No. 23-626

In the Supreme Court of the United States

ELON MUSK, 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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QUESTION PRESENTED

Whether petitioner's agreement to abide by certain conditions on his written communications about the company for which he serves as CEO, which was incorporated into a voluntary consent agreement between petitioner and the Securities and Exchange Commission and ultimately into the final judgment entered by the district court, violates the unconstitutional-conditions doctrine.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

Securities & Exchange Commission v. *Musk*, No. 18-cv-8865 (Apr. 27, 2022)

United States Court of Appeals (2d Cir.):

Securities & Exchange Commission v. *Musk*, No. 22-1291 (May 15, 2023)

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 10
Conclusion 22

TABLE OF AUTHORITIES

Cases:

Agency for Int'l Dev. v. *Alliance for Open Soc'y Int'l*, Inc., 570 U.S. 205 (2013) 15
Boykin v. *Alabama*, 395 U.S. 238 (1969) 11
Corbitt v. *New Jersey*, 439 U.S. 212 (1978) 16
Crosby v. *Bradstreet Co.*, 312 F.2d 483 (2d Cir.), cert. denied, 373 U.S. 911 (1963) 20
D. H. Overmyer Co. v. *Frick Co.*, 405 U.S. 174 (1972) 11
Davies v. *Grossmont Union High Sch. Dist.*, 930 F.2d 1390 (9th Cir.), cert. denied, 501 U.S. 1252 (1991) 19, 20
Dolan v. *City of Tigard*, 512 U.S. 374 (1994) 21
EEOC v. *Federal Labor Relations Auth.*, 476 U.S. 19 (1986) 14
Erie Telecomms., Inc. v. *City of Erie*, 853 F.2d 1084 (3d Cir. 1988) 18
FCC v. *League of Women Voters*, 468 U.S. 364 (1984) 15
G & V Lounge, Inc. v. *Michigan Liquor Control Comm'n*, 23 F.3d 1071 (6th Cir. 1994) 19
INS v. *St. Cyr*, 533 U.S. 289 (2001) 11
Kincaid v. *Government of D.C.*, 854 F.3d 721 (D.C. Cir. 2017) 15, 16

Cases—Continued: Page

Kokesh v. *SEC*, 581 U.S. 455 (2017) 2
Koontz v. *St. John's River Water Mgmt. Dist.*,
570 U.S. 595 (2013).. 15
Lake James Cmty. Volunteer Fire Dep't Inc. v.
Burke Cnty., 149 F.3d 277 (4th Cir. 1998),
cert. denied, 525 U.S. 1106 (1999) 18
Legal Servs. Corp. v. *Velazquez*, 531 U.S. 533 (2001) 15
Leonard v. *Clark*, 12 F.3d 885 (9th Cir. 1993) 18
Lorenzo v. *SEC*, 139 S. Ct. 1094 (2019) 2
National Equip. Rental, Ltd. v. *Szukhent*,
375 U.S. 311 (1964)... 11
Nebraska Press Ass'n v. *Stuart*, 427 U.S. 539 (1976) 16
O'Hare Truck Serv., Inc. v. *City of Northlake*,
518 U.S. 712 (1996)... 15
Overbey v. *Mayor & City Council*,
930 F.3d 215 (4th Cir. 2019)... 18, 19
People v. *Smith*, 918 N.W.2d 718 (Mich. 2018)............. 19, 20
Perry v. *Sindermann*, 408 U.S. 593 (1972) 15
Rufo v. *Inmates of Suffolk Cnty. Jail*,
502 U.S. 367 (1992)... 7, 8, 14
Rumsfeld v. *Forum for Acad. & Inst. Rights, Inc.*,
547 U.S. 47 (2006) 15
SEC v. *Capital Gains Research Bureau, Inc.*,
375 U.S. 180 (1963)... 2
SEC v. *Romeril:*
15 F.4th 166 (2d Cir. 2021), cert. denied,
142 S. Ct. 2836 (2022) 8, 20
142 S. Ct. 2836.. 10
Snepp v. *United States*, 444 U.S. 507 (1980)....................... 16
Speiser v. *Randall*, 357 U.S. 513 (1958) 15
Town of Newton v. *Rumery*,
480 U.S. 386 (1987).. 11-13, 16, 20

