19-4197

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Securities and Exchange Commission,

Plaintiff-Appellee,

v.

Barry D. Romeril,

Defendant-Appellant.

On appeal from the United States District Court for the Southern District of New York (Hon. Denise L. Cote)

BRIEF FOR THE PLAINTIFF-APPELLEE

ROBERT B. STEBBINS
General Counsel

MICHAEL A. CONLEY
Solicitor

JEFFREY A. BERGER
Senior Litigation Counsel

Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-9040
(202) 551-5112 (Berger)
bergerje@sec.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statues and Rules

Commission Materials

Other Authorities

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Securities and Exchange Commission,

Plaintiff-Appellee,

v.

Barry D. Romeril,

Defendant-Appellant.

On appeal from the United States District Court for the Southern District of New York (Hon. Denise L. Cote)

BRIEF FOR THE PLAINTIFF-APPELLEE

COUNTERSTATEMENT OF JURISDICTION

The Commission filed a civil enforcement action against Barry Romeril in 2003 pursuant to Section 21(d) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(d). As Romeril has admitted (JA67, 76), the district court had subject-matter jurisdiction pursuant to Sections 21 and 27 of the Exchange Act, 15 U.S.C. 78u, 78aa. The parties entered into a consent judgment in 2003, which Romeril did not appeal. JA66.

Sixteen years later, Romeril sought relief from that judgment pursuant to Federal Rule of Civil Procedure 60(b)(4). JA73-79. The district court denied his motion on November 18, 2019. JA 85-94. Romeril filed a timely notice of appeal on December 16, 2019. JA95. The district court's order was a final decision as to

Romeril's 60(b)(4) motion, and this Court has jurisdiction under 28 U.S.C. 1291. *Daily Mirror, Inc. v. N.Y. News, Inc.*, 533 F.2d 53, 56 (2d Cir. 1976) (per curiam).

COUNTERSTATEMENT OF THE ISSUES

In 2003, Romeril and the Commission settled an enforcement action alleging that Romeril violated the securities laws. The district court entered a consent judgment in which Romeril admitted jurisdiction, consented to injunctive and monetary relief, agreed not to publicly deny the allegations against him, and waived several other rights. In 2019, Romeril filed a Rule 60(b)(4) motion, arguing that the no-deny provision rendered the consent judgment void. The district court rejected Romeril's attempt to reopen the judgment to which he had agreed because he did not identify any jurisdictional or due process error and because the motion was untimely. The only issue properly on appeal is whether the district court correctly denied Romeril's motion where the consent judgment was entered, sixteen years earlier, after Romeril conceded jurisdiction and received ample opportunity to defend himself.

COUNTERSTATEMENT OF THE CASE

A. The Commission often settles enforcement actions through consent judgments in which defendants agree not to publicly deny the allegations in the complaint.

Congress authorized the Commission to investigate violations of the securities laws and bring enforcement actions in federal district court. 15 U.S.C 78u(a), (d). Prior to commencement of a district court action, investigations often entail a "Wells" process—once the Division of Enforcement is "close to recommending" that the

Commission authorize an action, the potential defendant receives an "opportunity to set forth his version of the law or facts" to the Commissioners. *Carlson v. Xerox Corp.*, 392 F. Supp. 2d 267, 279 (D. Conn. 2005); *see* 37 Fed. Reg. 23,829 (Nov. 9, 1972), codified at 17 C.F.R. 202.5(c) (establishing the process). If the staff recommends action, a potential defendant's Wells submission is "forwarded to the Commission," along with the staff recommendation, so the Commissioners can consider both as they decide whether to approve an enforcement action. 17 C.F.R. 202.5(c).

During the investigative process, there may be discussions about settlement via consent judgment. SEC Enforcement Manual, at 21 (2017), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf; William R. McLucas et al., *A Practitioner's Guide to the SEC's Investigative and Enforcement Process*, 70 TEMP. L. REV. 53, 111-16 (1997). Consent judgments are "compromises in which the parties give up something they might have won in litigation and waive their rights to litigation." *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 235 (1975); *accord Berger v. Heckler*, 771 F.2d 1556, 1568 (2d Cir. 1985). They "provide parties with a means to manage risk," and the "numerous factors that affect a litigant's decision whether to compromise a case or litigate it to the end include the value of the particular proposed compromise, the perceived likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial, and the resources that would need to be expended in the attempt." *SEC v. Citigroup Global Mkts.*, 752 F.3d 285, 295 (2d Cir. 2014) (internal quotation marks omitted) (*Citigroup* II).

Consent judgments have "attributes both of contracts and of judicial decrees." *ITT*, 420 U.S. at 236 n.10. They are contracts because they "are entered into by parties to a case after careful negotiation has produced agreement on their precise terms." *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971). And they are decrees because they are memorialized in a judgment over which a court usually retains jurisdiction. *Id.* Just as the Commissioners must authorize the commencement of a court action, they must also approve a settlement. SEC Enforcement Manual, at 22.

Contemporaneous with its establishment of the Wells process, the Commission announced a policy regarding defendants who settled without admitting wrongdoing, but then publicly denied the allegations. The Commission stated that it would not approve consent judgments that allowed defendants to "consent to a judgment or order that imposes a sanction while denying the allegations in the complaint." 37 Fed. Reg. 25,224 (Nov. 29, 1972). This policy, codified at 17 C.F.R. 202.5(e) among the Commission's "informal and other procedures," was intended "to avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur." *Id.* Rule 202.5(e) does not require settlement—defendants can decline to settle and proceed to trial.

B. Romeril entered into a consent judgment with Romeril, which included a no-deny provision, to resolve an enforcement action related to an alleged accounting fraud.

In 2003, Romeril and the Commission entered into a consent judgment to resolve allegations that Romeril, then the Chief Financial Officer of Xerox, and other

Xerox officers engaged in a fraudulent scheme to mislead investors by artificially inflating Xerox's revenues and earnings. JA11, ¶¶ 1-2; JA16, ¶ 15. More specifically, the Commission claimed that Xerox used accounting devices to distort the picture of its business performance and increase its pre-tax earnings by nearly $1.4 billion. JA11-12, 19-21, ¶¶ 1-6, 20-24. The Commission alleged that Romeril was responsible for ensuring the accuracy of Xerox's financial statements and that he helped create a "tone at the top" that drove the accounting distortion. JA16, ¶ 16; JA19-28, ¶¶ 20-36. The Commission charged Romeril with committing securities fraud and violating other statutes by knowingly and recklessly making materially false and misleading statements about Xerox's financial performance. JA54-58, ¶¶ 97-110, citing Section 10(b) of the Exchange Act, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5.

During the investigation into Xerox's accounting practices, Romeril was represented by experienced securities-law counsel—one had served as the Director of the Commission's Division of Enforcement, another would later serve as the Commission's acting General Counsel. JA2, 72. Romeril submitted a Wells filing and discussed settlement with Commission counsel. Those negotiations eventually led to Romeril making an offer of settlement, which the Commissioners accepted.

Romeril signed a consent, with his attorneys' approval as to form, in May 2003. JA72. In the consent, Romeril admitted "the Court's jurisdiction over [him] and over the subject matter of this action." JA67, ¶ 1. "Without admitting or denying the allegations of the complaint (except as to personal and subject matter jurisdiction),"

he agreed to be enjoined against violating the antifraud provisions of the securities laws (as well as other statutes), to pay disgorgement of $4.2 million and a penalty of $1 million, and to be subject to an officer/director bar. JA67-68, ¶ 2. Romeril agreed not to seek reimbursement for the penalty, JA68, ¶ 3, but Xerox reimbursed Romeril for "disgorgement, interest, and legal fees." Xerox, 2003 Annual Report, at 73 (Mar. 2004), https://www.xerox.com/downloads/usa/en/i/ir_2003_Annual_Report.pdf.

Romeril made several representations and waived several rights in the consent. He represented that the parties "reached a good faith settlement," that he entered "into this Consent voluntarily," and that "no threats, offers, promises, or inducement of any kind have been made by the Commission or any member, officer, employee, agent, or representative of the Commission to induce Defendant to enter into this Consent." JA69, ¶ 6; JA70, ¶ 12. He waived "the entry of findings of fact and conclusions of law," as well as "the right, if any, to appeal from the entry" of final judgment. JA69, ¶¶ 4-5. And he agreed that the consent "shall be incorporated in the Final Judgment," over which the court would retain jurisdiction. JA69, 71, ¶¶ 7, 15.

Romeril's consent contained a no-deny provision, which is distinct from the injunctive and monetary relief ordered by the court. Romeril represented that he "understands and agrees to comply with the Commission's policy 'not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegation in the complaint or order for proceedings,' 17 C.F.R. § 202.5." JA70, ¶ 11. He agreed "not to take any action or to make or permit to be

made any public statement denying, directly or indirectly, any allegation in the complaint or creating the impression that the complaint is without factual basis." *Id.* And he agreed that if he "breaches this agreement, the Commission may petition the Court to vacate the Final Judgment and restore this action to its active docket." *Id.* This provision did not affect Romeril's "testimonial obligations" or his "right to take legal or factual positions in litigation in which the Commission is not a party." *Id.*

The court entered final judgment in June 2003. JA61-66. The judgment reflected Romeril's "consent to the Court's jurisdiction" over him and the "subject matter of this action," and stated that he consented to "entry of this Final Judgment without admitting or denying the allegations of the Complaint (except as to jurisdiction, which is admitted)." JA61. The court imposed the agreed-upon injunctive and monetary relief, required Romeril to "comply with all of the undertakings and agreements" in the consent, and provided that "this Court shall retain jurisdiction" to enforce the judgment. JA61-65.

