does not contain any limiting language narrowing the meaning of "void" to specific defects, such as lack of subject matter or personal jurisdiction. Supporting this plain reading of Rule 60(b)(4) is the fact that where the Rules refer to lack of subject-matter or personal jurisdiction, or to lack of notice or an opportunity to be heard, they do so expressly, but Rule 60(b)(4) says "void" and not any of those things. Indeed, for many decades before and after the adoption of the Rules, the Supreme Court—and the Second Circuit itself—granted collateral relief from void judgments that the court was without authority to enter.

But the Second Circuit and some other Circuits have abandoned the plain language of the Rule and instead refused any relief from a void judgment unless its voidness results from a defect in subject-matter or personal jurisdiction, or a failure of notice or an opportunity to be heard. This restrictive interpretation rests on misinterpreted dicta in *United Student Aid Funds v. Espinosa*, 559 U.S. 260 (2010), rather than any analysis of the text of the Federal Rules of Civil Procedure.

Without the Supreme Court's intervention, certain lower courts will continue to reward the SEC—as they did for decades, and despite *Liu*—for extracting

unauthorized, extra-legal penalties from civil defendants. The Supreme Court should refuse to allow an erroneous, overly-restrictive reading of "void" to spread beyond the several Circuits that have adopted it, for it is a reading that runs contrary to the plain language of the Federal Rules of Civil Procedure as well as this Court's precedents. The petition should be granted.

A. The Underlying Proceedings Against Smith

Smith committed securities fraud, and he was punished accordingly with authorized sanctions—he was convicted of felonies, served seven years in federal prison, and satisfied a $6 million criminal restitution order.

The SEC also brought a parallel civil proceeding against Smith and his codefendants—Timothy McGinn and several McGinn-Smith entities—in the Northern District of New York. The SEC sought, among other things, an order "directing the Defendants . . . to disgorge their ill-gotten gains."

In 2015, the SEC successfully moved for summary judgment on its disgorgement claim. In its filings, based on the agency's tracing of the funds involved in the securities fraud, the SEC identified about $1.7 million that Smith received as proceeds of the fraud. Nonetheless, at the agency's urging, the district court held Smith jointly-and-severally liable for about $99 million in "disgorgement" based on a rudimentary

calculation of investor losses.[5] Thus, Smith was ordered to pay about $97 million *more* in disgorgement than he had received as ill-gotten gains. (A.14a-15a).

In 2010, when the SEC filed suit, the district court also appointed a receiver to control and disburse McGinn-Smith assets to investors as well as to seize control of the personal assets of Smith and his family members. In addition to assets recovered from the entities and their underlying investments, the receiver has collected more than $6 million from Smith and his family members—including from family assets obtained long before the securities fraud began—to satisfy the $99 million judgment against Smith. About $77 million remains unsatisfied as part of the "disgorgement" order that is still enforceable against Smith.

B. Affirmance of the Disgorgement Order

In a summary order, in 2016, the Second Circuit affirmed the disgorgement order. The court of appeals deemed Smith's argument that the disgorgement award should have represented only net profits after taking into account legitimate business expenses to

[5] The SEC and district court simply lumped together every dollar McGinn-Smith entities had ever raised—fraudulently or otherwise, with no regard to legitimate expenses or market losses—and subtracted amounts returned to investors, then added approximately $12 million in prejudgment interest to that amount.

have been forfeited. *SEC v. Smith*, 646 F. App'x 42, 43-44 (2d Cir. Apr. 18, 2016).

C. *Liu* and the Rule 60(b)(4) Motion

In 2020, this Court held in *Liu* that to constitute "equitable relief," which Congress had authorized in the 1930s under 15 U.S.C. § 78u(d)(5), SEC disgorgement must be restricted "to an individual wrongdoer's net profits to be awarded to victims." *Liu*, 140 S. Ct. at 1942. Disgorgement orders that exceede those bounds constitute extra-statutory punishments that Congress has not established: the courts did not "possess authority" to impose those unauthorized penalties, and Congress "prohibited" the SEC from seeking and obtaining them. *Id*. at 1942, 1946.

For decades, the lower courts had acquiesced in the SEC's efforts to expand its power and to penalize violators far beyond the limits established by Congress. *Liu* rejected the SEC's efforts, but nothing about *Liu* purported to change the law. *Liu* was based on settled principles of equity that Congress had "embedded" in 78u(d)(5) upon enactment. *Id*. at 1947.

In June 2021, Smith moved for relief from the disgorgement order under Federal Rule of Civil Procedure 60(b)(4). Smith argued that because the disgorgement order plainly exceeded the authority of the SEC and district court, as articulated in *Liu*, it constituted an unauthorized penalty and was "void" under Rule 60(b)(4). The SEC opposed. In a text-only order, in February 2022, the district court denied Smith's

motion "for the reasons offered in opposition" by the SEC. (A.6a).

D. Rule 60(b)(4) Appellate Proceedings

The Second Circuit affirmed. The panel held, "Relief is not available to Smith under Rule 60(b)(4) because he has not alleged that the judgment is 'void' within the meaning of the rule." (A.3a-4a). Relying primarily on *SEC v. Romeril*, 15 F.4th 166 (2d Cir. 2021), which the panel referred to as "[o]ur settled precedent," the panel stated that "void" in Rule 60(b)(4) means *only*: lack of subject-matter jurisdiction; lack of personal jurisdiction; lack of notice of the proceedings; or lack of opportunity to be heard. (A.4a).

Smith sought rehearing *en banc*, primarily arguing that the panel's comments on "voidness," based on *Romeril*, led to an intra-circuit conflict with *Crosby v. Bradstreet Co.*, 312 F.2d 483 (2d Cir. 1963). *Crosby* held that an order was "void" under Rule 60(b)(4) because the district court "was without power to make such an order" (which was a court-imposed prior restraint of speech)—even though the court had subject-matter and personal jurisdiction over the dispute, and there was no lack of notice or opportunity to be heard. *Id.* at 485. Smith also explained that *Romeril* misinterpreted dicta from this Court's decision in *Espinosa*.

Despite the intra-circuit conflict, the Second Circuit declined *en banc* review.[6] (A.21a).

ARGUMENT: REASONS FOR GRANTING THE PETITION

The Court should grant the petition and reverse the Second Circuit's order. The rule of the Second Circuit—that collateral relief from a void order lies only when the court lacked subject-matter or personal jurisdiction, or where there was a notice or opportunity-to-be-heard defect—perpetuates an order that the SEC was powerless to seek, and that the district court had no authority to impose.

