No. 21-1284

In the Supreme Court of the United States

BARRY D. ROMERIL, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a party may use a motion under Federal Rule of Civil Procedure 60(b)(4) to challenge a judgment on constitutional grounds unrelated to jurisdiction or due process more than 15 years after the judgment was entered.

2. Whether petitioner's promise not to publicly deny the allegations made in the Securities and Exchange Commission's complaint against him, which was incorporated into a consent agreement between the parties and ultimately into the final judgment entered by the district court, was obtained in violation of the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 15 F.4th 166. The opinion and order of the district court (Pet. App. 19-27) is not published in the Federal Supplement but is available at 2019 WL 6114484.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 2021. A petition for rehearing was denied on December 21, 2021 (Pet. App. 41-42). The petition for a writ of certiorari was filed on March 21, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Securities and Exchange Commission (SEC or Commission) is authorized to investigate, and to pur-

sue civil enforcement actions concerning, possible violations of the securities laws. See 15 U.S.C. 78u. Nearly half a century ago, the SEC adopted a policy regarding the circumstances in which it will agree to settle claims of securities violations as a way to resolve litigation or administrative proceedings. See 37 Fed. Reg. 25,224 (Nov. 29, 1972). When a defendant seeks to settle without admitting wrongdoing, the policy states that the Commission will not "consent to a judgment or order that imposes a sanction" on the defendant unless the defendant agrees not to "deny[] the allegations in the complaint or order for proceedings." 17 C.F.R. 202.5(e).

The SEC's longstanding policy reflects its desire 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." 17 C.F.R. 202.5(e). The policy does not require settlements; a defendant may choose not to settle and maintain that the alleged conduct did not occur. In that instance, the Commission will move forward with litigation or administrative proceedings, resulting either in vindication of the defendant's position or in a finding by an impartial adjudicator that the defendant engaged in the conduct the Commission had alleged.

2. In 2002, Xerox Corporation entered into a no-admit, no-deny settlement to resolve charges that it had engaged in a multibillion-dollar accounting fraud from 1997-2000, while petitioner was serving as its Chief Financial Officer. Pet. App. 6. In its settlement with the Commission, Xerox agreed, among other things, to restate its financial results and pay what was then the largest corporate penalty ever imposed in an SEC action. *Id.* at 20-21.

The following year, the SEC filed a civil enforcement suit in the United States District Court for the Southern District of New York, alleging that petitioner and other senior Xerox executives had violated the securities laws by manipulating Xerox's earnings reports. Pet. App. 6. Petitioner and the SEC agreed to settle the Commission's claims. *Ibid.* Petitioner, represented by counsel, signed a consent agreement in which he admitted "the Court's jurisdiction over [him] and over the subject matter of this action." *Id.* at 34. Petitioner agreed to entry of a judgment that would permanently enjoin him from violating certain securities laws, order him to pay disgorgement and a penalty, and bar him from serving as an officer or director for a class of securities-issuing companies. *Ibid.*; see *id.* at 34-40.

In the consent agreement, petitioner made several additional representations and waivers. He represented that the parties had "reached a good faith settlement"; that he was entering "into this Consent voluntarily"; and that "no threats, offers, promises, or inducement of any kind" had been made "to induce [petitioner] to enter into this Consent." Pet. App. 36, 38. 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. *Id.* at 36. And he agreed that the consent agreement "shall be incorporated into the Final Judgment," over which the district court would retain jurisdiction. *Ibid.*; see *id.* at 39.

Petitioner also agreed to a provision of the consent agreement that implemented the SEC's policy against settling with parties who publicly deny that they have engaged in the alleged conduct. In that no-denial provision, petitioner indicated 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.'" Pet. App. 37 (citation omitted). He also 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." *Ibid.* The parties stipulated that, in the event of a breach, "the Commission may petition the Court to vacate the Final Judgment and restore this action to its active docket." *Ibid.*

In June 2003, the district court entered final judgment. See Pet. App. 28-33. The judgment stated that petitioner had "consented to the Court's jurisdiction over [petitioner] and the subject matter of this action." *Id.* at 28. The judgment imposed the agreed-upon monetary and injunctive relief, *id.* at 31-33, and it required petitioner to "comply with all of the undertakings and agreements" in the consent agreement, *id.* at 33, which were "incorporated" into the judgment "with the same force and effect as if fully set forth [t]herein," *ibid.* The district court retained jurisdiction over the case "for the purposes of enforcing the terms of this Final Judgment." *Ibid.*