Romeril's settlement was one of several related to Xerox's accounting practices. Six executives settled for a total of $22 million. JA4 (Dkt. 4-9); Litig. Rel. No. 18174 (Jun. 5, 2003), https://www.sec.gov/litigation/litreleases/lr18174.htm. A separate consent judgment against Xerox required it to restate its financial results and pay what was then the largest corporate penalty ever imposed in a Commission action. *SEC v. Xerox*, No. 02-cv-2780, Dkt. No. 2 (S.D.N.Y. May 3, 2002); James Bandler, *Xerox Will Pay $10 Million Penalty to Settle SEC Accounting Charges*, Wall St. J., Apr. 2, 2002. The

Commission also entered into a consent judgment with Xerox's outside auditor, which paid $22 million in disgorgement, interest, and penalties. *SEC v. KPMG*, No., 03-cv-671, Dkt. No. 101 (Apr. 20, 2005). Xerox's accounting problems reverberated in Congress, whose members cited it while debating the Sarbanes-Oxley Act. *See* 148 Cong. Rec. H1550 (Apr. 24, 2002) (Rep. Bentsen) ("[T]he restatements at Xerox, Sunbeam and others are part of the corporate excesses that have occurred as a result of the exuberant nineties."); *id.* at H1586 (Rep. Dingell).

C. Sixteen years later, Romeril sought partial relief from the judgment.

In May 2019, Romeril submitted a motion pursuant to Federal Rule of Civil Procedure 60(b)(4). JA73-83. Romeril did not ask to void the entire judgment or eliminate the entire settlement. Instead, he submitted an "amended consent" that continues to "admit the Court's jurisdiction" "[w]ithout admitting or denying the allegations in the complaint," but that differs from the 2003 consent in one material respect—it omits the no-deny provision (paragraph 11 in the original). JA76-80.

The district court denied Romeril's motion "for two independent reasons." JA90. First, the motion was untimely—even under the "lenient" time constraints for Rule 60(b)(4) motions—because the "extraordinary" sixteen-year delay was "unreasonable." JA90-91. Second, even if the motion were timely, Romeril failed to identify "a jurisdictional defect or violation of due process that would render the Judgment void for purpose of Rule 60(b)(4)," particularly when Romeril admitted—and continues to admit—jurisdiction. JA91-92.

STANDARD OF REVIEW

While the Court generally reviews Rule 60(b) motions for an abuse of discretion, the district court's ruling on Romeril's 60(b)(4) motion is reviewed de novo. *Cent. Vt. Pub. Serv. Corp. v. Herbert*, 341 F.3d 186, 189 (2d Cir. 2003).

SUMMARY OF ARGUMENT

The Court should affirm the district court's denial of Romeril's Rule 60(b)(4) motion, which seeks to line-edit his settlement in order to eliminate a material term. Even though the Supreme Court recently held that a judgment can be void under Rule 60(b)(4) for only two possible reasons—lack of jurisdiction or lack of due process—Romeril contends that Rule 60(b)(4) nonetheless allows collateral First Amendment challenges any time after judgment. Such a radical expansion of Rule 60(b)(4) would contravene controlling precedent. And it is not supported by *Crosby v. Bradstreet Co.*, 312 F.2d 483 (2d Cir. 1963), which applied the principle that courts lack jurisdiction to enjoin defamation—a concept that is doubly inapposite here because the no-deny provision is not an injunction and has nothing to do with defamation.

Applying the proper scope of Rule 60(b)(4), the district court correctly held that the consent judgment is not void because Romeril identified no jurisdictional or due process flaw. To the contrary, Romeril admitted to subject-matter and personal jurisdiction when the judgment was entered, and he continues to concede both now. Romeril received ample process before entry of the consent judgment—he participated in the Wells process before the Commission, negotiated a settlement,

appeared in district court after the complaint was filed, and enjoyed the opportunity to contest both jurisdiction and liability, but conceded the former and waived his right to contest the latter at trial when he signed the consent in order to end the case.

The district court also properly denied the motion for the independent reason that it was untimely. This Court has been lenient about what "reasonable time" means for Rule 60(b)(4) motions, but its leniency has limits. The district court justifiably declined to excuse Romeril's decision to wait sixteen years before locating a constitutional problem in his consent, without explanation and after the passage of time likely impaired the Commission's ability to litigate.

While the only issue legitimately on appeal is the correctness of the Rule 60(b)(4) ruling, Romeril dedicates most of his brief to his First Amendment arguments, which the district court never reached and which are not properly before this Court. The Court should not address Romeril's constitutional arguments, but they lack merit in any event because First Amendment rights, like other constitutional rights, may be waived as part of a settlement with the government. Romeril focuses on decisions involving speech restraints imposed against the will of the speaker, which are constitutionally distinct from a voluntary agreement not to speak that is part of a consent judgment. If the Court examines Romeril's waiver of his First Amendment rights, his voluntary relinquishment of his rights should be upheld because, under the circumstances of this case, the public interest in maintaining the no-deny provision significantly outweighs Romeril's interest in disregarding the waiver.

ARGUMENT

I. The district court properly denied Romeril's 60(b)(4) motion because Romeril failed to demonstrate that the 2003 judgment is void.

A. A judgment is void only if there is a jurisdictional error or a due process violation.

Romeril's distorted view of Rule 60(b)(4) conflicts with the Supreme Court's unanimous decision articulating the only circumstances where a judgment may be void. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270-71 (2010). "A void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final," but "[t]he list of such infirmities is exceedingly short; otherwise, Rule 60(b)(4)'s exception to finality would swallow the rule." *Id.* at 270; 12 Moore's Federal Practice § 60.44[1][a] (2020) ("The concept of void judgments is narrowly construed."). This "exceedingly short" list has just two entries: "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.

Consistent with *Espinosa*, this Court has long held that a judgment is void "only 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." *City of N.Y. v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 138 (2d Cir. 2011); *Grace v. Bank Leumi Tr. Co.*, 443 F.3d 180, 193 (2d Cir. 2006); *In re Texlon Corp.*, 596 F.2d 1092, 1099 (2d Cir. 1979). A mere "error of law in determining whether [a court] has jurisdiction," let

alone a substantive error on the merits, does not render the judgment "void." *Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1986). To the contrary, "a judgment may be declared void for want of jurisdiction only when the court plainly usurped jurisdiction, or, put somewhat differently, when there is a total want of jurisdiction and no arguable basis on which it could have rested a finding that it had jurisdiction." *Cent. Vt.*, 341 F.3d at 190 (internal quotation marks omitted).

Romeril insists that Rule 60(b)(4) relief "is not limited" to these "two categories." Br. 17. But the law is clear—Rule 60(b)(4) applies "only" in the "rare instances" that one of them applies. *Espinosa*, 559 U.S. at 271. And courts have rejected invitations to "expand the universe of judgment defects that support Rule 60(b)(4) relief," declining to void judgments even if they contain non-jurisdictional errors. *Espinosa*, 559 U.S. at 270, 273; *Cent. Vt.*, 341 F.3d at 190.

B. The *Crosby* decision, which concerned a court's jurisdiction to enjoin defamation, does not apply here.

Romeril and his supporting amici rely heavily on *Crosby v. Bradstreet Co.,* 312 F.2d 483 (2d Cir. 1963), but the district court correctly held that "*Crosby* is of no assistance" here because, unlike this case, *Crosby* concerned a court's (1) jurisdiction (2) to enjoin (3) defamation. JA93. Stanford Crosby was acquitted of fraud, but his brother and partner Lloyd pleaded guilty. *Id.* at 484. Bradstreet published a credit report falsely stating that both men had been found guilty. *Id.* Stanford then sued Bradstreet for libel, and settled via a stipulated order that enjoined Bradstreet "from

publishing any report" about Stanford, Lloyd, or their business. *Id.* at 485. Thirty years later, Stanford sought to vacate the order because the absence of a Bradstreet report made it hard to obtain credit. *Id.* at 484. Lloyd opposed even though he was not a party to the suit, and the district court denied the motion. *Id.* This Court reversed, citing *American Malting Co. v. Keitel*, 209 F. 351 (2d Cir. 1913), and stating that the district court "was without power" to "enjoin publication of information about a person" in an order "enforceable through the contempt power." *Id.* at 485.