The Second Circuit's rule conflicts with Supreme Court precedent and with principles articulated in other Circuits. Historically, this Court (and others, including the Second Circuit itself) deemed orders "void" and granted collateral relief where the entering court lacked authority to impose the order. That practice comports with the plain text of the Federal Rules of Civil Procedure, but neither the Second Circuit—nor *any* court of appeals that now limits Rule 60(b)(4)—has undertaken that textual analysis. The Second Circuit approved the SEC's ability to extract, and the

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[6] As this Court knows, the Second Circuit grants "fewer petitions for rehearing *en banc* than any other circuit, both in absolute terms and relative to the court's caseload." Martin Flumenbaum & Brad S. Karp, *The Rarity of En Banc Review in the Second Circuit*, 256 N.Y.L.J. 38 (Aug. 24, 2016).

district courts' ability to impose, an unauthorized, extra-legal penalty largely based on *Espinosa*, but this Court permitted no such thing in *Espinosa*. The logic of *Espinosa* supports the conclusion that circumstances "on par with" a lack of subject-matter jurisdiction (such as the due process and separation-of-powers violation inherent in the imposition of a penalty nowhere permitted by statute) can *also* support a collateral attack for voidness. In any event, at most, the comments constituted non-binding dicta.

I. THE SEC AND DISTRICT COURT IMPOSED ON SMITH A PENALTY THAT CONGRESS "PROHIBITED"

By ordering Smith to "disgorge" approximately $97 million that he never received, the SEC, with the district court's acquiescence, imposed on Smith a penalty that Congress *prohibited* by permitting the SEC to seek "equitable relief" for securities laws violations. *Liu* delineated the limitations on "equitable relief" that have always been present under 15 U.S.C. § 78u(d)(5). Congress "embedded in the statute" those limitations when it first authorized the SEC to seek "equitable relief" in the 1930s. *Liu*, 140 S. Ct. at 1947; *see also id.* at 1946 (Congress "incorporate[ed] these longstanding principles into § 78u(d)(5)").

Thus, the only "disgorgement" relief Congress authorized in 78u(d)(5) was an order that securities violators give up their net profits from wrongdoing. *Id.* at 1942. Congress concomitantly barred the SEC from

seeking extra-statutory penalties that did not conform to those limitations on "equitable relief." *Id.* at 1946 ("By incorporating these longstanding principles into § 78u(d)(5), Congress *prohibited the SEC* from seeking an equitable remedy in excess of a defendant's net profits from wrongdoing." (emphasis added)). So too do the courts lack the power to impose such unauthorized orders: the courts literally do not "possess authority" to impose "disgorgement" that exceeds the bounds of equitable relief inherent in the statute. *Id.* at 1941 (quoting *Kokesh v. SEC*, 581 U.S. 455, 462 n.3 (2017)).[7]

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[7] Congress amended Section 78u, effective from the start of 2021, specifically to provide that "the Commission may seek, and any Federal court may order, disgorgement." 15 U.S.C. § 78u(d)(7). Simultaneously, the amendment referred to the "disgorgement" of "any unjust enrichment by the person who received such unjust enrichment as a result of such violation." *Id.* § 78u(d)(3)(A)(ii). The courts of appeals are currently split on what those statutory amendments mean and whether they codified *Liu*. *Compare SEC v. Ahmed*, 72 F.4th 379, 395-96 (2d Cir. 2023) (holding that "disgorgement" in 78u(d)(7) "refer[s] to equitable disgorgement as recognized in *Liu*" under 78u(d)(5)), *with SEC v. Hallam*, 42 F.4th 316, 336-41 (5th Cir. 2022) (rejecting the SEC's argument that the amendments codified *Liu*, and instead holding that the amendments created a new remedy that mirrored that imposed by lower courts prior to *Liu*). The SEC has never claimed that this amendment applies to Smith's case, and if it had, under Second Circuit authority, the amendment would simply confirm that the "disgorgement" order imposed was unlawful.

These prohibitions make sense. The SEC may not act beyond the authority conferred on it by Congress, *see, e.g.*, *La. Pub. Serv. Comm'n*, 476 U.S. at 374, and the courts may not accrete to themselves powers not derived from the common law, statute, or the Constitution, *see, e.g.*, *Owen Equip.*, 437 U.S. at 374. Thus, the SEC may not seek penalties that Congress has not authorized. *AMG Capital Mgmt. v. FTC*, 141 S. Ct. 1341, 1348 (2021) (holding that in a district court action, the FTC had no authority to obtain, and the court had no authority to order, equitable monetary relief; the applicable statute only permitted equitable relief in administrative enforcement proceedings, not in district court enforcement proceedings).

There is no reasonable dispute here that the "disgorgement" imposed on Smith in fact constitutes an unauthorized penalty. The SEC traced the funds involved in the underlying securities fraud and determined that Smith received $1.7 million in proceeds of the fraud.[8] Yet the "disgorgement" order holds him

[8] Indeed, the SEC won summary judgment on its disgorgement claim based on those tracing and accounting efforts and thus is judicially estopped from contradicting them. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (judicial estoppel "prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase" (quotation omitted)).

liable for about *fifty-eight* times that amount, $99 million.[9]

It follows then that the SEC was "prohibited" from obtaining, and the district court did not "possess authority" to impose, the extra-legal, $99 million "disgorgement" order. *Liu*, 140 S. Ct. at 1941, 1946. And the judgment is not theoretical or a thing of the past: about $6 million has been collected from Smith and his family as "disgorgement," and the SEC intends to continue to enforce the judgment against Smith in the future.

Furthermore, Smith did not, expressly or otherwise, agree to the $99 million "disgorgement" penalty imposed on him, or waive his right to challenge the court's and the SEC's authority to impose on him (and continue to enforce) an illegal penalty. As an individual litigant, he could not have conferred power upon the SEC and the judiciary that Congress forbade them. *See, e.g.*, *CFTC v. Schor*, 478 U.S. 833, 850-51 (1986); *cf. Nguyen v. United States*, 539 U.S. 69, 80-81

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[9] Incredibly, the SEC demonstrated a brazen lack of regard for this Court's admonitions in *Liu* and *Kokesh* by asserting before the Second Circuit that it would use the *exact same* rudimentary calculation of total investor losses to measure the disgorgement amount for Smith today. *Smith v. SEC*, No. 22-746, SEC Appellee's Brief (ECF 45), at 23-24 (2d Cir. Oct. 20, 2022); *SEC v. Smith*, No. 10-CV-475, SEC's Opposition to 60(b)(4) Motion (ECF 1198), at 17 (N.D.N.Y. June 25, 2021).

