19-4197

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Securities and Exchange Commission,

Plaintiff-Appellee,

—against—

Barry D. Romeril,

Defendant-Appellant.

Paul Allaire, G. Richard Thoman, Philip D. Fishbach, Daniel S. Marchibroda, and Gregory B. Tayler,

Defendants.

On appeal from the United States District Court
for the Southern District of New York
No. 03-cv-4087-DLC; Hon. Denise L. Cote

BRIEF FOR *AMICI CURIAE* ALAN GARFIELD, BURT NEUBORNE, CLAY CALVERT, RODNEY SMOLLA, REASON FOUNDATION, THE GOLDWATER INSTITUTE, THE INSTITUTE FOR JUSTICE, AND THE PELICAN INSTITUTE FOR PUBLIC POLICY IN SUPPORT OF DEFENDANT-APPELLANT

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INTERESTS OF THE AMICI

The Constitutional Law and First Amendment scholars, Alan Garfield, Burt Neuborne, Clay Calvert, and Rodney Smolla, have written extensively on the issues pending, and have an interest in submitting their views, for whatever assistance it may be to this Court.[1] They participate as individuals, and not representatives of the universities with which they are affiliated. Rodney Smolla, who is also the author of this Brief, is Dean and Professor of Law of the Widener University Delaware Law School. Alan Garfield is a Distinguished Professor of Law at the Widener University Delaware Law School. Clay Calvert is Professor of Law and Brechner Eminent Scholar in Mass Communications, and Director of the Marion B. Brechner First Amendment Project at the University of Florida. Burt Neuborne is the Norman Dorsen Professor of Civil Liberties at New York University School of Law and the founding legal director of the Brennan Center for Justice.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free

[1] *Amici* submit this brief with the consent of all parties pursuant to Federal Rule of Appellate Procedure 29(a)(2). *Amici* state that, pursuant to Federal Rule of Appellate Procedure 29(a)(4), none of the corporate *amici* have any parent corporations, and no publicly held corporation owns 10% or more of their stock, no party counsel authored any part of the brief, and no person or entity other than *amici* contributed money to prepare or file it.

markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason participates as *amicus curiae* in cases raising significant constitutional or legal issues.

The Goldwater Institute was established in 1988 as a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, policy briefings, and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, the Institute litigates cases and files amicus briefs when its or its clients' objectives are directly implicated. The Institute has litigated and won important victories for free speech, including *Arizona Free Enterprise Club's Freedom PAC v. Bennett*, 546 U.S. 721 (2011) (matching-funds provision violated First Amendment); *Coleman v. City of Mesa*, 284 P.3d 863 (Ariz. 2012) (First Amendment protects tattoos as free speech); and *Protect My Check, Inc. v. Dilger*, 176 F. Supp. 3d 685 (E.D. Ky. 2016) (scheme imposing different contribution limits on different classes of political donors violated Equal Protection Clause).

The Institute for Justice is a nonprofit public-interest law firm committed to securing greater protection for individual liberty. Much of IJ's free-speech practice

centers on protecting individuals' right to speak, including their right to speak critically of their government. Among other things, IJ currently represents the Cato Institute, a nonprofit think tank, in a lawsuit contending that the SEC's practice of demanding the sort of gag orders at issue in this case presents a barrier to Cato's ability to engage in its own advocacy featuring the stories of people who have been coerced into settlements with the SEC but are unable to speak publicly about them.

The Pelican Institute for Public Policy is a non-profit and nonpartisan research and educational organization and the leading voice for free markets in Louisiana. The Institute's mission is to conduct scholarly research and analysis that advances sound policies based on free enterprise, individual liberty, and constitutionally limited government. The Institute has an interest in protecting Louisiana citizens' First Amendment rights.

SUMMARY OF ARGUMENT

The SEC gag provision is a prior restraint and an exercise in content-based and viewpoint-based regulation of speech, presumptively invalid under the First Amendment. These constitutional infirmities are not cured merely because they were entered in a consent order. Powerful First Amendment principles argue for reversal of the District Court's ruling. The SEC has no countervailing interests sufficient to sustain its gag order regime.