Cases—Continued: Page

United States v. *Jones*, 565 U.S. 400 (2012)........................ 14
United States v. *Mezzanatto*,
513 U.S. 1961 (1995)... 11, 13, 15
United States v. *Richards*,
385 Fed. Appx. 691 (9th Cir. 2010).................................... 19
United States v. *Williams*, 504 U.S. 36 (1992) 14
Wisniewski v. *United States*, 353 U.S. 901 (1957) 20

Constitution, statutes, rule, and regulations:

U.S. Const. Amend. I 8, 9, 12, 14, 16-20
Securities Exchange Act of 1934,
Ch. 404, 48 Stat. 891 2
§ 10(b), 48 Stat. 891 .... 2, 3, 4, 17
15 U.S.C. 78j(b)... 2
15 U.S.C. 78u... 2
Federal Rule of Civil Procedure 60(b)(5).......................... 7, 8
17 C.F.R.:
Section 240.10b-5.. 2, 3, 4, 17
Section 240.10b-5(b) 2
Section 240.13a-15 3
Section 240.13a-15(a)... 4
Section 240.13a-15(e)... 4

Miscellaneous:

W. Brooke Elliott et al., *Negative News and Investor Trust: The Role of $Firm and #CEO Twitter Use*,
56 Journal of Accounting Research 1483 (2018)............. 21
Ernst & Young LLP et. al, *Disclosure committee report: Practices and trends* (2021) https://assets.ey.com/content/dam/ey-sites/ey-com/en_us/news/2021/ey-2021-disclosure-committee-report-practices-and-trends.pdf....................................... 21

Miscellaneous—Continued: Page

Restatement (Second) of Contracts (1981) 12

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-8a) is not published in the Federal Reporter but is available at 2023 WL 3451402. The opinion and order of the district court (Pet. App. 9a-33a) is not published in the Federal Supplement but is available at 2022 WL 1239252.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2023. A petition for rehearing was denied on July 24, 2023 (Pet. App. 57a). On October 18, 2023, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including December 7, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The "basic purpose behind" the securities laws is "'to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry.'" *Lorenzo* v. *SEC*, 139 S. Ct. 1094, 1103 (2019) (quoting *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963)) (emphasis omitted). To that end, Section 10(b) of the Securities Exchange Act of 1934, ch. 404, 48 Stat. 891 (15 U.S.C. 78j(b)), makes it unlawful for any person "[t]o use or employ, in connection with the purchase or sale of any security[,] * * * any manipulative or deceptive device or contrivance in contravention of" Securities and Exchange Commission (SEC or Commission) rules. 15 U.S.C. 78j(b). SEC Rule 10b-5 implements Section 10(b) by making it unlawful for any person to, *inter alia*, "make any untrue statement of a material fact * * * in connection with the purchase or sale of any security." 17 C.F.R. 240.10b-5(b).

"Congress vested the Commission with 'broad authority to conduct investigations into possible violations of the federal securities law,'" including violations of Section 10(b) and Rule 10b-5. *Kokesh* v. *SEC*, 581 U.S. 455, 458 (2017) (citation omitted). "If an investigation uncovers evidence of wrongdoing, the Commission may initiate enforcement actions in federal district court." *Ibid.*; see 15 U.S.C. 78u.

2. a. Petitioner is the CEO of Tesla, Inc., and the former Chairman of its Board of Directors. C.A. App. A19. Tesla is a publicly traded company that manufactures and sells electric vehicles and energy generation and storage systems. *Ibid.*

On August 7, 2018, petitioner posted on the social-media site Twitter (now called X): "Am considering taking Tesla private at $420. Funding secured." C.A. App. A25. Over the next three hours, petitioner additionally tweeted:

> My hope is *all* current investors remain with Tesla even if we're private. Would create special purpose fund enabling anyone to stay with Tesla. Already do this with Fidelity's SpaceX investment.
>
> Shareholders could either to [sic] sell at 420 or hold shares & go private.
>
> Investor support is confirmed. Only reason why this is not certain is that it's contingent on a shareholder vote.