(2003) ("[T]o ignore the violation of the designation statute in these cases would incorrectly suggest that some action (or inaction) on petitioners' part could create authority Congress has quite carefully withheld."). In other words, Congress's power to grant or withhold to an agency the authority to exact penalties is not a personal right that a litigant can waive.

It is also beyond dispute that Smith did not affirmatively waive—or purport to waive—his challenge to the disgorgement order, for example, as part of a negotiated settlement with the SEC. At worst, Smith can be said to have failed to preserve in the district court the specific arguments he made in opposition to the disgorgement order on direct appeal to the Second Circuit. *See Smith*, 646 F. App'x at 43-44; *United States v. Olano*, 507 U.S. 725, 733 (1993) ("Waiver is different from forfeiture.").

This case therefore differs in kind and fact from *Romeril v. SEC*, 142 S. Ct. 2836 (2022), in which the Court denied the petition for certiorari. In that case, Romeril waived his individual First Amendment rights as part of a negotiated settlement with the SEC. *Romeril*, 15 F.4th at 171-72 ("To the extent Romeril had the right to publicly deny the SEC's allegations against him, he waived that right by agreeing to the no-deny provision as part of a consent decree."). *Romeril* therefore was not an appropriate case to determine the scope of Rule 60(b)(4) relief from

judgments exceeding the SEC's statutory authority. This case is.

II. THE SECOND CIRCUIT'S DENIAL OF RELIEF FROM THE VOID JUDGMENT CONTRAVENES RULE 60(B)(4) AND THIS COURT'S AND OTHER CIRCUITS' PRECEDENTS

The Second Circuit's denial of Smith's request for relief from the extra-legal penalty imposed on him in 2015 is not only wrong, but it conflicts with this Court's precedent, the plain language of Rule 60(b)(4), and decisions of at least four other Circuits. Moreover, the decision below rests on a misreading of this Court's decision in *Espinosa*, a case that expressly declined to define the universe of "jurisdictional" errors that render a judgment void under Rule 60(b)(4). This Court should grant the petition to reconcile these conflicting authorities and confirm Rule 60(b)(4)'s promise to provide relief from "void" judgments.

A. The Decision Below Conflicts with Supreme Court Precedent

For decades, before and *after* the adoption of the Federal Rules of Civil Procedure, the Supreme Court provided collateral relief from "void" judgments—i.e., judgments that the court had no power to enter or that suffered from an infirmity other than the four to which the Second Circuit circumscribes Rule 60(b)(4) relief.

In 1876, the Court wrote:

> *Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties*, it is still limited in its mode of procedure, and in the extent and character of its judgments. It must act judicially in all things, *and cannot then transcend the power conferred by the law*.

Windsor, 93 U.S. at 282 (emphasis added). The Court further explained that where courts order relief that they lack power to impose, those judgments "would not be merely erroneous: they would be *absolutely void*; because the court in rendering them would transcend the limits of its authority in those cases." *Id*. (emphasis added). Such orders are therefore subject to collateral attack as void. *Id*.

In *Ex parte Lange*, 85 U.S. 163 (1873), the Court granted the habeas petition—a form of collateral challenge—of a defendant whom the lower court had penalized with a fine *and* imprisonment (when the statute authorized only one or the other). The Court explained that the judgment was "void" because the court "had no power to render" it, just as other judgments issued "in excess of the authority of the court" would be void. *Id*. at 176-77.

The Federal Rules of Civil Procedure, upon adoption, encompassed the collateral relief available to litigants, like those in *Windsor* and *Lange*, subject to orders issued in excess of a court's authority. Rule 60(b) was designed to include all of the "various kinds of

relief from judgments which were permitted in the federal courts *prior to* the adoption of [Rule 60(b)]." Fed. R. Civ. P. 60 advisory committee notes to 1946 amendment (emphasis added).

Indeed, *after* enactment of the Rules, this Court decided *Klaprott v. United States*, 335 U.S. 601 (1949), in which the Court granted an individual collateral relief, under Rule 60(b)(4), from a judgment of denaturalization because it had been entered "without proof of the charges made in [the] denaturalization complaint." *Id*. at 609-10. The Court explained that a 1948 amendment to Rule 60(b) "grant[ed] courts a broader," "more liberal" "power to set aside judgments" than the prior version, *id*. at 609, which itself had already encompassed the collateral relief from void judgments available at the common law, *see* Fed. R. Civ. P. 60 advisory committee notes to 1946 amendment. Nowhere did the Court limit its "broader" authority to set aside judgments under Rule 60(b)(4) to subject-matter jurisdiction, personal jurisdiction, or notice-and-hearing defects. *Id*. at 609. Instead, it refused to perpetuate the effects of an order that was void.

The Court also decided *United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506 (1940), after the Rules were adopted.[10] In *Fidelity*, the Court voided, on

[10] Because the underlying order had been entered prior to adoption of the Rules, the *Fidelity* Court did not analyze the Rules. 309 U.S. at 516.

collateral review, a judgment against the United States ("acting for the Choctaw and Chickasaw Nations") where the court had lacked statutory authority to impose it because Congress had never waived sovereign immunity for the Nations in that manner. *Id.* at 512-13. The Court held that the order was void even though the United States had not even sought direct appeal of the judgment. *Id.* at 510.

Nevertheless, the Second Circuit below concluded that "void" refers only to one of four defects: lack of subject-matter jurisdiction, personal jurisdiction, notice, or an opportunity to be heard. (A.3a-5a). That rule directly conflicts with these Supreme Court decisions granting collateral relief from orders that the entering court lacked statutory authority to enter—regardless of whether the court had subject-matter and personal jurisdiction. The petition should be granted.

B. The Decision Below Conflicts with the Text of the Rules

The Second Circuit never interpreted "void" based on the text of the Federal Rules of Civil Procedure. If it had, it would have concluded that "void," in Rule 60(b)(4), is not so limited as claimed.