ARGUMENT

I. THE SEC GAG PROVISION IS PRESUMPTIVELY INVALID UNDER THE FIRST AMENDMENT

A. The SEC Gag Is a Presumptively Invalid Prior Restraint

The SEC gag, incorporated in a consent order and enforceable through the contempt power, is a presumptively invalid prior restraint. This is the long-settled law of the Second Circuit. The Court's seminal decision on the issue is *Crosby v. Bradstreet Co.*, 312 F.2d 483 (2d Cir. 1963), in which Stanford Crosby sought relief under Rule 60(b) of the Federal Rules of Civil Procedure from an order entered on stipulation thirty years before. *Id*. at 483. That order, arising from the settlement of a libel suit, broadly restricted the parties from "publishing any report, past, present or future" germane to the parties or issues in the underlying suit. *Id.* at 485. In resisting relief from the order, the opposing parties argued that the silence imposed was the result of a binding contract, and therefore impervious to attack. This Court rejected that assertion, instead treating the gag as an unconstitutional prior restraint:

> 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.

Id., *citing Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931) (Striking down a prior restraint and observing, "[n]or can it be said that the constitutional freedom from previous restraint is lost because charges are made of derelictions which constitute crimes"); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that judicial enforcement of racially restrictive covenants entered into by private parties violated the Fourteenth Amendment). The Court in *Crosby* held the order void and awarded the Crosby relief under Rule 60(b)(4). *Crosby*, 312 F.2d at 485.

More recently, in *Ronnie Van Zant, Inc. v. Cleopatra Records, Inc.*, 906 F.3d 253 (2d Cir. 2018), this Court refused to grant an injunction to enforce a restriction on speech arising from a private contract, observing that "even though the injunction here has allegedly been imposed as a result of private contract rather than government censorship, it nonetheless restrains the viewing of an expressive work prior to its public availability, and courts should always be hesitant to approve such an injunction." *Id.* 257. The Court proceeded to apply prior restraint principles, reciting the classic dictum that "'[a]ny prior restraint on expression comes to [the Supreme] Court with a heavy presumption against its constitutional validity.'" *Id.*, *quoting Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971), and *citing* Melville Nimmer, *Nimmer on Freedom of Speech* § 4.03, p. 4-14 (1984) ("[P]ermanent injunctions . . . are classic examples of prior restraints.").

These decisions constitute the "law of the circuit," binding on any panel of this Court unless reversed by the full Court *en banc* or the Supreme Court. *United States v. Brutus*, 505 F.3d 80, 87 (2d Cir. 2007) ("We recognize that the law of the circuit doctrine dictates that we are 'bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court.'"), *quoting United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir.2004)

The SEC gag plainly operates as a prior restraint. "Here an agency of the United States is saying, in effect, 'Although we claim that these defendants have done terrible things, they refuse to admit it and we do not propose to prove it, but will simply resort to gagging their right to deny it.'" *S.E.C. v. Vitesse Semiconductor Corp.*, 771 F. Supp. 2d 304, 309 (S.D.N.Y. 2011). "By virtue of their alleged past wrongs, the agencies are trying to assert active control over the defendants' future speech." James Valvo, *The CFTC and SEC Are Demanding Unconstitutional Speech Bans in Their Settlement Agreements*, NOTICE & COMMENT, YALE J. REG., Dec. 4, 2017, http://bit.ly/2UJ410S.

Prior restraints bear "a heavy presumption against [their] constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). "Even among First Amendment claims, gag orders warrant a most rigorous form of review because they rest at the intersection of two disfavored forms of expressive limitations: prior

restraints and content-based restrictions." *In re Murphy-Brown, LLC*, 907 F.3d 788, 796-97 (4th Cir. 2018) (Wilkinson, J.).

B. The SEC Gag Is Presumptively Unconstitutional Content-Based and Viewpoint-Based Discrimination

The SEC gag engages in both content and viewpoint discrimination. Barry Romeril is forbidden by its terms "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."

Violation of the gag is plainly triggered by the *subject matter* of any public statement Romeril might make, rendering the gag content-based. "Content-based regulations 'target speech based on its communicative content.'" *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018), *quoting Reed v. Town of Gilbert*, 576 U.S. 155, 135 S. Ct. 2218, 2226 (2015) (no U.S. pinpoint cite available).

But it gets worse. Romeril is not under any restraint from publicly confessing guilt or praising the enforcement efforts of the SEC as sound and factually based. It is only if he professes innocence, or suggests critique of the order's factual predicate, and thereby explicitly or implicitly criticizes the actions of the SEC, that he violates the gag. This is viewpoint discrimination. The government "has no such authority

to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992).

