

IMPOSING SILENCE THROUGH SETTLEMENT:
A FIRST-AMENDMENT CASE STUDY OF THE
NEW YORK ATTORNEY GENERAL

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ABSTRACT

Vested with vast investigatory and prosecutorial authority, New York's Attorney General is one of the most powerful law enforcement officials in the nation, increasingly acting not only as an enforcer, but also as a de facto regulator. Among the AG's powers is that she may settle cases on the state's behalf by entering into agreements called "Assurances of Discontinuance" (AODs) with targets of state investigations—which for decades has been how the AG's Office has resolved the vast majority of its cases. And for several years now, the AG has been inserting in most AODs a provision forbidding the settling party from "tak[ing] any action" or "mak[ing] . . . any public statement denying" the AOD's "propriety . . . or expressing the view . . . that th[e] [AOD] is without factual basis." This provision is apparently inspired by virtually identical clauses that the SEC and CFTC have been including in their settlements for decades. The tension between such "gag" provisions and the American free-speech tradition is difficult to ignore. Yet their potential unconstitutionality has thus far flown under the radar, with no court or commentator even acknowledging the First-Amendment concerns raised by the New York AG's settlement practice.

This Article takes on that issue, arguing that these speech-suppressant provisions' inclusion in AODs flagrantly violates the freedom of speech. The gag clauses cannot properly be regarded as voluntary waivers of First-Amendment rights, since settling parties are required as a condition of settlement to surrender their right to

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publicly criticize the AG's allegations against them—and those who refuse to do so face reprisal in the form of state prosecution or investigation. The Constitution, generally speaking, forbids public officials from using such tactics to strong-arm citizens into giving up fundamental freedoms. In fact, in at least some instances, the AG's gag clauses amount to prior restraints on speech, a form of speech regulation considered particularly constitutionally problematic. Finally, in addition to their coercive nature, AODs' speech-suppressant provisions raise First-Amendment concerns for other reasons—namely, that they restrict the communication of ideas and information that the public has a strong interest in hearing. Although the Second Circuit recently rejected a First-Amendment challenge to similar gag clauses in the SEC's settlements, the court's reasoning was flawed, as this Article undertakes to show. This Article's conclusions carry important implications for the constitutionality of the CFTC's speech-suppressant practices, as well as for any other official attempt to exact surrenders of constitutional rights through settlement agreements.

INTRODUCTION

In a May 2019 speech in honor of national “Law Day” (established in 1958 by President Eisenhower to celebrate this country's commitment to the Rule of Law),¹ New York Attorney General (“AG”) Letitia James passionately paid homage to the freedom of expression, the theme of that year's Law Day festivities: “the concept of freedom of speech [is] a fundamental part of democracy,” said James.² “The very heart of a free society is the ability to express, and to speak, and to criticize freely.”³ However, she continued:

[T]he painful truth is that the situation is getting increasingly worse in America. With the rhetoric coming in from the federal government and the attacks made daily on news organizations, America is not living up to our legacy as a beacon of transparency I reject the characterization that

¹ Andrew Glass, *Eisenhower Proclaims 'Law Day,' May 1, 1958*, POLITICO (May 1, 2012), <https://www.politico.com/story/2012/05/eisenhower-proclaims-law-day-075750> [<https://perma.cc/JWS6-8VPS>].

² Letitia James, N.Y. State Attorney General, Keynote Speech on Law Day 2019 at Court of Appeals Hall, Albany, N.Y. (May 1, 2019), <http://ww2.nycourts.gov/sites/default/files/document/files/2019-05/Transcript-LawDay2019.pdf> [<https://perma.cc/5B4L-GNNS>] [hereinafter Keynote Speech].

³ *Id.*

the media is an enemy of the people and so have our reporters.⁴

In case it was not already obvious, James subsequently confirmed that her disheartening observations were directed at then-President Trump and his administration,⁵ the actions of which accounted in part for AG James' perception that "the very fabric of who we are and what we believe in" is currently being "challenged," as well as her rejoinder to the Nation that "[w]e must . . . navigate through today's challenges without surrendering constitutional rights to the passions of this moment"—"[o]ur ability to criticize government, our ability to speak and write freely, our ability to serve as a check on power must not be restrained."⁶

All this lip service to free expression is perfectly well and good, and at first blush seems like the kind of boilerplate rhetoric that would soon be forgotten amidst similar remarks given by politicians almost every day. But James' Law Day speech is remarkable, for beneath it lurks a layer of extraordinary constitutional irony: the New York Office of the Attorney General ("OAG") has, for over a decade, pursued a civil enforcement policy that effectively compels the OAG's most potent potential critics to surrender the same "constitutional rights" to "criticize government" that AG James' claims were threatened by the President's mean tweets.⁷

The New York AG is currently considered "one of the most powerful [state attorneys general] in the nation."⁸ Under New York's constitution and laws, she enjoys a "sweeping statutory array of . . . law-enforcement authority: to prosecute business frauds and other deceptive practices; commence civil investigations in the public interest; bring actions to remove persons [from] . . . corporate office; enforce the State's anti-discrimination . . . laws; enforce statutes regulating toxic substances in the workplace; . . . and other powers too numerous to mention."⁹ Also among the AG's powers is that she

⁴ *Id.*

⁵ See Chris Carola, *NY Attorney General: Trump Rhetoric Undermines Media, Judges*, AP NEWS (May 1, 2019), <https://apnews.com/4ef857dbc122459f937440529a9211c1> [<https://perma.cc/54ZN-NLNS>].

⁶ Keynote Speech, *supra* note 2.

⁷ See *id.*

⁸ See Allan Smith, *NY's Attorney General is one of the Most Powerful in the Nation. That Should Worry Trump*, NBC NEWS (April 1, 2019), <https://www.nbcnews.com/politics/donald-trump/ny-attorney-general-one-most-powerful-nation-should-worry-n985086> [<https://perma.cc/JKS7-MDBC>].

⁹ *People v. Gilmour*, 773 N.E.2d 479, 482 n.7 (N.Y. 2002).

may settle cases on the state's behalf by entering into agreements called "Assurances of Discontinuance" ("AODs") with targets of state investigations¹⁰—which in recent decades has emerged as the OAG's method of choice for resolving the vast majority of its cases.¹¹ And since at least 2009, the OAG has been inserting in most such agreements¹² a provision forbidding the settling party from "tak[ing] any action" or "mak[ing] or permit[ting] to be made any public statement denying, directly or indirectly," the AOD's "propriety . . . or expressing the view, in substance, that [the] [AOD] is without factual basis."¹³ This provision is apparently inspired by virtually identical gag provisions that the federal Securities and Exchange Commission ("SEC") and Commodity Futures Trading Commission ("CFTC") have included since 1972 and 1999, respectively, in all settlements with targets of the agencies'

¹⁰ See N.Y. EXEC. LAW § 63 (McKinney 2021) ("In any case where the [AG] has authority to institute a civil action . . . in connection with the enforcement of a [state] law . . . , in lieu thereof he may accept an assurance of discontinuance of any act or practice . . . from any person engaged . . . in such practice.").

¹¹ See *infra* pp. 26–29.

¹² So far as I am aware, no statute, regulation, policy statement, or other official document provides insight into how often and under what circumstances the OAG includes gag provisions in AODs. Nor does any such document make clear when OAG began including these clauses. In response to my request for this information, an OAG representative informed me only that the "Office . . . does not comment on settlement strategy." E-mail from Constituent Services, Attorney General's Office, (Feb. 24, 2020). Nevertheless, from extensive searches of legal databases and the OAG's website, it appears the practice of silencing settling parties about the allegations against them dates back to at least August 2009. See 2009 N.Y. Op. Att'y Gen. 124, 2009 WL 10272013. It also seems that speech-suppressant provisions are included in AODs more often than not. Based on a random sample of 10 out of the 35 AODs posted on the OAG's website, I found that 70% included a gag clause (though the OAG website's collection of AODs does not purport to be exhaustive). See Search Results for the Term "Assurance of Discontinuance", N.Y. ST. ATT'Y GEN., [<https://perma.cc/35V8-V2PH>]. A leading Network-specific treatise's "Sample assurance of discontinuance" likewise includes a gag clause, explaining that such provisions are "often" included in AODs, 4D N.Y.Prac., *Com. Litig. in N.Y. St. Cts.* § 102:2, :57 (5th ed. 2020) (see Assurance of Discontinuance and Voluntary Compliance, SEC, [<https://www.sec.gov/Archives/edgar/data/896159/000119312506092893/dex101.htm>] [<https://perma.cc/WZ2W-KHZU>]; and according to the author of the quoted treatise section, gag provisions appear in "most" AODs. Telephone Interview with Robert J. Anello, Partner, Morvillo Abramowitz Grand Iason & Anello PC (June 18, 2020). A former high-ranking official at the New York OAG, who wished to remain anonymous, also informed me that gag clauses, which are considered "standard language" by the Office, are included as a matter of course in every proposed AOD; and that respondents are initially told during settlement negotiations that gag provisions are "non-negotiable," though the Office is more "likely to compromise on [gags] later in the negotiations," such that settling parties who manage to prolong bargaining long enough may perhaps escape a gag. Telephone Interview with Anonymous Former New York State Attorney General Official (June 16, 2020).

¹³ 2014 N.Y. Op. Att'y Gen. 007, 2014 WL 7662172.

enforcement actions, prohibiting the settling party from publicly calling into question the basis for the agencies' allegations.¹⁴

Yet the tension between these “gag” clauses and the American free-speech tradition is difficult to ignore. Surely no court would uphold the constitutionality of, say, an act of Congress declaring that regulated parties shall not “make . . . any public statement denying, directly or indirectly, the propriety” of any federal legislation “or expressing the view, in substance,” that any congressional findings underlying such legislation are “without factual basis.”¹⁵ Any court in the United States would, without hesitation, lay waste to any enactment of this kind that came before it, as perhaps no proposition of the Bill of Rights case law is better established than the Supreme Court's repeated recognition that the Constitution “forbid[s] the State from exercising viewpoint discrimination,” “an egregious form of content discrimination” that constitutes a “blatant” “violation of the First Amendment.”¹⁶ Indeed, the OAG's settlement practice suppresses protected expression by the targets of its investigations and enforcement actions—precisely those “members of [the] community most likely to have informed and definite opinions”¹⁷ on the OAG's official conduct, an additional consideration strongly weighing against this practice's constitutionality. How can the First Amendment allow the OAG to silence criticism of its activities in this manner?

The answer, in short, is that the First Amendment allows no such thing. But the unconstitutionality of the New York OAG's settlement practice has thus far flown under the radar, with no court or commentator even acknowledging the First Amendment concerns raised by inclusion of speech-suppressant clauses in AODs. To be sure, the analogous gag provisions in SEC settlements have been the subject of two federal appellate cases, both decided in 2021, where the provisions were challenged as infringements upon the freedom of speech. In *Cato Institute v. SEC*, the D.C. Circuit held that the challengers lacked standing; while in *SEC v. Romeril*, the Second Circuit reached the merits, only to hold (erroneously, in my view) that no First Amendment violation had occurred.¹⁸ And petitions for

¹⁴ See SEC Enforcement Activities, 17 C.F.R. § 202.5(e) (2020); CFTC Scope and Applicability of Rules of Practice, 17 C.F.R. § 10.1, App. A. (2020).

¹⁵ See 2014 N.Y. Op. Att'y Gen. 007, 2014 WL 7662172.

¹⁶ See *Rosenberger v. Rector*, 515 U.S. 819, 829 (1995).

¹⁷ See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968).

¹⁸ See *Cato Inst. v. SEC*, 4 F.4th 91 (D.C. Cir. 2021); *SEC v. Romeril*, 15 F.4th 166, 172 (2d Cir. 2021). The author was involved in the latter litigation in the district court.

rulemaking recently filed with both the SEC and CFTC urged the agencies to abandon their policy of silencing settling parties.¹⁹ Similarly, in a 2011 case, a federal district judge suggested, in dicta, that the SEC's policy of gagging settling parties "raises a potential First Amendment problem," but did not offer further analysis.²⁰ A 2017 blog post published in the online edition of the *Yale Journal on Regulation* likewise contended that the gag clauses in the SEC's and CFTC's settlements were unconstitutional, arguing that the provisions were contrary to public policy and hence unenforceable.²¹ But this brief piece left unexplored several other (and, in my view, stronger) arguments for the gag clauses' unconstitutionality. In short, the SEC's and CFTC's speech-suppressant settlement practices have received only scant consideration in the literature and case law, and the only decision directly addressing the First Amendment issues posed by those practices (*Romeril*) rejected the constitutional challenge with only cursory analysis. Meanwhile, New York's OAG has yet to be taken to task at all for its similar policy.

I intend to change that with this Article—which, drawing on my experience working on recent First Amendment litigation against the SEC, argues that the speech-suppressant clauses of the New York OAG's AODs violate the First Amendment. Indeed, these provisions often constitute prior restraints, a particularly constitutionally problematic form of speech regulation, against which the judicial "presumption" of invalidity "is heavier—and the [constitutional] degree of protection broader—than that against limits on expression" enforced through subsequent punishments.²² Since the OAG has thus far never had to defend the constitutionality of its AODs' speech-suppressant provisions in court, it is anyone's guess what arguments the Office would put forth in doing so. But it is a safe bet that the OAG's defense of its gags would borrow heavily from the SEC—which has, during the litigation challenging that agency's virtually-

¹⁹ See Petition to Amend, *In re* SEC Rule Imposing Speech Restraints in Consent Orders 17 C. F. R. § 202.5(e) (Oct. 30, 2018) <https://www.sec.gov/rules/petitions/2018/petn4-733.pdf> [<https://perma.cc/232E-RXQF>]; Petition to Amend, *In re* CFTC Rule Imposing Speech Restraints in Consent Orders 17 C.F.R. APPENDIX A to PART 10—Commission Policy Relating to the Acceptance of Settlements in Administrative and Civil Proceedings (Jul. 18, 2019) <https://ml.globenewswire.com/Resource/Download/118cc646-929c-491d-a8b2-5cc555f628ac> [<https://perma.cc/G2EZ-KETE>].

²⁰ See *SEC v. Citigroup Glob. Mkts., Inc.*, 827 F. Supp. 2d 328, 333 n.5 (S.D.N.Y. 2011) (Rakoff, J.), *vacated on other grounds*, 752 F.3d 285 (2d Cir. 2014).

²¹ See James Valvo, *The CFTC and SEC Are Demanding Unconstitutional Speech Bans in Their Settlement Agreements*, *YALE J. ON REG.: NOTICE & COMMENT* (Dec. 4, 2017), <http://bit.ly/2UJ410S> [<https://perma.cc/S6MZ-SPR9>].

²² See *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558–59 (1975).

identical gag clauses, put forth what I consider to be the strongest conceivable justifications for silencing settling parties with such provisions.²³ This Article accordingly addresses each of the SEC's arguments to this effect, aiming to show that none can save the OAG's speech-suppressant settlement practice. Because that practice has received virtually no First Amendment scrutiny, my analysis focuses primarily on the OAG—though as I explain, my conclusion that the OAG's settlements violate the First Amendment applies with equal (if not greater) force to the identical gags used in SEC and CFTC settlements. The Second Circuit's decision in *Romeril* upholding the constitutionality of the SEC's gags, as I aim to show here, was analytically flawed and ultimately wrong. I hope, moreover, that this case study helps to delineate the broader constitutional limits on public officials' power to demand, as a condition of settlement, that citizens relinquish their fundamental rights.