Id. at A16-A17, A26-A27; see Pet. App. 10a.

On September 27, 2018, the SEC commenced an enforcement action against petitioner in the United States District Court for the Southern District of New York, alleging that his statements were materially false and misleading, in violation of Section 10(b) and Rule 10b-5. C.A. App. A16, A18. The Commission alleged that, before posting his tweets, petitioner "had not discussed specific deal terms with any potential financing partners," and that a "potential transaction was uncertain and subject to numerous contingencies." Pet. App. 10a. The Commission further alleged that petitioner's tweets had "caused Tesla's stock price to jump by over six percent * * * and led to significant market disruption." *Ibid.*

In a separate enforcement action, the Commission alleged that Tesla had violated SEC Rule 13a-15, which requires securities issuers to "maintain disclosure con-

trols and procedures" to "ensure that information required to be disclosed" is properly "recorded, processed, summarized and reported." 17 C.F.R. 240.13a-15(a), (e); see 18-cv-8947, D. Ct. Doc. 1, ¶¶ 34-38 (S.D.N.Y. Sept. 29, 2018). The complaint against Tesla alleged that, although Tesla had publicly designated petitioner's Twitter account as a channel for disclosure of material information about the company, Tesla lacked policies for reviewing or controlling petitioner's tweets. D. Ct. Doc. 1, ¶¶ 11, 33.

Petitioner and Tesla settled the actions against them, agreeing to separate consent judgments with the SEC. Pet. App. 10a-11a. The consent judgment against petitioner enjoined him from violating Section 10(b) and Rule 10b-5, ordered him to pay a $20 million civil penalty, and required him to resign as Chairman of Tesla's Board. *Id.* at 51a-52a, 55a. It further required him to "comply with all mandatory procedures implemented by Tesla" regarding (i) "the oversight of communications relating to [Tesla] made in any format, including but not limited to, posts on social media"; and (ii) "the pre-approval of any such written communications that contain, or reasonably could contain, information material to [Tesla] or its shareholders." *Id.* at 55a-56a. Petitioner represented to the district court that the parties had reached their settlement in "good faith"; that he was entering "into this Consent voluntarily"; and that "no threats, offers, promises, or inducements of any kind ha[d] been made by the Commission" or any of its officers to induce him "to enter into this Consent." C.A. App. A46, A48; see Pet. App. 11a.

Meanwhile, the consent judgment against Tesla required the company to create a committee of directors that would oversee "controls and processes governing

the Company's and its senior executives' disclosures and/or public statements that relate to the Company"; "employ or designate an experienced securities lawyer" to "review communications made through Twitter and other social media by the Company's senior officers in a manner that is consistent with the Company's disclosure policy and procedures"; and "implement mandatory procedures and controls to oversee all of [petitioner's] communications regarding the Company made in any format," including tweets, and "to pre-approve any such written communications that contain, or reasonably could contain, information material to the Company or its shareholders." 18-cv-8947, D. Ct. Doc. 14, at 5-6 (S.D.N.Y. Oct. 16, 2018); see Pet. App. 11a. Tesla implemented those procedures in December 2018, thereby requiring petitioner to seek pre-approval from a Tesla attorney before publishing written communications that "contain, or reasonably could contain, information material to Tesla or its stockholders." C.A. App. A55.

b. On February 19, 2019, petitioner tweeted that "Tesla made 0 cars in 2011, but will make around 500k in 2019." Pet. App. 12a (citation omitted); see C.A. App. A91. Several hours later, petitioner tweeted: "Meant to say annualized production rate at end of 2019 probably around 500k, ie 10k cars/week. Deliveries for year estimated to be about 400k." Pet. App. 12a (citation omitted); see C.A. App. A92. The Commission moved to hold petitioner in contempt for violating the consent judgment, contending that his first tweet had contained material, misleading information, and that he had not obtained pre-approval before posting it. Pet. App. 12a. The district court held a hearing to determine whether petitioner should be held in contempt, after which the

court ordered the parties to meet and confer. C.A. App. A216; see *id.* at A145. Following three weeks of negotiations, the parties agreed to amend the consent judgments against both petitioner and Tesla. Pet. App. 12a-13a.