C. Unless Some Exception Applies, the SEC Gag Plainly Violates the First Amendment

Unless some exception to the normally governing First Amendment standards applies, Romeril must prevail. The SEC gag cannot possibly withstand the rigors of the strict scrutiny test. "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 135 S. Ct. at 2226. It is doubtful that *any* constitutionally valid interests support the SEC's gag. Whatever interests might be posited, however, come nowhere near the "compelling" interests required under strict scrutiny. Nothing the SEC might marshal, for example, approaches interests such as those credited in *Snepp v. United States*, 444 U.S. 507 (1980), recognizing that the federal government "has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Id.* at 509 & n.3.

If the SEC gag cannot survive strict scrutiny, it certainly cannot survive the even more rigorous burdens imposed by the presumptions against viewpoint

discrimination and prior restraints, which operate as a kind of strict scrutiny on steroids. "Viewpoint discrimination is thus an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 829 (1995). "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.*

So too, prior restraints are especially anathema to the First Amendment. "It has long been established that such restraints constitute 'the most serious and the least tolerable infringement' on our freedoms of speech and press.'" *United States v. Quattrone*, 402 F.3d 304, 309 (2d Cir. 2005), *quoting Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976).

II. ROMERIL'S AGREEMENT TO THE CONSENT ORDER DOES NOT ELIMINATE THE FIRST AMENDMENT INFIRMITIES

A. Distinguishing Between Public and Private Agreements

This Court may set aside for another day the arguably more complex legal standards that govern the enforceability of purely private silencing contracts. There is growing judicial and scholarly skepticism regarding the enforceability of such provisions. This Court's decision *Van Zant* in is an exemplar of that skepticism, as was this Court's decision in *Crosby*, which preceded it. *Crosby*, 312 F.2d at 483-95; *Van Zant*, 906 F.3d at 253.

Scholarly critique questioning the propriety of permissive judicial enforcement of such private silencing arrangements is accelerating, with many calls for case-by-case balancing of competing interests. "While private contractual limitations on speech, including injunctions issued to enforce those limitations, may not violate the First Amendment *per se*, the values of the First Amendment do legitimately inform the prudential discretion of courts sitting in equity to construe such contracts carefully, and issue injunctions cautiously." Rodney Smolla, 2 *Smolla & Nimmer on Freedom of Speech* § 15:59.50 (2020 updated ed.). *See also* Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech,* 83 Cornell L. Rev. 261, 356 (1998); Burt Neuborne, *Limiting the Right to Buy Silence: A Hearer-Centered Approach,* 90 U. Colo. L. Rev. 411, 439 (2019); Clay Calvert, *Gag Clauses and the Right to Gripe: The Consumer Review Fairness Act of 2016 & State Efforts to Protect Online Reviews from Contractual Censorship,* 24 Widener L. Rev. 203, 212 (2018); Genelle I. Belmas & Brian N. Larson, *Clicking Away Your Speech Rights: The Enforceability of Gagwrap Licenses,* 12 Comm. L. & Policy 37 (2007).

When the agreement imposing silence involves the *government* as a party, however, powerful constitutional law and common law principles are activated, triggering a balancing test that should often result in a decision against enforcement of the gag provision. Whether the law will eventually evolve to apply an equivalent test in the purely private party context need not be addressed on this appeal. What

does matter, however, is that while *both* private and public silencing agreements may in some circumstances not be enforceable, silencing agreements imposed by government agencies must overcome more clearly defined and more formidable obstacles.

B. Case-By-Case Balancing Is Required

The test for determining whether an agreement to surrender rights is enforceable requires a two-step analysis. The first step is procedural, focusing on whether the purported waiver was knowingly and voluntarily exercised, the second step is substantive, focusing on whether the waiver, even if informed and voluntary, is nonetheless void for violating public policy, including policies of constitutional dimension, such as the free speech guarantees of the First Amendment.