The scope of this problem is far from trivial. Because the OAG does not provide data on its settlement practices, we cannot say with certainty how many gags the Office has imposed, or even how many of its enforcement actions have settled.²⁴ But it is clear that the OAG has inserted gag provisions into AODs for more than a decade, and that, for years now, such clauses have appeared in the vast majority of Assurances.²⁵ It is equally clear that the Office virtually never tries cases, preferring to rely instead on subjecting regulated parties to burdensome investigations so as to exhaust them into submitting to AODs.²⁶ Given these trends, and the New York OAG's status as arguably the Nation's most powerful state law enforcement agency, the suppression of political speech wrought by its AODs warrants some attention. And the suppression wrought by SEC and CFTC settlements warrants even more: the SEC "settles approximately 98 percent of its cases, totaling between 650 and 700 settlements each year,"²⁷ while the CFTC settles the overwhelming majority of its several hundred annual enforcement actions, though exact figures are not available.²⁸

²³ See generally Reply Memorandum in Support of Defendants' Motion to Dismiss at 1, *Cato Inst. v. SEC*, No. 1:9-cv-00047-ABJ, 2019 WL 4008703 (D.D.C. June 7, 2019) (setting forth the SEC's legal arguments).

²⁴ See *supra* note 12.

²⁵ See *supra* note 12 and accompanying text.

²⁶ See *infra* pp. 26–29.

²⁷ Paul Radvany, *The SEC Adds A New Weapon: How Does the New Admission Requirement Change the Landscape?*, 15 *CARDOZO J. CONFLICT RESOL.* 665, 670 (2014).

²⁸ See note 140, *infra*.

I. WAIVER

The OAG's most natural line of defense of its AODs' gag clauses would be to follow the SEC's example and characterize the speech-suppressant provisions as settling parties' voluntary waivers of First Amendment rights.²⁹ That is how the Second Circuit characterized them in *Romeril*.³⁰ But this characterization, as we shall see, fails spectacularly. That these clauses appear in documents that call themselves "agreements" should not delude us into believing that they represent actual agreement, lest we forget the Supreme Court's admonition that "state labels cannot be dispositive of degree of First Amendment protection."³¹

A. *Basic Principles*

It is well-established in constitutional jurisprudence that government may not condition a person's eligibility for a legal privilege or benefit upon his or her surrender of a privilege secured by the Constitution of the United States.³² The courts have applied this principle especially zealously in the First Amendment context, where case after case has reaffirmed that public officials "may not deny a benefit to a person on a basis that infringes his . . . freedom of speech even if he has no entitlement to that benefit."³³ This is true whether the "benefit" in question consists of material aid from government (such as financial subsidies),³⁴ or of relief from government-imposed sanctions or obligations (such as tax exemptions).³⁵

Far from being another newfangled innovation of twentieth century judges, this principle (often referred to today as the doctrine of "unconstitutional conditions")³⁶ has ancient roots. As early as

²⁹ See Reply Memorandum in Support of Defendants' Motion to Dismiss at 7–8, *Cato Inst. v. SEC*, No. 1:9-cv-00047-ABJ, 2019 WL 4008703 (D.D.C. June 7, 2019).

³⁰ See *SEC v. Romeril*, 15 F.4th 166, 172 (2d Cir. 2021).

³¹ See *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988).

³² See *Barron v. Burnside*, 121 U.S. 186, 200 (1887) ("As the Iowa Statute makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States, the statute requiring the permit must be held to be void.").

³³ *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013) (quoting *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006)).

³⁴ See *Alliance*, 570 U.S. at 214–15.

³⁵ See *Speiser v. Randall*, 357 U.S. 513, 528–29 (1958).

³⁶ See generally Edward J. Fuhr, *The Doctrine of Unconstitutional Conditions and the First Amendment*, 39 CASE WESTERN RES. L. REV. 97 (1989) (general support of name of doctrine of unconstitutional conditions).

1821, the Tennessee Supreme Court of Errors and Appeals unmistakably deployed the unconstitutional-conditions analysis in holding unconstitutional a state statute providing that a successful civil plaintiff could not recover on a judgment in his favor earlier than two years after such judgment was rendered unless he endorsed a document agreeing to “receive, in satisfaction of said execution,” paper notes issued by certain state banks or other paper currency of comparable value.³⁷ Defenders of the statute, while conceding that the state was constitutionally prohibited from “emit[ting] bills of credit” (i.e., paper money), nonetheless argued that since the legislature had discretionary power to determine by law how soon judgments would be executed after being rendered, the legislature must also have had the power to delay execution of judgments unless plaintiffs agreed to accept “scrip” as payment.³⁸ Tennessee’s highest court, however, was not persuaded by this line of reasoning:

Grant, for argument sake, that the right to execution is . . . a newly created one, given by the legislature only upon condition; shall it be permitted so to frame the condition, as to make it involve the relinquishment of a right secured by the constitution? . . . Can [the creditor] be required to relinquish that security in order that he may become entitled to the benefit of this new created right, to have execution? By such inventions every constitutional right may in succession be bartered away. Constitutional rights are . . . unalienable[,] . . . and every such condition is utterly void. If execution can be suspended on any condition, then the legislature has an absolute power to suspend it forever. How easy it is to invent a thousand conditions, with which no man in his senses would comply? . . . [I]f the right be antecedent, suspension is an unconstitutional penalty; if it be newly created, the condition is unconstitutional and the right vests absolutely.³⁹

The U.S. Supreme Court adopted the same reasoning several years after the adoption of the Fourteenth Amendment (through which the Bill of Rights’ guarantees were incorporated against state actors such

³⁷ See *Townsend v. Townsend*, 7 Tenn. (Peck) 1, 2 (1821).

³⁸ See *id.* at 2, 11, 13–14.

³⁹ *Id.* at 12.

as the New York OAG).⁴⁰ In 1874, the Court held invalid and unenforceable a contract between the State of Wisconsin and an out-of-state company, which had entered into the agreement pursuant to a Wisconsin law providing that “a corporation organized in another State shall not transact business within [Wisconsin] . . . unless it stipulates in advance that it will not remove into the Federal courts any suit that may be commenced against it by a [Wisconsin] citizen.”⁴¹ The Court explained that the “Constitution . . . secures to citizens of another State than that in which suit is brought an absolute right to remove their cases into the Federal court,” and although the freedom to transact business within a state was a privilege subject to modification or revocation by state laws, no “conditions may be imposed which are repugnant to the Constitution”; since the condition imposed by the Wisconsin statute was “an obstruction to” the right of removal to federal court, the Supreme Court struck down the law and the contract made pursuant thereto.⁴²

It is therefore practically hornbook law that public officials may not use the threat of an adverse exercise of sovereign power in order to pressure citizens into giving up a constitutional right. In light of this principle, the speech-suppressant terms of the New York OAG’s settlements cannot properly be regarded as settling parties’ voluntary waiver of their free speech rights. While constitutional rights certainly may be waived under some circumstances,⁴³ and while the OAG is obviously under no constitutional obligation to settle with targets of its investigations, the OAG certainly may *not* demand as a condition of settlement that settling parties agree to never publicly question the propriety of the OAG’s allegations, as such a condition “necessarily . . . ha[s] the effect of coercing” settlers into surrendering their freedom to “engag[e] in certain speech” protected by the First Amendment.⁴⁴ As long ago as 1963, the U.S. Supreme Court declared that it was “too late in the day to doubt that the libert[y] of . . . expression may be infringed by the denial of or

⁴⁰ See 4 JOSEPH STORY & THOMAS M. COOLEY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION 668–69 (Boston, Little, Brown & Co. 1873) (“[T]he terms, life, liberty, and property [in the Fourteenth Amendment] . . . cover every right to which a member of the body politic is entitled The word liberty here employed . . . embraces all our liberties—personal, civil, and political.”).

⁴¹ *Ins. Co. v. Morse*, 87 U.S. 445, 453 (1874).

⁴² *Id.* at 457–58.

⁴³ See *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 143 (1967) (first citing *Michel v. Louisiana*, 350 U.S. 91, 99 (1955); then citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

⁴⁴ See *Speiser v. Randall*, 357 U.S. 513, 519 (1958).

placing of conditions upon a benefit or privilege.”⁴⁵ Given that it was already “too late in the day” to question that proposition over fifty years ago, it is hard to imagine how the New York OAG in 2022 could plausibly defend its practice of routinely defying this basic constitutional-law principle when settling its enforcement actions.

Indeed, there is a great deal of modern case law suggesting that the OAG’s systematic muzzling of parties to its AODs is unconstitutional. One New York federal court, for instance, held that a probationer could not be required as a condition of probation to attend religious substance abuse programs; rejecting the argument that the probationer had waived his rights by assenting to the condition, the court explained that he was

[I]nfluenced by the possibility that any objections . . . could lead to a jail sentence or revocation of probation . . . [W]here the state . . . asserts that “invocation of the privilege would lead to revocation of probation, it would have created the classical penalty situation” . . . [T]he plaintiff did not waive . . . his right to make a subsequent objection to a violation of his constitutional rights.⁴⁶

Along the same lines, a Massachusetts court held that “a defendant who is awaiting trial and still presumed innocent cannot effectively consent to an unconstitutional search as a condition of pretrial probation.”⁴⁷ The Second Circuit, too, has held that a prosecutor (there, the defendant) violated the “right of an individual not to be forced to participate in a religious ceremony” when he required, as a condition of his dropping charges against the plaintiff, that she swear her innocence on a copy of the Bible; the court rejected the defendant prosecutor’s argument “that [plaintiff] was not in fact ‘forced’ to swear to her innocence in the Church, and that she did so of her own volition,” noting that “the only alternatives he offered [plaintiff] were to swear on a bible in the Church or . . . go to trial.”⁴⁸

Nor are the New York OAG’s constitutionally intolerable exactions insulated from judicial scrutiny simply because they are enshrined in

⁴⁵ *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (citing *Am. Commc’ns Ass’n v. Douds*, 339 U.S. 382, 390 (1949); *Wieman v. Updegraff*, 344 U.S. 183, 191–92 (1952); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 155–56 (1946)).

⁴⁶ *Warner v. Orange Cty. Dep’t of Prob.*, 968 F. Supp. 917, 923 (S.D.N.Y. 1997) (quoting *Minnesota v. Murphy*, 465 U.S. 420, 435 (1984)), *aff’d*, 173 F.3d 120 (2d Cir. 1999).

⁴⁷ *Commonwealth v. Dew*, No. 1584CR10164, 2015 WL 6759395, at *4 (Mass. Super. Ct. Oct. 27, 2015) (citing *United States v. Scott*, 450 F.3d 863, 868 (9th Cir. 2006)).

⁴⁸ *Doe v. Phillips*, 81 F.3d 1204, 1207, 1211–12 (2d Cir. 1996).

a “contract.” Even in cases where individuals have surrendered their constitutional rights by entering into an otherwise-enforceable agreement, courts have not hesitated to invalidate such waivers if they resulted from public officials’ threats to impose an unconstitutional condition.⁴⁹ In so holding, these decisions have properly heeded the Supreme Court’s admonition that “regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening [those] rights by coercively withholding benefits from those who exercise them.”⁵⁰

B. Basic Principles Applied to Settlement

In a move that the New York OAG will surely emulate, the SEC recently argued in litigation that the “unconstitutional conditions theory does not work in the settlement context because consent judgments, which embody compromises, will always condition the ‘benefit’ of settlement on the relinquishment of rights, including the waiver of the right to a trial and an appeal.”⁵¹ To be sure, practical considerations have led courts to apply the rule against unconstitutional conditions somewhat less forcefully in the settlement context. Plea agreements almost invariably involve the surrender of constitutional rights in exchange for a more favorable course of official action, yet such agreements have generally been held valid.⁵² A criminal defendant accepting a plea deal obviously must, for instance, forfeit her right to a jury trial, and “[a]lthough every such circumstance has a discouraging effect on the defendant’s assertion of his trial rights, the imposition of these difficult choices” is “an inevitable attribute of any . . . system which tolerates . . . the negotiation of pleas.”⁵³ In the civil setting, too, courts have upheld

⁴⁹ See *Elrod v. Burns*, 427 U.S. 347, 360 n.13 (1976) (plurality opinion) (rejecting argument that “respondents here have waived any objection to” unconstitutional conditions of public employment by accepting such employment); *Ins. Co. v. Morse*, 87 U.S. 445, 454, 458 (1874); *G & V Lounge, Inc. v. Mich. Liquor Control Comm’n*, 23 F.3d 1071, 1077 (6th Cir. 1994) (“[T]he city’s 1979 contract . . . constituted an attempt to condition Plaintiff’s receipt of a benefit upon Plaintiff’s waiver of its right to free expression As such, the contract is unenforceable.”); *United States v. Marchetti*, 466 F.2d 1309, 1317 (4th Cir. 1972) (“We would decline enforcement of the secrecy oath [respondent] signed . . . , for . . . the oath would be in contravention of his First Amendment rights.”); 49 C.J.S. *Judgments* § 506 (2020) (“A consent judgment may be set aside where it is void on constitutional grounds.”).

⁵⁰ *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013).

⁵¹ Memorandum in Opposition at 17, *SEC v. Allaire*, No. 03cv4087 (DLC), 2019 U.S. Dist. LEXIS 199887 (S.D.N.Y. Nov. 18, 2019).

⁵² See, e.g., *Brady v. United States*, 397 U.S. 742, 751–52 (1970).

⁵³ *Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973).

citizens' waivers of rights exacted by governmental litigants as a condition of settlement, at least where such waivers were reasonably necessary to conclusively bring the underlying disputes to an end.⁵⁴ Nevertheless, numerous judicial decisions have recognized constitutional limits on public officials' demands that citizens surrender fundamental rights as a condition of settlement. An examination of these cases, together with some old-fashioned legal reasoning, all but compels the conclusion that the New York OAG has been markedly overstepping this constitutional line.

To begin with, although plea agreements requiring criminal defendants to waive certain procedural rights have usually been upheld, in cases where defendants (or putative defendants) have been strong-armed by government into relinquishments of constitutional liberty that were *not* reasonably necessary to effectuate settlement of the underlying dispute, the courts have properly found these "waivers" invalid in virtually every instance. In one particularly illustrative decision, federal prosecutors were found to have overstepped their constitutional bounds when they demanded in non-prosecution agreements that individuals not distribute First Amendment protected magazines and videotapes.⁵⁵ The Ninth Circuit has likewise invalidated a term of a plea agreement that prevented the defendant from making public comments concerning a county commissioner as a violation of the First Amendment.⁵⁶ The Second Circuit has held that no plea agreement can require a defendant to admit to crimes other than those of which he has been convicted or has pled guilty in order to receive a sentence reduction; the court rejected the government's argument that the condition "d[id] not penalize a defendant for refusing to admit related conduct" but instead "simply withh[eld] a benefit," reasoning that "[t]o require . . . defendant[s] to accept responsibility for [such] crimes . . . forces defendants to choose between incriminating themselves . . . or forfeiting substantial reductions in their sentences

⁵⁴ See cases cited *infra* note 67.