3. Almost 16 years later, petitioner filed a motion for relief under Federal Rule of Civil Procedure 60(b)(4). See Pet. App. 22. That rule provides that, "[o]n motion and just terms," a district court "may relieve a party * * * from a final judgment" if "the judgment is void." Fed. R. Civ. P. 60(b)(4). Petitioner contended that the final judgment was "void" within the meaning of Rule 60(b)(4) because the no-deny provision in the consent agreement violated the First Amendment or due process. See Pet. App. 20. As relief, petitioner asked the

district court to substitute an "amended consent" agreement for the original consent agreement, while leaving the remaining terms of the final judgment intact. *Id.* at 23. The "amended consent" agreement would have excised the no-deny provision but was otherwise unchanged from the original agreement. See *id.* at 22-23.

The district court denied petitioner's motion "for two independent reasons." Pet. App. 24; see *id.* at 19-27. First, the court found that petitioner's motion was untimely because petitioner's "extraordinary" delay in filing was "unreasonable" even under the "lenient" time constraints for Rule 60(b)(4) motions. *Id.* at 24-25; see Fed. R. Civ. P. 60(c)(1) (providing that a "motion under Rule 60(b) must be made within a reasonable time"). Second, the court held that petitioner had not identified "a jurisdictional defect or violation of due process that would render the Judgment void for purposes of Rule 60(b)(4)" under the criteria for Rule 60(b)(4) relief identified by this Court in *United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260, 270 (2010). Pet. App. 25. The district court observed that petitioner had "acknowledged [the] [c]ourt's jurisdiction over him and the subject matter of the action," and had not "argue[d] that he was deprived of notice of the SEC action or of an opportunity to be heard." *Id.* at 25-26. The court explained that, even if petitioner could establish that the no-deny provision of the consent agreement violated his rights under the First Amendment, that would not constitute the sort of "jurisdictional error" that renders a judgment "void" under Rule 60(b)(4). *Id.* at 27.

4. The court of appeals affirmed. Pet. App. 1-18.

The court of appeals held that petitioner's motion failed to "allege a defect that would permit relief under

Rule 60(b)(4)," Pet. App. 4, and it therefore did not reach the question whether petitioner's motion had been timely filed, *id.* at 10 n.3. The court explained that, under *Espinosa*, *supra*, "Rule 60(b)(4) applies only in two situations: 'where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard.'" *Id.* at 9 (quoting *Espinosa*, 559 U.S. at 271). The court concluded that petitioner had "failed to show either a jurisdictional error or a due process violation within the meaning of the rule." *Id.* at 10.

a. The court of appeals held that petitioner had not shown a jurisdictional defect. The court found that, even if the 2003 final judgment had violated petitioner's First Amendment rights, the error would not have been jurisdictional, "for the district court had both subject matter and personal jurisdiction." Pet. App. 12. Under *Espinosa*, the court explained, a judgment is "not void 'simply because it is or may have been erroneous.'" *Id.* at 11-12 (citations omitted).

The court of appeals further held that, in any event, the 2003 final judgment "does not violate the First Amendment." Pet. App. 12. The court observed that, "[i]n the course of resolving legal proceedings, parties can * * * waive their rights," and "[t]he First Amendment is no exception." *Id.* at 12-13 (citing, *inter alia*, *Town of Newton* v. *Rumery*, 480 U.S. 386, 393 (1987)). Here, the court concluded, petitioner had validly waived his "right to publicly deny the [Commission's] allegations against him * * * by agreeing to the no-deny provision as part of a consent decree." *Id.* at 13-14.

b. The court of appeals further held that petitioner had not identified any due-process violation redressable under Rule 60(b)(4). See Pet. App. 17-18. The court

explained that "the due process right implicated by Rule 60(b)(4) is the right to 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Id.* at 17 (quoting *Espinosa*, 559 U.S. at 272) (internal quotation marks omitted). Here, petitioner "had actual notice of the proceedings as well as a full and fair opportunity to litigate." *Id.* at 17. Indeed, he had "participated in the [2003] proceedings while represented by capable and experienced counsel," and he had "willingly agreed to the no-deny provision." *Id.* at 17-18. The court accordingly held that petitioner could not "complain now, on post-judgment, collateral review, that the provision violates his right to due process." *Id.* at 18.

The court of appeals denied petitioner's request for rehearing or rehearing en banc without calling for a response. Pet. App. 41-42.