In *Town of Newton v. Rumery*, 480 U.S. 386 (1987), the Supreme Court dealt with a challenge to the enforceability of "release-dismissal agreements," in which a prosecutor agrees to the dismissal of criminal charges in exchange for a promise by a defendant not to bring suit against the prosecutor under 42 U.S.C. §1983. The First Circuit had adopted a *per se* rule invalidating all such waivers. The Supreme Court reversed, rejecting the position that all such waivers were *per se* invalid, and instead opting for a case-by-case balancing test, borrowed from common-law contract principles. The substantive test announced in *Rumery* was that "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances

by a public policy harmed by enforcement of the agreement." *Id*. at 392, *citing* Restatement (Second) of Contracts § 178(1) (1981), and *citing and quoting Crampton v. Ohio*, decided with *McGautha v. California*, 402 U.S. 183, 213 (1971) ("The threshold question is whether compelling [a defendant to decide whether to waive constitutional rights] impairs to an appreciable extent any of the policies behind the rights involved").

Amici here commend to this Court the insights offered by the Fourth Circuit's recent decision in *Overbey v. Mayor of Baltimore*, 930 F.3d 215 (4th Cir. 2019). In *Overbey* the court held non-enforceable a non-disparagement clause entered into between Baltimore and Ashley Overbey, arising from the settlement of a police misconduct claim. Overbey's suit challenged Baltimore's practice of including non-disparagement clauses in virtually all such settlement agreements. The Fourth Circuit held that "the non-disparagement clause in Overbey's settlement agreement amounts to a waiver of her First Amendment rights and that strong public interests rooted in the First Amendment make it unenforceable and void." *Id*. at 222.

In defending the non-disparagement clause, Baltimore advanced the strained argument that the clause was not properly characterized as a "waiver" of anything, but was simply an exercise by Overbey of her constitutional right "not to speak," which she exercised in exchange for payment by the government. The Fourth Circuit summarily dispatched this implausible framing of the problem, correctly observing

that the right to refrain from speaking was simply not implicated. The government was not forcing Overbey to speak against her will; it was attempting to prevent her from speaking according to her will. As the court explained, "no one tried to punish Overbey for refusing to say something she did not want to say." *Id.* at 223. Instead, "Overbey agreed, on pain of contractual liability to the City, to curb her voluntary speech to meet the City's specifications." *Id*.

The court held that Baltimore's inclusion of the waiver in the settlement agreement was void and unenforceable, for public policy reasons animated by the First Amendment, stating that "[w]e do not presume that the waiver of a constitutional right—even one that appears in an otherwise valid contract with the government—is enforceable." *Id.* Rather, the court held, such a waiver is enforceable only if it meets two conditions. First, it must be "made knowingly and voluntarily." *Id.* Second, under the circumstances, the interest in enforcing the waiver must "not outweighed by a relevant public policy that would be harmed by enforcement." *Id.*, *citing Pee Dee Health Care, P.A. v. Sanford*, 509 F.3d 204, 212 (4th Cir. 2007) ("the controlling principle for determining whether a waiver clause is unenforceable is 'if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement.'") (internal citation omitted); *Davies v. Grossmont Union High School District*, 930 F.2d 1390, 1397 (9th Cir. 1991) (holding that when it seeks to enforce a contractual

waiver of a constitutional right, the government bears the burden of "demonstrat[ing] that the public interest is better served by enforcement . . . than by non-enforcement"). The Fourth Circuit applied only the second prong of the test, finding it dispositive as matter of law: "Under the circumstances, the City's asserted interests in enforcing Overbey's waiver of her First Amendment rights are outweighed by strong policy interests that are rooted in the First Amendment and counsel against the waiver's enforcement." *Overbey*, 930 F.3d at 223.

C. The Unconstitutional Conditions Doctrine Reinforces the Balancing Test

The "unconstitutional conditions doctrine" instructs that "the Government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.'" *Agency for International Development v. Alliance for Open Society, Inc.*, 570 U.S. 205, 214 (2013) (citations omitted). The doctrine fully applies to the SEC policy of requiring submission to a gag order as a condition of settling an investigation through a consent order. The truism that no defendant is entitled to a consent order does not mean that the government may condition the receipt of such a "benefit" on the surrender of First Amendment freedoms.

The unconstitutional conditions doctrine compliments and reinforces the balancing test required to determine the enforceability of a waiver. Indeed, the

balancing test contemplated by waiver doctrine and the principles governing unconstitutional conditions largely overlap and merge. Both doctrines focus on such factors as whether the condition imposed is truly voluntary or inherently coercive, the nexus between the benefit and the condition extracted, and the severity of the condition in relation to the government's legitimate goals. While this Brief organizes its argument under the waiver framework, the factors that militate against enforcement of the SEC gag under the waiver balancing test are the same factors that render the gag an unconstitutional condition.