⁵⁵ See *PHE, Inc. v. U.S. Dep't of Justice*, 743 F. Supp. 15, 18–19, 26 (D.D.C. 1990) ("[Government's] attempt to persuade the Court that the conditions they have demanded in exchange for non-prosecution . . . are merely . . . normal plea bargain negotiations . . . misses the mark [Their] conduct amount[s] to threats of prosecution for constitutionally protected activity."); see also *Council for Periodical Distrib. Ass'n v. Evans*, 642 F. Supp. 552, 565 (M.D. Ala. 1986) (explaining that a prosecutor's "scheme ran afoul of the constitution when he sought to suppress, again by use of the consent decree, . . . magazine[s]" protected by the First Amendment); cf. *People v. Smith*, 918 N.W.2d 718, 729–30 (Mich. 2018) (invalidating term in plea agreement waiving defendant's state constitutional right to run for office, explaining that the waiver lacked a "close nexus" to "the charged offenses").

⁵⁶ See *United States v. Richards*, 385 F. App'x 691, 692–93 (9th Cir. 2010).

to which they would otherwise be entitled.”⁵⁷ More recently, in a particularly sensational and high-profile application of this principle, a federal district court ordered President Trump’s former personal attorney, Michael Cohen, released from prison after he violated a condition of his supervised release agreement prohibiting him from speaking to the media.⁵⁸ In a preliminary order, the court explained that the government’s “purpose in transferring Cohen . . . back to custody was retaliat[ion]” for Cohen’s “exercise [of] his First Amendment rights to publish a book critical of the President and to discuss the book on social media.”⁵⁹ This case has since been resolved by stipulation, pursuant to which Cohen remains on supervised release, but with “no specific media provision governing [his] home confinement.”⁶⁰

Another line of decisions applying the unconstitutional conditions doctrine to settlements of criminal proceedings—one that may be of particular salience to the New York OAG—consists of cases in which state courts have carefully policed constitutional constraints on “Adjournments in Contemplation of Dismissal” (“ACDs”), which “as practiced in [New York] courts [are] merely” a form of “what is commonly referred to as ‘plea bargaining.’”⁶¹ One such decision confronted an ACD with a “condition . . . [that] the defendant relinquish his constitutional right to petition the government for a redress of grievances;” the court, in a holding that has been repeatedly reaffirmed, invalidated this term of the ACD, explaining that “the prosecutor may not condition his consent upon defendant’s release of his constitutional rights,” which would “amount[] to undue pressure and an act of coercion.”⁶² Indeed, it is an established rule of New York jurisprudence that, in the words of a leading treatise, “a prosecutor may not condition the ACD upon matters extraneous to the criminal process involving the defendant’s civil rights or matters exercising certain constitutional rights.”⁶³ It arguably follows from this principle that the OAG similarly cannot condition an *AOD* upon

⁵⁷ See *United States v. Oliveras*, 905 F.2d 623, 627–28 (1990); *United States v. Ramirez*, 113 F.3d 1230 (2d Cir. 1997).

⁵⁸ See *Cohen v. Barr*, No. 20 Civ. 5614 (AKH), 2020 WL 4250342, at *1 (S.D.N.Y. July 23, 2020) (order granting preliminary injunction).

⁵⁹ *Id.*

⁶⁰ Stipulation and Order, *Cohen v. Barr*, No. 20 Civ. 5614 (AKH), 2020 U.S. Dist. LEXIS 132817 (S.D.N.Y. Jan. 26, 2021), ECF No. 36.

⁶¹ See *People v. Siragusa*, 366 N.Y.S.2d 336, 341 (Dist. Ct. Nassau Cty. 1975).

⁶² See *id.* at 342; accord *People v. Cunningham*, 431 N.Y.S.2d 785, 786–87 (Crim Ct. Kings Cty. 1980); *People v. Wilmot*, 428 N.Y.S.2d 568, 569–70 (Crim. Ct. Kings Cty. 1980).

⁶³ 34 CARMODY-WAIT 2D NEW YORK PRACTICE WITH FORMS § 189:70 (Alexa Ashworth et al. eds., 2020).

matters extraneous to the *civil*-enforcement process involving the *settling party's* civil or constitutional rights.

The same unconstitutional conditions principle discussed thus far in the criminal context would, as matter of logic, seem equally applicable to civil settlements involving the government: if public officials may not use the threat of an adverse exercise of sovereign power to exact a surrender of constitutional liberties (except to the extent such surrender is appropriate in order to conclusively settle the dispute), it should hardly matter whether the threatened exercise is a criminal prosecution or a civil enforcement action.

Sure enough, a robust line of judicial decisions have recognized that the Constitution does not countenance attempts by public officials to recast extortion as mere civil settlement negotiations. So held the Ninth Circuit in an oft-cited 1991 case, explaining that, “[b]efore the government can require a citizen to surrender a constitutional right as part of a settlement or other contract, it must have a legitimate reason for including the waiver in the particular agreement,” which is to say there must be “a close nexus - a tight fit - between the specific interest the government seeks to advance in the dispute underlying the litigation involved and the specific right waived.”⁶⁴ In that case, the court invalidated the citizen’s “waiver” of his constitutional right to run for office, explaining that “the nexus between the individual right waived and the dispute that was resolved by the settlement agreement is not a close one,” and “[h]ad it not been for the [appellee’s] insistence on the inclusion of the waiver provision in the settlement agreement,” the waiving party’s “right to run for elective office could not have been affected by a resolution of the litigation,” and so it was improper to “extract[] a waiver of” the “right . . . as a condition to settling the lawsuit.”⁶⁵ Later cases have hewed to the same principle, rejecting conditions of settlement agreements involving the government that demand a greater surrender of constitutional liberty than is necessary to actually resolve ongoing or imminent proceedings;⁶⁶ while the decisions approving waivers of rights in such settlements have done

⁶⁴ *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1399 (9th Cir. 1991).

⁶⁵ *Id.*

⁶⁶ *See Lil’ Man In The Boat, Inc. v. City & County of San Francisco*, No. 17-cv-00904-JST, 2017 WL 3129913, at *9–10 (N.D. Cal. July 24, 2017) (finding that a settlement “does not concern” or “resolve[] a pending dispute” if it is “overly broad and fails . . . the close nexus test.”).

so only when the right surrendered is plainly related to achieving the desired finality.⁶⁷

The right that the OAG's AODs purport to take from settling parties plainly falls into the former category; or, to borrow the Ninth Circuit's phraseology, the waiver of speech rights demanded by the OAG fails the "close nexus" test. The essence of a settlement agreement, as the Supreme Court has explained, is a "compromise[] in which the parties give up something they might have won in litigation and waive their rights to litigation."⁶⁸ But the right that the OAG's AODs take from settling parties (the right to publicly criticize the basis for the OAG's allegations)⁶⁹ is not one that they would have lost had the OAG successfully pursued enforcement actions against them, nor is it a right necessarily surrendered when a matter is resolved out of court (such as the right to an impartial adjudicator). Said otherwise, the right is extraneous to civil-settlement process, and is therefore a constitutionally inappropriate concession for the OAG to require of settling parties.

This distinction—between rights "extraneous" to the settlement process and rights plainly related to conclusively settling the underlying dispute—has a solid foundation in case law governing unconstitutional conditions on government funding. The Court recognizes an analogous distinction "between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself."⁷⁰ The former class of conditions pose no constitutional problem, whereas the latter, in "plac[ing] a condition on the *recipient* of the subsidy rather than on a particular [government] program or service, . . . effectively prohibit[] the

⁶⁷ See *Emmert Indus. Corp. v. City of Milwaukee*, 307 F. App'x 65, 67 (9th Cir. 2009) ("The condition the government imposed—a litigation waiver—directly advanced" the City's "legitimate interest in settling a dispute . . . The benefit Emmert was to receive—a [] settlement—was also closely connected to the [] waiver and the City's need for resolution."); *Leonard v. Clark*, 12 F.3d 885, 892 (9th Cir. 1993) ("[W]e cannot find that" a "[u]nion's completely unfettered freedom of expression outweighs the public interests in the finality of collective bargaining agreements and the predictability of municipal budgets."); *Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084, 1097 (3d Cir. 1988) (upholding the waiver of constitutional claims on the ground that the settlement contract was appropriately "put[ting] an end to all disputes . . . raised in . . . litigation. . . ."); *La. Pac. Corp. v. Beazer Materials & Servs., Inc.*, 842 F. Supp. 1243, 1253–54 (E.D. Cal. 1994) ("Moreover, the constitutional right sought to be waived is directly implicated by the benefit the Government sought[:]. . . a termination of litigation.").

⁶⁸ *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 235 (1975).

⁶⁹ See 2014 N.Y. Op. Att'y Gen. 007, 2014 WL 7662172.

⁷⁰ See *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214–215 (2013).

recipient from engaging in the protected conduct outside the scope of the . . . program” in violation of the First Amendment.⁷¹ The OAG forever prohibits public criticism of its allegations by the recipients of the “benefit” of settlement, even long after the state’s objectives of imposing sanctions and settling enforcement proceedings have been achieved.⁷² In this way, the condition imposed by the OAG unconstitutionally “leverage[s]” offers of settlement “to regulate speech outside the contours” of the Office’s enforcement program.⁷³

Relatedly, it is worth mentioning that the constitutional argument against the OAG’s AODs is at least as strong (and probably stronger) under the New York State constitutional guarantee of free speech as it is under the federal First Amendment. As the state’s highest court has correctly noted, state courts “may interpret their own law to supplement or expand” rights guaranteed by the Federal Constitution.⁷⁴ That same tribunal has accordingly held that because “New York has a long history and tradition of fostering freedom of expression, . . . the minimal national standard established by the Supreme Court for First Amendment rights cannot be considered dispositive in determining the scope of this State’s constitutional guarantee of freedom of expression.”⁷⁵ New York courts, if they intend to carry on this long history and tradition of free speech, must at the first available opportunity put a stop to their state’s top law-enforcement official’s policy of silencing her critics through settlement, especially since that policy violates even the minimal standard of free-speech protection established by the *federal* Constitution.

The SEC, for its part, argued in the litigation over its gag clauses that the courts have generally “employ[ed] an unconstitutional-conditions analysis” in cases involving such prototypical “government benefit[s]” as the “granting [of] funds, a permit, or a license[;]” the SEC’s “acceptance of a defendant’s offer of settlement,” however, “is not the equivalent of granting funds, a permit, or a license,” and so, the agency argues, the doctrine should be limited to cases where conditions are attached to these sorts of benefits.⁷⁶

⁷¹ *Rust v. Sullivan*, 500 U.S. 173, 197 (1991).

⁷² *See* 2014 N.Y. Op. Att’y Gen. 007, 2014 WL 7662172.

⁷³ *See Agency for Int’l Dev.*, 570 U.S. at 214–15.

⁷⁴ *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 302 (1986).

⁷⁵ *People ex rel. Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 557–58 (1986).

⁷⁶ Brief for the Petitioner-Appellee at 39–40, *SEC v. Romeril*, No. 19-4197-cv (2d Cir. July 21, 2020).

But this hairsplitting analysis misses the point of the unconstitutional-conditions doctrine entirely. The rule that government cannot “deny a benefit to a person because of his constitutionally protected speech” is not limited to any particular type of government action, but rather is simply one manifestation of the more general principle that government cannot “penalize[] [or] inhibit[]” in any manner the exercise of that freedom.⁷⁷ The Supreme Court’s “precedents thus apply the most exacting scrutiny to regulations” that in any way “suppress, disadvantage, or impose differential burdens upon speech because of its content.”⁷⁸ That is precisely what the New York OAG, SEC, and CFTC all do in gagging settling parties—who, in order to avoid an adverse exercise of sovereign power, must surrender their rights to express a particular viewpoint regarding the agencies’ allegations; and who must also forever abide by the restriction on their speech or else face official reprisal in one form or another.⁷⁹ That such a condition may not be imposed as a condition of settlement is reinforced by the substantial body of case law discussed thus far.

It is admittedly true that all federal decisions of which I am aware that deployed the unconstitutional-conditions doctrine specifically to

⁷⁷ See *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

⁷⁸ *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641–42 (1994).

⁷⁹ The New York OAG may enforce AODs either by reopening enforcement proceedings against the settling party, or by seeking specific performance, restitution, or damages. See *infra* notes 172–173 and accompanying text. As for the SEC and CFTC’s gag clauses, the remedy issue is somewhat more complex. In general, where a consent “decree does not specify the consequences of a breach,” a district court has “equitable discretion” to fashion a remedy for such violations. *Cook v. City of Chicago*, 192 F.3d 693, 698 (7th Cir. 1999). However, according to the SEC, the gag provisions in its settlements are “not . . . injunction[s], but rather . . . contractual provision[s] with a specific remedy for breach.” Memorandum in Opposition to Motion for Relief from Judgment at 15, *SEC v. Allaire*, No. 1:03-cv-4087-DLC, (S.D.N.Y. June 18, 2019). As the agency’s settlements themselves provide, the remedy is that “the Commission may petition the Court to vacate the Final Judgment and restore this action to its active docket” if the settling party violates the gag clause. See, e.g., *SEC v. Honig*, No. 18 Civ 8175 (ER), 2020 WL 1150449, at *6 (S.D.N.Y. Mar. 6, 2020). Thus, since the agreements themselves “cabin the district court’s equitable discretion by stipulating the remedies for breach,” *Cook*, 192 F.3d at 698, the SEC may seek to punish forbidden utterances only with revived prosecution. On the other hand, so far as I am aware, CFTC gag clauses do not specify a remedy for their breach, see, e.g., *In re Liora Welles*, CFTC No. 19-32, 2019 WL 4915497 (Sept. 30, 2019), suggesting that violators may be subject not only to revived prosecution, but also to equitable penalties at the court’s discretion. See *CFTC v. R2 Capital Grp., LLC*, No. 14-CV-02182-MSK-KLM, 2017 WL 4350366, at *2 (D. Colo. Aug. 3, 2017). In any event, however, the SEC and CFTC’s gag clauses flagrantly contravene the First Amendment regardless of whether violators are punished with reopened prosecution, equitable penalties, or both. Though they perhaps differ in degree of severity, either sanction has the effect of impermissibly penalizing the exercise of speech rights. See *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 812 (2000) (“The distinction between laws burdening and laws banning speech is but a matter of degree. The Government’s content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.”).

invalidate a condition demanded by government as part of a civil settlement agreement are either district or appellate cases from the Ninth Circuit. But neither have I found a case from any jurisdiction holding the unconstitutional-conditions doctrine categorically inapplicable to the civil-settlement context (with the exception of the Second Circuit's recent misguided decision in *Romeril*).⁸⁰ This lack of contrary authority is wholly unsurprising, for there is no reason why the unconstitutional-conditions doctrine would be inapplicable across the board to civil settlement conditions demanded by governmental litigants.