As relevant here, petitioner's amended consent judgment differs from the original in two respects. First, to determine which communications must be pre-approved, the parties agreed to shift from a standard based on materiality to a specific list of topics—for example, "events regarding [Tesla's] securities," "including [petitioner's] acquisition or disposition of [Tesla's] securities." Pet. App. 38a. Second, the amended consent judgment expressly requires petitioner to obtain pre-approval of covered communications by "an experienced securities lawyer employed by [Tesla]." *Ibid.* Again, petitioner represented that he was entering "into this Consent voluntarily," and that the Commission had made "no threats, offers, promises, or inducements" to induce him "to enter into this Consent." C.A. App. A226.

The amended consent judgment against Tesla contains corresponding changes. Specifically, it requires Tesla to implement mandatory procedures and controls "requiring pre-approval by Securities Counsel of any written communication that contains information regarding" the same list of topics set forth in petitioner's amended consent judgment, such as "events regarding [Tesla's] securities (including [petitioner's] acquisition or disposition of [Tesla's] securities)." 18-cv-8947, D. Ct. Doc. 17, at 1-2 (S.D.N.Y. Apr. 30, 2019).

3. On November 6, 2021, petitioner posted multiple tweets "concerning his potential sale of a large portion of his holdings in Tesla." Pet. App. 13a. The first tweet

stated: "Much is made lately of unrealized gains being a measure of tax avoidance, so I propose selling 10% of my Tesla stock. Do you support this?" *Ibid.* (citation omitted). The next tweet stated that he would "abide by the results of this poll, whichever way it goes." *Ibid.* (citation omitted). "[O]ver seven million votes were cast," with 57.9% of the voters answering "yes." *Ibid.*

Following those tweets, the Commission served subpoenas on petitioner and Tesla seeking "information about the tweets and the process that was employed before they were disseminated to the public." Pet. App. 13a. Rather than complying with the subpoenas, petitioner (but not Tesla) filed a motion under Federal Rule of Civil Procedure 60(b)(5), which allows a court to relieve a party from a judgment where "applying it prospectively is no longer equitable." *Ibid.*; see Pet. App. 14a.[1] Among other things, petitioner contended that enforcing the amended consent judgment "poses a grave threat to [his] First Amendment rights." C.A. Supp. App. SA36. But petitioner did not argue that the provision requiring pre-approval of his tweets was unenforceable under the unconstitutional-conditions doctrine. See *id.* at SA10-SA58.

The district court denied petitioner's motion. Pet. App. 9a-33a. The court observed that "a party seeking modification of a consent decree" under Rule 60(b)(5) "bears the burden of establishing that a *significant* change in circumstances warrants revision of the decree." *Id.* at 25a (quoting *Rufo* v. *Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 383 (1992)). The court empha-

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[1] Petitioner also moved to quash portions of the subpoena issued to him. Pet. App. 15a. The district court denied that motion, *id.* at 15a-25a, and petitioner did not appeal that decision.

sized that Rule 60(b)(5) "does not permit a court to relieve a party of the burden of a consent decree on the theory that 'it is no longer convenient to live with the terms of a consent decree.'" *Ibid.* (quoting *Rufo*, 502 U.S. at 383).