Whether analyzed through the parlance of waiver or unconstitutional conditions, the regime under which the SEC operates effectively presented to Romeril an "offer he can't refuse." [2] No actual choice exists. What is presented is a "gun to the head." *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 581 (2012). And whether analyzed under the rubric of waiver or unconstitutional conditions, there is no imperative nexus between the SEC enforcement program and the gag condition. To the contrary, the gag is not a component defining the contours of the SEC's enforcement duties, but rather a gratuitous exertion of coercive leverage that operates to obscure the truth, shelter the SEC from critique, and manipulate the marketplace of ideas. These characteristics militate against enforcement of the gag under waiver analysis. They also expose the

[2] Mario Puzo, *The Godfather* (New York: G.P. Putman's Sons, 1969).

SEC gag as an unconstitutional condition, implicating the key distinction "between conditions that define the federal program and those that reach outside it." *Alliance*, 570 U.S. at 217. The SEC's gag regime is a quintessential example of impermissible "conditions that seek to leverage [a benefit] to regulate speech." *Id*. at 214-15.

III. FIRST AMENDMENT VALUES STAND AGAINST ENFORCEMENT

A. Romeril's Proposed Speech Is on Issues of Public Concern

Romeril's proposed speech, discussing the events that led to the original SEC investigation and enforcement action, and the propriety of the consent order, are matters of public concern. The notion that the government may silence discussion surrounding crime and punishment was laid to rest in In *Simon & Schuster, Inc. v. New York State Crime Victims Board*, 502 U.S. 105, 116 (1991), a unanimous Supreme Court ruling striking down New York's "Son of Sam" law. The law required that an accused or convicted criminal's income from works describing his crime be deposited in an escrow account and held to compensate victims. The Court found the statute to be a content-based restriction on matters of public concern, invoking works that recounted details of criminal activity from *The Autobiography of Malcolm X*, to Henry David Thoreau's *Civil Disobedience*, to the *Confessions of Saint Augustine*. *Id.* at 511. The Court emphatically declared that that "[i]n the context of financial regulation, it bears repeating, as we did in *Leathers*, that the government's ability to impose content-based burdens on speech raises the specter

that the government may effectively drive certain ideas or viewpoints from the marketplace." *Id.* at 116, *citing Leathers v. Medlock*, 499 U.S. 439 (1991).

In *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), the Supreme Court struck down North Carolina's restrictions on convicted sex offenders' access to social media, notwithstanding the admittedly compelling state interest in keeping sex offenders away from vulnerable victims, holding that North Carolina had not "met its burden to show that this sweeping law is necessary or legitimate to serve that purpose." *Id.* at 1737.

If serial killers and sex offenders retain robust First Amendment protection in the aftermath of their convictions, surely the First Amendment must also provide robust protection to those who submit to consent orders by the SEC.

B. The Public Has a Strong Interest in Receiving Romeril's Speech

"It is now well established that the Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). The First Amendment "freedom embraces the right to distribute literature, . . . and necessarily protects the right to receive it." *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 143 (1943), *citing Lovell v. Griffin*, 303 U.S. 444, 452 (1938). "[T]he right to receive publications is such a fundamental right. . . It would be a barren marketplace of ideas that had only sellers and no buyers." *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring). "'It is the right of the public to receive suitable

access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.'" *Kleindienst v. Mandel*, 408 U.S. 753, 763, (1972), *quoting Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United v. Federal Election Commission*, 558 U.S. 310, 339 (2010).

The right to receive information should weigh heavily in the calculus applied by this Court. "[S]trong arguments support the idea that courts should apply a more stringent standard to the waiver of First Amendment rights." Garfield, *Promises of* Silence at 356. These First Amendment interests include both the right to speak and the right to receive information, "[b]ecause free speech rights are at the core of our democratic system, and because a waiver of speech rights implicates both the public's interest as well as the individual's interest." *Id. See also* Neuborne, *Limiting the Right to Buy Silence* at 429 ("In any event, a nonparty hearer who can demonstrate significant public interest in access to the information protected by the NDA of a public figure has the raw material for an effective First Amendment challenge. That's just one more reason to continue the disaggregation of the First Amendment from a solidly speaker-centered doctrine to a more complex doctrine reflecting the interests of speakers, hearers, conduits, targets, and regulators."); Calvert, *Gag Clauses*, at 229 ("the unenumerated First Amendment right to receive

speech is deployable for buttressing the argument that speaker autonomy is thwarted by gag clauses").