One could perhaps argue otherwise on the theory that government's actions in settling civil proceedings are not exercises of "sovereign" power, since initiating civil suits (unlike initiating criminal charges) is not exclusively the prerogative of government.⁸¹ This argument fails, however, because for one, the Supreme Court has *never* limited the unconstitutional-conditions doctrine to situations in which the government exercises "sovereign" power; on the contrary, the Court has held time and time again that government may not attach certain conditions to either public employment or awards of public contracts that penalize constitutionally protected speech, even though government in either case acts in more a proprietary than in a sovereign capacity.⁸² And the Court's holdings to this effect have a solid historical pedigree. As Thomas Cooley explained in his monumental 1868 treatise *on Constitutional Limitations*, "a statute would not be constitutional which should proscribe a class or a party for opinion's sake," giving as an example a law that barred those with certain objectionable political views from employment in a municipal police department.⁸³ Second, even if it were true that the unconstitutional conditions doctrine is inapplicable when government acts in a non-sovereign capacity, this argument could not constitutionally justify the New York OAG's practice of gagging settling respondents because the OAG *does* wield the sovereign power of the state in bringing civil

⁸⁰ See *SEC v. Romeril*, 15 F.4th 166, 172 (2d Cir. 2021).

⁸¹ See Will Erstad, *Civil Law vs. Criminal Law: Breaking Down the Differences*, RAMUSSEN COLL. (Oct. 29, 2018), <https://www.rasmussen.edu/degrees/justice-studies/blog/civil-law-versus-criminal-law/> [<https://perma.cc/RFE5-D4VH>].

⁸² See, e.g., *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574–75 (1968); *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 684–85 (1996).

⁸³ THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 390 & n.1 (1868); accord *Attorney General v. Bd. of Councilmen of Detroit*, 24 N.W. 887, 889–90 (Mich. 1885); see also *Mayor of Nashville v. Althrop*, 45 Tenn. 554, 559 (1868) (quoting Cooley); *Village of Braceville v. Doherty*, 30 Ill. App. 645, 653 (Ill. App. Ct. 1889) (quoting Cooley).

enforcement actions.⁸⁴ Indeed, it is established in New York jurisprudence that the OAG's interest "in the proper enforcement and administration of its laws is purely a sovereign one."⁸⁵ Hence, the OAG and other similar "government litigants" have many prerogatives "available to them" in civil litigation—the most notable of which I discuss *infra* in Section D of this Part—that "are more favorable than those that are available to private litigants."⁸⁶ In fact, says one scholar, "it is quite clear that the relaxed procedural and substantive standards under" New York's financial regulatory statutes "contributed mightily to the [OAG's] success" in pressuring some of the nation's largest banks into settlement.⁸⁷ Much of the same can be said of both the SEC and CFTC, which also have powers and privileges in investigation and litigation beyond those enjoyed by non-governmental litigants.⁸⁸

There are, to be sure, innumerable cases upholding the constitutional validity of "gag" clauses in settlement agreements between *private* parties.⁸⁹ But such decisions are inapposite, for the First Amendment "prohibits only *governmental* abridgment of speech."⁹⁰ That said, it is certainly worth noting that gag (or "non-disparagement") clauses in private consumer contracts, which restrict the consumer's freedom to discuss a product or service,⁹¹ were recently declared unlawful and unenforceable by federal statute.⁹² Upon the introduction of this legislation in the House, one supporter of the measure explained to her fellow lawmakers, "Businesses have

⁸⁴ See *Letitia James NY Attorney General*, N.Y. ST. OFF. ATT'Y GEN., <https://ag.ny.gov/our-office> [<https://perma.cc/37H6-9M2H>].

⁸⁵ 96 N.Y. JUR. 2D *State of New York* § 38.

⁸⁶ See Steven K. Berenson, *Government Lawyer as Cause Lawyer: A Study of Three High Profile Government Lawsuits*, 86 DENV. U. L. REV. 457, 506 (2009).

⁸⁷ See *id.*

⁸⁸ See *SEC v. Mgmt. Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir. 1975) ("[T]he SEC appears in these proceedings not as an ordinary litigant, but as a . . . guardian . . . safeguarding the public interest in enforcing the securities laws."); James D. Cox, *Response: Securities Class Actions As Public Law*, 160 U. PA. L. REV. PENNUMBRA 73, 82 (2011) ("[T]he SEC and the private litigant face very different constraints."); HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, 3D SEC. & FED. CORP. LAW § 20:92 (2d ed. 2020) (detailing SEC investigatory powers); DANIEL J. FETTERMAN & MARK P. GOODMAN, DEFENDING CORPORATIONS AND INDIVIDUALS IN GOVERNMENT INVESTIGATIONS § 17:33 (2020 ed.); *CFTC v. British Am. Commodity Options Corp.*, 560 F.2d 135, 141 (2d Cir. 1977); Jesse N. Panoff, *Rescuing Expedited Discovery from the Commodity Futures Trading Commission & Returning it to Fed. R. Civ. P. 26(d)(1): Using a Doctrine's Forgotten History to Achieve Legitimacy*, 42 GOLDEN GATE U. L. REV. 393, 398–99 (2012).

⁸⁹ See, e.g., *Trump v. Trump*, 582 N.Y.S.2d 1008, 1008, 1011 (App. Div. 1992).

⁹⁰ *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019).

⁹¹ See Annie H. Lee, *Gagging Gag Clauses under the Consumer Review Fairness Act*, VENABLE LLP (May 9, 2019), <https://www.allaboutadvertisinglaw.com/2019/05/gagging-gag-clauses-under-the-consumer-review-fairness-act.html> [<https://perma.cc/NT4X-VEWZ>].

⁹² See 15 U.S.C. § 45b (Westlaw through Pub. L. No. 116–259).

snuck so-called nondisparagement clauses in terms of service agreements, and consumers don't really have a choice when it comes to those form contracts."⁹³ The same concerns apply *a fortiori* to gag clauses imposed by the New York OAG in agreements to settle enforcement proceedings: if consumers "don't really have a choice" when it comes to gag provisions of commercial contracts, how much less freedom do targets of OAG enforcement actions have to reject imposition of a similar gag clause in an assurance of discontinuance?

Finally, with respect to the SEC's and CFTC's gag clauses, there is an additional consideration that further demonstrates these provisions' coercive nature: they represent official attempts at *programmatically* demanding surrenders of First Amendment rights, not through genuine bargaining, but instead pursuant to across-the-board policy⁹⁴—a mode of extracting such waivers that the Supreme Court has traditionally regarded with suspicion. In *United States v. Jackson*, the Court struck down a provision of the Federal Kidnapping Act that allowed imposition of the death penalty only on offenders that declined to plead guilty or forego their right to a jury trial.⁹⁵ Although a similar condition might have been imposed on a defendant through plea bargaining, the Court concluded that the provision "needlessly chill[ed] the exercise of basic constitutional rights."⁹⁶ In subsequent cases, the Court distinguished such needless chilling from ordinary plea bargaining by explaining that the Constitution prohibits "unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right . . . a situation 'very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power.'"⁹⁷ In fact, this kind of unilateral imposition of contractual terms has been held to weigh heavily against enforceability of waivers of constitutional rights even in agreements between *private* parties. Because "courts indulge every reasonable presumption against waiver' of fundamental constitutional rights,"⁹⁸ such waivers in private contracts are more likely to be held invalid where there is "no bargaining over

⁹³ 162 CONG. REC. 5,295–96 (2016) (statement of Rep. Schakowsky).

⁹⁴ See SEC Enforcement Activities, 17 C.F.R. § 202.5(e) (2020); CFTC Scope and Applicability of Rules of Practice, 17 C.F.R. § 10.1, App. A. (2020).

⁹⁵ See *United States v. Jackson*, 390 U.S. 570, 582–83 (1968).

⁹⁶ See *id.* at 582.

⁹⁷ *Bordenkircher v. Hayes*, 434 U.S. 357, 362–63 (1978) (quoting *Parker v. North Carolina*, 397 U.S. 790, 809 (1970)).

⁹⁸ *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937)).

contractual terms” or the parties are “far from equal in bargaining power,” such as when the “waiver provision was . . . part of a form sales contract and a necessary condition of the sale.”⁹⁹

This impermissible “unilateral” imposition of a penalty is precisely what the SEC and CFTC do in silencing settling parties. As the former agency itself admits, “the Commission will accept a settlement only if the defendant agrees to . . . a no-deny provision.”¹⁰⁰ Indeed, the SEC and CFTC have issued regulations with the force of law that require inclusion of this speech-suppressant clause in all settlements.¹⁰¹ The agencies tolerate no “give-and-take” negotiation over this term of settlement. If non-negotiable nature of a contractual waiver of constitutional rights in a *consumer* contract weighs against its enforceability, surely a federal agency’s non-negotiable insistence on a similar waiver from a settling target of an enforcement action is all the more constitutionally troubling, as it is hard to imagine a greater disparity in bargaining power than that which exists between the SEC or CFTC and those they regulate. After all, regulated parties (unlike consumers) have literally no choice but to deal with the agencies.¹⁰²

C. A Counterargument?

The SEC, in the recent litigation over that agency’s policy of silencing settling parties, cited in its filings several decisions that supposedly support its position;¹⁰³ and if drawn into similar litigation over its AODs, the New York OAG would, in all likelihood, follow in the footsteps of its censorious hero and point to these same cases.

⁹⁹ *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972); *see also* *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 188 (1972) (explaining that waivers of constitutional rights in private contracts are less likely to be enforceable “where the contract is one of adhesion” or “there is great disparity in bargaining power”).

¹⁰⁰ Memorandum in Opposition to Motion for Relief from Judgment at 1, *SEC v. Allaire*, No. 1:03-cv-4087-DLC, (S.D.N.Y. June 18, 2019).

¹⁰¹ *See* SEC Enforcement Activities, 17 C.F.R. § 202.5(e) (2020); CFTC Scope and Applicability of Rules of Practice, 17 C.F.R. § 10.1, App. A. (2020).

¹⁰² *See, e.g., The Laws That Govern the Securities Industry*, INVESTOR.GOV, <https://www.investor.gov/introduction-investing/investing-basics/role-sec/laws-govern-securities-industry> [<https://perma.cc/6AQU-49HV>].

¹⁰³ Aside from *Lake James*, most of the cases cited by the SEC approving waivers of rights in settlements involving the government appear in note 67, *supra*. *See, e.g.,* *Leonard v. Clark*, 12 F.3d 885, 892 (9th Cir. 1993); *Emmert Indus. Corp. v. City of Milwaukee*, 307 F. App’x 65, 67 (9th Cir. 2009); *Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084, 1097 (3d Cir. 1988). As I have already explained, however, the cited decisions provide no support for the speech-suppressant conditions in the New York OAG’s AODS because all such cases involved waivers of rights that “directly advanced [the government’s] interest . . . [in] . . . ensuring the dispute would come to a quick end.” *See Emmert*, 307 F. App’x at 67.

First and foremost, the SEC claimed that the Fourth Circuit in *Lake James Community Volunteer Fire Department v. Burke County*¹⁰⁴ “enforced a waiver of First Amendment rights in a government contract that affected the right to petition.”¹⁰⁵ That is true, but upon scrutiny, *Lake James* does nothing to support the constitutionality of either the SEC’s or the New York OAG’s gagging of settling respondents. In *Lake James*, the Fourth Circuit relied on the fact that

[B]y agreeing to the consent provision . . . the [gagged party] did not give away anything that it had prior to entering into the . . . contract Thus, when the County insisted during negotiations that the [other party] agree not to exercise its statutory veto right, the County demanded nothing that it did not then have.¹⁰⁶

As for the unconstitutional-conditions argument, the Fourth Circuit did not in any way suggest that the doctrine was inapplicable in the settlement context, but instead correctly noted that “[e]ven under the unconstitutional conditions doctrine, the condition that a person give up his constitutional rights is balanced against the government’s interest in promoting the efficiency of public services,”¹⁰⁷ citing a Supreme Court decision holding that greater “[d]eference is . . . due to the government’s reasonable assessments of its interests *as contractor*” or “*as employer*” than is due when government “exercise[s] sovereign power against . . . a citizen in response to his political speech.”¹⁰⁸ The *Lake James* court noted that the County was acting as a contractor and upheld the waiver of rights it extracted from the settling party on this (possibly independent) ground; and further supported its holding by reasoning that the waiver demanded by the County was reasonably related to achieving finality in the underlying dispute.¹⁰⁹

¹⁰⁴ *Lake James Cmty. Volunteer Fire Dep’t v. Burke County.*, 149 F.3d 277 (4th Cir. 1998).

¹⁰⁵ Memorandum in Opposition to Motion for Relief from Judgment at 10, *SEC v. Allaire*, No. 1:03-cv-4087-DLC, (S.D.N.Y. June 18, 2019). See *Lake James Cmty. Volunteer Fire Dep’t v. Burke County*, 149 F.3d 277, 282 (4th Cir. 1998).

¹⁰⁶ *Lake James*, 149 F.3d at 281.

¹⁰⁷ *Id.* at 282 (citing *Bd. of Cty. Comm’rs v. Umbehr*, 518 U.S. 668, 676 (1996)).

¹⁰⁸ *Umbehr*, 518 U.S. 668, 676, 678 (1996) (quoting *Waters v. Churchill*, 511 U.S. 661, 675 (1994)).

¹⁰⁹ See *Lake James*, 149 F.3d at 281–282 (“[T]he County had a compelling interest . . . in seeking finality to an ongoing dispute which had recurrently interrupted fire protection services.”).

All of this is worlds away from the situation with which we are concerned here. For one, unlike the contract at issue in *Lake James*, the free speech right that the New York OAG's AODs purport to take from settling parties is not one that they would have lost had the OAG prevailed in its civil claims, nor is it a right that must be waived in order to conclusively settle the underlying dispute. Furthermore, in strong-arming settling parties into surrendering their liberties, the OAG (unlike the County in *Lake James*) is, as was already discussed, indisputably threatening to exercise its power as sovereign, rather than as contractor or employer.

A few words are also in order regarding the Second Circuit's reasoning in *Romeril*, which upheld the SEC's standard gag clause against a First-Amendment challenge.¹¹⁰ The court concluded that the settling party "waived [his free-speech] right by agreeing to the no-deny provision as part of a consent decree."¹¹¹ But the majority opinion's analysis of the issue was quite terse, citing just a few cases—none of which, upon close inspection, adequately support the court's holding.

For starters, two of the cases relied upon by the Second Circuit involved waivers of speech rights in agreements between private parties.¹¹² These decisions are obviously inapposite because the First Amendment binds only the government. Otherwise, the court in *Romeril* cited just three cases where a governmental actor was a party to a purported contractual waiver of First-Amendment rights.¹¹³

The first was a federal appellate decision upholding a labor union's waiver of such rights as part of a consent decree with the United States; crucially, however, the union did not allege in that case that the government had required it to surrender its rights as a condition of settlement.¹¹⁴ The Second Circuit also cited *Leonard v. Clark*, where the Ninth Circuit rejected a public-sector union's First Amendment challenge to a provision in its collective bargaining agreement with a city.¹¹⁵ The provision in question stated that if the union successfully advocated for state legislation that increased the city's payroll burden, the additional costs to the city would be

¹¹⁰ See *SEC v. Romeril*, 15 F.4th 166, 172 (2d Cir. 2021).

