No. 21-1284

IN THE

Supreme Court of the United States

BARRY D. ROMERIL,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

Brief of *Amicus Curiae* Pelican Institute
for Public Policy
In Support of Petition for a Writ of Certiorari

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INTEREST OF THE *AMICUS CURIAE*

This brief is submitted on behalf of the Pelican Institute for Public Policy ("Amicus").[1] Amicus is a non-profit and non-partisan research and educational organization and the leading voice for free markets in Louisiana. Amicus's mission is to conduct scholarly research and analysis that advances sound policies based on free enterprise, individual liberty, and constitutionally limited government. Amicus has an interest in protecting Louisiana citizens' First Amendment rights.

SUMMARY OF THE ARGUMENT

The Second Circuit's decision in *Crosby v. Bradstreet*, 312 F.2d 483 (2d Cir. 1963) stood as the seminal case in the federal courts holding that a lifelong injunction against truthful speech of public interest was "void" and therefore subject to vacatur under Rule 60(b)(4) of the Federal Rules of Civil Procedure. *Crosby*'s holding, if properly applied to the facts of this case, should have led the court below to grant Petitioner's request to strike the provision of

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[1] Pursuant to Supreme Court Rule 37.6, Amicus states that this brief was prepared in its entirety by *amicus curiae* and its counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amicus curiae* and its counsel. This brief is filed with the consent of both parties.

the consent decree that purports to prohibit Petitioner from denying the allegations in the complaint ("No-Deny Provision"). The decision below effectively abrogates *Crosby*, however, based on several legal errors.

First, the court erred in giving effect to the No-Deny Provision simply because Petitioner consented to it, notwithstanding *Crosby*'s teaching that such consent is "immaterial" if the injunction itself is unconstitutional. *Id.* *Crosby*'s holding is consistent with this Court's limited guidance on waiver of First Amendment rights. In *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980), this Court ruled that a former CIA employee's agreement not to speak about his employment was enforceable—but only after noting that enforcement of such an agreement served the "vital" government interest of protecting secrets important to national security. The Fourth Circuit has created a similar test for waivers of First Amendment rights in agreements with government entities. In *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 223 (4th Cir. 2019), the court held that a waiver of First Amendment rights in an agreement with the government is enforceable only if (1) the waiver is knowing and voluntary, and (2) relevant First Amendment public policies favor enforcement of the waiver. Similarly (albeit in a non-First Amendment case), the Eleventh Circuit has instructed district courts that they cannot enter unconstitutional judgments simply because the parties have consented to entry of such a judgment. *See Stovall v. City of Cocoa*, 117 F.3d 1238, 1242–43 (11th Cir. 1997). In contrast to these cases, the court below did

not wrestle at all with the constitutional issues concerning the No-Deny Provision, instead concluding that the No-Deny Provision was valid simply because Petitioner agreed to it and entered into the settlement knowingly and voluntarily. Op.13–14 & n.4. This decision is inconsistent with *Crosby*, *Snepp*, *Overbey*, and *Stovall*, and this Court should grant certiorari to provide definitive guidance and resolve the circuit conflict on the circumstances in which a waiver of First Amendment rights is enforceable.

The court below also erred in its Rule 60(b)(4) holding, determining that Petitioner could not show "jurisdictional" error rendering the No-Deny Provision void because the court had subject matter and personal jurisdiction. Op. 14–19. *Crosby* held otherwise, as has this Court. 312 F.2d at 485; *Klapprott v. United States*, 335 U.S. 601, 609–13 (1949). Both *Crosby* and *Klapprott* hold that a judgment is void and must be vacated under Rule 60(b)(4) if the district court granted relief that was beyond its authority to grant. Contrary to the panel's reasoning, this is entirely consistent with *dicta* in *United Student Aid Funds, Inc. v. Espinosa* stating that Rule 60(b)(4) applies where there is a "certain type of jurisdictional error." 559 U.S. 260, 271 (2010). This Court has never elaborated on what type of jurisdictional error renders a judgment void, and the *Espinosa* opinion expressly declined to reach that question. But in speaking of void judgments, this Court has long said that a district court lacks "jurisdiction" if it "transcend[s] the limits of its authority." *Windsor v. McVeigh*, 93 U.S. 274, 282 (1873); *see Klapprott*, 335 U.S. at 609–13; *Ex Parte*