Applying that framework, the district court rejected petitioner's argument that the consent judgment had become unconstitutional under the First Amendment. Pet. App. 27a-28a. The court observed that "even [petitioner] concedes that his free speech rights do not permit him to engage in speech that is or could be considered fraudulent or otherwise violative of the securities laws." *Id*. at 27a (citation and internal quotation marks omitted). The court then stated that, "to the extent that the consent decree imposes an additional restriction on [petitioner's] speech by requiring him to obtain pre-approval of his communications about Tesla, 'parties can waive their First Amendment rights in consent decrees and other settlements of judicial proceedings.'" *Id.* at 27a-28a (quoting *SEC* v. *Romeril*, 15 F.4th 166, 172 (2d Cir. 2021), cert. denied, 142 S. Ct. 2836 (2022)) (footnote omitted). The district court explained that, because petitioner had "agreed to the provision requiring the pre-approval" of his communications, "[h]e cannot now complain that this provision violates his First Amendment rights." *Id.* at 29a. The court emphasized that petitioner "was not forced to enter into the consent decree," but rather had done so "for [his] own strategic purposes, * * * with the advice and assistance of counsel, * * * in order to secure the benefits thereof, including finality." *Id.* at 32a-33a (citation omitted; brackets in original).

4. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-8a. The court "disagree[d]" with petitioner's argument "that the SEC's methods of enforcing the consent decree constitute changed circumstances that have made compliance with it substantially more onerous." *Id*. at 4a. The court saw "no evidence" that the Commission had "used the consent decree to conduct bad-faith, harassing investigations of his protected speech." *Id.* at 5a.

The court of appeals observed that, "[w]hether or not the consent decree may have provided broader relief than the court could have awarded after a trial does not detract from the SEC's ability to enforce the agreement [petitioner] voluntarily signed, the terms of which plainly came within the general scope of the case made by the pleadings and furthered the objectives of the law upon which the complaint was based." Pet. App. 6a (citation, brackets, and internal quotation marks omitted). The court further held that the "public interest" did not "require modif[ying] the consent decree." *Ibid.* "If anything," the court explained, the public interest "cuts in the other direction, given the importance of * * * enforcement of federal securities laws" and the "'strong federal policy favoring the approval and enforcement of consent decrees.'" *Id.* at 6a-7a (citation omitted).

The court of appeals also held that petitioner had validly waived his First Amendment rights, thus precluding his "argument that the consent decree is effectively a 'prior restraint' on his speech." Pet. App. 7a. "Parties entering into consent decrees," the court reasoned, "may voluntarily waive their First Amendment and other rights." *Ibid.* "Indeed," the court noted, "every consent decree by definition involves waiver of the right to trial." *Ibid.* "Had [petitioner] wished to preserve his

right to tweet without even limited internal oversight concerning certain Tesla-related topics," the court emphasized, "he had 'the right to litigate and defend against the [SEC's] charges' or to negotiate a different agreement." *Ibid.* (citation omitted; second set of brackets in original). But having "*chose[n]* not to do so," the court concluded, petitioner "may not use Rule 60 to collaterally re-open a final judgment merely because he has now changed his mind." *Id.* at 7a-8a.

Finally, the court of appeals observed that petitioner was "also argu[ing] that any waiver of his First Amendment rights is unenforceable." Pet. App. 8a n.3. But because petitioner had "not made that argument before the district court," the court of appeals deemed it "forfeited." *Ibid.*

The court of appeals denied petitioner's request for rehearing or rehearing en banc without calling for a response. Pet. App. 57a.

ARGUMENT

Petitioner contends (Pet. 12-18) that his voluntary agreement to obtain approval from Tesla's lawyers before tweeting about certain Tesla-related topics, in exchange for resolution of the SEC's enforcement action against him, violates the unconstitutional-conditions doctrine. This Court recently denied a petition raising a similar claim, see *Romeril* v. *SEC*, 142 S. Ct. 2836 (2022) (No. 21-1284), and it should follow the same course here.

The court of appeals declined to address petitioner's unconstitutional-conditions argument, correctly holding that petitioner had forfeited that claim. This Court should not grant certiorari to review an issue that was not properly preserved or passed upon below. Petitioner's argument also fails on its own terms. This

Court has consistently held that, 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 waiver categorically unconstitutional. And the settlement term here was reasonably designed to minimize the likelihood that petitioner would make future false or misleading statements in violation of the securities laws. In all events, the question presented lacks practical significance because the unchallenged consent judgment involving Tesla already requires preapproval by Tesla attorneys of petitioner's tweets. Further review is not warranted.