¹¹¹ *Id.* at 173.

¹¹² *Id.* at 173 n.4 (citing *In re George F. Nord Bldg. Corp.*, 129 F.2d 173, 176 (7th Cir. 1942); *Ronnie Van Zant, Inc. v. Cleopatra Recs., Inc.*, 906 F.3d 253, 257 (2d Cir. 2018)).

¹¹³ See *Leonard v. Clark*, 12 F.3d 885 (9th Cir. 1993); *United States v. Int'l Bhd. of Teamsters*, 931 F.2d 177 (2d Cir. 1991); *Snepp v. United States*, 444 U.S. 507 (1980).

¹¹⁴ See *Teamsters*, 931 F.2d at 188.

¹¹⁵ See *Leonard*, 12 F.3d at 885.

chargeable against its salary agreement with the union.¹¹⁶ The Ninth Circuit held that the union validly waived its First Amendment rights by entering into the agreement.¹¹⁷ But the provision at issue in *Leonard*, unlike the gags included in the SEC's or New York OAG's settlements, was proposed *by the union*, not demanded by the city as a condition of settlement.¹¹⁸ Moreover, as the Ninth Circuit pointed out, there was a "close nexus" between the right surrendered by the union and the benefit the union obtained by entering into the agreement: the clause at issue simply required the union to bear the costs of any state legislation for which it lobbied that affected the other terms of its labor agreement with the city.¹¹⁹ This is the same reason why, for example, a plea agreement may require a criminal defendant to waive rights that are fundamentally inconsistent with the agreement's core purpose of settling the proceedings (e.g., appeal, jury trial, etc.). In both scenarios, the constitutional rights waived by the contracting party are only those the exercise of which would undermine the agreement's other terms. Not so with the speech rights taken by the SEC's or New York OAG's gag clauses—which, for reasons discussed earlier, are extraneous to the settlement process and thus fail the "close nexus" test.

Finally, the Second Circuit in *Romeril* relied on *Snepp v. United States*, where the Supreme Court upheld a term in former CIA agent's employment contract that prohibited him from publishing any writings during or after his employment that discussed the CIA's activities unless he first gave the agency the opportunity to screen proposed publications for classified information.¹²⁰ But this is a far cry from the speech-suppressant conditions in SEC and New York OAG settlements because, as the Court in *Snepp* explained, "even in the absence of an express agreement[,] the CIA could have . . . impos[ed] reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment."¹²¹ "The Government has a compelling interest in protecting both the secrecy of information important to our national security and the . . . confidentiality so essential to . . . our foreign intelligence service."¹²² Clearly, no such interests are implicated when settling

¹¹⁶ See *id.* at 886.

¹¹⁷ See *id.* at 888.

¹¹⁸ See *id.* at 890.

¹¹⁹ See *id.* at 892 n.10.

¹²⁰ See *SEC v. Romeril*, 15 F.4th 166, 173 n.4 (2d Cir. 2021); *Snepp*, 444 U.S. at 507.

¹²¹ *Snepp*, 444 U.S. at 510 n.3 (citing *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973)).

¹²² *Snepp*, 444 U.S. at 510 n.3. What is more, unlike the SEC's gags, the CIA's contractual conditions in *Snepp* merely restricted former employees' dissemination of

targets of SEC or New York OAG investigations express their personal opinions as to whether the charges against them were well-founded.

D. The OAG's Practices

A close examination of the New York OAG's powers and practices leave no doubt that the prospect of an OAG enforcement action is a threat serious enough to coerce even the most resilient of unwilling parties into relinquishing their First Amendment rights.

The AG, in exercising her broad authority to “[p]rosecute and defend all actions and proceedings in which the state is interested,”¹²³ has in recent decades “gradually become a regulator rather than chief lawyer,”¹²⁴ and today is often called “one of the most powerful [state attorneys general] in the nation.”¹²⁵ New York’s highest court has marveled at the extent of the OAG’s “sweeping statutory array of prosecutorial and other law-enforcement authority: to prosecute business frauds and other deceptive practices; commence civil investigations in the public interest; bring actions to remove persons unlawfully in public or corporate office . . . and other powers too numerous to mention.”¹²⁶ State law also “allows the attorney general to seek restitution and damages [] and, in extreme cases, dissolution,”¹²⁷ a remedy that “has been described as ‘a judgment . . . of corporate death.’”¹²⁸

In investigating suspected fraud, the AG has a breathtaking set of prerogatives. For example, she may issue subpoenas liberally, and

[N]eed only show that the records . . . [s]he seeks bear a reasonable relation to the subject-matter under investigation . . . [U]nless the subpoena calls for “documents which are utterly irrelevant to any proper inquiry” or its

“information . . . [gained] only by virtue of” their employment at the agency, such that (to borrow from the Court’s case law on litigants’ dissemination of information learned through civil discovery) the CIA’s “continued . . . control over the . . . information does not raise the same specter of government censorship that such control might suggest in other situations.” *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984).

¹²³ N.Y. EXEC. LAW § 63(1) (McKinney 2021).

¹²⁴ Ben Brachfeld, *The Evolving Powers of the New York Attorney General*, *GOTHAM GAZETTE* (May 18, 2017), <https://www.gothamgazette.com/state/6939-the-evolving-powers-of-the-new-york-attorney-general> [<https://perma.cc/73ZF-GTF6>].

¹²⁵ See Smith, *supra* note 8.

¹²⁶ *People v. Gilmour*, 773 N.E.2d 479, 482 n.7 (N.Y. 2002).

¹²⁷ Smith, *supra* note 8.

¹²⁸ *People ex rel. Abrams v. Oliver Sch., Inc.*, 619 N.Y.S.2d 911, 913 (App. Div. 1994) (quoting *California v. Am. Stores Co.*, 495 U.S. 271, 289 (1990)).

“futility to uncover anything legitimate is inevitable or obvious,” the courts will be slow to strike it down.¹²⁹

Notably, the state’s Martin Act “gives the New York AG vast[] . . . latitude in prosecuting financial crimes against shareholders;” among state laws of its kind, the Martin Act “is largely considered to be the toughest in the nation,” with even the Act’s “[p]roponents . . . not[ing] the high rate at which financial crimes are prosecuted in New York.”¹³⁰ Among the law’s noteworthy features are that those “called in for questioning during Martin Act investigations do not have a right to counsel or a right against self-incrimination,”¹³¹ and that, “in contrast to a common-law fraud claim, the [OAG] ‘need not allege’ . . . ‘intentional fraud’ in a civil enforcement action under the Martin Act.”¹³² A Martin Act investigation is “‘the legal equivalent of a weapon of mass destruction,’ said a lawyer at a major New York firm who represents defendants in [such] cases (and who didn’t want his name used because he feared retribution by [the AG]). ‘The damage that can be done under the statute is unlimited.’”¹³³

These pressures all but compel targets of OAG investigations to settle, usually on whatever terms the OAG sees fit to impose:

In recent years, the [New York OAG] has been increasingly aggressive in its enforcement efforts [M]any individuals and entities feel compelled to negotiate with and resolve matters with the [OAG] regardless of the relative strength or weakness of the Office’s case As a result, [the OAG] has been successful in obtaining large financial settlements in recent years [A] settling party is disabled from publicly articulating the reasons it may have settled . . . (such as the enormous pressure resulting from an . . . investigation) and from issuing statements to undercut the one-sided findings

¹²⁹ *La Belle Creole Int’l, S. A. v. Att’y Gen.*, 176 N.E.2d 705, 707 (N.Y. 1961) (first quoting *Carlisle v. Bennett*, 197 N.E. 220, 222 (N.Y. 1935); then quoting *Dairymen’s League Co-op. Ass’n, Inc. v. Murtagh*, 84 N.Y.S.2d 749, 754 (App. Div. 1948), *aff’d*, 86 N.E.2d 509 (1949); and then quoting *In re Edge Ho Holding Corp.*, 176 N.E. 537, 539 (N.Y. 1931)).

¹³⁰ Brachfeld, *supra* note 124; accord N.Y. GEN. BUS. LAW § 352 (Consol. 2020).

¹³¹ Nicholas Thompson, *The Sword of Spitzer*, LEGAL AFFAIRS (June 2004), http://www.legalaffairs.org/issues/May-June-2004/feature_thompson_mayjun04.msp [<https://perma.cc/2BG7-BKRU>].

¹³² *Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgmt. Inc.*, 962 N.E.2d 765, 768 (N.Y. 2011) (citing *State v. Rachmani Corp.*, 525 N.E.2d 704, 708 n.6 (N.Y. 1988)).

¹³³ Thompson, *supra* note 131.

contained in the AOD Many practitioners liken this proscription to a necessary deal with the devil.¹³⁴

The SEC's investigations and enforcement actions can be equally devastating in nature—and equally likely to drive their desperate targets into settlement. A current SEC commissioner explains settlements are often “negotiated by someone desperate to end an investigation that is disrupting or destroying her life It can take years to conduct investigations, which often involve many documents and complex facts.”¹³⁵

Naturally, given the advantages of bargaining power enjoyed by the New York OAG, settlement increasingly appears to be the Office's law-enforcement weapon of choice. During Eliot Spitzer's tenure as AG from 1999 to 2006, “the knee-jerk response on Wall Street to even the most preliminary inquiry by Eliot Spitzer” became, “O.K., I'll take a plea deal' or ‘Can we work out a settlement?’ The specter of Mr. Spitzer's wrath . . . made Masters of the Universe cower in a corner.”¹³⁶ It is telling that, although Spitzer took office as AG in January 1999, “the first time [his] office . . . tried any financial fraud case” was in mid-2005, and his resulting loss “showed that he had clearly overreached.”¹³⁷ Today, “the New York [OAG] announces . . . [a]most daily” its investigations of or settlements with “organizations of all sizes and in a variety of industries,” from “publicly-traded companies” to “family-owned businesses Accusations from the [OAG] can have a devastating impact on an organization's reputation and operation.”¹³⁸ According

¹³⁴ 4E ROBERT L. HAIG, *NEW YORK PRACTICE SERIES: COMMERCIAL LITIGATION IN NEW YORK STATE COURTS* § 125:2 (5th ed. 2020).

¹³⁵ See Hester M. Peirce, SEC Commissioner, Remarks at the 50th Annual Rocky Mountain Securities Conference: The Why Behind the No (May 11, 2018), <https://www.sec.gov/news/speech/peirce-why-behind-no-051118> [<https://perma.cc/8XWG-M3NK>]; accord Roberta S. Karmel, *Creating Law at the Securities and Exchange Commission: The Lawyer as Prosecutor*, 61 *LAW & CONTEMP. PROBS.* 33, 45 (1998) (former SEC commissioner) (noting that “enforcement actions against regulated persons and businesses . . . have serious adverse consequences”); Andrew N. Vollmer, *Four Ways to Improve SEC Enforcement*, 43 *SEC. REG. L. J.* 333, 336 (2015) (former SEC General Counsel) (noting that a “private party must incur the costs, distress, and adverse publicity . . . , and the pressure to settle is overpowering even when the SEC case lacks merit”).

¹³⁶ Andrew Ross Sorkin, *Maybe Spitzer's Cape Was Too Big*, *N.Y. TIMES* (June 12, 2005), <https://www.nytimes.com/2005/06/12/business/yourmoney/maybe-spitzers-cape-was-too-big.html> [<https://perma.cc/CJE2-24XB>].

¹³⁷ *Id.*

¹³⁸ *New York State Attorney General Investigations*, HARRIS BEACH PLLC (Apr. 6, 2020), https://www.harrisbeach.com/wp-content/uploads/2017/04/FOCUS_NYS_Attorney_General1.pdf [<https://perma.cc/WTS8-9BEP>].

to the most recent data of which I am aware, the SEC's and CFTC's are also overwhelmingly resolved by settlement, with the former agency settling a whopping 98% of its enforcement cases¹³⁹ and the latter approximately 71.3%.¹⁴⁰

The New York OAG's enthusiasm for settlement is quite unsurprising given how the practice allows the Office to sidestep legal checks on its power. Under New York law, the "AG . . . has leeway into how settlement funds are used," a discretionary power that "recent attorneys general" have increasingly "used for whatever priorities they see fit, at times expanding their office's reach even further beyond the traditional role of AG."¹⁴¹ In addition, a settlement-based approach to law enforcement allows New York's OAG to impose even its most off-the-wall theories of legal liability on settling parties without interference from pesky courts. Former

¹³⁹ See Luis A. Aguilar, SEC Commissioner, Address at 20th Annual Securities Litigation and Regulatory Enforcement Seminar: A Stronger Enforcement Program to Enhance Investor Protection (Oct. 25, 2013), <https://www.sec.gov/news/speech/2013-spch102513laa> [https://perma.cc/8QMP-T763].

¹⁴⁰ During the five most recent fiscal years at the time of this Article's writing (2017 to 2021), the CFTC reports that it brought a total of 369 enforcement actions. See COMMODITY FUTURES TRADING COMMISSION, DIVISION OF ENFORCEMENT ANNUAL REPORT 4 (2021); COMMODITY FUTURES TRADING COMMISSION, DIVISION OF ENFORCEMENT ANNUAL REPORT 4 (2020); COMMODITY FUTURES TRADING COMMISSION, FY 2019 AGENCY FINANCIAL REPORT 6 (2019); COMMODITY FUTURES TRADING COMMISSION, FY 2018 AGENCY FINANCIAL REPORT 61 (2018). Over the same period, a Westlaw search reveals that the Commission entered into at least 263 settlements. Westlaw search results for CFTC settlements, l.next.westlaw.com (follow "Administrative Decisions & Guidance" hyperlink; then follow "Commodity Futures Trading Commission (CFTC)" hyperlink and enter the following in search field: "advanced: (settlement /p accept) & DA(aft 09-30-2016 & bef 10-01-2021)", <https://www.westlaw.com/SharedLink/687ca8379421449686cac1699f894b83?VR=3.0&RS=cblt1.0> (last visited Sept. 14, 2022); then, to find CFTC settlements entered as district-court consent judgments, search among federal district court decisions for the following: "advanced: DA(aft 09-30-2016 & bef 10-01-2021) & (consent /p (order or judgment or decree)) & "any public statement" & TI("Commodity Futures Trading Commission" or "CFTC" or "c.f.t.c.")", <https://www.westlaw.com/SharedLink/fdb055ce513e4a3f8f144e0f714e67ee?VR=3.0&RS=cblt1.0> (last visited Sept. 14, 2022); finally, subtract the one result from those 52 that is not a consent judgment, see *In re Newcom*, 619 B.R. 758 (M.D. Fla. 2020)). Granted, not every enforcement action settled during the relevant time frame was brought during that time frame, nor was every enforcement action brought during that period settled within the same. But a comparison of the number of settlements to the number of enforcement actions commenced yields an arguably fair estimate of the rate at which such actions settle: about 71.3%. *Id.* And these agreements frequently result in windfalls for the Commission; "[j]ust six settled attempted manipulation cases resulted in \$780 million of the total penalties imposed in 2018." Greg Kaufman & Amber Unwala, *A Look Back on the CFTC's Robust Year in Enforcement*, CORP. COMPLIANCE INSIGHTS (Jan. 23, 2019), <https://www.corporatecomplianceinsights.com/a-look-back-on-the-cftcs-robust-year-in-enforcement/> [https://perma.cc/M2SR-JKYN]; accord Geoffrey Aronow, *Keep Speaking, CFTC: In Defense of Speaking Orders*, 24 No. 7 FUTURES & DERIVATIVES L. REP. 10 (Oct. 2004) (former CFTC official noting agency's "large percentage of settlements").