Lange, 85 U.S. 171, 176 (1873). This Court should grant certiorari to correct the Second Circuit's misunderstanding of *Espinosa*, which stands in conflict with the Fifth Circuit's correct observation that this Court has never "definitively interpreted" Rule 60(b)(4). *Brumfield v. La. State Bd. of Educ.*, 806 F.3d 289, 301 (5th Cir. 2015).

ARGUMENT[2]

I. *CROSBY* AND THE DECISION BELOW

A. *Crosby v. Bradstreet Co.*

Brothers and business partners Stanford and Lloyd Crosby were indicted for mail fraud in 1928. A jury acquitted Stanford and hung as to Lloyd. Thereafter, Lloyd pleaded guilty and received a suspended sentence. In 1932, Stanford—as a lone plaintiff—brought a libel action against Dun & Bradstreet ("D&B") (then called Bradstreet Co.) asserting that D&B had falsely stated in a credit report that Stanford was convicted of mail fraud.

[2] Amicus cites to the Second Circuit's archived file in *Crosby* for certain background facts that are not illustrated in the court's opinion. This file is included in the record as a Special Appendix to Petitioner's Petition for Rehearing or Rehearing *En Banc*, filed with the Second Circuit on November 12, 2021.

Stanford and D&B entered into a settlement under which D&B agreed to pay Stanford $300 and to:

> refrain from issuing or publishing any report, comment or statement either in writing or otherwise concerning [Stanford] Crosby, the plaintiff herein, L. Lloyd Crosby[,] [and others] . . . or concerning the business activities of any of the foregoing persons . . . whether past, present or future.

Crosby, 312 F.2d at 484. The district court entered an order giving effect to the parties' agreement on July 8, 1933 ("1933 Order").

Nearly 30 years later, Stanford had found it difficult to obtain credit without a report from D&B. Thus, on January 10, 1962, he filed a Petition for Termination of Order of July 8, 1933. By this time, Stanford and Lloyd were no longer in business together—and, in fact, were business rivals. Lloyd opposed the petition, arguing that Stanford and D&B were bound by their consent to entry of the 1933 Order and that the Order "served to protect, not only Petitioner, but the others named in said order and judgment, including myself." SA31–32. Lloyd accused Stanford of trying to "destroy his business" by vacating the 1933 Order and allowing D&B to publish a report on Lloyd that would mention Lloyd's mail fraud conviction. *Crosby*, 312 F.2d at 484. D&B opposed termination "unless its right to make reference to Lloyd Crosby in its statement about Stanford Crosby [was] protected." *Id.* In his reply affidavit, Stanford pointed out that Lloyd was not a party to the 1933 proceeding and therefore had no

standing to object to the vacatur of the Order. SA34–36.

The district court denied Stanford's petition in an order dated April 10, 1962. Balancing the equities at stake, the district court found that the harm to Lloyd of vacating the 1933 Order "far outweigh[ed]" the benefit to Stanford. SA23.

Stanford filed an appeal to the Second Circuit. He primarily argued that Lloyd had no standing to contest vacatur of the 1933 Order because Lloyd was not a party to the underlying action. SA18–19. Stanford also raised a First Amendment argument, asserting that the 1933 Order was "void on its face for want of jurisdiction" because "[n]o court in the United States has the power—and every court is inhibited by the Constitution—to enjoin publication of even falsities, much less of the truth or of matters of public record." SA17; *see* SA19–21.