The traditional tools of statutory interpretation apply to the Federal Rules of Civil Procedure. *Pavlevic & LeFlore v. Marvel Ent. Grp.*, 493 U.S. 120, 123 (1989). Analysis of what "void" means in Rule 60(b)(4) should therefore start with the text.

Where the Rules refer to the four defects identified by the Second Circuit, they do so expressly. For example, Rule 12(b) enumerates certain defenses a defendant may raise by motion, and it does *not* say "void." Instead, Rule 12(b) specifically lists: "(1) lack of subject-matter jurisdiction"; "(2) lack of personal jurisdiction"; "(4) insufficient process"; and "(5) insufficient service of process." Additional examples include Rule 13, which refers to a court's subject-matter and personal jurisdiction over counterclaims, and Rule 4, which ensures that parties receive constitutionally sufficient notice and opportunity to be heard.

Rule 60(b), on the other hand, says none of those things—it says relief must be granted from a "void" judgment. "Void" must mean something more than lack of subject-matter or personal jurisdiction, or lack of notice or an opportunity to be heard, otherwise Rule 60(b)(4) would specifically refer to or list those defects, as the Rules do repeatedly elsewhere. The choice instead to use the word "void" shows that Rule 60(b)(4) should not be reduced to merely a collateral forum for the litigation (or re-litigation) of certain Rule 12(b) motions.

The Second Circuit below did not engage in that straightforward (or *any*) exercise in interpretation. The Supreme Court should grant review to ensure that the text of the Rules plays a proper role in governing their scope.

C. The Circuits Have Created Conflicting Rules of Uncertain Scope

The courts of appeals have adopted conflicting tests, with varying degrees of overlap, regarding the circumstances that permit collateral relief under Rule 60(b)(4). Three Circuits (the Second, Eleventh, and D.C. Circuits), historically used a test for "voidness" consistent with the text of the Rule and this Court's precedents but abandoned those precedents in favor of a restrictive test after this Court's decision in *Espinosa*. The Fourth, Fifth, Eighth, and Ninth Circuits appear to have adopted similarly restrictive tests. By contrast, the tests articulated in the remaining five circuits (the First, Third, Sixth, Seventh, and Tenth) conflict with those restrictive readings, and instead provide relief from judgments that a court was without power to issue. And it appears that *no* court of appeals—regardless of its ultimate rule—has conducted a textual analysis, like the one above, to interpret the meaning of "void" as used in Rule 60(b)(4).

1. The Second, Eleventh, and D.C. Circuits Erroneously Restricted Access to Relief after *Espinosa*

The Second Circuit itself historically followed this Court's teachings and the text of the Rules to permit collateral relief from a judgment a district court issued in excess of its authority. In 1933, Stanford Crosby sued Bradstreet Company, a credit-information publisher, for libel, and the parties settled the action for

$300 in damages and an agreement that Bradstreet would "refrain from issuing or publishing any report" concerning Stanford or his brother, Lloyd Crosby. *Crosby v. Bradstreet Co.*, 312 F.2d 483, 484 (2d Cir. 1963). Thirty years later, Stanford moved for relief from the order, claiming that the injunction made it more difficult for him to obtain credit. *Id*. Lloyd, on the other hand, sought to enforce the order and opposed the motion. *Id*.

On appeal, the Second Circuit held that "[t]he order was void, and under Rule 60(b)(4) of the Federal Rules of Civil Procedure, the parties must be granted relief therefrom." *Id.* at 485. The Second Circuit found that the district court, decades earlier, "was without power to make such an order" (because it was an impermissible prior restraint on speech), and the order was therefore void. *Id*. *Crosby* had nothing to do with lack of subject-matter or personal jurisdiction, or with lack of notice or opportunity to be heard; to the contrary, the *parties*—who had a full and fair opportunity to litigate the underlying libel action and negotiated the injunction as part of a settlement—wanted relief from the order. *Id*. at 484.

At least two other courts of appeals, like the Second Circuit, appear to have followed the rule that an order issued in excess of the court's authority is void under Rule 60(b)(4), only to change their minds post-*Espinosa*. *Compare Burke v. Smith*, 252 F.3d 1260, 1263 (11th Cir. 2001) ("A judgment also is void for

Rule 60(b)(4) purposes if the rendering court was powerless to enter it."), and *Combs v. Nick Garin Trucking*, 825 F.2d 437, 442 (D.C. Cir. 1987) (same), *with Bainbridge v. Governor of Florida*, __ F.4th __, 2023 WL 4986412, at *5 (11th Cir. Aug. 4, 2023) (limiting 60(b)(4) relief), and *United States v. Philip Morris USA Inc.*, 840 F.3d 844, 849-51 (D.C. Cir. 2016) (same).

2. Other Circuits Have Adopted Similarly Restrictive Tests Without Interpreting the Plain Language of the Rule

The Fourth, Fifth, Eighth, and Ninth Circuits appear to place the same limitations as the current Second Circuit on Rule 60(b)(4) relief. That is, in those courts, "void" appears to mean *only* lack of subject-matter or personal jurisdiction, or a notice or opportunity-to-be-heard deprivation. *Wells Fargo Bank, N.A. v. AMH Roman Two NC*, 859 F.3d 295, 299 (4th Cir. 2017)[11]; *SEC v. Novinger*, 40 F.4th 297, 302-03 (5th Cir. 2022); *PIRS Cap., LLC v. Williams*, 54 F.4th

[11] Though *AMH Roman* dealt with an alleged notice defect, the Fourth Circuit did not expressly state that due process defects under Rule 60(b)(4) encompass *only* deficiencies in notice or opportunity to be heard. 859 F.3d at 303. That echoes *Espinosa*, in which the alleged due process violation related to notice; any comments on other due process violations—such as the imposition of an extra-legal penalty—constitute dicta. 559 U.S. at 271-72.

1050, 1054 (8th Cir. 2022); *Hoffmann v. Pulido*, 928 F.3d 1147, 1151 (9th Cir. 2019).