ARGUMENT

The court of appeals correctly rejected petitioner's attempt to use Rule 60(b)(4) to make a unilateral change to the 2003 consent agreement between petitioner and the Commission. "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." *United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260, 271 (2010). Because petitioner's challenge to the no-deny provision does not fall within either of those categories, it is not cognizable under Rule 60(b)(4). No circuit has found Rule 60(b)(4) applicable in analogous circumstances.

Even if the lawfulness of the no-deny provision were properly before the Court, petitioner's First Amendment challenge lacks merit. In resolving litigation, parties may choose to waive even fundamental constitutional rights. See *Town of Newton* v. *Rumery*, 480 U.S. 386, 393 (1987). Petitioner identifies no circuit that has held such a provision unconstitutional. Further review is not warranted.

1. Petitioner contends (Pet. 31-36) that Rule 60(b)(4) allows him to raise constitutional objections to the district court's final judgment nearly two decades after it was entered, even though he had the opportunity to raise those objections contemporaneously but chose not to do so. The court of appeals correctly rejected that argument, and petitioner identifies no court of appeals that has approved relief under Rule 60(b)(4) in analogous circumstances.

a. Rule 60(b) "provides an 'exception to finality' * * * that 'allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances,'" even after the time for direct appeal has run. *Espinosa*, 559 U.S. at 269-270 (quoting *Gonzalez* v. *Crosby*, 545 U.S. 524, 528-529 (2005)). One covered circumstance is when "the judgment is void." Fed. R. Civ. P. 60(b)(4).

In *Espinosa*, *supra*, this Court explained that the "list of * * * infirmities" that can render a judgment "void" for purposes of Rule 60(b)(4) "is exceedingly short; otherwise, Rule 60(b)(4)'s exception to finality would swallow the rule." 559 U.S. at 270. "'A judgment is not void,' for example, 'simply because it is or may have been erroneous.'" *Ibid.* (citations omitted). "Instead, 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." *Id.* at 271. Because petitioner's current objections to the no-deny provision do not fall into either of those categories, those objections are not cognizable under Rule 60(b)(4).

First, petitioner has not identified any "jurisdictional error" in the district court's final judgment. *Espinosa*, 559 U.S. at 271. An error is "jurisdictional" if it "deprive[s] th[e] courts * * * of authority to consider [the case] on the merits." *Id.* at 270 n.9 (citing *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 515-516 (2006); *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 167 (2010)). In appropriate circumstances, a Rule 60(b)(4) motion therefore is an available mechanism for collaterally attacking a prior judgment issued by a court that lacked subject-matter or personal jurisdiction. See 12 James Wm. Moore, *Moore's Federal Practice* § 60.44[1][a], at 60-149 to 60-150 (Daniel R. Coquillette et al. eds., 3d ed. Dec. 2019) ("A judgment is valid whenever the court that renders it has jurisdiction over the subject matter and the parties."); 11 Charles Allen Wright et al., *Federal Practice and Procedure* § 2862, at 434-441 (3d ed. 2012) (*Federal Practice & Procedure*) ("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.") (footnotes omitted). But at the time petitioner consented to entry of judgment against him, he "admit[ted]" that the district court had "personal and subject matter jurisdiction" over the case, Pet. App. 34, and petitioner does not dispute those admissions now. See D. Ct. Doc. 23, at 4 (May 6, 2019) (admitting in proposed amended consent

agreement that the district court has subject-matter and personal jurisdiction).

Second, petitioner has likewise failed to identify any "violation of due process that deprive[d] [him] of notice or the opportunity to be heard." *Espinosa*, 559 U.S. at 271. Courts have most often invoked that ground for Rule 60(b)(4) relief in cases involving default judgments or absent class members, where the party seeking relief from the judgment had not actively participated in the earlier proceedings. See *Federal Practice & Procedure* § 2862, at 441 n.11 (collecting cases). Petitioner, by contrast, "had actual notice of the proceedings as well as a full and fair opportunity to litigate on the merits," having "participated in the proceedings while represented by capable and experienced counsel." Pet. App. 17-18. There is accordingly no basis for setting aside or modifying the final judgment under Rule 60(b)(4).

b. Petitioner's contrary arguments lack merit.