Lloyd disagreed, asserting that the case did not turn on the court's "jurisdiction" because "[j]urisdiction is not concerned with the outcome of litigation, or its ultimate effect, but with the power to determine that outcome." SA50. Lloyd disputed that he lacked standing given that he was named in the 1933 Order and therefore had an interest in its continued enforcement. SA49–50. Lloyd also argued that the equities favored keeping the injunction in place because of Stanford's alleged bad motive in petitioning for vacatur of the 1933 Order. SA47–48.

D&B changed its position in the Court of Appeals, admitting that its agreement to the 1933 Order had been "improvident" and noting that it had in no other instance agreed to be bound by such an

injunction. SA64. D&B concurred with Stanford that the 1933 Order violated the First Amendment as a prior restraint on speech and, therefore, that the court "acted without jurisdiction and without power," and "the [O]rder is a nullity." SA67.

The Second Circuit reversed the decision of the district court. In full, the court reasoned:

> The 1933 order was extremely broad in its terms. It restrained the defendant from publishing any report, past, present or future, about certain named persons. It is true that the order arose out of a libel action. But even assuming, contrary to authority, that it is proper for a federal court to enjoin a libel, the order here in question was not directed solely to defamatory reports, comments or statements, but to 'any' statements. In fact, from all that appears, it would seem that whatever The Bradstreet Company published in 1932 was not libelous as to Lloyd Crosby.
>
> Lloyd Crosby contends that the order was entered on consent and that Bradstreet is bound by contract to refrain from publishing matter about him. We disagree. We are concerned with the power of a court of the United States to enjoin publication of information about a person, without regard to truth, falsity, or defamatory character of that information. Such an injunction, enforceable through the

> contempt power, constitutes a prior restraint by the United States against the publication of facts which the community has a right to know and which Dun & Bradstreet had and has the right to publish. The court was without power to make such an order; that the parties may have agreed to it is immaterial.
>
> The order dated July 8, 1933 was in violation of the First Amendment to the Constitution. *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948) indicates that the First Amendment limits court action. The order was void, and under Rule 60(b)(4) of the Federal Rules of Civil Procedure, the parties must be granted relief therefrom.

Crosby, 312 F.2d at 485 (citations omitted). The undersigned counsel's law firm represented D&B before the Second Circuit in the 1963 *Crosby* decision.

In a petition for rehearing *en banc*, Lloyd asserted that circuit precedent compelled the court to find that Stanford and D&B could agree to a waiver of First Amendment rights and that they were bound by their agreement. SA114–19. The Second Circuit denied rehearing, and this Court subsequently denied a petition for a writ of certiorari.

B. The Second Circuit's Analysis of *Crosby* in This Case

In the decision below, the Second Circuit purported to distinguish *Crosby* on several grounds. First, the court noted that *Crosby* "was decided more than fifty years ago, long before [*United Students Aid Funds, Inc. v.*] *Espinosa* and the other cases discussed above limited the grounds for relief under Rule 60(b)(4)." Op.15. The court relied on *dicta* in *Espinosa* stating, "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 violation of due process that deprives a party of notice or the opportunity to be heard." *Espinosa*, 559 U.S. at 271. The Second Circuit reasoned that Petitioner could not show (1) jurisdictional error—because he stipulated to subject matter and personal jurisdiction, or (2) a due process violation—because he had notice and an opportunity to be heard. Op.14–19.

Second, the panel explained that, in its view, *Crosby* did not control because, unlike the consent order in this case, the 1933 Order extended to nonparties, such as Lloyd. "In that sense," the court continued, "the district court [in *Crosby*] lacked jurisdiction over these other persons, who were not before the court and likely had not had notice of the proceedings or an opportunity to be heard." Op.16. The panel concluded that this made *Crosby* factually distinguishable because "[h]ere, the Judgment affected only [Petitioner]." Op.17.