Crosby applied the rule that a court in "equity had no jurisdiction to enjoin a libel." *Am. Malting*, 209 F. at 354-57. This rule concerns the *power* of courts "to enjoin defamation"—a defect in jurisdiction over a category of cases that can render a judgment void under Rule 60(b)(4). *Hope v. Hearst Consol. Publ'ns*, 294 F.2d 681, 691 (2d Cir. 1961); *Bynog v. SL Green Realty Corp.*, 2005 U.S. Dist. Lexis 34617, at *8 (S.D.N.Y. Dec. 22, 2005).[1] This defamation-specific rule rests "in large part on the

[1] *Accord Francis v. Flinn*, 118 U.S. 385, 389 (1886) ("If a court of equity could interfere and use its remedy of injunction in [libel] cases, it would draw to itself the greater part of the litigation properly belonging to courts of law."); *Kidd v. Horry*, 28 F. 773, 776 (3d Cir. 1886) ("[T]he court of chancery will not interfere, by injunction, to restrain the publication of a libel."); *Baltimore Car-Wheel Co. v. Bemis*, 29 F. 95, 95 (1st Cir. 1886) ("There is no jurisdiction in a court of equity to enjoin libel."); *Robert E. Hicks Corp. v. Nat'l Salesmen's Training Ass'n*, 19 F.2d 963, 964 (7th Cir. 1927) ("The general rule is that a court of equity will not enjoin the publication of a libel."); *Oil Conservation Eng'g Co. v. Brooks Eng'g Co.*, 52 F.2d 783, 785-86 (6th Cir. 1931) ("A court of equity has no jurisdiction to enjoin a mere slander or libel."); *Organovo Holdings v. Dimitrov*, 162 A.3d 102, 115-18 (Del. Ch. 2017) ("Historically, equity declined to exercise jurisdiction over a claim for defamation based on a prayer for injunctive relief.").

principle that injunctions are limited to rights that are without an adequate remedy at law, and because ordinarily libels may be remedied by damages, equity will not enjoin a libel absent extraordinary circumstances." *Metro. Opera Ass'n v. Local 100, Hotel Emples. & Rest. Emples. Int'l Union*, 239 F.3d 172, 177 (2d Cir. 2001); *Cmty. for Creative Non-Violence v. Pierce*, 814 F.2d 663, 672 (D.C. Cir. 1987) ("The usual rule is that equity does not enjoin a libel or slander and that the only remedy for defamation is an action for damages.") (internal quotation marks omitted). While there has been debate about the rule's continuing vitality, there is no question that it does not apply outside of private defamation suits. *Kramer v. Thompson*, 947 F.2d 666, 670-71 & n.13 (3d Cir. 1991); *Greenberg v. Burglass*, 229 So.2d 83, 86 (La. 1969).[2]

In light of this context, the district court appropriately described *Crosby* as turning "on a unique jurisdictional issue" that is not present here. JA93. Romeril consented to a judgment resolving a government action to enforce the securities laws, not a private defamation suit. The no-deny provision he agreed to is not an injunction, despite Romeril's labors to portray it otherwise. Unlike the part of the judgment that "permanently restrains and enjoins" Romeril, the no-deny provision does not use the words "restrain" or "enjoin," but rather states that Romeril "agrees" not to deny the allegations in the complaint and that if he "breaches this agreement,

[2] Doug Rendleman, *The Defamation Injunction Meets the Prior Restraint Doctrine*, 56 SAN DIEGO L. REV. 615 (2019); David S. Ardia, *Freedom of Speech, Defamation, and Injunctions*, 55 WM. & MARY L. REV. 1 (2013); Estella Gold, *Does Equity Still Lack Jurisdiction to Enjoin a Libel or Slander?* 48 BROOK. L. REV. 231 (1982).

the Commission may petition the Court to vacate the Final Judgment and restore this action to its active docket." *Compare* JA61-63 *with* JA70.

This difference between "enjoins" and "agrees" is crucial in terms of *Crosby*'s jurisdictional holding. Injunctions against defamation expose defendants to contempt for speech that a jury has not yet found to be defamatory, as opposed to deferring a judgment's effect on speech "until all avenues of appellate review have been exhausted." *Metro. Opera*, 239 F.3d at 176 (internal quotations marks omitted). By contrast, if Romeril denies the allegations, the Commission cannot seek contempt—it can only move to vacate the judgment and return the parties to their pre-settlement positions. *See United States v. Volvo Powertrain Corp.*, 758 F.3d 330, 343 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 2833 (2015) ("'[I]f parties to a consent decree wish to cabin the district court's equitable discretion by stipulating the remedies for breach, they are free to do so,' and 'the stipulation will fix the measure of relief to which the victim of a breach is entitled.'"), quoting *Cook v. City of Chicago*, 192 F.3d 693, 698 (7th Cir. 1999).

Romeril incorrectly insists that *Crosby* allows litigants to invoke Rule 60(b)(4) to launch any constitutional challenge any time after entry of judgment. Br. 18-22. But courts have refused to transform Rule 60(b)(4) into such a vehicle for collateral attacks on the substance of judgments. This Court, for instance, held that a judgment was not "void because the stipulation of settlement underlying it is contrary to state law." *Congregation Mischknois Lavier Yakov, Inc. v. Bd. of Trs. for Vill. of Airmont*, 301 Fed. Appx. 14, 15 (2d Cir. 2008) (summary order). It explained that Rule 60(b)(4) applies

"only if the court that rendered it lacked jurisdiction" or "acted in a manner inconsistent with due process" and that there were no cases "stand[ing] for the proposition" that a settlement's inconsistency with substantive law "violates a party's due process rights and is therefore subject to attack under Rule 60(b)(4) as void." *Id.* at 15-16. Similarly, the Ninth Circuit rejected a Rule 60(b)(4) challenge to a consent decree on First Amendment grounds, holding that even though the consent decree may have contained error because it enjoined protected speech (as well as unprotected obscenity), the judgment was not void when there was no claimed "infirmity in the jurisdiction of the court that entered the consent decree" or lack of due process. *United States v. Berke*, 170 F.3d 882, 883 (9th Cir. 1999).

Romeril's erroneous interpretation of *Crosby* is not "the prevailing law," and the cases he cites do not support his spurious claim. Br. 16-18, 24 & nn. 4, 6. In *Mickalis,* this Court affirmed the *denial* of a Rule 60(b)(4) motion and addressed only "voidness for lack of personal jurisdiction" in the context of default judgments. *Id.* at 138; *see also Klapprott v. United States*, 335 U.S. 601, 609 (1949) (holding that a default judgment was void where the defendant did not have an opportunity to participate in proceedings against him). While the Tenth Circuit cited *Crosby* in a *dicta* footnote in *V.T.A., Inc. v. Airco, Inc.*, it held that "the concept of setting aside a judgment on voidness grounds is narrowly restricted," and it affirmed the *denial* of a Rule 60(b)(4) motion where there was no issue regarding jurisdiction or due process. 597 F.2d 220, 224-25 (10th Cir. 1979); *see also Simer v. Rios*, 661 F.2d 655, 663 (7th Cir. 1981)

(judgment was void because "entry of the settlement decree without notice to putative class members violated the due process rights of the class members"). Far from supporting Romeril's attempt to use Rule 60(b)(4) as a tool to raise substantive issues long after entry of judgment, the court in *V.T.A.* emphasized that if "the judgment was erroneous in the first instance, the proper procedure for review would have been by direct appeal, not collateral attack." 597 F.2d at 225-26.

Even if *Crosby* could be construed as something more than a ruling about jurisdiction to enjoin defamation, it must be juxtaposed with *Espinosa*, which is why the district court aptly questioned whether "*Crosby* survives *Espinosa*." JA93. Whatever the contours of Rule 60(b)(4) fifty years ago, the Supreme Court left no doubt in 2010 that "void" is narrowly construed, that a judgment is not void even if it is later deemed erroneous, and that there are only two reasons to void a judgment: lack of jurisdiction or a lack of due process. 559 U.S. at 271, citing *United States v. Boch Oldsmobile, Inc.,* 909 F.2d 657, 661 (1st Cir. 1990).

The effect of *Espinosa* on *Crosby* was addressed by the Sixth Circuit in a ruling that rejected an argument nearly identical to Romeril's. *See* JA93, citing *Northridge Church v. Charter Twp. of Plymouth*, 647 F.3d 606 (6th Cir. 2011). In *Northridge*, a church claimed that a town's zoning restrictions violated the First Amendment, and the parties settled the action by entering into a consent decree that allowed the church to expand its facilities, albeit with restrictions. 647 F.3d at 609-10. Years later, the church moved for Rule 60(b)(4) relief, arguing that the judgment was void because the

agreed-upon restrictions were unconstitutional. The court, citing *Espinosa*, denied relief because the plaintiff did "not rely on either of the two bases that would allow it to challenge the consent judgment under Rule 60(b)(4)—a lack of jurisdiction or a violation of due process in the judgment's issuance." *Id.* at 612. The church cited *Crosby*, but the court distinguished it as resting "on a unique *jurisdictional issue*"—"equity will not enjoin the publication of a libel"—"that rendered the court entering the order without power to do so." *Id.* (internal quotation marks omitted). Because "no analogous issue prohibit[ed] jurisdiction" over the consent judgment between the church and the town, the court properly declined to void the judgment. *Id.*

The Fifth Circuit similarly applied *Espinosa* in a decision that Romeril misunderstands. Br. 19, citing *Brumfield v. La. Bd. of Educ.*, 806 F.3d 289 (5th Cir. 2015). In *Brumfield*, intervenors invoked Rule 60(b)(4) to vacate an order that modified and expanded the reach of a consent decree entered forty years earlier—the original 1975 decree concerned racial discrimination in *private* schools, but the 2014 order enlarged the decree to cover *public* schools as well. 806 F.3d at 292-93. Consistent with *Espinosa*, the Fifth Circuit stated that an order "is void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or it acted in a manner inconsistent with due process of law." *Id.* at 298 (internal quotation marks omitted). The court held, however, that the order expanding the consent decree was "void for lack of subject matter jurisdiction" because it was "outside the scope of the district court's continuing jurisdiction" established in 1975. *Id.*

Brumfield did not endorse using Rule 60(b)(4) to assert any constitutional claim any number of years after judgment. Nor did the court void the entire consent decree; the effect of its ruling was to vacate the 2014 order and revert the decree back to its original 1975 boundaries. At most, *Brumfield* stands for the proposition that Rule 60(b)(4) relief may be appropriate in institutional litigation when a court purports to use its continuing jurisdiction to address matters beyond the scope of the original judgment and the original exercise of its jurisdiction. *Id.* at 301-03. This case is not remotely similar—it is not as if the Commission, having invoked jurisdiction under the securities laws, asked the court, decades later, to modify the judgment to cover Romeril's compliance with the banking laws.