¹⁴¹ Brachfeld, *supra* note 124; accord HAIG, *supra* note 134 (providing support for determining how settlement funds will be used).

Clinton era U.S. Labor Secretary, Robert Reich, too, has sounded the alarm about regulation by settlement, citing similar concerns.¹⁴² This practice, Reich rightly worries, affords regulators “extraordinary discretion to decide who’s misleading the public and whose products are defective,” frequently based on “novel legal theories.”¹⁴³ “Worse, no judge will ever scrutinize these theories,” since the officials bringing these suits “ha[ve] no intention of seeing [them] through to final verdicts. The goal . . . is to threaten the industries with the risk of such large penalties that they’ll agree to a deal.”¹⁴⁴ In fact, if New York’s OAG has its way, not only will no judge scrutinize its legal theories, but the public, too, will be denied the opportunity to hear the presumably informed contrary opinions of settling defendants (who are silenced with respect to allegations against them).¹⁴⁵ Naturally, and likely for similar reasons, the SEC and CFTC have also been criticized for using settlement-based enforcement methods in order to insulate their questionable legal positions from judicial review.¹⁴⁶

II. PRIOR RESTRAINT

Upon close scrutiny, the speech-suppressant provisions of the New York OAG’s AODs constitute not only government-imposed restraints on protected speech (as opposed to valid waivers of First Amendment rights), but also *prior* restraints on speech, against which the “presumption” of invalidity “is heavier—and the degree of protection broader—than that against limits on expression” enforced through subsequent punishments.¹⁴⁷ “[T]he main purpose of [the] constitutional provisions” for the freedoms of speech and press, after all, was “to prevent all such previous restraints upon publications.”¹⁴⁸

¹⁴² See Robert Reich, *Smoking, Guns*, AM. PROSPECT (Dec. 19, 2001), <https://prospect.org/features/smoking-guns/> [<https://perma.cc/AG7L-QZZH>].

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ See N.Y. Op. Att’y Gen. 007, 2014 WL 7662172.

¹⁴⁶ See, e.g., Karmel, *supra* note 135, at 45 (former SEC commissioner noting that SEC “has considerable latitude in choosing its enforcement targets and theories,” and thus the agency is in effect “sometimes permit[ted] . . . to create the law”); Vollmer, *supra* note 135, at 336 (former SEC General Counsel noting that those charged by the SEC “face[] severe and frequently career . . . ending sanctions,” “even if . . . the legal theory is . . . untested [P]ressure to settle is overpowering even when the SEC case lacks merit”); Matthew C. Turk, *Regulation by Settlement*, 66 U. KAN. L. REV. 259, 285–91 (2017) (similar argument re: CFTC).

¹⁴⁷ *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558–59 (1975).

¹⁴⁸ *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (emphasis omitted) (quoting *Commonwealth v. Blanding*, 20 Mass. 304, 313 (1825)).

A. Consent Judgments vs. Out-of-Court Settlements

The characterization of the speech-suppressant provisions of the New York OAG's AODs is especially appropriate where such settlements have been memorialized in consent judgments, as opposed to out-of-court agreements.¹⁴⁹ Gag orders imposed by judicial or administrative adjudicatory decree are an especially objectionable form of prior restraint, in that violators may be punished through enforcement proceedings during which the collateral bar rule precludes any challenge to the underlying order's validity.¹⁵⁰ Such speech restrictions, as the case law firmly establishes, pose unusually "formidable" "risks of freewheeling censorship" that are plainly in tension with the "theory deeply etched in our law" that "a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand."¹⁵¹

And yet, in many instances, the New York OAG has happily "throttled" its potential critics with precisely this kind of *ex ante* speech restriction, sometimes by effectuating its AODs through "consent" orders entered by state administrative agencies;¹⁵² and sometimes by seeking entry of judicial consent judgments, usually in New York courts, but occasionally in federal courts.¹⁵³ "A consent decree" entered by a New York or federal court "is . . . enforceable as, a judicial decree that is subject to the rules generally applicable to other . . . decrees,"¹⁵⁴ including the collateral bar rule generally prohibiting violators of the court's decree from contesting its

¹⁴⁹ These forms of disposition have different consequences: "A settlement agreement has the legal status of a contract between the parties [V]iolations can be addressed only by filing a separate suit A consent decree, on the other hand, is entered as an order . . . fully enforceable by the court." 13 KENNETH W. TABER, NEW YORK PRACTICE SERIES: EMPLOYMENT LITIGATION IN NEW YORK § 6:32 (2019); see *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 381 (1994).

¹⁵⁰ See *United States v. Cutler*, 58 F.3d 825, 832 (2d Cir. 1995) ("Under the collateral bar doctrine, a party may not challenge a district court's order by violating it.").

¹⁵¹ See *Promotions*, 420 U.S. at 559 (emphasis omitted).

¹⁵² See, e.g., *In re Conduent Education Services, LLC*, 2019 WL 329540 (N.Y. Bank Dept. Jan. 4, 2019).

¹⁵³ See, e.g., Stipulation & Order of Settlement, *United States ex rel. Shievdalay v. Centers Plan for Healthy Living*, No. CV-14-6129 (E.D.N.Y. 2018); Consent Order and Judgment, *State v. Credit-Forget It, Inc.*, No. 450626 (N.Y. Sup. Ct. 2015); Consent Judgment, *State v. Juice Factory Corp.*, No. 2014-11757 (N.Y. Sup. Ct. 2014).

¹⁵⁴ *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 378 (1992) (citing *Railway Emps. v. Wright*, 364 U.S. 642, 650–51 (1961)); see also *Robinson v. Finkel*, 748 N.Y.S.2d 448, 459 n.10 (Sup. Ct. 2002)), *aff'd*, 764 N.Y.S.2d 94 (App. Div. 2003); *Canfield v. Elmer E. Harris & Co.*, 170 N.E. 121, 122 (N.Y. 1930); 47 AM. JUR. 2D *Judgments* § 653.

validity.¹⁵⁵ The same is true under New York law for administrative agencies' consent orders.¹⁵⁶ And the SEC and CFTC, for their part, enshrine their settlements in consent judgments as a matter of course¹⁵⁷—sometimes in federal district court, sometimes in administrative proceedings;¹⁵⁸ either way, such a judgment's validity may not be challenged in a subsequent action instituted by the agency to enforce the settlement's terms.¹⁵⁹

B. Other Forms of Prior Restraint

But while the speech-suppressant provisions of the OAG's AODs more obviously amount to prior restraints when imposed through adjudicatory consent decrees (and accordingly governed by the collateral bar rule), the Supreme Court's case law suggest that the AODs' gag clauses are prior restraints even when imposed through out-of-court settlements (even though such provisions are presumably *not* governed by the collateral bar rule).¹⁶⁰ As the modern Court has said of its own decisions, “we may have given a broader

¹⁵⁵ See, e.g., *Bd. of Educ. of Buffalo v. Pisa*, 389 N.Y.S.2d 938, 943 (App. Div. 1976); *Cutler*, 58 F.3d at 832.

¹⁵⁶ See, e.g., *Cahill v. Harter*, 716 N.Y.S.2d 447, 449 (App. Div. 2000) (“[D]efendants failed to properly challenge . . . the 1991 consent order” and thus “may not now collaterally attack the propriety of the order[] in this enforcement proceeding.”); *Pub. Serv. Comm’n v. Rochester Tel. Corp.*, 434 N.E.2d 699, 702 (1982).

¹⁵⁷ See 13A JERRY W. MARKHAM, *COMMODITIES REGULATION* § 22:9 (2020); Memorandum in Opposition to Motion for Relief from Judgment at 2, *SEC v. Allaire*, No. 1:03-cv-4087-DLC, (S.D.N.Y. June 18, 2019).

¹⁵⁸ Jason E. Siegel, *Admit It! Corporate Admissions of Wrongdoing in SEC Settlements: Evaluating Collateral Estoppel Effects*, 103 *GEO. L. J.* 433, 445 (2015) (SEC); see, e.g., *In re Hadar*, CFTC No. 19-33 (Sept. 30, 2019); *In re Foremost Trading LLC*, CFTC No. 20-21 (July 6, 2020).

¹⁵⁹ See *RESTATEMENT (SECOND) OF JUDGMENTS* § 83 cmt. b (AM. LAW INST., 1982); Siegel, *supra* note 158, at 446 (SEC); see, e.g., *Jones v. SEC*, 115 F.3d 1173, 1178 (4th Cir. 1997) (same) (citing *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966)); *Newcom v. CFTC*, 619 B.R. 758, 764 (M.D. Fla. 2020) (CFTC) (citing *B&B Hardware, Inc. v. Hargis Indus.*, 575 U.S. 138, 148 (2015)); *Hlavinka v. Blunt, Ellis & Loewi, Inc.*, 497 N.W.2d 756, 763 (Wis. Ct. App. 1993) (same) (citing *Univ. of Tenn. v. Elliot*, 478 U.S. 788, 799 (1986); *Acharya v. AFSCME*, 432 N.W.2d 140, 142 (Wis. Ct. App. 1988)).

¹⁶⁰ This is certainly true in federal courts, and New York courts appear to follow the same rule. See *Ott v. Barash*, 491 N.Y.S.2d 661, 668 (App. Div. 2nd Dept. 1985) (quoting *Peterson v. Forkey*, 376 N.Y.S.2d 560, 561–62 (App. Div. 1st Dept. 1975); *Gallo v. Teplitz Tri-State Recycling, Inc.*, 678 N.Y.S.2d 140, 142 (App. Div. 2nd Dept. 1998) (citing *Berkshire Nursing Ctr. v. Len Realty Co.*, 562 N.Y.S.2d 716, 717 (App. Div. 2nd Dept. 1990); *Dunleavy v. First Am. Tit. Ins. Co.*, 499 N.Y.S.2d 264, 265 (App. Div. 3rd Dept. 1986); *Ott*, 491 N.Y.S.2d at 661–69); *Stuart Realty Co. v. Rye Country Store, Inc.*, 745 N.Y.S.2d 72, 73 (App. Div. 2nd Dept. 2002) (citing *Gallo*, 678 N.Y.S.2d at 142; *Berkshire Nursing Ctr.*, 562 N.Y.S.2d at 716; *Dunleavy*, 499 N.Y.S.2d at 265); *Corsa v. Pac. Indem. Co.*, 859 N.Y.S.2d 703, 704–05 (App. Div. 2nd Dept. 2008) (citing *Singleton Mgmt. v. Compere*, 673 N.Y.S.2d 381, 384 (App. Div. 2nd Dept. 1998); *Gallo*, 678 N.Y.S.2d at 142; *Ott*, 491 N.Y.S.2d at 661–69).

definition to the term ‘prior restraint’ than was given to it in English common law.”¹⁶¹ Several of the Court’s cases in particular suggest that this “broader definition” would encompass the OAG’s gag clauses.

In *Interstate Circuit, Inc. v. City of Dallas*,¹⁶² the Court “held that a prior restraint was created” where “an administrative board . . . classified films as ‘suitable . . .’ or ‘not suitable for young persons’” and required exhibitors of the latter “to have special licenses and to advertise their classification in order to show them.”¹⁶³ The Court specifically rejected the government’s argument that “the problem” was “cured merely by affording *de novo* judicial review” of administrative determinations after the fact: “standards” too vague to “sufficiently guide the censor,” the Court said “encourage erratic administration whether the censor be administrative or judicial.”¹⁶⁴ So far as I am aware, the New York OAG is subject to *no* statutory standards whatsoever in determining whether to include a “non-disparagement” clause in an AOD, or, if such provision is included, what speech will be suppressed and in what manner.

The Court’s decision in *Bantam Books, Inc. v. Sullivan*¹⁶⁵ also does a great deal to condemn the New York OAG’s AODs as unconstitutional prior restraints. There, a Rhode Island state commission had a practice of threatening booksellers with obscenity prosecution if they did not remove certain books to which officials objected, following up on their threats with police visitations to ensure merchants’ compliance; “though the Commission [was] limited to informal sanctions—the threat of . . . legal sanctions and other means of . . . intimidation”—for securing cooperation, the Court nonetheless held the policy violative of the First Amendment.¹⁶⁶ The justices were not impressed with the reasoning of the court below upholding the challenged practice on the ground that the commission was “only seeking . . . voluntary cooperation” with its demands, which the affected booksellers were “free to disregard” and thereafter would have “nothing to fear except prosecution.”¹⁶⁷ On the contrary, the Supreme Court concluded:

¹⁶¹ *Alexander v. United States*, 509 U.S. 544, 553 (1993).

¹⁶² *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968).

¹⁶³ *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 n.8 (1975) (describing *Interstate Circuit*’s holding).

¹⁶⁴ *Interstate Circuit*, 390 U.S. at 685.

¹⁶⁵ *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

¹⁶⁶ *See id.* at 67, 70.

¹⁶⁷ *See Bantam Books, Inc. v. Sullivan*, 176 A.2d 393, 396–97 (R.I. 1961); *see Bantam Books*, 372 U.S. at 72.

[t]he Commission's notices, phrased virtually as orders, reasonably understood to be such by the distributor, invariably followed up by police visitations, in fact stopped the circulation of the listed publications The Commission's operation is a form of effective state regulation [T]he "cooperation" it seeks from distributors . . . entails . . . suppression of the listed publications.¹⁶⁸

Even worse, said the Court, was that the commission had effectively "subject[ed] the distribution of publications to a system of prior administrative restraints."¹⁶⁹ Subsequent federal cases have reaffirmed *Bantam's* logic time and time again.¹⁷⁰

If the Court in *Bantam Books* found it constitutionally intolerable for public officials to secure "cooperation" with their speech-suppressant demands even though their tools for so doing were "limited to informal sanctions[,] the threat of invoking legal sanctions and other means of . . . intimidation," how much more constitutionally intolerable would the scheme have been if the commission could obtain injunctions against future violations of its "agreements" with booksellers, as well as damages for booksellers' past violations of such agreements?¹⁷¹ Those tools are certainly available to the New York OAG, which may enforce AODs not only by reopening enforcement proceedings against the settling party,¹⁷² but also by seeking specific performance, restitution, or damages.¹⁷³

The Supreme Court in *Bantam Books* also objected to the fact that the commission's scheme of speech suppression at issue there had "no provision whatever for judicial superintendence before notices issue or even for judicial review of the Commission's determinations."¹⁷⁴ It is therefore improbable that the Court would approve the New York OAG's current practice surrounding settlement, since "the discretion

¹⁶⁸ *Bantam Books*, 372 U.S. at 68–69, 71.

¹⁶⁹ *Id.* at 70.