Lastly, the panel below also concluded that "[t]he Judgment does not violate the First

Amendment because [Petitioner] waived his right to publicly deny the allegations of the complaint." Op.12. In *Crosby*, Lloyd raised this same contention. 312 F.2d at 485 ("Lloyd Crosby contends that the order was entered on consent and that Bradstreet is bound by contract to refrain from publishing matter about him."); SA49–50. The *Crosby* court rejected Lloyd's argument: "The court was without power to make such an order; that the parties may have agreed to it is immaterial." *Id.* The court below, however, did not attempt to reconcile its decision with *Crosby* on this point.

II. *CROSBY'*S FIRST AMENDMENT HOLDING IS STILL GOOD LAW, AND THE SECOND CIRCUIT ERRED IN DEPARTING FROM IT

The Second Circuit in *Crosby* held that the 1933 Order violated the First Amendment as a prior restraint on D&B's speech, *even though D&B and Stanford consented to entry of the Order*.

A. *Crosby* Was Correctly Decided in 1963

The *Crosby* court identified *Near v. Minnesota*, 283 U.S. 697 (1931), and *Shelley v. Kraemer*, 334 U.S. 1 (1948), as the most salient constitutional precedents. *Near* held that a Minnesota law authorizing permanent injunctions on newspapers with "malicious, scandalous or defamatory" content violated the First Amendment as a prior restraint. 283 U.S. at 707–23. *Shelley* teaches that courts may not participate in unconstitutional agreements by enforcing them and thereby giving such agreements "the clear and unmistakable imprimatur of the State." 334 U.S. at

20. Taken together, these cases were sufficient to support *Crosby*'s holding. The 1933 Order was unconstitutional because it was a permanent, content-based injunction against truthful speech of public interest. *See Near*, 283 U.S. at 722–23. And the court, therefore, could not be a party to its enforcement. *See Shelley*, 334 U.S. at 20. Thus, the 1933 Order "was void" because it "was in violation of the First Amendment." *Crosby*, 312 F.2d at 485.

B. The Second Circuit Misconstrued *Crosby* and Failed to Apply its First Amendment Holding

The court erred in concluding that the No-Deny Provision is valid because Petitioner "waived his right to publicly deny the allegations of the complaint." Op.12. *Crosby* plainly holds that such consent is "immaterial" if the injunction violates the First Amendment. 312 F.2d at 485. By failing to even consider the underlying First Amendment issues and presuming the No-Deny Provision to be valid because of Petitioner's consent without any analysis of the substantive First Amendment issues, the court committed legal error.

The court also misapprehended the underlying facts of the *Crosby* decision. The panel's decision purports to distinguish *Crosby* from this case on the basis that the 1933 Order barred D&B from making statements about nonparties to the underlying litigation, such as Lloyd. The panel reasoned that the district court in *Crosby* "lacked jurisdiction over these other persons," and, in contrast, "[h]ere, the Judgment affected only [Petitioner], who was before the court and had an opportunity to be heard."

Op.16–17. Because of this distinction, the panel concluded, "*Crosby* does not control."[3] Op.17. This analysis is flawed. A straightforward reading of *Crosby* confirms that the Second Circuit there did not rely on the presence of nonparties in the 1933 Order to invalidate it. Instead, the *Crosby* court held that the 1933 Order "was in violation of the First Amendment to the Constitution." 312 F.2d at 485. Despite this clear statement, the panel below seemed to believe, wrongly, that *Crosby* is a due process case, rather than a First Amendment case. This is inconsistent with *Crosby*'s text, in which the court directly confronted the First Amendment issue in the case and said absolutely nothing about due process.