Romeril (at 19) misreads the discussion in *Brumfield* about whether *Espinosa* "definitively interpreted" the rule that "a judgment is void" only "in the exceptional case" where the court "'lacked even an "arguable basis" for jurisdiction.'" 806 F.3d at 301, quoting *Espinosa*, 559 U.S. at 271. The "arguable basis" "rule" is the idea that "'[t]otal want of jurisdiction' must be distinguished from an error in the exercise of jurisdiction.'" *Espinosa*, 559 U.S. at 271, quoting *Boch*, 909 F.2d at 661-62. As in *Espinosa*, there is "no occasion" in this case "to engage in such an 'arguable basis' inquiry or to define the precise circumstances in which a jurisdictional error will render a judgment void" because Romeril does not identify *any* defect in the district court's exercise of its power in 2003. *Espinosa*, 559 U.S. at 271. And until the Supreme Court rules otherwise, in this circuit, "a court will be deemed to have plainly

usurped jurisdiction only when there is a 'total want of jurisdiction' and no arguable basis on which it could have rested a finding that it had jurisdiction." *Nemaizer*, 793 F.2d at 65, cited by *Espinosa*, 559 U.S. at 271.

C. Romeril admitted in 2003—and continues to concede—that the district court properly exercised jurisdiction.

Under *Espinosa* and this Court's precedent, Romeril's consent judgment is not void for lack of subject-matter or personal jurisdiction. The district court had subject-matter jurisdiction pursuant to Sections 21 and 27 of the Exchange Act, 15 U.S.C. 78u and 78aa, as well as 28 U.S.C. 1331. In 2003, Romeril admitted as much—he consented to "the Court's jurisdiction over Defendant and over the subject matter of this action." JA67; JA61 (stating that Romeril "entered a general appearance" and "consented to the Court's jurisdiction over Defendant and the subject matter of this action"). Sixteen years later, Romeril repeats this admission, as he affirmatively *invoked* the district court's jurisdiction by asking the court to enter a "proposed amended consent" in which he once more concedes "the Court's jurisdiction over the Defendant and over the subject matter of this action." JA76; *see also* Br. 1, 20.

Despite his admission of jurisdiction, which is fatal to his Rule 60(b)(4) motion, Romeril contends that the judgment is still void because courts lack jurisdiction if an order is later deemed to be "unconstitutional." Br. 21. The Supreme Court disagrees; it has clarified that "jurisdiction" refers to "a court's adjudicatory capacity," *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011), namely its "statutory or constitutional *power* to

adjudicate the case," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). *Accord* Black's Law Dictionary (11th ed. 2019) (jurisdiction is the "legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it"). Thus, "[a] lack of subject-matter jurisdiction for the purpose of making a judgment void means a court's lack of jurisdiction over an entire category of cases, not whether a court makes a proper or improper determination of subject-matter in a particular case." 12 Moore's Federal Practice, Civil § 60.44[2][a] (2019). Romeril does not seriously question the "court's competence to adjudicate a particular category of cases," namely securities-law enforcement actions, because he asks the district court to continue exercising jurisdiction over *this* securities-law enforcement action. *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 316 (2006).

Espinosa confirms that, for Rule 60(b)(4) purposes, there is a dispositive difference between a court lacking power to enter an order and a court entering an erroneous order. In *Espinosa*, the Court found that the lower court *had* committed "a legal error," but nonetheless held that the judgment was not void "'simply because it is or may have been erroneous.'" 559 U.S. at 270-71, quoting *Hoult v. Hoult*, 57 F.3d 1, 6 (1st Cir. 1995); *accord Texlon*, 596 F.2d at 1099 ("'[A] judgment is not void merely because it is erroneous.'"). Rather, only an error that goes to a court's power to hear a case—regardless of whether its ruling is substantively incorrect—justifies relief under Rule 60(b)(4). Romeril identifies no such error here.

The district court did not lack jurisdiction on Article III standing grounds, as one amicus (CEI) contends (in an argument that not even Romeril makes). CEI does not cite any decision holding that a federal agency lacks standing to bring an action to enforce the laws that Congress has empowered it to enforce. None exists because when an agency commences an action in the public interest pursuant to express statutory authority, there is a "case or controversy"—in this instance, the case or controversy concerns the allegations that Romeril violated the securities laws.

CEI acknowledges the Commission's "unique claim to standing" as a sovereign law enforcement agency, CEI Br. 8, but then posits that standing evaporates unless every aspect of a consent judgment is expressly authorized by statute. CEI provides no support for this bewildering proposition,[3] which is unsurprising because "[w]hen Congress invests an agency with enforcement and investigatory authority, it is not necessary to identify explicitly each and every technique that may be used in the course of executing the statutory mission." *Dow Chem. Co. v. United States*, 476 U.S.

[3] CEI relies instead on inapposite cases involving: the standing of private plaintiffs, *e.g.*, *Town of Chester v. Laroe Estates*, 137 S. Ct. 1645 (2017); *Hollingsworth v. Perry*, 570 U.S. 693 (2013); sovereign immunity, where the government is a defendant; *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); the standing of "a single chamber of a bicameral legislature" to appeal a ruling "separately from the State of which it is a part," *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019); the FDIC's standing when acting as a receiver for a bank and not in an enforcement capacity, *FDIC v. Grella*, 553 F.2d 258 (2d Cir. 1977); and the federal office that has statutory authority to represent the United States in the Supreme Court, *United States v. Providence Journal Co.*, 485 U.S. 693 (1988) (confirming a "unique" sovereign interest under Article III to enforce the law but dismissing a writ of certiorari because only the Solicitor General, not a special prosecutor, can seek review in the Supreme Court).

227, 233 (1986). Moreover, there is a distinction between "[s]ubject-matter jurisdiction," which "refers to a tribunal's power to hear a case," and the question of "whether the allegations the plaintiff makes entitle him to relief." *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 254 (2010) (internal quotation marks omitted); *see also SEC v. Sloan*, 436 U.S. 103, 117 (1978) (holding, without mentioning standing, that the Commission exceeded its authority to issue suspension orders).

CEI's standing theory would prove too much if accepted. CEI Br. 11-12. Agencies, including the Commission, often settle actions in the absence of statutory language specifically authorizing those settlements. *See Ass'n of Irritated Residents v. EPA*, 494 F.3d 1027, 1031 (D.C. Cir. 2007) (applying the ruling in *Heckler v. Chaney*, 470 U.S. 821, 830 (1985), about matters committed to agency discretion to "an agency's decision to settle an enforcement action"). Yet, in CEI's view, a court loses jurisdiction if the Commission settles and seeks waivers because no statute expressly authorizes those actions. Similarly, the Justice Department would not be able to resolve Fair Housing Act cases through consent decrees that require defendants, as part of the ordered relief, to issue antidiscrimination policies and undergo training—as it has been doing for decades—because the housing laws do not expressly mention consent decrees or that precise relief. *See* https://www.justice.gov/crt/housing-and-civil-enforcement-section-cases-1 (listing dozens of such consent decrees). This Court should decline the invitation to allow such a warped version of standing to diminish the availability of settlements, in contravention of the general federal policy

favoring settlement as a way to lessen docket congestion and make the judicial system more efficient. *Marek v. Chesny*, 473 U.S. 1, 10 (1985); *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187, 202 (2d Cir. 2006); *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005); *Jalbert v. SEC*, 945 F.3d 587, 596 n.5 (1st Cir. 2019).

D. Romeril received due process because he had notice of the enforcement action and an opportunity to defend himself.

Romeril has not identified a due process violation that would justify voiding the consent judgment under Rule 60(b)(4). The "constitutional right to due process * * * requires 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.'" *Espinosa*, 559 U.S. at 272, quoting *Mullane v. Cent. Hanover Bank & Trust*, 339 U.S. 306, 314 (1950). Thus, a judgment may be void when there is a "failure to serve a defendant with process or give adequate notice to class members," 12 Moore's Federal Practice Civil § 60.44[4], or when a judgment is impermissibly based on a stipulation made by a corporation appearing pro se, *Grace*, 443 F.3d at 192-93. But there is generally not "a 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." 12 Moore's Federal Practice Civil § 60.44[4]; *Espinosa*, 559 U.S. at 276 ("Where, as here, a party is notified of a plan's contents and fails to object to confirmation of the plan before the time for appeal expires, that party has been afforded a full and fair opportunity to litigate, and

the party's failure to avail itself of that opportunity will not justify Rule 60(b)(4) relief.").