1. 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 constitutional rights," parties can 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)") (emphasis omitted); *United States* v. *Mezzanatto*, 513 U.S. 196, 201 (1995) ("A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution."); *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 had released his right to bring a Section 1983 claim in exchange for the dismissal of pending criminal charges. See 480 U.S. at 391-392. The Court found that such agreements were not 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.").

Here, the court of appeals correctly held that petitioner had validly waived any First Amendment right he may have "to tweet without even limited internal oversight concerning certain Tesla-related topics." Pet. App. 7a. The SEC's request to include that provision in

the consent judgment required petitioner to choose between agreeing to the provision or proceeding to trial, 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's "choice between facing criminal charges and waiving his right to sue under § 1983." *Ibid.* Petitioner's choice instead reflected the "highly rational judgment" to forgo 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; see *Mezzanatto*, 513 U.S. at 208 (explaining that the "sound[est] way to encourage settlement is to permit the interested parties to enter into knowing and voluntary negotiations without any arbitrary limits on their bargaining chips").

2. Petitioner ignores *Rumery* and this Court's other decisions addressing parties' voluntary waivers of constitutional rights within the context of litigation settlements. Instead, he invokes (Pet. 13) this Court's "unconstitutional conditions doctrine." This case would be a poor vehicle for evaluating any unconstitutional-conditions argument, and that argument lacks merit in any event.

a. As a threshold matter, this case would be an unsuitable vehicle for considering petitioner's unconstitutional-conditions argument because petitioner forfeited that argument, and the court of appeals therefore declined to address it. In the district court, petitioner argued that the consent judgment should be

terminated or modified under Rule 60(b)(5) for three reasons: (1) by issuing subpoenas and document requests, the Commission had failed "to uphold its side of the bargain," C.A. Supp. App. SA36; (2) the pre-approval provision violated petitioner's First Amendment rights, *id.* at SA36-SA39; and (3) petitioner was under economic duress when he agreed to settle, *id.* at SA39-SA40. Petitioner never argued that either the original or the amended consent judgment violated the unconstitutional-conditions doctrine. Indeed, petitioner's district-court briefing did not use the term "unconstitutional conditions" or cite any of this Court's unconstitutional-conditions precedents. See *id.* at SA10-SA58. The district court therefore decided the case based on this Court's framework for Rule 60(b)(5) challenges, see *Rufo* v. *Inmates of Suffolk Cnty. Jail*, 502 U.S. 367 (1992), without considering the unconstitutional-conditions doctrine. See Pet. App. 25a-30a.

On appeal, petitioner argued for the first time that the consent judgment's pre-approval provision was unenforceable under the unconstitutional-conditions doctrine. Pet. C.A. Br. 35-38. But the court of appeals correctly held that petitioner had "forfeited" that challenge by failing to "ma[k]e that argument before the district court." Pet. App. 8a n.3. The court therefore never addressed petitioner's unconstitutional-conditions argument on the merits. See Pet. 12 n.4. This Court's "traditional rule * * * precludes a grant of certiorari" on a question that "'was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted); see, *e.g.*, *EEOC* v. *Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986) (per curiam); see also *United States* v. *Jones*, 565 U.S. 400, 413 (2012) (finding "no occasion to consider [an] argument" that a party

had "forfeited" below and that the court of appeals "therefore did not address"). There is no sound basis to deviate from that rule here.

b. Even if petitioner's unconstitutional-conditions argument had been adequately preserved, that argument would lack merit. Petitioner contends (Pet. 14) that, under the unconstitutional-conditions doctrine, the government may not "condition[] [a] benefit on an agreement to forego constitutional protections." But petitioner identifies no judicial decision applying that expansive conception of the unconstitutional-conditions doctrine to the settlement of legal claims. Rather, petitioner's cited cases (Pet. 12-19) arose in the distinct contexts of federal funding, *Agency for Int'l Dev.* v. *Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013); *Rumsfeld* v. *Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47 (2006); *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533 (2001); *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984), tax exemptions, *Speiser* v. *Randall*, 357 U.S. 513 (1958), land-use permits, *Koontz* v. *St. John's River Water Mgmt. Dist.*, 570 U.S. 595 (2013), and government contracts, *O'Hare Truck Serv., Inc.* v. *City of Northlake*, 518 U.S. 712 (1996); *Perry* v. *Sindermann*, 408 U.S. 593 (1972).