3. Five Circuits' Tests Correctly Require Relief from Judgments that Were Beyond the Issuing Court's Power

Contrary to the above-discussed Circuits, the First, Third, Seventh, and Tenth Circuits have all articulated principles consistent with the Rule and this Court's precedents—that a judgment issued by a court powerless to enter it is also void, even if the issuing court had subject-matter and personal jurisdiction, and the parties had notice and an opportunity to be heard. Indeed, this Court in *Espinosa* approvingly cited the rule of a First Circuit decision, stating: "[R]are instances of *a clear usurpation of power* will render a judgment void." *Espinosa*, 559 U.S. at 271 (quoting *United States v. Boch Oldsmobile, Inc.*, 909 F.2d 657, 661-62 (1st Cir. 1990)) (emphasis added). The Third Circuit allows collateral relief under Rule 60(b)(4) where the order in question was "not within the powers granted to it by the law." *Marshall v. Bd. of Educ.*, 575 F.2d 417, 422 (3d Cir. 1978). Likewise, the Seventh Circuit has granted collateral relief under Rule 60(b)(4) from a judgment that was void "because the district court had no authority to enter it." *United States v. Indoor Cultivation Equip. from High Tech Indoor Garden Supply*, 55 F.3d 1311, 1317 (7th Cir. 1995) (finding a civil forfeiture order void and subject

to collateral attack where it was issued in contravention of time limitations established by statute). And the Tenth Circuit continues to follow the rule that "[a] judgment is void for Rule 60(b)(4) purposes if the rendering court was powerless to enter it." *United States v. Lamberd*, No. 21-3135, 2022 WL 1763734, at *2 (10th Cir. June 1, 2022) (quoting *Gschwind v. Cessna Aircraft Co.*, 232 F.3d 1342, 1346 (10th Cir. 2000)).[12]

The Sixth Circuit also appears to disagree with the restrictive reading adopted by the Second Circuit below. The Sixth Circuit articulates the standard: "A judgment is void under 60(b)(4) 'if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law.'" *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, 108 (6th Cir. 1995) (quoting *In re Edwards*, 962 F.2d 641, 644 (7th Cir. 1992)).

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[12] The Tenth and the Third Circuits appear to incorrectly adopt heightened or deferential review. *See Lamberd*, 2022 WL 1763734, at *2 (adopting "no arguable basis" test); *Aurum Asset Managers v. Bradesco Companhia de Seguros*, 441 F. App'x 822, 823 (3d Cir. 2011) (appearing to treat "clear usurpation of power" as a heightened review standard). Outside the area of fully litigated subject-matter jurisdictional questions, no such deference is due. *See Irvin v. Harris*, 944 F.3d 63, 68 (2d Cir. 2019) (stating that *de novo* review is required "because if the underlying judgment is void, it is a per se abuse of discretion for a district court to deny a movant's motion to vacate the judgment under Rule 60(b)(4)" (quotation omitted)); *Indoor Cultivation Equip.*, 55 F.3d at 1316-17 (same).

In a concurring opinion in a later case, one judge of the Sixth Circuit stated, "For purposes of Rule 60(b)(4), a judgment is void if a court entered an order outside its legal powers," and cited *Antoine*, among other cases, for that proposition. *Jalapeno Prop. Mgmt. v. Dukas*, 265 F.3d 506, 516 (2001) (Batchelder, C.J., concurring). In still another case, the Sixth Circuit declared that the defect identified by the Second Circuit in *Crosby* was "jurisdictional" (even though it was not a subject-matter or personal jurisdiction defect and instead related to the court's power). *Northridge Church v. Charter Tp. of Plymouth*, 647 F.3d 606, 612 (2011). The Court stated: "*Crosby* rested on a unique jurisdictional issue that rendered the court entering the order without power to do so. Rule 60(b)(4) would be the proper vehicle for such a challenge . . . ." *Id*. This shows that the Sixth Circuit's interpretation of the Rule, too, is contrary to the Second Circuit's restrictive *Romeril* interpretation.

* * * *

At bottom, the courts of appeals are split, or at the very least have created a variety of unclear tests. The restrictive reading adopted below pays heed neither to the text of the Federal Rules of Civil Procedure nor to the Supreme Court's longstanding precedent granting collateral relief from orders issued in excess of the district court's authority. The petition should be granted to resolve this confusion and confirm this Court's pre-*Espinosa* precedents.

D. The Second Circuit Misreads *Espinosa*

The Second Circuit panel based its decision largely on *Romeril*, a decision of another panel of that court. (A.3a-4a). *Romeril*, in turn, misreads the Supreme Court's decision in *Espinosa*. *See* 15 F.4th at 171-72. The *Espinosa* decision does not support *Romeril*'s restrictive reading of Rule 60(b)(4), abrogate the Second Circuit's *Crosby* decision or other Circuits' articulated rules establishing that a judgment issued without authority is void, or *sub silentio* overrule this Court's precedents establishing that principle.

In *Espinosa*, Francisco Espinosa filed for Chapter 13 bankruptcy and proposed a plan to discharge his student loan debt, which he owed to United. 559 U.S. at 264-65. United failed to "object to the proposed discharge of Espinosa's student loan interest without a determination of undue hardship," nor to the lack of an adversary proceeding regarding the student loan debt. *Id*. at 265. The bankruptcy court confirmed the plan, Espinosa repaid his student loan principal, and the bankruptcy court discharged his student loan interest. *Id*. at 265-66. United later filed a 60(b)(4) motion because that process failed to comply with applicable laws requiring a finding of undue hardship. *Id*. at 266.

On certiorari review, the Supreme Court specifically stated that *Espinosa* did not present an "occasion" "to define the precise circumstances in which a jurisdictional error will render a judgment void

because United does not argue that the Bankruptcy Court's error was jurisdictional." *Id*. The Court stated, "[I]t suffices to say that a void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final." *Id*. at 270. The Court also stated that "Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on *a certain type of jurisdictional error* or on a [notice or hearing due process violation]." *Id*. at 271 (emphasis added). The Court did *not* state that "a certain type of jurisdictional error" is restricted to a lack of subject-matter or personal jurisdiction, or that a court imposing an order beyond its authority is excluded from such errors.

Indeed, the Court's comments showed that there is no such restriction on relief, for the Court discussed not only these types of defects, but also considered whether the statutory precondition was "on par with" them, before denying relief. The statutory undue-hardship requirement was "a precondition to obtaining a discharge order, not a limitation on the bankruptcy court's jurisdiction." *Id*. The Court was therefore "not persuaded that a failure to find undue hardship in accordance with [the statute] [was] *on par with* the jurisdictional and notice failings that qualify for relief under Rule 60(b)(4)." *Id*. at 273 (emphasis added). The Court also "express[ed] no view on the conditions under which an order confirming the discharge" of debts that, according to statute, "are *not*

dischargeable under *any* circumstances" "could be set aside as void." *Id*. at 273 n.10 (emphasis original).