Romeril was not "deprived of notice" or "of an opportunity to be heard." JA92. Before the matter arrived in district court, Romeril utilized the Wells process to argue to the Commissioners why no enforcement action should be brought against him. After the Commissioners approved the filing of a complaint, Romeril appeared in district court and, "[w]hile represented by counsel, he executed the Consent and waived his right to trial." JA92. "Had he chosen to contest" the claims against him, "he would have been able to present his defense to a jury and appeal any adverse verdict." *Id.* But he opted for a different path, and he does not—and cannot—claim "any violation of due process that deprived [him] of the opportunity to be heard." *SEC v. Boock*, 750 Fed. Appx. 61, 62 (2d Cir. 2019).

Instead, Romeril offers an array of specious arguments, two of which were forfeited and all of which lack merit.[4] Romeril argues that the consent judgment "violates due process because it is unconstitutionally vague." Br. 46. But even if there were vagueness in the contractual language to which he agreed, it would not indicate that Romeril was deprived of the opportunity to litigate. Romeril does not

[4] The "due process" argument in Section IV of Romeril's brief (Br. 46-47) was raised below, *see* Dkt. 24, at 15-16, but the arguments in Sections V-VI (Br. 47-52) were not. "It is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal." *Tannerite Sports, LLC v. NBCUniversal News Grp.*, 864 F.3d 236, 252-53 (2d Cir. 2017) (internal quotation marks omitted).

identify any decision granting Rule 60(b)(4) relief for vagueness, let alone one that voided a judgment after the defendant appeared in court, consented to jurisdiction, and agreed to the judgment. *See Espinosa*, 559 U.S. at 276 (denying relief when party was "afforded a full and fair opportunity to litigate"). Instead, he cites cases striking down *statutes* for vagueness reasons on direct review, as opposed to an application of vagueness law on post-judgment, collateral review of a judicial order. Br. 46.

As to Romeril's forfeited arguments, he claims that the consent judgment should be vacated because the Commission lacked authority to issue the "no-deny" policy. Br. 47-49. But the Commission's announcement of its policy in 1972 has no bearing on whether Romeril received notice and opportunity to defend himself in 2003. In any event, Romeril's apparent facial challenge to Rule 202.5(e) fails because the policy simply informs litigants that the Commission will not agree to a settlement without admissions if a defendant wishes to deny the allegations in the complaint. 17 C.F.R. 202.5(e). Rule 202.5(e) does not "bind anyone," Br. 47—the policy does not require defendants to settle or limit their ability to litigate a matter through trial.[5]

[5] Congress authorized the Commission to adopt rules that are "necessary or appropriate to implement" the securities laws and "for the execution of the functions vested in it," including investigations and litigation. 15 U.S.C. 78w(a). Even if Romeril could initiate an APA challenge to Rule 202.5(e), fifty years after its entry, on the theory that the Commission did not engage in notice-and-comment rulemaking, such a procedural argument would fail because the no-deny policy fits within the exemption from notice and comment for "general statements of policy and rules of agency organization, procedure, or practice." 5 U.S.C. 553(b)(A).

Romeril next suggests that because his consent has no end date, it somehow raises due process concerns. Br. 49-51. But even if the consent's duration implicated the type of due process issues that are pertinent to Rule 60(b)(4), Romeril entered into the "[c]onsent voluntarily," JA69—with the guidance of counsel, JA72—and the absence of an end date was no surprise, as it was clear from the document's face.

Finally, Romeril asserts that the no-deny provision is unfair because if he had been hypothetically charged with violating a different law, and then that other law changed, he would "be forever bound to his initial conviction in the court of public opinion." Br. 50. Romeril's hypothetical is beside the point. Rule 60(b) authorizes relief from judgments issued by courts of law, not from any sentiments found in the "court of public opinion." And the possibility of a change in a law that he was not alleged to have violated has no bearing on whether he received due process in 2003 when the court entered the judgment, particularly when Romeril appeared and consented to the judgment.

In any event, Romeril was not "charged for issuing public forecasts." Br. 50. He was charged with, and continues to consent to an injunction against, violating the antifraud and reporting provisions of the Exchange Act. *Compare* JA54-59 *with* JA61-63 *with* JA76-77. There was "fair notice of illegality," Br. 52, because making materially false or misleading statements in financial reports was just as illegal in 2003 as it was in 1934—and as it is now.

II. The district court properly held, as an independent ground for denial, that Romeril did not file his Rule 60(b)(4) motion within a reasonable time.

In light of Romeril's particular circumstances, the district court did not err in holding that his "extraordinary" sixteen-year delay in seeking relief was an "independent" ground for denial. JA90-91. While Rule 60(c)(1) requires that Rule 60(b)(4) motions "be made within a reasonable time," this Court has "been exceedingly lenient" and has stated that "a motion to vacate *a default judgment* as void may be made at any time." *Grace*, 443 F.3d at 190 (emphasis added); *"R" Best Produce, Inc. v. DiSapio*, 540 F.3d 115, 123-24 (2d Cir. 2008) (default judgment). Still, leniency has limits. JA90; *State St. Bank & Tr. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 179 (2d Cir. 2004) (citing the "any time" language but denying a Rule 60(b)(4) motion as untimely); *Beller & Keller v. Tyler*, 120 F.3d 21, 24 (2d Cir. 1997) (noting leniency but remarking that the court "probably should have just denied the motion as untimely").

One such limit is that "Rule 60(b)(4) does not provide a license for litigants to sleep on their rights." *Espinosa*, 559 U.S. at 275. Rather, "Rule 60(b)(4) strikes a balance between the need for finality of judgments and the importance of ensuring that litigants have a full and fair opportunity to litigate a dispute." *Id.* at 276. The Supreme Court's cautionary words about balance are particularly salient here because Romeril seeks an expansion of Rule 60(b)(4) to cover alleged substantive errors in judgments, which would permit non-jurisdictional collateral attacks on judgments in perpetuity. Unlike in default-judgment situations where a litigant may be coming to a

court for the first time, years after judgment and having never had a chance to litigate, Romeril had "actual notice" and an "opportunity to litigate," but did not "avail [him]self of that opportunity." *Id.* In situations like Romeril's, it makes little sense to permit a Rule 60(b)(4) challenge years after judgment, particular when the law is that if "the parties *could* have challenged the court's power to hear a case, then *res judicata* principles serve to bar them from later challenging it collaterally." *Nemaizer,* 793 F.2d at 65, *citing Ins. Corp. of Ireland v. Compagnie Des Bauxites*, 456 U.S. 694, 702 n.9 (1982) (holding that when a party had an opportunity to litigate jurisdiction, it may not "reopen that question in a collateral attack upon an adverse judgment.").

Romeril's sixteen-year gap between consent judgment and motion should not be excused. Romeril could have litigated jurisdiction, but he appeared in the case, conceded jurisdiction (and continues to do so), and agreed to the no-deny provision. Romeril offers no reason why he waited until 2019—after memories may have faded and evidence may have been lost—to invoke the First Amendment.

Romeril rhetorically asks why it should matter whether he is raising his "constitutional claims within 60 days, 6 years, or a decade." Br. 15. It matters because the passage of time has likely compromised the Commission's ability to try the case if the settlement were materially altered and the Commission sought reinstatement to the active docket. And it matters because of the complexity of imposing an amended judgment on the Commission that features different terms without any opportunity for renegotiation. Romeril's "timing does not matter"

argument ultimately backfires because any constitutional issue was present the moment Romeril signed the consent—as well as after "60 days" and "6 years" and "a decade"—yet he did nothing until 2019, the quintessence of sleeping on one's rights. *See Espinosa*, 559 U.S. at 275. This Court has been "interested less in the number of years from the time of judgment, than * * * what has happened in between," and Romeril's silence about his silence underscores the correctness of the district court's decision to deny his motion as untimely. *Grace*, 443 F.3d at 191.

* * *

The only issue properly on appeal is the correctness of the district court's denial of the Rule 60(b)(4) motion. Romeril acknowledges that the district court did not reach his constitutional claims, but he nonetheless dedicates most of his brief to discussing them. Br. 7 ("Sections II-VII will address the constitutional doctrines that were not addressed by the district court."). Similarly, his supporting amici focus on issues that the district court never addressed. But it "is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). If this Court were to reverse, it is the "distinctly preferred practice to remand" the constitutional issues "for consideration by the district court in the first instance." *Schonfeld v. Hilliard*, 218 F.3d 164, 184 (2d Cir. 2000). To the extent the Court delves into the First Amendment arguments, however, the Commission explains next why they lack merit.

III. The consent judgment does not violate the First Amendment because Romeril voluntarily waived his rights and the waiver should be upheld.

A. Romeril agreed not to deny the allegations in the complaint, waiving any First Amendment rights.

Romeril sidesteps the dispositive difference between an agreement to be silent and a restraint imposed against the will of the silenced party. Just as it is "settled that plea bargaining does not violate the Constitution even though a guilty plea waives important constitutional rights," it is settled that parties can waive their constitutional rights when voluntarily resolving other types of litigation. *Newton v. Rumery*, 480 U.S. 386, 393 (1987); *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 184-87 (1972). In *Rumery*, the Court upheld the enforcement of an agreement in which a defendant released his right to bring a Section 1983 action against government actors in exchange for the dismissal of pending criminal charges. 480 U.S. at 391-92. The Court rejected the contention that such agreements are necessarily invalid simply because they require "difficult choices that effectively waive constitutional rights." *Id.* at 393. The Court saw "no reason to believe that [the agreements at issue] pose a more coercive choice than other situations," and it declined to establish "a per se rule of invalidity." *Id.* at 394-95; *see also INS v. St. Cyr*, 533 U.S. 289, 321-22 (2001) (describing plea agreements as "a *quid pro quo* between a criminal defendant and the government"—"[i]n exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial)").