Those contexts are not analogous to the one here, *i.e.*, a settlement in which the government and a defendant each voluntarily forgoes certain potential advantages in exchange for finality. In this context, the Court "has long sanctioned law enforcement practices, including plea bargaining, that may exert 'pressure' on defendants to waive 'a series of fundamental rights' in exchange for the 'substantial benefits' of leniency." *Kincaid* v. *Government of D.C.*, 854 F.3d 721, 728 (D.C. Cir. 2017) (Kavanaugh, J.) (quoting *Mezzanatto*, 513

U.S. at 210); see, *e.g.*, *Rumery*, 480 U.S. at 391-392; *Corbitt* v. *New Jersey*, 439 U.S. 212, 219-221 (1978). Taken to its logical conclusion, 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. See Pet. 23 (acknowledging that the logic of his position would "extend beyond SEC settlements to all instances in which the government settles"). The Court should "decline [petitioner's] invitation to deviate from [this Court's] established precedent by adopting a novel 'unconstitutional conditions' rule that would call into question the traditional practices of police departments, prosecutors, and law enforcement agencies across the country," *Kincaid*, 854 F.3d at 728, while depriving courts, agencies, and defendants of the benefits of waivers in settlement agreements.

Petitioner's reliance on decisions involving prior restraints on speech is likewise misplaced. See Pet. 18 (citing *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 559 (1976) (involving restrictions on the publication and broadcast of trial information by the press)). Those decisions 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 consent judgment a term to which petitioner had agreed. Even if petitioner would otherwise have a right to tweet about Tesla "without even limited internal oversight," he "voluntarily waive[d]" that right when settling with the SEC. Pet. App. 7a; see *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam) (rejecting argument that provision in government employment con-

tract "expressly obligat[ing] [person] to submit any proposed publication for prior review" was "unenforceable as a prior restraint on protected speech").

Although the court of appeals declined to address petitioner's unpreserved argument that "any waiver of his First Amendment rights is unenforceable," Pet. App. 8a n.3, the court correctly recognized that the settlement term to which petitioner now objects "plainly came within the general scope of the case made by the pleadings and furthered the objectives of the law upon which the complaint was based," *id.* at 6a (citation, brackets, and internal quotation marks omitted). The SEC's complaint alleged that petitioner had made materially false and misleading statements, in violation of Section 10(b) and Rule 10b-5. See p. 3, *supra*. In the district court, petitioner "concede[d] that his free speech rights do not permit him to engage in speech that is or could be considered fraudulent or otherwise violative of the securities laws." Pet. App. 27a (citation and internal quotation marks omitted). The relevant settlement term is a measure reasonably designed to minimize the likelihood that petitioner will commit future securities-law violations. That term does not preclude petitioner from engaging in any form of speech or require pre-approval by a government official; it simply requires pre-approval by Tesla's own attorneys before petitioner speaks publicly about specified matters related to the company. The pre-approval requirement is particularly reasonable as applied to petitioner's use of his Twitter (now X) account, which Tesla had publicly designated as a channel for disclosure of material information about the company. See p. 4, *supra*.

3. Petitioner does not assert that the decision below conflicts with any decision of another circuit or any

state court of last resort. Courts agree that "First Amendment rights may be waived upon clear and convincing evidence that the waiver is knowing, voluntary and intelligent." *Leonard* v. *Clark*, 12 F.3d 885, 889 (9th Cir. 1994); see, *e.g.*, *Lake James Cmty. Volunteer Fire Dep't, Inc.* v. *Burke Cnty.*, 149 F.3d 277, 282 (4th Cir. 1998) (concluding that "the 'unconstitutional conditions' doctrine * * * does not categorically preclude parties from negotiating contractual relationships that include waivers of constitutional rights") (citations omitted), cert. denied, 525 U.S. 1106 (1999); *Erie Telecomms., Inc.* v. *City of Erie*, 853 F.2d 1084, 1096 (3d Cir. 1988) (explaining that "constitutional rights, like rights and privileges of lesser importance, may be contractually waived").