Petitioner primarily disputes this Court's statement in *Espinosa* that relief under Rule 60(b)(4) is available "only" to correct the "rare" jurisdictional and due-process errors that the Court identified there. See Pet. 31-34. Petitioner contends (Pet. 31) that limiting Rule 60(b)(4) to those two categories of errors would mean "overrul[ing] *sub silentio* at least three prior precedents of this Court"—*Klapprott* v. *United States*, 335 U.S. 601 (1949); *United States ex rel. Wilson* v. *Walker*, 109 U.S. 258 (1883); and *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1874). Petitioner is incorrect.

In *Espinosa*, this Court explained that cases like *Wilson* and *Lange* "are not controlling because they predate Rule 60(b)(4)'s enactment" in 1947. 559 U.S. at 275 n.12.[1]

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[1] *Wilson* and *Lange* also involved errors materially unlike the errors petitioner alleges in this case. In *Wilson*, Congress had

And while *Klapprott* post-dated the adoption of Rule 60(b)(4), the Court's fractured decision there is not inconsistent with the *Espinosa* Court's later clear and unanimous description of the limitations on Rule 60(b)(4) relief.

Klapprott involved a challenge to a default judgment entered in a denaturalization suit while the petitioner was being "wrongful[ly]" detained. 335 U.S. at 608 (opinion of Black, J., joined by Douglas, J.). Two of the five Justices who voted to set aside the judgment did so on the ground that the procedures followed had violated due process. See *id.* at 616-620 (Rutledge, J., joined by Murphy, J., concurring in the result). Two other Justices suggested that Rule 60(b)(4) relief might be available because "the hearing of evidence [wa]s a legal prerequisite to rendition of a valid default judgment in denaturalization proceedings," but they found it unnecessary to resolve that question because they perceived "compelling reasons" to grant relief under Rule 60(b)(6). *Id.* at 609, 613 (opinion of Black, J., joined by Douglas, J.). The fifth Justice concluded that relief was warranted "under the special circumstances here shown on behalf of this petitioner," but he declined to "express[] an opinion upon any issues not now before the Court," or even to identify which provision of Rule 60(b) he viewed as applicable to the case. *Id.* at 616 (opinion of

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"stripp[ed] courts of jurisdiction" over "the res" implicated in the probate dispute at issue. *Espinosa*, 559 U.S. at 275 n.12 (citing *Wilson*, 109 U.S. at 265-266). And in *Lange*, the Court held that a second criminal judgment imposed against a defendant was void because, once the first judgment was entered, the court's "power to punish for that offence was at an end." 85 U.S. (18 Wall.) at 176. Nothing similar has occurred here.

Burton, J.). Accordingly, nothing in *Klapprott* establishes that Rule 60(b)(4) extends beyond the two categories identified in *Espinosa*. To the extent *Klapprott* rested on Rule 60(b)(4) at all, it is best understood as a case in which the judgment could be set aside because the defendant had been deprived of "the opportunity to be heard." *Espinosa*, 559 U.S. at 271.

Petitioner additionally contends (Pet. 31) that, when a judgment has been entered in violation of some statutory or constitutional limitation (as petitioner alleges occurred here), *Espinosa* allows a collateral attack on the ground that "the court lacked power—that is, *jurisdiction*—to enter" the challenged judgment. That expansive understanding of jurisdictional errors finds no support in *Espinosa*. As discussed above, see p. 9, *supra*, the *Espinosa* Court used the term "jurisdictional" to describe courts' "authority to consider [arguments] on the merits," and it cited decisions like *Arbaugh* that have emphasized the need for careful use of the term "jurisdictional." *Espinosa*, 559 U.S. at 270 n.9 (citing *Arbaugh*, 546 U.S. at 515-516). It is not plausible that the Court intended the same word to cover the far broader class of errors suggested by petitioner, in which a court has authority to resolve a case on the merits but violates some other statutory or constitutional limitation in adjudicating the case before it.[2]

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[2] Petitioner observes that the Court in *Espinosa* "expressly *declined* to 'define the precise circumstances in which a jurisdictional error will render a judgment void.'" Pet. 32 (quoting *Espinosa*, 559 U.S. at 271). But the Court simply reserved decision about whether Rule 60(b)(4) encompasses *all* jurisdictional errors or—as most courts of appeals have held—is instead limited to "the exceptional case in which the court that rendered judgment lacked even an 'arguable basis' for jurisdiction." *Espinosa*, 559 U.S. at 271 (citation