Relinquishment of constitutional rights, including First Amendment rights, occurs in many governmental contexts. In addition to *Rumery*, courts "have routinely enforced voluntary agreements with the government in which citizens have, for example, given up * * * the right to speak regarding government secrets through confidentiality agreements, *see Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam); [and] the right to a jury trial through agreements to submit litigable disputes exclusively to arbitration, *see AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648-49 (1986)." *Lake James Cmty. Volunteer Fire Dep't v. Burke Cty.*, 149 F.3d 277, 280 (4th Cir. 1998) (internal citations shortened). Similarly, courts have rejected First Amendment claims by cable television providers who effectively bargained away some free-speech rights by entering into franchise agreements with municipalities that limited the providers' ability to engage in commercial speech. *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310, 1315 (8th Cir. 1991); *Erie Telecomms. v. City of Erie*, 853 F.2d 1084, 1096 (3d Cir. 1988) (holding that a cable provider waived First Amendment rights when it signed a franchise agreement with a municipality).

For purposes of waiving First Amendment rights, consent decrees are not treated differently than other types of agreements. A litigant may waive speech rights as part of a settlement so long as "the waiver is knowing, voluntary, and intelligent." *Leonard v. Clark*, 12 F.3d 885, 889 (9th Cir. 1993). In one example from this Court, the government and a union entered into a consent decree to resolve a case that placed conditions on the publication of materials for union elections. *United States v.*

Int'l Brotherhood of Teamsters, 931 F.2d 177, 187 (2d Cir. 1991). The Court rejected the union's subsequent challenge to the judgment, holding that even if the decree encroached upon First Amendment rights against compelled speech, the union waived any constitutional objection by consenting. *Id.* at 187-88; *see also Ronnie Van Zant, Inc. v. Cleopatra Records, Inc.*, 906 F.3d 253, 257 (2d Cir. 2018) (stating that "parties are free to limit by contract publication rights otherwise available" but vacating an injunction that restricted "an entity that was not a party to the contract").

Other courts agree that a party to a consent decree "is in no position to claim that such decree restricts his freedom of speech" because "[h]e has waived his right and given his consent to its limitations." *In re George F. Nord Bldg. Corp.*, 129 F.2d 173, 176 (7th Cir. 1942). The Third Circuit declined to vacate a consent decree after one of the parties later argued that the judgment was unconstitutional, holding that the challenging party "voluntarily agreed" to "abide by the very provisions that it now challenges as unconstitutional." *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 673 F.3d 192, 206-07 (3d Cir. 2012). The Ninth Circuit enforced a consent decree in which the parties agreed to a non-disparagement clause, rejecting the notion that the provision unconstitutionally restricted the right to file safety reports. *Malem Med., Ltd. v. Theos Med. Sys.*, 761 Fed. Appx. 762, 764-65 (9th Cir. 2019). And even the Fourth Circuit case on which Romeril and his amici rely states that it "is well-settled that a person may choose to waive certain constitutional rights pursuant to a contract with

the government." *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 223 (4th Cir. 2019), citing *Lake James*, 149 F.3d at 280.

In resisting this precedent, Romeril falls back on *Crosby*. But to the extent *Crosby* can be understood to mean that waiver is irrelevant to the constitutional analysis, 312 F.2d at 485, it is inconsistent with *Rumery,* which rejected a "*per se* rule" against voluntary relinquishment of rights, 480 U.S. at 394. *Accord Lake James*, 149 F.3d at 280 ("[S]imply because a contract includes the waiver of a constitutional right does not render the contract *per se* unenforceable."); Amicus Br. of Garfield et al. at 11-14 (acknowledging that there is no *per se* rule against waivers of constitutional rights). *Crosby* also pre-dates precedent favoring settlements and consent decrees, which necessarily involve waivers of procedural rights. *E.g.*, *Marek*, 473 U.S. at 10; *ITT*, 420 U.S. at 235-36.

In exchange for certain advantages of settling, Romeril relinquished numerous rights. He agreed not to "make or permit to be made any public statement denying, directly or indirectly, any allegation in the complaint." JA70. He gave up his right to a trial and an appeal. JA69; *see Armour*, 402 U.S. at 682 ("Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written * * * ."). And he represented that he "voluntarily" waived these rights and that no "threats, offers, promises, or inducements of any kind have been made." JA69.

Romeril was under no obligation to waive these rights, making his consent a far cry from judicial orders or statutes imposing silence. *See* CEI Br. 15, 22 (analogizing a no-deny clause to the Alien Sedition Act of 1798, which made it a crime, punishable by imprisonment, to defame the government). The Commission's policy regarding denials, as stated in Rule 202.5(e), was clear when Romeril negotiated a settlement. Romeril did not have to sign a consent to resolve the case—Rule 202.5(e) does not compel settlements and Romeril was free to litigate the case to trial. *See SEC v. Clifton*, 700 F.2d 744, 748 (D.C. Cir. 1983) (defendants who settle without admissions "often seek and receive concessions concerning the violations to be alleged in the complaint, the language and factual allegations in the complaint, and the collateral, administrative consequences of the consent decree"). If Romeril "felt that [his] First Amendment rights were burdened" by the consent, he "should not have bargained them away and signed the agreement." *Leonard*, 12 F.3d at 889-90. The "forum for protecting [his] free speech rights was the bargaining table, not the courtroom" sixteen years later. *Paragould Cablevision*, 930 F.2d at 1315.

Romeril implies that the costs of litigation undercut the voluntariness of his agreement. Br. 31-32, 44. But *Rumery* covered this ground when it held that waivers are not "inherently coercive" even though settling defendants often "are required to make difficult choices that effectively waive constitutional rights." 480 U.S. at 393. As the Court later said, "not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid." *Corbitt v.*

New Jersey, 439 U.S. 212, 218 (1978); *United States v. Maria*, 186 F.3d 65, 68 n.2 (2d Cir. 1999) ("[D]efendants are regularly forced to confront the choice between forgoing the exercise of legal rights and risking stiffer penalties.").

In this instance, the circumstances of Romeril's agreement reveal "a highly rational judgment" that the advantages of settlement exceeded the benefits of what he waived. *Rumery*, 480 U.S. at 394. Like the settling party in *Rumery*, Romeril was "a sophisticated businessman," the CFO of Xerox, and he had ample time to consider the agreement "before signing it." *Id.* He was represented by "experienced" counsel who approved the form of the consent. *Id.* And his lament that the costs of litigation brought him to his "knees" (Br. 44) is implausible: Xerox was required to, and did, indemnify him for attorneys' fees, as well as the lion's share of his monetary liability. Floyd Norris, *6 From Xerox to Pay SEC $22 Million*, N.Y. Times, Jun. 6, 2003, at C1. Whatever the costs of litigation, they were borne by Xerox, not Romeril.

Romeril barely mentions, let alone accepts, his role in agreeing to the no-deny provision and relinquishing his opportunity to deny the allegations at trial. He made a choice not to speak in exchange for avoiding a trial process that would have afforded him multiple opportunities to deny the allegations but also could have resulted in more serious sanctions than those he agreed to. This is a difference of constitutional magnitude under the case law—he accepted silence as a condition of settlement rather than being forced into silence against his will.

B. Romeril offers no legitimate justification for ignoring his waiver.

If the Court reaches the issue, it should uphold the waiver. Romeril's scattershot arguments regarding "prior restraint," "unconstitutional conditions," and the details of his consent fail to show that "the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Rumery*, 480 U.S. at 392.

1. "Prior restraint" cases are inapposite because Romeril has not been enjoined from speaking against his will.

Romeril invokes "prior restraint" decisions that do not support disregarding his waiver. Most of these cases do not involve judicial restrictions—actual "gag orders"—but instead concern statutes and licensing regimes.[6] Some of the cited cases address injunctions against defamation and other speech, with contempt as a potential consequence of violation.[7] The decision in *Near v. Minnesota*, which Romeril emphasizes, combines the two fact patterns: the Court struck down a statute that

---

[6] Br. 25-30, *citing Sorrell v. IMS Health Inc.,* 564 U.S. 552, 564 (2011) (statute restricting use of pharmacy records); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (statute limiting criminals' ability to profit from books related to their crimes); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 220 (1990) (licensing scheme); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (preapproval scheme); *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965) (describing judicial procedures necessary for a review scheme to be constitutional); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67-71 (1963) (administrative review of publications).

[7] *See also* Br. 23-28, *citing Vance v. Universal Amusement Co.*, 445 U.S. 308, 314 (1980) (injunction against obscenity); *Sindi v. El-Moslimany*, 896 F.3d 1, 14 (1st Cir. 2018) (injunction against defamation); *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 470 (5th Cir. 1980) (order barring attorneys from contacting potential class members).

permitted courts to enjoin defamation, holding that plaintiffs must "find their remedies for false accusations in actions under the libel laws providing for redress and punishment and not in proceedings to restrain the publication of newspapers and periodicals." 283 U.S. 697, 716, 719 (1931).