Petitioner briefly suggests (Pet. 22) that, "[i]n other contexts, courts have recognized that restrictions like the one at issue here are contrary to the Constitution." But the only decision he cites to support that proposition, *Overbey* v. *Mayor & City Council*, 930 F.3d 215 (4th Cir. 2019), does not suggest that governmental plaintiffs are categorically foreclosed from negotiating First Amendment waivers as conditions of settlement. In *Overbey*, a city 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. *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 certain constitutional rights pursuant to a contract with the government." *Id.* at 223.

But applying the test established in *Rumery*, the court declined to enforce the clause in the specific circumstances presented there. *Id.* at 223-225. 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. *Ibid.* No similar circumstances are present here.

The amicus supporting petitioner cites additional decisions that it views as inconsistent with the decision below. See New Civil Liberties Alliance Amicus Br. 20-21. Two of those decisions did not involve the terms of agreements to terminate legal proceedings. In *G & V Lounge, Inc.* v. *Michigan Liquor Control Commission*, 23 F.3d 1071 (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 incorporated without the defendant's consent. See *id.* at 693.

The other decisions cited by the amicus likewise fail to establish a conflict. 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 [the plaintiff] vigorously disagrees." 930 F.2d at 1398; see *id.* at 1392-1393, 1398-1399. In *Smith*, the court similarly 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. At most, those cases suggest that the government's ability to obtain and enforce waivers of First Amendment rights is not unlimited. See *Rumery*, 480 U.S. at 392. 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.[2]

4. Finally, this Court's review is unwarranted because the question presented lacks practical significance. Even if a court granted petitioner's request to

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[2] Amicus's reliance (Br. 21) on the Second Circuit's earlier decision in *Crosby* v. *Bradstreet Co.*, 312 F.2d 483 (2d Cir.), cert. denied, 373 U.S. 911 (1963), is likewise misplaced, because that case 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." *SEC* v. *Romeril*, 15 F.4th 166, 174 (2d Cir. 2021), cert. denied, 142 S. Ct. 2836 (2022). Regardless, any resolution of an intracircuit disagreement would be the task of the court of appeals, not of this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

alter his consent judgment, that alteration would not affect the related Tesla consent judgment, which produces the same operational result. The Tesla consent judgment independently obligates Tesla to implement procedures requiring petitioner to obtain pre-approval of written communications about the same Tesla-related topics referenced in petitioner's own consent judgment. See p. 5-6, *supra*; 18-cv-8947, D. Ct. Doc. 17. Thus, regardless of how petitioner's claim in this case is resolved, he would still be subject to the same pre-approval procedures to which he objects.

More broadly, the pre-approval provision at issue here is idiosyncratic, so any unconstitutional-conditions analysis of that specific term would be unlikely to affect other litigants. Indeed, the Commission has not included similar terms in other consent agreements—likely because many companies already maintain communications procedures that executives must follow.[3] Petitioner emphasizes (Pet. 19) the prevalence of *other* types of SEC settlement provisions that he claims raise First Amendment concerns. But under the unconstitutional-conditions framework that petitioner invokes here, a court must analyze the specific condition at issue. See, *e.g.*, *Dolan* v. *City of Tigard*, 512 U.S. 374, 386 (1994) (analyzing the specific "permit condition exacted by the city"). And petitioner identifies no reason to believe that analysis of the specific condition at issue here

[3] See W. Brooke Elliott et al., *Negative News and Investor Trust: The Role of $Firm and #CEO Twitter Use*, 56 Journal of Accounting Research 1483, 1490 (2018) (77% of surveyed firms had a social media policy); Ernst & Young LLP et al., *Disclosure committee report: Practices and trends* at 5 (2021), https://assets.ey.com/content/dam/ey-sites/ey-com/en_us/news/2021/ey-2021-disclosure-committee-report-practices-and-trends.pdf (94% of companies had a formal information-disclosure committee).

would provide meaningful guidance applicable to other cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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