C. Romeril's Speech Serves First Amendment Values of Accountability

Romeril's speech may be believed or disbelieved by the public. To the extent his speech is critical of the SEC, the public may credit or discredit his critique. Protection of such debate and critique, and its concomitant power to check and render accountable the processes of government, is a defining purpose of the First Amendment. In *Overbey* the Fourth Circuit identified this interest as one of the key "public interests favoring non-enforcement." *Overbey*, 930 F.3d at 223. "Famously, one of the interests at the heart of the First Amendment is 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Id.* at 224, *quoting New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Debate over issues of public concern in turn operates as a check on governmental abuse of power. "Standing shoulder to shoulder with the citizenry's interest in uninhibited, robust debate on public issues is this nation's cautious 'mistrust of governmental power.'" *Overbey*, 930 F.3d at 223.

The SEC wields enormous influence and power through is use of consent orders. Any notion that the public must accept the SEC's assurances that it only deploys this power wisely is fundamentally inconsistent with the values that inspired

the Framers of the Constitution, who were fundamentally mistrustful of government. The public is not required to respect assurances of *noblesse oblige*. *See United States v. Stevens*, 559 U.S. 460, 480 (2010) ("Not to worry, the Government says: The Executive Branch construes § 48 to reach only 'extreme' cruelty, and it 'neither has brought nor will bring a prosecution for anything less. . . . But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.") *citing Whitman v. American Trucking Assns., Inc*., 531 U.S. 457, 473, (2001) ("The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory."). "Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints." *Citizens United*, 558 U.S. at 340.

IV. NO COUNTERVAILING GOVERNMENTAL INTERESTS ARE SUFFICIENT TO JUSTIFY THE SEC GAG PROVISION

A. The Generalized Interest in Settlement Is Not Sufficient

The American legal system is heavily dependent on voluntary settlement of legal disputes. Most criminal matters are resolved through plea bargains; most civil matters settle without trial. The SEC settles 98% of its investigations through consent orders.

To be sure, there is a generalized societal interest in encouraging settlements. As the Ninth Circuit correctly observed in *Davies*, however, the *generalized* policy favoring enforcement of private agreements and the encouragement of settling litigation" cannot, in the nature of things, be a sufficient basis alone for justifying clauses in settlements restricting the exercise of constitutional rights, because the generalized policy is present in *all* settlements of legal disputes. If the general interest in settling claims were enough to do the trick, *all* waiver clauses in settlement agreements would be impermeable to attack. *Davies*, 930 F.2d at 1398. As important as the interest in encouraging settlement may be, it "is an interest that will be present in every dispute over the enforceability of an agreement terminating litigation." *Id*.

The very existence of judicially crafted balancing tests employed to analyze the enforceability of waiver provisions in settlements presupposes that the generalized interest in encouraging settlement is not in itself strong enough in the poetic imagery of Justice Holmes, "to turn the color of legal litmus paper." *Abrams v. United States*, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting). Thus, "where a substantial public interest favoring nonenforcement is present, the interest in settlement is insufficient." *Davies*, 930 F.2d at 1398. "[W]hen a settlement agreement contains a waiver of a constitutional right, the government's general interest in using settlement agreements to expedite litigation is not enough to make

the waiver enforceable—otherwise, no balance-of-interests test would be required." *Overbey*, 930 F.3d at 225. In sum, the SEC "cannot succeed merely by invoking its general interest in settling lawsuits." *Id.* "It must point to additional interests that, under the circumstances, justify enforcing . . . waiver of . . . First Amendment rights." *Id.*

B. Whether Romeril's Speech Proves Truthful or False, the SEC Cannot Justify Suppression Prior to His Expression, and in No Event Unless the SEC Demonstrates that Romeril's Speech Causes Palpable and Legally Cognizable Harm

1. The SEC Cannot Justify Hiding Truthful Disclosures

Romeril's motion for relief from the gag order provision is predicated on his assertion that what he seeks to place before the public is *truthful* information. While at this stage in the litigation nothing establishes exactly what, if free to talk, Romeril would say, by hypothesis his allegedly truthful statements would deny, in whole or in part, guilt or wrongdoing arising from the underlying consent judgment against Xerox brought by the SEC. or question the factual basis for the consent order.