Thus, contrary to the Second Circuit's comments, *see Romeril*, 15 F.4th at 171-72, the Supreme Court in *Espinosa* expressly declined to define the universe of "jurisdictional" errors that render a judgment void under Rule 60(b)(4). Indeed, the D.C. Circuit has acknowledged that the Supreme Court never established such a rule in *Espinosa*. *Philip Morris USA*, 840 F.3d at 850 ("[T]he Court [in *Espinosa*] did not specify which types of jurisdictional infirmities make a judgment void . . . ."). These diverging views on the import of *Espinosa* likewise present a Circuit split.

Furthermore, the due process violation that United alleged in *Espinosa* was that it lacked notice of the proposed discharge of Espinosa's student loan debt. 559 U.S. at 272. The Supreme Court rejected that argument because United had received actual notice of the bankruptcy plan. *Id*. Thus, *Espinosa*'s comment that "Rule 60(b)(4) applies only in the rare instance where a judgment is premised . . . on a due process violation that deprives a party of notice or the opportunity to be heard," *id*. at 271, should not be interpreted as an attempt to define the full universe of due process violations that might render a judgment void, but only to reject the particular due process violation asserted by United. Moreover, to the extent *Espinosa* opined on other due process violations, those comments would be unnecessary and irrelevant to the

holding, and therefore non-binding dicta. *Espinosa* should not be read, therefore, as restricting collateral relief on due process grounds from an order, such as the one issued against Smith, that imposes an unauthorized, extra-legal penalty.

* * * *

The Second Circuit's decision below wrongly continues to enforce a judgment the SEC had no power to seek, and the district court had no authority to order. The decision also improperly circumscribes "void" judgments from which collateral relief is available under Rule 60(b)(4). Those limitations are out of step with the text of the Federal Rules of Civil Procedure and longstanding Supreme Court precedent (from before and after the Rules were adopted) that establish that collateral relief must be granted from an order the district court had no power to enter. The Court should grant the petition.

CONCLUSION

For the reasons stated above, the Court should grant the petition and, on merits review, reverse the Second Circuit's summary order and direct the lower court to grant relief from the void judgment.

Dated: September 11, 2023

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APPENDIX

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***UNITED STATES SECURITIES AND EXCHANGE COMMISSION V. DAVID L. SMITH*, NO. 22-746-CV, 2023 WL 2817894 (MEM.) (2D CIR. APR. 7, 2023)**
(Summary Order affirming denial of relief from judgment)

United States Court of Appeals, Second Circuit.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, Plaintiff-Appellee,

v.

DAVID L. SMITH, Defendant-Appellant.[1]

22-746-cv

April 7, 2023

Present: Debra Ann Livingston, Chief Judge, Rosemary S. Pooler, Robert D. Sack, Circuit Judges.

Appeal from a judgment of the U.S. District Court for the Northern District of New York (Sharpe, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of the district court is AFFIRMED.

Defendant-Appellant David L. Smith ("Smith") appeals from a February 10, 2022, final order of the U.S. District Court for the Northern District of New

[1] The Clerk of Court is directed to amend the caption as set forth above.

York (Sharpe, J.) denying his motion pursuant to Federal Rule of Civil Procedure 60(b)(4) for relief from a 2015 disgorgement order, which this Court upheld on appeal in 2016. See S.E.C. v. Smith, 646 F. App'x 42 (2d Cir. 2016) (summary order). The district court entered the disgorgement order jointly and severally against Smith and his co-defendant Timothy McGinn ("McGinn"), as part of a civil enforcement action brought by Plaintiff-Appellee the Securities and Exchange Commission. For the reasons set forth below, we affirm the district court's February 10, 2022 order. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

* * *

In 2015, the district court ordered Smith, jointly and severally with McGinn, to disgorge the amount obtained from investors, minus the amount returned to investors via interest and other payments, for a total of $87,433,218. S.E.C. v. McGinn, Smith & Co., 98 F. Supp. 3d 506, 51921 (N.D.N.Y. 2015). In our 2016 decision, we affirmed the disgorgement award, finding (1) that Smith had waived the argument that disgorgement in the civil case must take into account the expenses of operating the illegal scheme, such that Smith could only be ordered to disgorge an amount that equaled his net profit; and (2) that collateral estoppel did not limit the disgorgement amount in the

civil action to the amount awarded in restitution in the criminal action. Smith, 646 F. App'x at 44. On June 3, 2021, Smith moved pursuant to Federal Rule of Civil Procedure 60(b)(4) for relief from the disgorgement order. He argues that the order was "void" under that rule because it exceeded the limits of equitable relief and was an unauthorized penalty.

"We review *de novo* a district court's denial of a Rule 60(b)(4) motion." *S.E.C. v. Romeril*, 15 F.4th 166, 170–71 (2d Cir. 2021) (quoting *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 138 (2d Cir. 2011)). Rule 60(b)(4) provides that a "court may relieve a party . . . from a final judgment" when "the judgment is void." Fed. R. Civ. P. 60(b)(4). "[A] void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 (2010). "The list of such infirmities is exceedingly short; otherwise, Rule 60(b)(4)'s exception to finality would swallow the rule." *Id.* "Rule 60(b)(4) applies only in two situations: 'where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard.'" *Romeril*, 15 F.4th at 171 (quoting *Espinosa*, 559 U.S. at 271).

Relief is not available to Smith under Rule 60(b)(4) because he has not alleged that the judgment is "void"

within the meaning of the rule. Our settled precedent in *Romeril* makes clear that "[a] judgment is not void . . . simply because it is or may have been erroneous." 15 F.4th at 171 (quoting *Espinosa*, 559 U.S. at 270).

Smith has failed to allege a jurisdictional error or a due process violation that would render the judgment void within the meaning of Rule 60(b)(4). A judgment is void under Rule 60(b)(4) for lack of jurisdiction "only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties." *Grace v. Bank Leumi Tr. Co.*, 443 F.3d 180, 193 (2d Cir. 2006) (citation omitted). Smith does not dispute the existence of subject matter jurisdiction or personal jurisdiction.