Expanding Rule 60(b)(4) to reach asserted errors in courts' resolution of cases that were properly before them would also upset the "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." *Espinosa*, 559 U.S. at 276. Allowing substantive constitutional challenges through Rule 60(b)(4) would leave judgments open in perpetuity, particularly because courts have allowed Rule 60(b)(4) motions to be filed at almost any time despite the requirement that a "motion under Rule 60(b) must be made within a reasonable time." Fed. R. Civ. P. 60(c)(1); see Pet. App. 10 n.3 (describing judicial leniency with respect to timing of Rule 60(b)(4) motions). Under petitioner's approach, even a litigant (like petitioner) who explicitly waives his right to file a direct appeal could invoke Rule 60(b)(4) years later to raise substantive challenges to the judgment against him, without any need to demonstrate some intervening change in law or facts.

Finally, petitioner contends (Pet. 28) for the first time in this Court that he "had no notice and opportunity to be heard on the terms of the consent decree" because the Commission would not have agreed to a settlement that omitted the no-deny provision. Petitioner "forfeited" that argument by failing to "raise it below." *United States* v. *Jones*, 565 U.S. 400, 413 (2012). In any event, the argument lacks merit. The fact that an opposing party is willing to settle only on certain terms does not deprive a litigant of "notice or the opportunity to be heard" on the question whether those terms should

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omitted). The Court did not suggest that errors like the ones petitioner alleges, which do not concern the court's subject-matter or personal jurisdiction, can be recharacterized as "jurisdictional" for purposes of the Rule 60(b)(4) analysis.

be incorporated into the district court's judgment. *Espinosa*, 559 U.S. at 271. The litigant can simply decline to settle and can exercise his due process rights at trial, as petitioner was free to do here.

c. No circuit conflict exists on the question whether litigants may use Rule 60(b)(4) to raise substantive challenges of the sort petitioner brings here. On the contrary, every regional circuit has recognized this Court's clear holding in *Espinosa* that Rule 60(b)(4) "applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process." *Mitchell Law Firm, L.P.* v. *Bessie Jeanne Worthy Revocable Trust*, 8 F.4th 417, 420 (5th Cir. 2021).[3] The Sixth Circuit, for example, held that a litigant could not invoke Rule 60(b)(4) to raise a First Amendment challenge years after entering into a consent judgment because the litigant was not relying "on either of the two bases" for relief—"a lack of jurisdiction or a violation of due process in the judgment's

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[3] Accord *Carrasquillo-Serrano* v. *Municipality of Canovanas*, 991 F.3d 32 (1st Cir. 2021); *Metropolitan Edison Co.* v. *Pennsylvania Pub. Util. Comm'n*, 767 F.3d 335 (3d Cir. 2014), cert. denied, 575 U.S. 1025 (2015); *United States* v. *Welsh*, 879 F.3d 530 (4th Cir. 2018), cert. denied, 139 S. Ct. 1168 (2019); *Northridge Church* v. *Charter Twp. of Plymouth*, 647 F.3d 606 (6th Cir. 2011); *Lee* v. *Christenson*, 558 Fed. Appx. 674 (7th Cir. 2014); *Bell* v. *Pulmosan Safety Equip. Corp.*, 906 F.3d 711 (8th Cir. 2018); *Dietz* v. *Bouldin*, 794 F.3d 1093 (9th Cir. 2015), aff'd, 579 U.S. 40 (2016); *Johnson* v. *Spencer*, 950 F.3d 680 (10th Cir. 2020); *Stansell* v. *Revolutionary Armed Forces of Columbia, (FARC)*, 771 F.3d 713 (11th Cir. 2014), cert. denied, 575 U.S. 998, and 577 U.S. 815 (2015); *United States* v. *Philip Morris USA Inc.*, 840 F.3d 844 (D.C. Cir. 2016). The Federal Circuit appears to have had no occasion to apply this Court's decision in *Espinosa*.

issuance." *Northridge Church* v. *Charter Twp. of Plymouth*, 647 F.3d 606, 612 (2011). And even before *Espinosa*, the Ninth Circuit rejected the use of Rule 60(b)(4) to attack a consent decree on First Amendment grounds, notwithstanding the possibility that the judgment contained a constitutional error, because there was neither a claimed "infirmity in the jurisdiction of the court that entered the consent decree" nor a lack of "due process." *United States* v. *Berke*, 170 F.3d 882, 883 (1999); see *id.* at 883-884.