C. Subsequent Developments Confirm that Petitioner's Waiver of His First Amendment Rights Was Immaterial

If the panel had grappled with the First Amendment issues present in this case instead of distinguishing *Crosby* on dubious grounds, it would

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[3] The panel speculated that the nonparties named in the 1933 Order "likely had not had notice of the proceedings or an opportunity to be heard." Op.16. This is wrong. Lloyd noted in his appellate brief that the nonparties were "members of the family and their corporations." SA 44. Lloyd also claimed to have paid for the prosecution of the 1933 litigation and that that litigation "was initiated and concluded under his direction," SA44, which Stanford did not dispute in his reply, SA74–81.

have concluded that the No-Deny Provision is unconstitutional. First, it is plain that the No-Deny Provision is a prior restraint against speech. *See Neb. Press Assoc. v. Stuart*, 427 U.S. 539, 556 (1976); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971). And this Court's cases leave no doubt that a lifelong, content-based injunction against truthful speech of public interest would be unconstitutional absent consent. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). This is because "[a] prior restraint, . . . by definition, has an immediate and irreversible sanction." *Stuart*, 427 U.S. at 559. A prior restraint for an indefinite period is particularly suspect. *Cf. Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 (1980); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226 (1990). Neither the district court, the Second Circuit, nor the SEC have suggested that the No-Deny Provision is not a prior restraint or that it would be valid absent Petitioner's consent.[4] Instead, all maintained that the No-Deny Provision was valid because of Petitioner's consent to it.

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[4] To Amicus's knowledge, the SEC has never obtained such injunctive relief against a party who contested the SEC's charges, and it is plain that this would violate the First Amendment. *Cf. Near*, 283 U.S. at 722–23.

Therefore, the key First Amendment question in this case—which *Crosby* answered correctly—is whether consent to the sort of injunction issued here has constitutional significance. It does not. This Court has never upheld (1) a lifelong, content-based waiver of First Amendment rights (2) secured by the government (3) that lacks a compelling government interest. *Cf. Snepp*, 444 U.S. at 509 n.3.

The circumstances under which such a waiver is valid is an issue ripe for this Court's consideration. This Court has not directly confronted the issue of a government-secured waiver of First Amendment rights. Until very recently, in the Second Circuit such a waiver was invalid—even if between private parties—because the federal courts could not constitutionally enforce it. *Crosby*, 312 F.2d at 485. It appears from the decision below that now such a waiver is presumptively valid, even where the government has secured the waiver. Op.13–14 & n.4. In contrast, the Fourth Circuit has held that an individual may validly waive his First Amendment rights in a contract with the government only if (1) "the waiver is made knowingly and voluntarily," *and* (2) "*the interest in enforcing the waiver is not outweighed by a relevant public policy that would be harmed by enforcement*." *Overbey*, 930 F.3d at 223 (emphasis added). The Fourth Circuit developed this test from this Court's decision in *Town of Newton v. Rumery*, 480 U.S. 386 (1987) (upholding waiver of right to sue under Section 1983); *see Pee Dee Health Care, P.A. v. Sanford*, 509 F.3d 204, 212 (4th Cir. 2007). Thus, in *Overbey*, the Fourth Circuit invalidated a provision in a settlement agreement between a private individual and the City of

Baltimore that prohibited the individual, a police-misconduct claimant, from speaking publicly about her case. 930 F.3d at 219. The court found that public policies—such as the "'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open'" and "this nation's cautious 'mistrust of governmental power'"—rendered the waiver unenforceable. *Id.* (first quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), and then quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 319, 340 (2010)); *see also Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1397 (9th Cir. 1991) (noting that *Rumery* involved the waiver of a mere *statutory* right, and suggesting that a waiver of a *constitutional* right may require "a stricter standard"); *Baskin v. Royal Goode Prods., LLC*, .8:21-cv-2558, 2021 WL 6125612, at *6 (M.D. Fla. Nov. 19, 2021) (citing *Crosby* and concluding that it could not enforce a contract prohibiting protected speech).