On the assumption that Romeril would speak the truth, the gag provision places the SEC in an ethically unseemly and constitutionally infirm position. To the extent the SEC is seeking to suppress the disclosure of truthful information, its actions come perilously close to trafficking in hush money. *See Overbey*, 930 F.3d at 226 ("[I]t is difficult to see what distinguishes it from hush money."). Federal

courts ought not be in the business of ratifying "the government's purchase of a potential critic's silence merely because it would be unfair to deprive the government of the full value of its hush money." *Id.*

The First Amendment does not operate like the famous line from the movie *A Few Good Men*, in which Jack Nicholson, playing the role of Colonel Nathan Jessup, indignantly exclaims: "You can't handle the truth!"[3] "Those who seek to censor or burden free expression often assert that disfavored speech has adverse effects. But the 'fear that people would make bad decisions if given truthful information' cannot justify content-based burdens on speech." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 577 (2013) , *quoting Thompson v. Western States Medical Center*, 535 U.S. 357, 374 (2002)). *See also Simon & Schuster*, 502 U.S. at 121 ("The Board disclaims, as it must, any state interest in suppressing descriptions of crime out of solicitude for the sensibilities of readers."); *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 105 (1990) ("We reject the paternalistic assumption that the recipients of petitioner's letterhead are no more discriminating than the audience for children's television."); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 791-792, and n. 31 (1978) (criticizing State's paternalistic interest in protecting the political process by restricting speech by corporations);

[3] *A Few Good Men*, available at: https://www.youtube.com/watch?v=9FnO3igOkOk

Rubin v. Coors Brewing Company, 514 U.S. 476, 497 (1995) (Stevens, J., concurring) ("Any 'interest' in restricting the flow of accurate information because of the perceived danger of that knowledge is anathema to the First Amendment . . . the Constitution is most skeptical of supposed state interests that seek to keep people in the dark for what the government believes to be their own good."); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 738 (1996) (Thomas, J., concurring) ("In case after case . . . the Court, and individual Members of the Court, have continued to stress . . . the antipaternalistic premises of the First Amendment"); *Riley v. National Federation of the Blind of North Carolina*, Inc., 487 U.S. 781, 790-91 (1988) ("The State's remaining justification—the paternalistic premise that charities' speech must be regulated for their own benefit—is equally unsound. The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it.").

2. Even if Romeril's Statements Prove False, the SEC Cannot Suppress the Statements in the Absence of Proof that Romeril's False Statements Would Cause Palpable, Legally Cognizable Harm

It is also possible, of course, that Mr. Romeril might make statements about his guilt or complicity in wrongdoing that would ultimately prove false. Romeril is constitutionally entitled to his *opinions* about the SEC, and to the extent that any statements he might make are nothing more than that—mere subjective expressions of rhetorical hyperbole or his opinions of government of the sort not capable of

objective proof or disproof, they are fully protected by the First Amendment. *Milkovich v. Lorain Journal Co*., 497 U.S. 1 (1990). This protection extends to rhetorical hyperbole and opinion surrounding commercial activity and financial markets. *See Chau v. Lewis*, 771 F.3d 118, 121 (2d Cir. 2014) (holding as non-actionable rhetorical hyperbole and opinion statements contained in the book by Michael Lewis, *The Big Short: Inside the Doomsday Machine*, which chronicled the profits made by those who took short stock positions anticipating the crash of the subprime mortgage market).

The whole point of prior restraint doctrines is that the possibility that a person might *in the future* utter a falsehood cannot justify advance suppression of that speech. Moreover, "[i]n addition to the First Amendment's heavy presumption against prior restraints, courts have long held that equity will not enjoin a libel." *Metropolitan Opera Association, Inc. v. Local 100, Hotel Employees & Restaurant Employees International Union*, 239 F.3d 172, 177 (2d Cir. 2001).