In addition, Smith's theory of a due process violation premised on an alleged separation of powers issue is unavailing. "The due process right implicated by Rule 60(b)(4) is the right to 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Romeril*, 15 F.4th at 174 (quoting *Espinosa*, 559 U.S. at 272) (internal quotation marks omitted). "As a general matter, there is no 'denial of due process for purposes of Rule 60(b)(4) if the party seeking relief received actual notice of the proceedings and had a full and fair opportunity to litigate the merits.'" *Id.* (quoting 12 Moore's Federal Practice Civil

§ 60.44[4]). Smith does not dispute that he had actual notice of the proceedings and a full and fair opportunity to litigate the merits, with representation by competent counsel. Accordingly, the district court correctly found that relief is not available to Smith under Rule 60(b)(4).

* * *

We have considered Smith's remaining arguments and find them to be without merit. Accordingly, we AFFIRM the order of the district court.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

***UNITED STATES SECURITIES AND EXCHANGE COMMISSION V. MCGINN, SMITH & CO. INC.*, NO. 10 CIV. 457 (N.D.N.Y. FEB. 10, 2022) (Text only order denying relief from judgment)**

TEXT ONLY ORDER − Pending is defendant David L. Smith's motion, pursuant to Rule 60(b)(4) of the Federal Rules of Civil Procedure, to, among other things, set aside the judgment as void. (Dkt. No. 1195.) The court has carefully considered the arguments contained within Smith's motion, and, for the reasons offered in opposition by plaintiff Securities and Exchange Commission, (Dkt. No. 1198), and the Receiver, William J. Brown, (Dkt. No. 1196), the motion, (Dkt. No. 1195), is DENIED.

IT IS SO ORDERED. Issued by Senior Judge Gary L. Sharpe on 2/10/2022.

***UNITED STATES SECURITIES AND EXCHANGE COMMISSION V. MCGINN, SMITH & CO. INC.*, NO. 10 CIV. 457 (N.D.N.Y. JUNE15, 2015) (Final judgment as to David L. Smith)**

United States District Court
Northern District Of New York

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

V.

McGINN SMITH & CO., INC., McGINN, SMITH ADVISORS, LLC, McGINN, SMITH CAPITAL HOLDINGS CORP., FIRST ADVISORY INCOME NOTES, LLC, FIRST EXCELSIOR INCOME NOTES, LLC, FIRST INDEPENDENT INCOME NOTES, LLC, THIRD ALBANY INCOME NOTES, LLC, TIMOTHY M. McGINN, DA YID L. SMITH, LYNN A. SMITH, GEOFFREY R. SMITH, Individually and as Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04, LAUREN.T. SMITH, and NANCY McGINN,

Defendants,

LYNN A. SMITH and NANCY McGINN,

Relief Defendants,

GEOFFREY R. SMITH, Individually and as Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04,

Intervenors.

l: I 0-cv-457 (GLS/CFH)

June 25, 2015

FINAL JUDGMENT AS TO DEFENDANT DAVID L. SMITH

The Court, on February 17, 2015 and March 30, 2015, having issued Memorandum-Decision and Orders (Dkt. 807, 816) granting plaintiff Securities and Exchange Commission's motion for summary judgment on the First, Second, Third, Fourth, Sixth and Eighth Claims for Relief alleged in the Second Amended Complaint (Dkt. 334) as to defendant David L. Smith ("Smith"); and it appearing that a Final Judgment against Smith should enter:

I.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that Defendant Smith is permanently enjoined and restrained from violating Section 17(a) of the Securities Act of 1933 (the "Securities Act") [15 U.S.C. §.77q(a)] in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly:

(a) to employ any device, scheme, or artifice to defraud;

(b) to obtain money or property by means of any untrue statement of a material fact or any omission of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(c) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise : (a) Defendant Smith's officers, agents, servants, employees , and attorneys; and (b) other persons in active concert or participation with Defendant Smith or with anyone described in (a).

II.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that Defendant Smith is permanently restrained and enjoined from violating, directly or indirectly, Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 promulgated thereunder [17 C.F.R. § 240.1 0b-5], by using any means or instrumentality of interstate commerce, or of the mails, or of any

facility of any national securities exchange, in connection with the purchase or sale of any security:

(a) to employ any device, scheme, or artifice to defraud;

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant Smith's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant Smith or with anyone described in (a).

III.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that Defendant Smith is permanently restrained and enjoined from violating, or aiding and abetting any violation of, Section 15(c)(l) of the Exchange Act [15 U.S.C. § 78o(c)(l)] and Rule 10b-3

promulgated thereunder [17 C.F.R. § 240.10b-3] by knowingly or recklessly providing substantial assistance to any broker or dealer (i) that makes use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than commercial paper, bankers' acceptances, or commercial bills), or any security-based swap agreement by means of any manipulative, deceptive, or other fraudulent device, (ii) that makes use of the mails or any instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange of which it is a member, in connection with which such broker or dealer engages in any fraudulent, deceptive, or manipulative act or practice, or makes any fictional quotation, or (iii) that makes use of the mails or any instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security (except a government security) or commercial paper, bankers' acceptances, or commercial bills) in contravention of such rules and regulations as the Commission shall prescribe pursuant to such statute.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant Smith's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant Smith or with anyone described in (a).

IV.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that Defendant Smith is permanently restrained and enjoined from violating Sections 206(1), 206(2) and 206(4) of the Investment Advisors Act of 1940 [15 U.S.C. §§ 80b-6(1), 80b-6(2), and 80b-6(4)] and Rule 206(4)-8 promulgated thereunder [17 C.F.R. § 275.206(4)-8] by the use of the mails or by any means or instrumentality of interstate commerce, directly or indirectly, (i) to employ any device, scheme, or artifice to defraud any client or prospective client, (ii) to engage in any transaction, practice, or course of business which operates ~s fraud or deceit upon any client or prospective client, or (iii) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also

binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant Smith's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant Smith or with anyone described in (a).

V.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that Defendant Smith is permanently restrained and enjoined from violating Section 5 of the Securities Act [15 U.S.C. § 77e] by, directly or indirectly, in the absence of any applicable exemption:

(a) Unless a registration statement is in effect as to a security, making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise;

(b) Unless a registration statement is in effect as to a security, carrying or causing to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale; or

(c) Making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration

statement has been filed with the Commission as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under Section 8 of the Securities Act [15 U.S.C. § 77h].

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that, as provided in Federal Rule of Civil Procedure 65(d)(2), the foregoing paragraph also binds the following who receive actual notice of this Final Judgment by personal service or otherwise: (a) Defendant Smith's officers, agents, servants, employees, and attorneys; and (b) other persons in active concert or participation with Defendant Smith or with anyone described in (a).