The Fourth Circuit's test is far more consistent with this Court's precedents than the decision below. In *Snepp*, this Court upheld a waiver of First Amendment rights where that waiver was "a reasonable means for protecting [a] vital [government] interest."[5] 444 U.S. at 509 n.3. By

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[5] *Snepp* is distinguishable on another ground as well. There, the government procured a waiver of First Amendment rights in exchange for access to classified information that the

refusing to consider whether First Amendment interests favored invalidating Petitioner's consent to the No-Deny Provision, the Second Circuit here failed entirely to address the most important issues in this case.[6] If the court had engaged in the analysis required under *Snepp* and *Overbey*, it would

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government would not have shared with the individual absent the waiver and which the individual had no right to know. Here, in contrast, the SEC seeks to enjoin Petitioner from speaking about facts he already knew about prior to agreeing to the No-Deny provision.

[6] The court inaptly equated Petitioner's waiver to a criminal defendant's waiver of constitutional rights upon pleading guilty. Op.13. As a logical necessity, a criminal defendant who pleads guilty *must* waive certain rights that are immediately attendant to the criminal adjudicatory process, such as the right to a jury trial. There was no such necessity here. Nothing inherently required the SEC to demand a lifelong waiver of Petitioner's First Amendment rights to resolve the allegations it had made against Petitioner. A more correct analogy would be a settlement in which the SEC requires an individual to consent indefinitely to unreasonable searches of his home or person; or to surrender his firearms; or to refrain from practicing his religion of choice. Surely, the panel would not have countenanced an order that allowed a cruel and unusual punishment to be inflicted on Petitioner in violation of the Eighth Amendment—even if Petitioner consented to that order. *Cf. Ex Parte Lange*, 85 U.S. at 176 (explaining that a judgment on a complaint for misdemeanor libel would be void if the court "should render a judgment that [the defendant] be hung").

have concluded that Petitioner's waiver was unenforceable in light of *Crosby*'s teaching that "extremely broad," content-based injunctions that apply "past, present or future" and which enjoin "'any' statements," true or false, including "facts which the community has a right to know" violate the First Amendment, regardless of any waiver. 312 F.2d at 485. The court would have been compelled to invalidate the No-Deny Provision in light of (1) the American value favoring uninhibited discussion of issues of public interest, *see Overbey*, 930 F.3d at 223, and (2) the potential for government abuse of injunctions of the type issued here, *see* Petition for Cert. at 18–23.

The panel's decision also conflicts with case law directing district courts not to enter unconstitutional judgments simply because litigants provide consent. In *Stovall*, 117 F.3d at 1242–43, the district court granted the defendant's motion to withdraw a joint motion to enter a consent decree after the defendant asserted the consent decree should not be entered because it violated the Equal Protection Clause. On appeal from that decision, the Eleventh Circuit vacated and remanded, holding that the district court did not develop a sufficient factual record. *Id.* at 1244. The court made clear that, on remand, the district court had an obligation to reject the consent decree "if it determined the decree was . . . unconstitutional." *Id.* at 1242. In direct opposition to *Stovall*, the decision below indicates that district courts in the Second Circuit may enter unconstitutional injunctions so long as the parties consent. Op.12. Indeed, the panel's reasoning is entirely backwards: the court found that

Petitioner's consent rendered the No-Deny Provision constitutional, when in fact the court should have considered whether the No-Deny Provision is constitutional to determine whether Petitioner's consent was valid. Because of this fundamental legal error, the decision below cannot be reconciled with the Eleventh Circuit's approach to unconstitutional consent judgments in *Stovall*.

This case presents this Court with an opportunity to resolve the circuit courts' varying approaches to determining the validity of a waiver of constitutional, and particularly First Amendment, rights, and the Court should grant certiorari to resolve that conflict.

III. *CROSBY'S* RULE 60(b)(4) HOLDING IS STILL GOOD LAW, AND THE SECOND CIRCUIT ERRED IN DEPARTING FROM IT

After contending with the First Amendment issues in the case, the *Crosby* court concluded readily that the Order "was void" and therefore must be vacated under Rule 60(b)(4). 312 F.2d at 485. The court below also disregarded this holding in ruling against Petitioner.