Yet even if, at the end of the day, Romeril were to make statements that were subsequently proven factually false, those statements would not automatically be stripped of First Amendment protection. This is the learning of the Supreme Court's decision in *United States v. Alvarez*, 567 U.S. 709 (2012), striking down a federal statute making it a crime to falsely claim military honors. *Alvarez* establishes that even a false statement by Romeril would enjoy First Amendment protection unless

the statement causes some palpable harm beyond the naked falsity itself. If Romeril's statement were to defame someone, the aggrieved victim could sue Romeril for defamation, subject to whatever common law and constitutional law standards would apply. If Romeril's statements revealed trade secrets, he might be subject to liability under laws protecting intellectual property. If his statements somehow triggered new violations of federal securities laws, of the sort that could cause current investors harm or constitute a fraud on the market, the SEC could move against him through its wide panoply of enforcement mechanisms.

But suppose no new palpable harm of the sort creating legally cognizable claims could be plausibly identified—no defamation, no appropriation of intellectual property, no new violations of law—just a simple false statement, such as denying guilt when in fact he was guilty. *Alvarez* stands for the proposition that even in those circumstances, the falsehood would be protected. *Id*. at 222-23 ("The statute seeks to control and suppress all false statements on this one subject in almost limitless times and settings. And it does so entirely without regard to whether the lie was made for the purpose of material gain."). Rather than suppress such false speech, the First Amendment presupposes that counter-speech, purporting to "set the record straight," is the appropriate remedy.

As in *Alvarez*, the SEC here "has not shown, and cannot show, why counterspeech would not suffice to achieve its interest." *Id*. at 726. The SEC, if

bothered by Romeril's protestations, but if unable to charge Romeril with any actual violation of federal law, could still publicly repudiate Romeril's assertions. "The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth." *Id* at 727, *citing Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence"). "The theory of our Constitution is 'that the best test of truth is the power of the thought to get itself accepted in the competition of the market.'" *Alvarez*, 567 U.S. at 728, *quoting Abrams v. United States*, 250 U.S. at 630 (Holmes, J., dissenting).

The SEC's gag policy cannot be squared with these First Amendment principles. "[S]uppression of speech by the government can make exposure of falsity more difficult, not less so." *Alvarez*, 567 U.S. at 728. The SEC's regime of requiring gag provisions in all consent orders undermines society's "right and civic duty to engage in open, dynamic, rational discourse." *Id.* "These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates." *Id.*

C. The SEC Has No Legitimate Interest in Seeking to Shelter Itself from Attack

It is perfectly plausible, of course, that Romeril's statements would cause embarrassment to the SEC, tarnishing the agency's reputation. Indeed, it appears that the SEC's adoption of the gag policy in 1972 was generated in large part by the agency's concerns over public perceptions of its actions. The policy arose in response to situations in which "defendants and respondents were entering into consent decrees and then publicly denying that they had done anything wrong or violated any law or regulation." David Rosenfeld, *Admissions in SEC Enforcement Cases: The Revolution That Wasn't*, 103 Iowa L. Rev. 113, 118–19 (2017).

In any consent order scenario, the SEC might well take fire from all directions, as some say it was too soft, and others too harsh. The SEC must accept the criticism either way. In the United States, there is no libel against the government. "For good reason, 'no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence.'' *New York Times v. Sullivan*, 376 U.S. at 292, *quoting City of Chicago v. Tribune Co.*, 307 Ill. 595, 601 (1923). A governmental entity's desire to shelter itself from critique or embarrassment cannot be credited in the balance of interests considered by a court in determining whether to enforce a gag provision.

In *Overbey* the Fourth Circuit rejected the argument that Baltimore or its police "have an interest in avoiding 'harmful publicity.'" *Overbey* 930 F.3d at 226.

"Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations." *New York Times*, 376 U.S. at 273. "Enforcing a waiver of First Amendment rights for the very purpose of insulating public officials from unpleasant attacks would plainly undermine that core First Amendment principle." *Overbey*, 930 F.3d at 226.

CONCLUSION

Amici urge the Court to reverse the decision of the District Court, and grant Romeril the relief requested.

Dated: April 16, 2020
New York, New York

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Rule 32(a)(7)(B) and Rule 29(a)(5) of the Federal Rules of Appellate Procedure, as modified by Local Rules 32.1(a)(4)(A) and 29.1(c), respectively, because it contains 6,885 words, excluding those portions of the brief exempted by Rule 32(f).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared on a computer, using the Microsoft Word 365 word processing program, using Times New Roman 14-point font, and is double-spaced.

Dated: New York, New York
April 16, 2020

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