But none of these decisions involved a voluntary waiver of the right to speak in a consent judgment entered after judicial review. Even under the strictest reading of prior restraint caselaw, there is no legitimate comparison between a statute authorizing *ex ante* injunctions against defamation and an agreed-upon provision that, if breached, could lead to an *ex post* hearing where a court could, at most, reinstate the case.

Romeril points to *Crosby*, but the no-deny portion of Romeril's consent is *not* "an injunction, enforceable through the contempt power." *Crosby*, 312 F.2d at 485. The consent judgment did *not* enjoin Romeril from denying the allegations, and contempt is not an option if Romeril makes a public denial. Rather, the Commission's remedy for breach is to ask the district court to undo the settlement. JA70. Romeril's complaint about "threat of further prosecution" is overblown because the consent does not give the Commission unilateral "discretion" to "reopen cases"—only the district court could vacate the judgment and reopen the case, upon Commission motion. Br. 26-27. Additionally, in *Crosby*, the plaintiff that originally sought the injunction also sought its dissolution, only to be opposed by a non-party to the injunction. In this case, however, the Commission seeks to maintain the consent judgment. 312 F.3d at 485 ("[T]here does not seems to be any equity in Lloyd

Crosby's position since he requests the continuation of an injunction which should never have been entered in the first place.").

As a last-ditch effort, Romeril cites dicta in a footnote of a vacated district court opinion, along with commentary by the judge who authored it. Br. 24, 29-31, 35, 38, *citing SEC v. Citigroup Global Markets*, 827 F. Supp. 2d 328, 333 n.5 (S.D.N.Y. 2011). But the issue in *Citigroup* was whether the district court could require *admissions* by a settling defendant as a prerequisite to the entry of a consent judgment, and Romeril's "amended consent" does not reveal any willingness to admit wrongdoing here. *Id.* at 332-33. In any event, this Court found that the district court abused its discretion, and, far from suggesting that no-deny provisions are unconstitutional, stated instead that "[i]n many cases, setting out the colorable claims, supported by factual averments by the S.E.C., neither admitted nor denied by the wrongdoer, will suffice to allow the district court to conduct its review." *Citigroup* II, 752 F.3d at 295.

2. The "unconstitutional conditions" theory is inapplicable because an agreement to settle is not a government benefit.

The "unconstitutional conditions" theory does not justify disregarding Romeril's waiver because it has no relevance here. Br. 39-41. Courts sometimes employ an unconstitutional-conditions analysis when a government benefit is involved, but Romeril does not identify any decision holding that the "ability to settle" (Br. 39) qualifies. Instead, he cites cases about funds for legal assistance, *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), funds for libraries, *United States v. Am. Library*

Ass'n, 539 U.S. 194 (2003), land-use permits, *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013), unemployment benefits, *Sherbert v. Verner*, 374 U.S. 398 (1963), and liquor licenses, *G&V Lounge v. Mich. Liquor Control Comm'n*, 23 F.3d 1071 (6th Cir. 1994).

Applying the unconstitutional-conditions theory in the settlement context is unjustifiable and would likely be disruptive. The Commission's acceptance of a defendant's offer of settlement is not the equivalent of granting funds, a permit, or a license. *See Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214-15 (2013) (distinguishing between permissible limits on spending programs and improper attempts to leverage "funding to regulate speech outside the contours of the federal program").[8] Even though the settlement ordered monetary and injunctive relief, Romeril presumes that its primary purpose was to benefit *him*. But the Commission settles cases to benefit the *public* by obtaining the best possible outcome for the public interest, while managing risk and maximizing its allocation of finite resources. *Citigroup* II, 752 F.3d at 295. A settlement may be described as conferring some advantage by comparison to the alternative of trial, but that does not transform settlements into conveyances of government benefits akin to a tax credit or a grant. If

[8] Even when a funding benefit is involved, the Court distinguishes between "conditions that define the federal program," which are permissible, "and those that reach outside it," which are not. *AID*, 570 U.S. at 217. To the extent it can be analogized, the no-deny provision is an integral part of the consent and defines its reach—it concerns the allegations in the complaint and nothing beyond that.

every settlement were deemed a benefit, and every provision of a settlement waiving constitutional rights an "unconstitutional condition," it would effectively end government settlements, which always contain waivers.

3. There are compelling public interests in enforcing the waiver.

The public interest in enforcement of the waiver outweighs Romeril's interest in disregarding it. *See Rumery*, 480 U.S. at 394. The balancing of interests occurs against the backdrop of a presumption that once a consent judgment is entered, "the court is by and large required to honor the terms agreed to." *SEC v. Levine*, 881 F.2d 1165, 1181 (2d Cir. 1989). "Long standing precedent evinces a strong public policy against judicial rewriting of consent decrees," *Reynolds v. Roberts*, 202 F.3d 1303, 1312 (11th Cir. 2000), and they are "strictly construed to preserve the bargained for position of the parties," *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983).

Courts have been "reluctant to upset this balance of advantages and disadvantages" and dissolve "consent decrees years after" entry because "significant governmental interests would be impaired if courts too readily lifted" a consent decree. *Clifton*, 700 F.2d at 748. A "defendant who has obtained the benefits of a consent decree—not the least of which is the termination of the litigation—cannot then be permitted to ignore such affirmative obligations as were imposed by the decree." *Berger*, 771 F.2d at 1568. "If sanctioned parties easily are able to reopen consent decrees years later, the SEC would have little incentive to enter into such agreements." *Miller v. SEC*, 998 F.2d 62, 65 (2d Cir. 1993).

Set against this background, the public interests in maintaining the no-deny provisions in consent judgments include (1) the effective enforcement of the securities laws and (2) preservation of the integrity and resources of the courts.

The Commission settled with Romeril in furtherance of its law enforcement mission. Both sides waived "their right to litigate the issues," saving "themselves the time, expense, and inevitable risk of litigation," and both sides gave "up something they might have won had they proceeded with the litigation." *Armour*, 402 U.S. 673 at 681 (parties settle "after careful negotiation" produce "agreement on [a consent's] precise terms"); *Citigroup* II, 752 F.3d at 295-96. The Commission decided that the "optimal allocation of its limited resources" involved settling with Romeril on specific terms. *SEC v. Citigroup Global Mkts.*, 673 F.3d 158, 165 (2d Cir. 2012) (*Citigroup* I). The Commission gave "up a number of advantages," *Clifton*, 700 F.2d at 748, in exchange for obtaining monetary remedies more quickly than it could have at trial, which accelerated the return of money to investors. Litig. Rel. No. 20471 (Feb. 29, 2008), https://www.sec.gov/litigation/litreleases/2008/lr20471.htm (distributing $45 million from Romeril's and other Xerox settlements to over 80,000 investors). Romeril avoided the risk of a worse outcome at trial, which could have affected parallel private litigation, "in consideration of abandoning" his ability to deny the allegations. *Rumery*, 480 U.S. at 394.

A no-deny provision allows the Commission to avoid the confusion and credibility issues that would result if a defendant could settle one day and deny the

next. A consent judgment establishes a record of the staff's investigation and reflects the Commission's determination that the securities laws were violated, reached after the defendant had an opportunity during the Wells process to convince the Commissioners not to bring the case. The complaint memorializes this record, which has informational and deterrence value, particularly as compared with the alternative of an off-the-record settlement. *Clifton*, 700 F.2d at 748.

If a defendant can sign a consent and deny the allegations the next day, month, or decade—in contrast to criminal pleas that require an admission of guilt and a factual basis for the plea, Fed. R. Crim. P. 11—it could undermine confidence in the Commission's enforcement program. It could create the incorrect impression that there was no basis for the Commission's enforcement action—but only after the Commission relinquished "the filing of findings of fact and court opinions clearly setting forth the reasons for the result in a particular case." *Clifton*, 700 F.2d at 748. Proving the point, Romeril implies that the Commission was "underenforcing the laws while colluding" with him, Br. 31, a falsehood that cannot be reconciled with the Commission's vigorous prosecution of the action against him and the Xerox defendants.

Denials would also undermine the credibility of the courts that enter consent judgments. District courts must approve a consent judgment after they "necessarily establish that a factual basis exists for the proposed decree" and the equitable and remedial relief it imposes. *Citigroup* II, 752 F.3d at 295, 296-97; *Williams*, 720 F.2d at

920 ("Judicial approval of a settlement agreement places the power and prestige of the court behind the compromise struck by the parties."). Disregarding Romeril's waiver would create uncertainty as to the grounds for that judicial assessment, leaving the public with the impression that the judgments derive from an unfair process. In this instance, Romeril now asks the district court to maintain most of the the settlement in his "amended consent," including the injunctive and monetary relief, but to remove the no-deny provision so that, presumably, he can publicly proclaim that there was no factual basis to support the court's imposition of that relief.