A. *Crosby* Was Correctly Decided in 1963

The *Crosby* court did not cite any case law for its Rule 60(b)(4) holding, but there was ample authority available in 1963. This Court had confirmed that Rule 60(b)(4) furnishes a basis for vacating an order granting relief that the district court had no authority to grant. *See Klapprott*, 335 U.S. at 609–13 (vacating a denaturalization

judgment under Rule 60(b)(4) where the district court issued the judgment pursuant to a statute that provided "no command and no express authority" for such judgment). *Klapprott* accords with this Court's pre-Rules cases. *See Ex Parte Lange*, 85 U.S. at 176 (explaining that a judgment would be void, *even if the court had personal and subject matter jurisdiction*, if it "had no power to render such a judgment"); *Bigelow v. Forrest*, 76 U.S. 339, 351 (1869). Therefore, the Second Circuit in *Crosby* correctly held that Rule 60(b)(4) required vacatur of the 1933 Order in light of the district court's lack of authorization to "enter[] it in the first place." 312 F.2d at 485.

B. Contrary to the Second Circuit's Reasoning, *Espinosa* Does Not Undermine *Crosby*

Despite *Crosby*'s clear holding, the court below concluded that Rule 60(b)(4) did not apply. The court seized on a single sentence of *dicta* in *Espinosa* to circumvent *Crosby*. That sentence states, "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 violation of due process that deprives a party of notice or the opportunity to be heard." *Espinosa*, 559 U.S. at 271.

The court erred in relying on this *dicta*. By its explicit text, *Espinosa* does not comprehensively define the sort of error that renders a judgment void for Rule 60(b)(4) purposes. *Id.* at 272 ("This case presents no occasion . . . to define the precise circumstances in which a jurisdictional error will render a judgment void . . . ."). Furthermore, the

Espinosa Court stated, also in *dicta*, 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. This formulation is entirely consistent with *Crosby*'s holding that an unconstitutional judgment is void.

This Court has never elaborated on the "certain type of jurisdictional error" that renders a judgment void. *Id.*; *see Brumfield*, 806 F.3d at 301. In contravention of its own precedent, the panel decided that this phrase refers only to errors in the district court's exercise of subject matter or personal jurisdiction. Op.9–11. True, the word "jurisdiction" is most accurately limited to these contexts. *See Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). But this Court has often acknowledged that it has not always been so careful in its use of the term, *see, e.g.*, *id.*, and there is a strong reason to think that the *Espinosa* court intended the word "jurisdiction" to refer also to the authority of the court to order certain forms of relief. Longstanding and unchallenged precedent, both pre- and post-Rules, confirms this understanding. *See Klapprott*, 335 U.S. at 609–13; *Ex Parte Lange*, 85 U.S. at 176; *see also Watson v. Jones*, 80 U.S. 679, 733 (1871) (stating that whether a tribunal "exceeds the powers conferred upon it" "may be said to be [a] question[] of jurisdiction.").

Given that the *Espinosa* Court expressly disclaimed any attempt to define what types of "jurisdictional" defect render a judgment void, it was error for the Second Circuit to cherry-pick a lone sentence of *dicta* and read that sentence as effectively overruling both *Crosby* and this Court's

precedents which teach that a judgment is void if the court entered an order that "transcend[s] the limits of its authority." *Windsor*, 93 U.S. at 282 (providing numerous examples of judgments that "would be absolutely void" even though the court has "complete jurisdiction over the subject and parties"); *see Klapprott*, 335 U.S. at 609–12. Because this Court "does not normally overturn, or so dramatically limit, earlier authority *sub silentio*," *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000), and certainly not in a single sentence of *dicta* that was entirely unnecessary to resolve the case before the Court, the Second Circuit erred in reasoning that *Espinosa* rendered *Crosby* inapplicable. For these reasons, this Court should grant certiorari to clarify *Espinosa*, which the Second Circuit has clearly misapprehended as overturning prior precedents, in conflict with the Fifth Circuit. *See Brumfield*, 806 F.3d at 301.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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