¹⁷⁰ See, e.g., Council for Periodical Distribs. Ass'n v. Evans, 642 F. Supp. 552, 565 (M.D. Ala. 1986); Penthouse Int'l, Ltd. v. McAuliffe, 610 F.2d 1353, 1362 (5th Cir. 1980); Okwedy v. Molinari, 333 F.3d 339, 344 (2d Cir. 2003).

¹⁷¹ See *Bantam Books*, 372 U.S. at 67.

¹⁷² See, e.g., 2009 N.Y. Op. Att'y Gen. 124, 2009 WL 10272013.

¹⁷³ See *State v. Solil Mgmt. Corp.*, 491 N.Y.S.2d 243, 249 (Sup. Ct. 1985), *aff'd*, 114 A.D.2d 1057 (N.Y. App. Div. 1985); *Spitzer ex rel. People v. Condor Pontiac, Inc.*, No. 02-1020, 2003 WL 21649689, at *6–7 (N.Y. Sup. Ct. July 3, 2003); *Koppell ex rel. People v. Long Island Soc. for Prevention of Cruelty to Children*, 621 N.Y.S.2d 762, 763 (Sup. Ct. 1994).

¹⁷⁴ *Bantam Books*, 372 U.S. at 70–71.

of the [OAG] in maintaining or discontinuing an action may not be made the subject of inquiry by the courts.”¹⁷⁵ What is more, state statutory law declares that “[e]vidence of a violation of [an Assurance of Discontinuance] shall constitute prima facie proof of violation of the applicable law in any civil action or proceeding thereafter commenced by the attorney general”¹⁷⁶—a provision that, per current case law, allows the OAG to impose legal obligations on settling parties that have no independent basis in state statutory or administrative law.¹⁷⁷ These attributes of New York OAG’s AODs, when considered in light of the Supreme Court’s condemnation of the state commission’s practice at issue in *Bantam Books* (as well as the Court’s analysis in *Interstate Circuit*), would seem to render the speech-suppressant aspects of the agreements not only encroachments upon First Amendment freedoms, but prior restraints.

All this fine-grained discussion of judicial procedure, however, should not obscure the more basic conclusion that the speech-suppressant clauses in the New York OAG’s AODs violate the First Amendment, regardless of whether they function as prior restraints or subsequent punishments of speech. Our Constitution guarantees the right to freely and openly discuss matters political without either form of official interference. Such was James Madison’s position, expressed in an 1800 report on behalf of a Virginia legislative committee: “the American idea” of “the freedom of publication,” the report observed, properly recognizes that “since a law inflicting penalties on printed publications, would have a similar effect with a law authorizing a previous restraint on them,” it “would seem a mockery to say, that no law should be passed, preventing publications from being made, but that laws might be passed for punishing them in case they should be made.”¹⁷⁸

¹⁷⁵ *People v. Bunge Corp.*, 250 N.E.2d 204, 206 (N.Y. 1969).

¹⁷⁶ N.Y. EXEC. LAW § 63.15 (McKinney 2020).

¹⁷⁷ See *Condor Pontiac*, 2003 WL 21649689, at *6.

¹⁷⁸ REPORT OF THE COMMITTEE RELATIVE TO THE RESOLUTIONS CONCERNING THE ALIEN AND SEDITION LAWS, H.D. (photo rept. 1833) (Va. 1800); accord, APPENDIX, NOTE G, 1 BLACKSTONE’S COMMENTARIES (St. George Tucker ed., 1803), <https://lonang.com/library/reference/tucker-blackstone-notes-reference/tuck-2g/> [<https://perma.cc/LF8K-9U2K>] (“freedom of the press requires” protection from both “previous inspection of licensers” and “the subsequent penalty of laws”).

III. RIGHTS OF THE PUBLIC

A. *Public Interest Generally*

The speech-suppressant provisions of the OAG's assurances of discontinuance are constitutionally objectionable, if not flatly invalid, for another reason wholly apart from their coercive nature: they suppress speech about important matters in which the public has an exceedingly strong interest. Even a voluntary waiver of constitutional freedom, the Supreme Court has said, "is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement."¹⁷⁹

Without a doubt, the First Amendment "serves significant societal interests" beyond merely "those of the party seeking . . . vindication" of its own free-speech rights.¹⁸⁰ The guarantee protects not only the right to disseminate information, but also "necessarily protects the right to receive it."¹⁸¹ "It is the purpose of the First Amendment," the Supreme Court has said, "to preserve an uninhibited marketplace of ideas," and "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences . . . is crucial."¹⁸² This line of reasoning runs strongly through the Court's case law on public employees' free speech rights, where the Court has often held these rights worthy of protection in significant part due to listeners' interests: "Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions."¹⁸³

By the same token, the public's interest in monitoring the activities of the New York AG (arguably the most powerful state law enforcement official in the country)¹⁸⁴ is sacrificed when the OAG silences targets of its enforcement power, as they "are, as a class, the members of a community most likely to have informed and definite opinions" on the OAG's official conduct and, "[a]ccordingly, it is essential that they be able to speak out freely on such questions."¹⁸⁵

¹⁷⁹ *Newton v. Rumery*, 480 U.S. 386, 392 (1987).

¹⁸⁰ *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978).

¹⁸¹ *Martin v. Struthers*, 319 U.S. 141, 143 (1943).

¹⁸² *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (citing *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

¹⁸³ *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion) (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968)).

¹⁸⁴ *Smith*, *supra* note 8.

¹⁸⁵ *Pickering*, 391 U.S. at 572.

And what could be more essential than robust, uninhibited discussion of a public official who not only holds one of the most powerful law enforcement positions in the nation, but whose post also “often provides a stepping stone to higher office[?]”¹⁸⁶ No settling target of an OAG investigation can waive the rights of the public to hear all relevant information about such a person, particularly given that the OAG itself remains free to tilt the playing field toward its own perception of the law and facts, “resulting in a one-sided presentation of the case to the public.”¹⁸⁷

Even worse, the AODs’ gag clauses themselves contemplate the suppression even of *truthful* speech, in that they qualify their demand that the settling party “shall not . . . make any statement denying . . . the propriety of,” or the “factual basis” for, “this Assurance” with the caveat that “[n]othing in this paragraph affects [the settling party’s] testimonial obligations or . . . right to take . . . positions in defense of litigation . . . to which the OAG is not a party”¹⁸⁸ (a qualification that also appears in every SEC and CFTC gag clause that my research has identified).¹⁸⁹ By stipulating that the settling party may criticize the investigation’s propriety if “testimonial obligations” of truthfulness so require, the OAG all but admits that its gag clauses are suppressing truthful criticism of the Office’s conduct; otherwise, the aforementioned proviso would obviously be unnecessary. While the OAG’s aversion to the truth is perhaps understandable given how poorly many of the state’s recent attorneys general have fared when subject to scrutiny,¹⁹⁰ the Office may not enshrine this censorious mentality in its settlement policies, for “[t]he freedom of speech . . . guaranteed by the Constitution,” consistent with “its historic function” “embraces . . . the liberty to discuss publicly and truthfully all matters of public concern.”¹⁹¹

¹⁸⁶ Robert J. McCarthy, *The 2018 Race for N.Y. Attorney General: From Ho-hum to Hotly Contested*, BUFFALO NEWS (Sept. 11, 2018), https://buffalonews.com/news/local/the-2018-race-for-n-y-attorney-general-from-ho-hum-to-hotly-contested/article_0e8c4b9a-077a-5940-90b0-fd36e9e1de58.html [<https://perma.cc/39LE-EC7T>].

¹⁸⁷ See HAIG, *supra* note 134.

¹⁸⁸ 14 N.Y. Op. Att’y Gen. 238, 2015 WL 315892.

¹⁸⁹ See, e.g., SEC v. Honig, No. 18 Civ 8175 (ER), 2020 WL 1150449 (S.D.N.Y. Mar. 6, 2020); *In re Liora Welles*, CFTC No. 19-32, 2019 WL 4915497 (Sept. 30, 2019).

¹⁹⁰ See, e.g., Robert E. Kessler, *The Call Girl Scandal Pressure Hooker; Sources: \$80G on Prostitutes*, NEWSDAY, Mar. 12, 2008, at A02; Jane Mayer & Ronan Farrow, *Four Women Accuse New York’s Attorney General of Physical Abuse*, NEW YORKER (May 7, 2018), <https://www.newyorker.com/news/news-desk/four-women-accuse-new-yorks-attorney-general-of-physical-abuse> [<https://perma.cc/7HBB-2VCA>].

¹⁹¹ *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940).

Such public-interest considerations have led courts to invalidate gag clauses in settlements or other contracts as First-Amendment violations, even when contracting parties were found to have voluntarily waived their speech rights. The Fourth Circuit in 2019 refused to enforce a non-disparagement provision in a settlement between the City of Baltimore and a plaintiff suing over alleged police misconduct, on the ground that “the City’s asserted interests in enforcing [the citizen’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.”¹⁹² The Second Circuit has invalidated a consent judgment that “enjoin[ed] . . . the publication of facts which the community has a right to know,” reasoning that the court that entered the judgment “was without power to make such an order; that the parties may have agreed to it is immaterial.”¹⁹³ More recently, the same tribunal again noted that even when a speech-suppressant injunction “has allegedly been imposed as a result of private contract rather than government censorship,” courts should nonetheless “be hesitant to approve such an injunction,” which “restrains the viewing of an expressive work prior to its public availability.”¹⁹⁴ And federal courts regularly invalidate confidentiality or non-disparagement clauses in Fair Labor Standards Act settlements between private parties, not on “coercion” grounds, but because they “contraven[e] the policies underlying the [Act] and limit[] . . . rights under the First Amendment.”¹⁹⁵

In addition, applying a similar conception of the public’s interest in First-Amendment protected communication, the Sixth Circuit in 2016 concluded that records of proceedings in a private civil action should be unsealed, rejecting the “contention that [the party opposing the seal] ‘waived its right to challenge’ the sealing order.”¹⁹⁶ On the contrary, said the court, neither litigant could have “waived the

¹⁹² *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 223, 226 (4th Cir. 2019).

¹⁹³ *Crosby v. Bradstreet Co.*, 312 F.2d 483, 485 (2d Cir. 1963).

¹⁹⁴ *Ronnie Van Zant, Inc. v. Cleopatra Records, Inc.*, 906 F.3d 253, 257 (2d Cir. 2018).

¹⁹⁵ See *Gillard v. Fleetmatics U.S.A., LLC*, No. 8:16-cv-81-T-27MAP, 2016 WL 6997167, at *1 (M.D. Fla. Sept. 20, 2016) (citing *Dees v. Hydradry, Inc.*, 706 F. Supp. 2d 1227, 1242–43 (M.D. Fla. 2010)); *accord* *Menjiva v. E & L Const. Serv., LLC*, No. 6:14-cv-2057-Orl-31KRS, 2015 WL 3485991, at *3 (M.D. Fla. May 14, 2015); *Nichols v. Dollar Tree Stores, Inc.*, No. 1:13-CV-88 (WLS), 2013 WL 5933991, at *3 (M.D. Ga. Nov. 1, 2013); *Housen v. Econosweep & Maint. Servs., Inc.*, No. 3:12-Cv-461-J-34TEM, 2013 WL 2455958, at *2 (M.D. Fla. May 24, 2013); *DeGraff v. SMA Behavioral Health Servs., Inc.*, 945 F. Supp. 2d 1324, 1330 (M.D. Fla. 2013); *Valdez v. T.A.S.O. Properties, Inc.*, No. 8:09-cv-2250-T-23TGW, 2010 WL 1730700, at *1 n.1 (M.D. Fla. Apr. 28, 2010).

¹⁹⁶ *Rudd Equip. Co. v. John Deere Constr. & Forestry Co.*, 834 F.3d 589, 594–95 (6th Cir. 2016).

public's First Amendment . . . right of access Rather, the court has an independent 'obligation to consider the rights of the public.' . . . 'even if neither party objects to the motion to seal.'"¹⁹⁷

Nor can it be said that any of the foregoing First Amendment analysis is affected by the fact that most parties to the New York OAG's settlements are corporations.¹⁹⁸ Such silly attempts to argue that infringements upon constitutional liberties are somehow less objectionable when they specifically target individuals who exercise their rights collectively through the corporate form have never been met with approval by the Supreme Court, which observed as early as 1823 that "it is difficult to perceive upon what ground the civil rights of a . . . corporation should be lost . . . when it is admitted, that those of an individual would remain unaffected by the same circumstance."¹⁹⁹ This view predominated from the Framing era through Reconstruction,²⁰⁰ and despite the critiques lodged against it by some modern commentators,²⁰¹ survives to this day—and for good reason: some oft-reaffirmed wisdom of American free-speech law, as stated by the Court in 1978 and endorsed countless times since, is that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."²⁰²

B. *Third Parties*

Still other constitutional problems hide in the arcane, seemingly boilerplate language of the New York OAG's settlements. The Second Circuit, in a 2018 decision involving a similar gag provision in a contract between private parties, admonished courts to hesitate

¹⁹⁷ *Id.* at 595 (first quoting *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 475 (6th Cir. 1983); then quoting *Shane Group v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 306 (6th Cir. 2016)).

¹⁹⁸ See Search Results for the Term "Settlement", N.Y. ST. ATT'Y GEN., https://ag.ny.gov/search?search=settlement&type=All&sort_bef_combine=search_api_relevance%20DESC [<https://perma.cc/B4AD-EBDM>].

¹⁹⁹ *Soc'y for Propagation of Gospel in Foreign Parts v. Town of New Haven*, 21 U.S. 464, 482 (1823).

²⁰⁰ See, e.g., *id.*; *Bank of U.S. v. Deveaux*, 9 U.S. 61, 88–89 (1809), *overruled on other grounds*, 43 U.S. 497 (1844); *Santa Clara Cty. v. S. Pac. R. Co.*, 18 F. 385, 403 (C.C.D. Cal. 1883); *People ex rel. Bd. Park Comm'rs v. Common Council of Detroit*, 28 Mich. 228, 241 (Mich. 1873); *State ex rel. Bd. Educ. v. Haben*, 22 Wis. 660, 665 (Wis. 1868).

²⁰¹ See, e.g., C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. PA. L. REV. 646, 652 (1982); Carol R. Goforth, "A Corporation Has No Soul"—*Modern Corporations, Corporate Governance, and Involvement in the Political Process*, 47 HOUS. L. REV. 617, 663 (2010); Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1070 (1998).