VI.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that Defendant Smith is liable for disgorgement of $87,433,218, representing profits gained as a result of the conduct alleged in the Second Amended Complaint, together with prejudgment interest thereon in the amount $11,668,132, for a total of $99,101,350. This liability for disgorgement and prejudgment interest (and for post-judgment interest pursuant to 28 U.S.C. § 1961) shall be a joint and several liability of Defendant Smith and Defendant Timothy M. McGinn. Defendant Smith shall satisfy this obligation by paying $99,101,350 to William J.

Brown, Esq., the Receiver appointed herein (the "Receiver"), within 14 days after entry of this Final Judgment.

By making this payment, Defendant Smith relinquishes all legal and equitable right, title, and interest in such funds and no part of the funds shall be returned to Defendant Smith.

The Commission may enforce the Court's judgment for disgorgement and prejudgment interest by moving for civil contempt (and/or through other collection procedures authorized by law) at any time after 14 days following entry of this Final Judgment. Defendant Smith shall pay post judgment interest on any delinquent amounts pursuant to 28 U.S.C. § 1961.

VII.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that:

A. Smith is a joint owner of the brokerage account in the name of Lynn A. Smith (" L. Smith"), account number RMR-040916 (the "Stock Account"), and the Stock Account's assets, including all cash and securities, shall be treated as an asset of Smith's and shall be applied to Smith's payment obligations under this Final Judgment;

B. Smith is a beneficial owner of the assets of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04 (the "Smith Trust"), including account number

RMR-069671; therefore, the Smith Trust's assets, including all cash and securities, shall be treated as an asset of Smith's and shall be applied to Smith's payment obligations under this Final Judgment;

C. Smith's transfers to L. Smith of the title to a home at 906 Orchid Point Way, Vero Beach, Florida (the " Vero Beach Property"), and a joint checking account at Bank of America (the " BOA Account"), which had both been held jointly with L. Smith, are hereby declared to have been fraudulent conveyances made by Smith in violation of Section 276 of the New York Debtor and Creditor Law, and these transfers are hereby set aside;

D. The five transfers made from the Smith Trust following the decision of the Court on July 7, 2010 which, among other things, vacated the asset freeze as to the Smith Trust, are hereby declared to have been fraudulent conveyances made by Smith and L. Smith in violation of Section 276 of the New York Debtor and Creditor Law, and these five transfers are hereby set aside. The five transfers are:

i. The July 9, 2010 transfer of$95,741 to the Dunn Law Firm;

ii. The July 12, 2010 transfer of $96,500 to Geoffrey R. Smith;

iii. The July 12, 2010 transfer of $83,000 to Lauren T. Smith;

iv. The July 16, 2010 transfer of $200,000 to Geoffrey R. Smith; and

v. The July 23, 2010 transfer of $449,878 to Lynn A. Smith;

E. Smith shall return the fraudulently conveyed assets listed in Section VII(D)(i)-(v) to the Receiver, or their equivalent value.

F. The assets of the Stock Account and the Smith Trust, and the assets in the BOA Account, shall be delivered to the Receiver, and the Receiver is authorized to take custody of these assets and to apply them in partial satisfaction of Smith's payment obligations in this Final Judgment.

VIII.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that the Receiver shall hold all payments received from the Defendant Smith and from or with respect to other Defendants and Relief Defendants in this action. Any payments or recoveries delivered to the Receiver in satisfaction of the Final Judgments entered, together with the funds in the possession of the Receiver, including the proceeds of the sales of the Sacandaga Lake Property and the Vero Beach Property, shall be referred to as the Distribution Fund. The Receiver shall submit to the Court a proposed Plan of Distribution.

Any assets recovered by or under the control of the Receiver collected from the Defendant Smith pursuant to the prior orders of this Court are deemed to be assets of the Distribution Fund effective upon the entry of this Final Judgment.

The Receiver is authorized to liquidate and monetize any assets recovered from or on behalf of or in connection with Defendant Smith and to deposit the proceeds thereof in an appropriate account.

To the extent that further legal action is required to obtain custody over any assets of the Defendant Smith, the Commission or the Receiver is authorized to file a motion in this action seeking relief pursuant to Rule 69(a) of the Federal Rules of Civil Procedure and New York Civil Practice Law and Rules 5225 and/or 5227, or such other provision of law as may be appropriate, seeking to have such assets turned over to the Receiver.

IX.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. § 523, any debt for disgorgement, prejudgment interest, or other amounts due by Defendant

Smith under this Final Judgment or any other judgment, order, consent order, decree or settlement

agreement entered in connection with this proceeding, is a debt for the violation by Defendant Smith of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(l 9) of the Bankruptcy Code, 11 U.S.C. §523(a)(l 9).

X.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that this Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Final Judgment.

XI.

There being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk is ordered to enter this Final Judgment forthwith and without further notice.

Dated: June 25, 2015
Albany, New York

Gary L. Sharpe
United States District Judge

***UNITED STATES SECURITIES AND EXCHANGE COMMISSION V. DAVID L. SMITH*, NO. 22-746-CV, (MEM.) (2D CIR. JUNE 12, 2023) (Order denying *en banc* review)**

United States Court of Appeals, Second Circuit.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, *Plaintiff-Appellee*,

v.

DAVID L. SMITH, *Defendant-Appellant*,

McGinn, Smith & Company, Incorporated, McGinn, Smith Advisors, LLC, McGinn, Smith Capital Holdings Corporation, First Advisory Income Notes, LLC, First Excelsior Income Notes, LLC, First Independent Income Notes, LLC, Third Albany Income Notes, LLC, Timothy M. McGinn, Nancy McGinn, Relief Defendant, David M. Wojeski, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04, Financial Industry Regulatory Authority, Inc., and FINRA Employees, RBS Citizens, N.A., Lynn A. Smith, Relief Defendant, Geoffrey R. Smith, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04, Lauren T. Smith,

Defendants,

United States Attorney's Office of the Northern District of New York,

Intervenor.

22-746-cv

April 7, 2023

Appellant David L. Smith filed a petition for rehearing *en banc*. The active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

U.S. CONSTITUTION AMEND. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FEDERAL RULE OF CIVIL PROCEDURE 60

Rule 60. Relief From a Judgment or Order

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic, misrepresentation, or misconduct by any opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) ***Timing.*** A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) ***Effect on Finality.*** The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela**.**