Petitioner contends (Pet. 31-32) that the decision below conflicts with the Fifth Circuit's decision in *Brumfield* v. *Louisiana State Board of Education*, 806 F.3d 289 (2015). That is incorrect. In *Brumfield*, the court recognized that "[a]n 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 (citation omitted). The court found that the order at issue there was "void for lack of subject matter jurisdiction." *Ibid.* And while the court observed that *Espinosa* did not make clear whether *all* jurisdictional errors concerning subject-matter and personal jurisdiction could be raised under Rule 60(b)(4), or only those in which there was no "arguable basis" for jurisdiction, *id.* at 301 (citation omitted); see p. 12 n.2, *supra*, the Fifth Circuit did not suggest that Rule 60(b)(4) motions can be used to assert claims that implicate neither jurisdiction nor due process. See *Brumfield*, 806 F.3d at 298 (emphasizing that "other errors" will "not afford grounds for relief").

Finally, petitioner contends (Pet. 25-26) that the decision below conflicts with the Second Circuit's own earlier decision in *Crosby* v. *Bradstreet Co.*, 312 F.2d 483 (2d Cir.), cert. denied, 373 U.S. 911 (1963). This Court

ordinarily does not grant review to resolve intracircuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). And as the court of appeals recognized here, *Crosby* "was decided more than fifty years ago, long before *Espinosa*"; contained minimal analysis of Rule 60(b)(4); and presented materially different circumstances because it involved the rights of non-parties "who were not before the court and likely had not had notice of the proceedings or an opportunity to be heard." Pet. App. 14, 16.

2. Because Rule 60(b)(4) does not provide a mechanism for raising substantive challenges to a judgment, petitioner's arguments (Pet. 13-31) about the lawfulness of the no-deny provision are not properly before the Court. In any event, those arguments lack merit and do not implicate any division in the lower courts.

a. This Court has long recognized that individuals may waive their constitutional rights in order to resolve or avoid litigation. Just as "plea bargaining does not violate the Constitution even though a guilty plea waives important rights," so too can parties waive constitutional rights in other types of settlements or agreements. *Rumery*, 480 U.S. at 393; see, *e.g.*, *INS* v. *St. Cyr*, 533 U.S. 289, 321-322 (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)"); *D. H. Overmyer Co.* v. *Frick Co.*, 405 U.S. 174, 185 (1972) (holding that "due process rights to notice and hearing prior to a civil judgment are subject to waiver," including by contract); *Boykin* v. *Alabama*, 395 U.S. 238 (1969)

(waiver of criminal trial by guilty plea); *National Equip. Rental, Ltd.* v. *Szukhent*, 375 U.S. 311, 315-316 (1964) ("[I]t is settled * * * that parties to a contract may agree in advance to submit to the jurisdiction of a given court" or even to "waive notice" about the suit.).

In *Rumery*, for example, this Court approved the enforcement of an agreement in which a defendant released his right to bring a Section 1983 action in exchange for the dismissal of pending criminal charges. See 480 U.S. at 391-392. The Court found that such agreements cannot be deemed improper simply because they require "difficult choices that effectively waive constitutional rights." *Id.* at 393. Seeing "no reason to believe" that the agreement at issue posed "a more coercive choice than other situations [the Court had] accepted," *ibid.*, the Court declined to establish "a *per se* rule of invalidity," *id.* at 392; see *id.* at 395. Instead, the Court explained that the enforceability of such a waiver must be evaluated on a case-by-case basis using the "well established" principle that a contractual "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. See Restatement (Second) of Contracts § 178(1) (1981) ("A promise or other term of an agreement is unenforceable on grounds of public policy if * * * the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.") (emphasis omitted).

Relying on *Rumery* and similar decisions, the court of appeals correctly held that inclusion of the no-deny provision in the 2003 final judgment, based on petitioner's consent to that settlement term, did not violate

the First Amendment. See Pet. App. 12-14. The Commission's unwillingness to settle with defendants who will later publicly deny their culpability may put defendants to "the difficult choice" (Pet. 23) of either proceeding to trial or agreeing to a no-deny provision, but "the legal system[] is replete with situations requiring the making of difficult judgments as to which course to follow." *Rumery*, 480 U.S. at 393 (citation and internal quotation marks omitted). Petitioner identifies no reason to believe that the options available to him "pose[d] a more coercive choice than other situations [this Court] ha[s] accepted," such as a criminal defendant presented "with a choice between facing criminal charges and waiving his right to sue under § 1983." *Ibid.* Petitioner's choice instead reflected the "highly rational judgment" to give up the future exercise of certain rights that evidently mattered less to him than the "risk, publicity, and expense" of proceeding to trial on the Commission's claims. *Id.* at 393-394.