If no-deny provisions cannot be enforced, it may affect how the Commission negotiates settlements, implicating the public interest in conserving government resources. Consent judgments allow the Commission to "manage risk" by balancing the value of a settlement with the range of outcomes at trial and the resources a trial consumes. *Citigroup* II, 752 F.3d at 295; *see Bd. of Trade v. SEC*, 883 F.2d 525, 531 (7th Cir. 1989) ("Congress gives the [Commission] a budget, setting a cap on its personnel," which means that time spent on one case "means less time for something else."); *SEC v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984) ("The SEC's resources are limited, and that is why it often uses consent decrees as a means of enforcement."). If defendants can settle and deny, the Commission may proceed to trial more frequently, since, as a practical matter, few defendants would be willing to admit wrongdoing due to the collateral estoppel effect on parallel private litigation. *Citigroup* I, 673 F.3d at 161. This would affect the Commission's ability "to conserve its own and judicial

resources," *Clifton*, 700 F.2d at 748, and would undercut the "strong federal policy favoring the approval and enforcement of consent decrees," *SEC v. Wang*, 944 F.2d 80, 85 (2d Cir. 1991); *see Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983) ("[I]t is precisely the desire to avoid a protracted examination of the parties' legal rights which underlies consent decrees" because "[n]ot only the parties, but the general public as well, benefit from the saving of time and money that results from the voluntary settlement of litigation.").

Ultimately, Romeril and his amici never explain why the Commission should not retain the ability to ask a court to void a settlement if a defendant contravenes a material term. A "settlement is by definition a compromise," *Citigroup* I, 673 F.3d at 166, and an important part of the compromise for the Commission is that defendants not turn around and proclaim that they did not do what the complaint alleges they did. If a defendant is not willing to abide by that part of the compromise, it is not against public policy for the Commission to have the option to ask a court to undo the settlement and seek to go to trial, which is the full extent of relief that the no-deny provision reserves.[9]

[9] A defendant's decision to retract a denial after being reminded of its contractual obligations by Commission counsel is a strategic choice to eliminate the possibility of the Commission moving to reopen a case, not an example of compelled speech, as one amicus incorrectly claims. Americans for Prosperity Amicus Br. at 16-18.

4. Romeril's interests in disregarding his waiver do not outweigh the public interests in enforcing it.

The compelling public interests in enforcing Romeril's waiver are not outweighed by Romeril's interests in disregarding it.

First, Romeril claims that disregarding the waiver will facilitate public debate about how the Commission enforces the securities laws.[10] But his notion that the public is going uninformed cannot be reconciled with his myriad references to an ongoing, "uninhibited, robust, and wide-open" debate about the Commission's enforcement program and settlement practices. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *see* Br. 29-45 (citing examples of debate about the Commission). And Romeril can contribute to that debate in many ways. Only public denials of the allegations would trigger the Commission's option to ask a court to undo the settlement. The Commission could not seek that relief if Romeril advocates for change in enforcement practices, criticizes the Commission, or encourages others to do so without publicly denying the allegations.

---

[10] As support, Romeril cites inapposite cases involving restraints on government employees, which balance an employee's "interest, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). Romeril, of course, is not a public employee to whom that test applies. Romeril also points to a federal statute invalidating private contracts that restrict consumers from reviewing goods or services. 15 U.S.C. 45b(b)(1). This statute governs private actors, not settling federal agencies, and it would not help Romeril in any event because even it were analogous, it contains an exception for "any duty of confidentiality imposed by law," which would seemingly include a no-deny provision incorporated into a consent judgment. *Id.* at 45(b)(2)(A).

Lost in Romeril's musings about public discourse is any recognition of his role in limiting that discourse. He could have litigated the case, putting the Commission to its proof, but instead chose to settle and then waited sixteen years before deciding that *now* is the time for a debate. Romeril and his amici allude to the Commission's ability to engage in counter-speech if Romeril is freed from his waiver, envisioning some sort of battle by press release, but the no-deny provision offers a more appropriate forum for speech if Romeril breaches the consent by denying the allegations—a reopened case, tried in a courtroom, operating under the rules of procedure and evidence.

Romeril's "amended consent" confirms that he wants to retain all the advantages of the settlement—avoiding trial, the risk of greater sanction, and the collateral-estoppel effect of an adverse verdict—without the disadvantages he bargained for. He rhapsodizes about the "truth," Br. 39, 54, but he is no more interested in an adversarial proceeding now than he was in 2003. As the Court stated in a similar context, if "a defendant, who has secured the benefits of a plea agreement and knowingly and voluntarily waived the right to appeal," can then appeal, it "would render the plea bargaining process and the resulting agreement meaningless." *United States v. Salcido-Contreras*, 990 F.2d 51, 53 (2d Cir. 1993); *accord Erie Telecomms.*, 853 F.2d at 1097 (declining to permit cable provider "to withdraw from performing its obligations and from discharging its burdens, while it still continues to retain all of the benefits it received from the City as a result of the agreements").

Second, Romeril contends that his waiver is underinclusive because it does not affect "testimonial obligations" or his "right to take legal or factual positions in litigation in which the Commission is not a party." JA70. Romeril labels this a "strategic exception," Br. 38, but it is "strategic" for *defendants*, not the Commission—they insist on this language so they can defend against related private actions. *See Citigroup* I, 673 F.3d at 165 (requiring admissions "would in many cases undermine any chance for compromise"). Romeril employed that strategy here to his advantage; he was able to deny the allegations against him in a private securities-fraud class action arising from his conduct at Xerox. *Carlson v. Xerox Corp.*, No. 00-cv-1621, Dkt. No. 438 (D. Conn. Nov. 9, 2007) (answer). The fact that this so-called exception allows for *more* speech, not less, does not justify disregarding his waiver. *See Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015) (declining to invalidate a law for "abridging *too little* speech" because the Court has "upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of their stated interests").

Finally, Romeril and several amici focus on the distinguishable *Overbey* decision from a divided Fourth Circuit panel in which the majority declined to enforce a waiver under very different facts. Overbey brought a suit for police-misconduct and settled for $63,000 pursuant to an agreement that contained a "non-disparagement clause," which precluded her from discussing her case, the allegations, or the settlement. 930 F.3d at 230. If she breached, the city would be entitled to half the

settlement proceeds. *Id.* After she signed the settlement, the city declared that she had violated the agreement based on comments she made, and the city paid her only $31,500, retaining the other half as "'liquidated damages.'" *Id.* Overbey filed a second lawsuit for the other half, claiming that the agreement violated the First Amendment. *Id.* at 220-21.

The majority of the panel declined to enforce the non-disparagement clause. While it acknowledged that a party can waive constitutional rights, it held that the waiver was not enforceable "under the circumstances" of a civil-rights suit for police misconduct. *Id.* at 223. The dissent, by contrast, concluded that the waiver should be enforced. Based on the "narrow scope of the waiver," the dissenting judge found that the interests in disregarding the waiver were outweighed by the city's interests in "the finality of the litigation" and "the certainty of their contract." *Id.* at 232-34.

The differences between Overbey's settlement and Romeril's consent are so stark that there is no need for this Court to debate or choose among the differing views of the divided *Overbey* panel. *See Rumery*, 480 U.S. at 392-94 (rejecting a "*per se* rule of invalidity" in favor of a fact-specific approach in determining whether to enforce a waiver of constitutional rights). The majority focused on the ramifications of silence and the need for transparency regarding police-misconduct claims where the settlement effectively silenced *the plaintiff*. *Id.* at 224-25. But the Commission is the plaintiff here, and Romeril's consent judgment produced a public record of the Commission's investigation and its reasons for believing Romeril and others violated

the securities laws, while obtaining relief in the public interest, a significant portion of which has already been returned to injured investors. Moreover, the Commission's interest in halting denials after settlement differs materially from Baltimore's interest in "clearing officer's names"—the Commission seeks to avoid confusion about the bases for its actions, ensure the deterrence and guidance value of the allegations in the complaint underpinning a consent judgment, and further the federal policy favoring settlement as a way to preserve agency and judicial resources. *Id.* at 225-26.

The scope of the provisions also differ. The non-disparagement clause in Overbey's settlement precluded her from discussing the details of the settlement or the settlement process. 930 F.3d at 220. By contrast, Romeril's settlement precludes public denials of the allegations in the complaint, but does not bar discussion of the settlement process, the terms of the settlement, or any other broad criticism or scrutiny of the Commission and its enforcement program.

Finally, the two settlements differ significantly as to process. While Baltimore retained "the unilateral ability to determine whether the claimant has broken her promise" and deprive her of half the settlement proceeds by executive fiat, if Romeril breached the no-deny provision, it would afford the Commission the opportunity to ask a court to vacate the judgment, which the court could deny. *Id.* at 224. Moreover, the non-disparagement clause in *Overbey* "in essence" held the plaintiff "civilly liable" to the city because she lost half her settlement for speaking without any ability to reopen the case or obtain the full value of the settlement. *Id.* at 220, 224. But, at

most, Romeril's denial of the allegations would result in the returning the parties to litigation and allowing Romeril to do at trial what he claims to want to do now—deny the claims against him.

CONCLUSION

The district court's order denying Romeril's Rule 60(b)(4) motion should be affirmed.

Respectfully submitted,

ROBERT B. STEBBINS
General Counsel

MICHAEL A. CONLEY
Solicitor

/s/ Jeffrey A. Berger
JEFFREY A. BERGER
Senior Litigation Counsel

Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549
(202) 551-5112 (Berger)

July 10, 2020

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,656 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface—Garamond, 14 point—using Microsoft Word.

/s/ Jeffrey A. Berger