The SEC likewise had a valid interest in seeking a no-deny clause as a condition in the settlement. The SEC files an enforcement action only when a majority of the Commissioners have concluded, based on a substantial investigation, that the defendant has violated or is violating the securities laws. See Division of Enforcement, Securities and Exchange Commission, *Enforcement Manual* § 2.5.1 (Nov. 28, 2017) ("The filing or institution of any enforcement action must be authorized by the Commission."), https://go.usa.gov/xuufU; see also *id.* § 2.4 (describing "Wells Process" through which targets of Commission investigation may dispute the potential charges and seek to persuade the Commission not to pursue an enforcement action) (emphasis omitted); 17 C.F.R. 202.5(c) (providing for voluntary written "Wells

submissions" to the Commission by targets of SEC investigations). When a defendant disputes the results of that investigation, the SEC therefore has an interest in presenting its claims to an impartial adjudicator in order to maintain public confidence in the Commission's exercise of its enforcement discretion. See 17 C.F.R. 202.5(e) (explaining that the Commission's no-denial policy reflects its view that it is "important 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").

The no-deny clause is tailored to serve that interest. Petitioner asserts (Pet. 13) that violating the no-deny provision would put him "at potential risk for contempt of court."[4] But the agreement specifies a different remedy for any such violation: "If [petitioner] breaches th[e] agreement, the Commission may petition the Court to vacate the Final Judgment and restore this action to its active docket." Pet. App. 37. That provision ensures that, if a defendant avoids trial by settling the SEC's claims, then later contends that the Commission's allegations were inaccurate, the agency can seek the opportunity to prove those allegations in court.

b. Petitioner ignores *Rumery* and this Court's other decisions concerning the circumstances in which parties may voluntarily waive constitutional rights as part of a litigation settlement. Instead, he focuses on decisions

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[4] Petitioner rests (Pet. 13 n.7) that assertion on a statement by the D.C. Circuit in *Cato Institute* v. *Securities & Exchange Commission*, 4 F.4th 91, 95 (2021) (per curiam). The D.C. Circuit in that case considered a broad challenge to the SEC's policy of requiring no-deny provisions in no-admit settlements, but did not address language in specific consent agreements describing the available relief in the event of a breach. See *id.* at 96.

involving injunctions, statutes, "gag orders," and other forms of prior restraint imposed over a defendant's objection. See Pet. 13-23 (citing, *inter alia*, *Simon & Schuster, Inc.* v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116-117 (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 system); *Vance* v. *Universal Amusement Co.*, 445 U.S. 308, 314 (1980) (per curiam) (injunction against obscenity); *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 542-543 (1976) (restrictions on the publication and broadcast of trial information by the press); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 547-548 (1975) (preapproval regulation); *Freedman* v. *Maryland*, 380 U.S. 51, 58-59 (1965) (describing judicial procedures necessary for preapproval regime to be constitutional); *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697, 716, 718-719 (1931) (statute authorizing injunctions against defamation)).

Those decisions are inapposite here. They reflect the scope and substance of petitioner's First Amendment rights, but they do not suggest that the district court erred by incorporating into the 2003 final judgment a term to which petitioner had agreed. Petitioner unquestionably had the right to deny the Commission's allegations against him, but "he waived that right by agreeing to the no-deny provision as part of a consent decree." Pet. App. 14.

Petitioner also invokes (Pet. 24) this Court's "unconstitutional conditions doctrine." Petitioner contends that, under that doctrine, "[t]he government may not condition anyone's ability to receive a benefit on the surrender of their constitutional rights" (Pet. 23), including

a waiver of the right to a hearing (Pet. 28-29). Petitioner identifies no judicial decision applying that expansive conception of the unconstitutional-conditions doctrine to the settlement of legal claims. Petitioner's approach would effectively preclude the settlement of any government enforcement suit because settlement inherently entails the defendant's waiver of his right to trial before a jury or judge. Instead, this Court has analyzed the enforceability of settlement agreements that waive a defendant's rights using the inquiry set out in *Rumery*. See 480 U.S. at 392. As discussed above, see pp. 16-19, the court of appeals correctly held that the waiver here was permissible.

c. The court of appeals' decision does not conflict with any decision of another circuit or of any state court of last resort. Contra Pet. 7-8.

Two of the decisions on which petitioner relies (Pet. 7-8) did not involve the terms of consent agreements at all. In *G & V Lounge, Inc.* v. *Michigan Liquor Control Commission*, 23 F.3d 1071, 1077 (1994), the Sixth Circuit held that a city had violated the First Amendment by conditioning approval of a liquor license on the applicant's agreement not to permit topless dancing in the establishment. See *id.* at 1077-1078. And while the defendant in *United States* v. *Richards*, 385 Fed. Appx. 691 (9th Cir. 2010), had entered into a plea agreement, the First Amendment challenge there concerned a probation term that was entered without the defendant's consent. See *id.* at 693.

In the other three cases that petitioner invokes, courts applied *Rumery* and considered the relevant facts and circumstances before determining that the specific First Amendment waivers at issue were not enforceable. None of those decisions, however, suggested

that governmental plaintiffs are categorically foreclosed from negotiating First Amendment waivers as a condition of settlement. Nor did those decisions involve provisions, like the one at issue here, in which the specified remedy for a breach was to place the parties back in their pre-settlement positions. See p. 19, *supra*.

In *Overbey* v. *Mayor of Baltimore*, 930 F.3d 215 (4th Cir. 2019), the City of Baltimore clawed back half of the amount it had agreed to pay the plaintiff in settling a police-misconduct suit, based on the city's unilateral determination that the plaintiff had violated a non-disparagement clause in the settlement agreement. See *id.* at 220-221. The plaintiff then filed a separate suit alleging that the city's actions violated the First Amendment, and the city raised the non-disparagement clause as a defense. *Id.* at 221. The court found it "well-settled that a person may choose to waive constitutional rights pursuant to a contract with the government." *Id.* at 223. But applying the test established in *Rumery*, *supra*, the court declined to enforce the clause in the specific circumstances presented there. 930 F.3d at 223-225; see *id.* at 223 (asking whether "the interest in enforcing the waiver is * * * outweighed by a relevant public policy that would be harmed by enforcement") (citing *Pee Dee Health Care, P.A.* v. *Sanford*, 509 F.3d 204, 212 (4th Cir. 2007), in turn citing *Rumery*, 480 U.S. at 398)). In particular, the court emphasized the nature of the police-misconduct action and the fact that the agreement there allowed the government to make a unilateral determination whether a breach had occurred and to recoup half of the settlement amount from the plaintiff without any judicial involvement. *Id.* at 223-225.

In *Davies* v. *Grossmont Union High School District*, 930 F.2d 1390 (9th Cir.), cert. denied, 501 U.S. 1252

(1991), and *People* v. *Smith*, 918 N.W.2d 718 (Mich. 2018), courts considered the enforceability of a settlement (*Davies*) and plea agreement (*Smith*) in which individuals had agreed not to run for public office. See *Davies*, 930 F.2d at 1396-1399; *Smith*, 918 N.W.2d at 725-730. In *Davies*, the court found the provision unenforceable after determining that there was no governmental interest in preventing the plaintiff from running for public office; instead, enforcement would simply favor "the current members of the [school board], with whose policies Dr. Davies vigorously disagrees." *Davies*, 930 F.2d at 1398; see *id.* at 1398-1399. In *Smith*, the court likewise found that public-policy considerations weighed against enforcing the bar because the defendant "was not charged with misconduct that was in any manner related to public office." 918 N.W. 2d at 730. Recognizing that simply voiding that provision could "impose[] a different plea bargain on the prosecutor than he or she agreed to," however, the court held that the prosecutor should be given "an opportunity to withdraw from the agreement." *Id.* at 731. The court thus declined to adopt the remedy—*i.e.*, imposing upon the government a truncated settlement to which the government had never agreed—that petitioner requested in this case.

The decisions that petitioner invokes reflect the fact that the government's ability to obtain and enforce waivers of First Amendment rights is not unlimited. They do not, however, support the broad proposition that petitioner advocates, *i.e.*, that a defendant's promise not to engage in activities that otherwise would be protected by the First Amendment can *never* be a valid term of a settlement agreement. The court of appeals in this case correctly held that the no-deny provision of petitioner's

2003 consent agreement was valid. In any event, because Rule 60(b)(4) is not an appropriate mechanism for raising non-jurisdictional challenges like the one petitioner brings here, this case is not a suitable vehicle for resolving that constitutional question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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