²⁰² *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978).

before enforcing such clauses if they purport to bind entities other than those immediately party to the agreement: “although parties are free to limit by contract [free speech] rights . . . , the injunction in this case restricts the actions of an entity that was not a party to the contract that is alleged to be the source of the restriction,” which “raises serious concerns.”²⁰³ While those who contract with an entity bound by a speech-restrictive contract or consent judgment might be said to signal an attenuated form of “consent” to the restriction, courts regard this kind of “indirect” waiver with suspicion, given that they “‘indulge every reasonable presumption against waiver’ of fundamental constitutional rights”²⁰⁴ and frequently require an on-the-record showing that those purportedly waiving their rights “were actually aware or made aware of the significance” of the contractual language providing for the waiver.²⁰⁵

The New York OAG’s AODs almost invariably contain some language similarly purporting to silence protected speech by others besides the settling party. Take, for instance, the following language in an OAG settlement executed in 2017:

This Agreement is *binding upon all parties and upon the assigns, heirs, transferees, purchasers and any successors-in-interest of the [signing p]arties* The Allure Group agrees not to take any action or to make *or permit to be made* any public statement denying, directly or indirectly, any finding in this Agreement or creating the impression that this Agreement is without factual basis.²⁰⁶

The second italicized portion seems to say that those acting on behalf of Allure cannot “permit to be made” any public criticism of the OAG’s allegations. Yet presumably this would compel Allure to silence anyone over which it had authority with regard to that subject, even though many of those effectively silenced had no say in whether to sign the settlement agreement and in no way consented to be gagged pursuant thereto.

²⁰³ *Ronnie Van Zant, Inc. v. Cleopatra Records, Inc.*, 906 F.3d 253, 257–258 (2d Cir. 2018) (citing *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, 673 F.3d 192, 204–07 (3d Cir. 2012); *Erie Telecomm., Inc. v. City of Erie*, 853 F.2d 1084, 1096 (3d Cir. 1988).

²⁰⁴ *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937)).

²⁰⁵ *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972).

²⁰⁶ *In re Assurance of Discontinuance Pursuant to Executive Law § 63*, Op. Att’y Gen. *30–31 (Nov. 27, 2017).

As for the AOD's stated intention to bind signatories' "assigns, heirs, transferees, purchasers and . . . successors-in-interest," the risk that this provision will muzzle the speech of unwitting parties besides the signatories is somewhat less significant, though still constitutionally concerning. A "successor in interest" is "[s]omeone who follows another in ownership or control of property" and "retains the same rights as the original owner, with no change in substance,"²⁰⁷ while an "assign" or "assignee" is "[s]omeone to whom property rights or powers are transferred by another"—though "[u]se of the term is so widespread that it is difficult to ascribe positive meaning to it with any specificity."²⁰⁸ "As a general rule," however, an assignee is one who "occupies the same position that the assignor . . . occupied, taking the interest granted, with all of the grantor's rights and . . . liabilities."²⁰⁹ "When a valid assignment is made, the assignee steps into the assignor's shoes and acquires whatever rights the latter had."²¹⁰ "Whether a new organization is the successor of an enjoined organization depends upon the facts and circumstances of the case."²¹¹ New York courts adhere to the general rule that even when a contract "purport[s] to bind successors and assigns of the parties to the agreement, an assignee or successor will not be bound to the terms of a contract absent an affirmative assumption of the duties."²¹² However, that state's jurisprudence recognizes "exceptions to this general rule, under which the purchaser of the assets of a corporation will be held liable for the liabilities of that predecessor corporation."²¹³ One court explains that "[i]t is well established that a transaction structured as a purchase of assets may be deemed . . . a de facto merger, and permit the

²⁰⁷ *Successor in Interest*, BLACK'S LAW DICTIONARY (11th ed. 2019).

²⁰⁸ *Assignee*, BLACK'S LAW DICTIONARY (11th ed. 2019).

²⁰⁹ 26B C.J.S. *Descent and Distribution* § 92 (2020); accord *Griffey v. N.Y. Cent. Ins. Co.*, 3 N.E. 309, 311 (N.Y. 1885).

²¹⁰ *In re Estate of Stralem*, 758 N.Y.S.2d 345, 347 (App. Div. 2003) (citing *Furlong v. Shalala*, 156 F.3d 384, 392 (2d Cir. 1998)).

²¹¹ *New York v. Operation Rescue Nat'l*, 80 F.3d 64, 70 (2d Cir. 1996) (citing *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 256 (1974); *Int'l Union of Operating Engr's v. Centor Contractors, Inc.*, 831 F.2d 1309, 1312–13 (7th Cir. 1987)).

²¹² *Amalgamated Transit Union Local 1181 v. City of New York*, 846 N.Y.S.2d 336, 338 (App. Div. 2007) (citing *Sillman v. Twentieth Century-Fox Film Corp.*, 144 N.E.2d 387, 391 (N.Y. 1957); *Hudson Eng'g Assocs. v. Ames Dev. Corp.*, 643 N.Y.S.2d 677, 678 (App. Div. 1996); *152 W. 58th St. Owners Corp. v. Local 32B-32J, Serv. Emps. Int'l Union*, 514 N.Y.S.2d 11, 12 (App. Div. 1987); *Todd v. Krolick*, 466 N.Y.S.2d 788, 789 (App. Div. 1983)).

²¹³ *Trystate Mech., Inc. v. Tefco, LLC*, No. 7347/10, 29 Misc. 3d 1208(A), 2010 WL 3960604, at *4 (Sup. Ct. Oct. 6, 2010), *aff'd sub nom. Trystate Mech., Inc. v. Macy's Retail Holdings, Inc.*, 943 N.Y.S.2d 158 (App. Div. 2012).

imposition of successor liability.”²¹⁴ In considering whether this has occurred, courts analyze the issue “in a flexible manner . . . ask[ing] whether, in substance, it was the intent of the successor to absorb and continue the operation of the predecessor.”²¹⁵ Thus, in such instances, an entity that was not party to an AOD might unwittingly find itself bound to the Assurance’s speech-suppressant terms after purchasing a signatory’s assets—a risk that further demonstrates the unconstitutionality of the New York OAG’s settlement practice.

IV. APPLYING STRICT SCRUTINY

At this point, I hope to have amply demonstrated that the speech-suppressant provisions of the New York OAG’s AODs are not exempt from First Amendment scrutiny as valid “waivers” of settling parties’ constitutional rights. Parties to these AODs might *submit* to the OAG’s terms, but they do not *agree*.

Hence, with its potential waiver argument lying in ruins, the New York OAG’s gag clauses in its AODs are constitutionally doomed unless it can be shown that the suppression of speech critical of OAG investigations—a restriction on expression that targets speech based on not merely its content, but on its *viewpoint*—survives the “strict” judicial scrutiny applicable to such policies: the restriction is “presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests.”²¹⁶ In truth, the OAG’s gag clauses likely must clear an even higher bar, at least insofar as they can be characterized as prior restraints, for the “presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression” enforced through subsequent punishments.²¹⁷ But since it is inconceivable that the OAG could justify silencing criticism under even ordinary strict scrutiny, we need not concern ourselves with how the gag clauses would fare under the standards governing prior restraints.

Are the gag clauses in its AODs suppressing speech critical of the OAG’s investigation “narrowly tailored” to serve a “compelling

²¹⁴ *Id.* at *5 (citing *AT&S Transp., LLC v. Odyssey Logistics & Tech. Corp.*, 803 N.Y.S.2d 118, 120 (App. Div. 2005); *In re New York City Asbestos Litig.*, 789 N.Y.S.2d 484, 486 (App. Div. 2005)).

²¹⁵ *Trystate*, 2010 WL 3960604, at *5 (quoting *AT&S Transp.*, 803 N.Y.S.2d at 120).

²¹⁶ *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992); *Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991)).

²¹⁷ *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558–59 (1975).

government interest?” The question almost answers itself. And yet, incredibly enough, the SEC has argued in defending the similar speech-suppressant term in its settlements that “[e]ven if the [gag] provision is viewed through the lens of a judicially imposed restriction on speech against the speaker’s will—rather than as a voluntary agreement not to speak—it is constitutional.”²¹⁸ This is lunacy.

Granted, the SEC is correct in its observation that judicial “gag orders on trial participants are evaluated under a less stringent standard” of First Amendment scrutiny “than gag orders on the press.”²¹⁹ Hooray for that. As a leading treatise clarifies, however, “[e]ven accounting for the inherent power of judges to control judicial proceedings, First Amendment doctrines will place significant restrictions on the power of courts to control the speech of participants in those proceedings.”²²⁰ Generally speaking, gag orders on trial participants have been upheld only where necessary either to ensure the impartial administration of justice in pending proceedings, or to prevent dissemination of private or confidential information acquired by participants through their involvement in the trial process.²²¹ In the case of the OAG’s AODs, both rationales for restraints on settling parties’ speech are obviously inapplicable; there are no pending enforcement proceedings (since an AOD by definition *settles* the dispute),²²² nor is the suppressed speech (the settling parties’ views on whether the OAG’s allegations are well-founded) the kind of confidential information that could be acquired only through involvement in judicial proceedings.

²¹⁸ Memorandum in Opposition to Motion for Relief from Judgment at 18, SEC v. Allaire, No. 1:03-cv-4087-DLC, (S.D.N.Y. June 18, 2019).

²¹⁹ United States v. Brown, 218 F.3d 415, 425 (5th Cir. 2000).

²²⁰ 2 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 15:42 (2019).

²²¹ See, e.g., United States v. Salameh, 992 F.2d 445, 447 (2d Cir. 1993) (explaining that gag orders on participants in proceedings must be “no broader than necessary to protect the integrity of the judicial system and the . . . right to a fair trial”); *Brown*, 218 F.3d at 425, 427 (similar); *CBS Inc. v. Young*, 522 F.2d 234, 241 (6th Cir. 1975) (similar); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984) (“[P]etitioners gained the information they wish to disseminate only by virtue of the trial court’s discovery processes . . . [t]hus, continued court control over the discovered information does not raise the same specter of government censorship that such control might suggest in other situations.”); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1033, 1074 (1991) (upholding prohibition on extrajudicial statements by an attorney to press that the attorney reasonably should have known would have a “substantial likelihood of materially prejudicing an [ongoing] adjudicative proceeding,” and explaining that “[b]ecause lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding”).

²²² See N.Y. EXEC. LAW § 63 (McKinney 2021).

The point is helpfully illustrated by a 1999 D.C. District Court case in which a federal judge, sanctioned pursuant to the Judicial Conduct and Disability Act's investigation procedures, challenged a provision of that statute declaring that "all papers, documents, and records of proceedings related to investigations . . . shall not be disclosed by any person in any proceeding [except to the extent that] such disclosure is authorized in writing" by the official overseeing the investigation.²²³ The sanctioned jurist argued that this section was violative of the First Amendment, as it "precluded him from defending himself in public against the accusations" of judicial misconduct.²²⁴ The D.C. District Court agreed, explaining that the government's "interest in shielding witnesses from publicity and encouraging complainants to come forward in the future . . . is insufficient to justify the restriction on [the sanctioned judge's] open and frank discussion of the proceedings once they have concluded and sanctions have been imposed."²²⁵ It stands to reason that the New York OAG likewise cannot justify precluding targets of its investigations from defending themselves in public against its accusations or engaging in "open and frank discussion of the proceedings once they have concluded and sanctions have been imposed."²²⁶

To similar effect, the U.S. Supreme Court unanimously invalidated a state law that prohibited grand jury witnesses from disclosing their own testimony after the grand jury's term had ended, even if the disclosure consisted only of "information of which [a witness] was in possession before he testified before the grand jury."²²⁷ The Court concluded that such an infringement on free expression was not justified by the state's proffered interests in the secrecy of proceedings: "[w]hen [a grand jury] investigation ends, there is no longer a need to keep information from the targeted individual in order to prevent his escape," nor is there any "longer a need to prevent the importuning of grand jurors since their deliberations will be over."²²⁸ Also troubling to the Court was the fact that the grand-jury testimony at issue in that case included "information relating to alleged governmental misconduct—speech which has traditionally

²²³ *McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of the Judicial Conference*, 83 F. Supp. 2d 135, 171 (D.C. Cir. 1999), *vacated in part on other grounds*, 264 F.3d 52 (D.C. Cir. 2001).

²²⁴ *Id.*

²²⁵ *Id.* at 178.

²²⁶ *See id.* at 171, 178.

²²⁷ *Butterworth v. Smith*, 494 U.S. 624, 632 (1990).

²²⁸ *Id.* at 632–33.

been recognized as lying at the core of the First Amendment.”²²⁹ How, in light of the Court’s holding, can the New York OAG defend the suppression of settling parties’ public statements “relating to alleged governmental misconduct” on the OAG’s part even after the Office’s “investigation ends?”²³⁰ So long as those statements do not consist of otherwise-confidential “information obtained through” the investigative process, but instead only of opinions informed by “lawfully obtain[ed] . . . information about a matter of public significance,”²³¹ it would seem that the OAG simply cannot justify restricting such speech, which of course “has traditionally been recognized as lying at the core of the First Amendment.”²³²

What other “compelling interests” might the OAG argue are served by the gag provisions in its AODs? For guidance, we may again look to the SEC’s arguments in recent litigation, where the Commission asserts that if settling parties were permitted to publicly call into question the basis for the charges against them, “[i]t would create confusion about the allegations in the complaint It could also undermine confidence in the Commission’s . . . program by creating an unfair impression that there was no factual or legal basis for the . . . enforcement action.”²³³

This asserted interest, which in substance amounts to arguing that settling parties cannot be allowed to criticize the government because that would make the government look bad, does not pass the “laugh test,” let alone strict scrutiny.²³⁴ Unfortunately for New York’s OAG, our law no longer accepts the proposition that, as Lord Chief Justice

²²⁹ *Id.* at 632 (citing *Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829, 838 (1978); *Wood v. Georgia*, 370 U.S. 375, 388–89, 392 (1962)).

²³⁰ *Butterworth*, 494 U.S. at 632.

²³¹ *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984); *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979).

²³² *Butterworth*, 494 U.S. at 632.

²³³ Memorandum in Opposition to Motion for Relief from Judgment at 20, *SEC v. Allaire*, No. 1:03-cv-4087-DLC, (S.D.N.Y. June 18, 2019).

²³⁴ The SEC also argues that, insofar as settlements with gag clauses are entered as consent judgments, allowing settling parties to publicly criticize the propriety of the charges against them would “undermine the credibility of the courts that enter consent judgments” and “leav[e] the public with the impression that the judgments derive from an unfair process”; and that preventing such perceptions is a “compelling interest.” Brief for the Plaintiff-Appellee at 43–44, *SEC v. Romeril*, No. 19-4197-cv (2d Cir. July 21, 2020). But just as individuals are free to criticize the President, Congress, or any other public official in such a way that the public might consider that official’s decision-making less “credible” or “fair,” so too are individuals free to criticize courts in the same way: “the law gives . . . ‘courts . . . no greater immunity from criticism than other . . . institutions.”” *Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829, 839 (1978) (cleaned up) (quoting *Bridges v. California*, 314 U.S. 252, 289 (1941)); *accord* *Republica v. Dennie*, 4 Yeates 267, 267 (Pa. 1805) (“[A]cts . . . of any branch of the government, are open to public discussion.”).

Holt of the Queen's Bench declared in 1704 in upholding a seditious libel prosecution, "it is very necessary for all governments that the people should have a good opinion of it."²³⁵ On the contrary, reluctant as the OAG might be to be subject to criticism it considers unfair, it has long been recognized in this country that, as commentator George Tucker wrote in 1803,

[T]hose who administer the government . . . are the . . . servants of the people, not their rulers or tyrants. . . . [T]o enforce this responsibility, it is indispensably [sic] necessary that the people should inquire into the conduct of their agents; that in this inquiry, they must, or ought to scrutinize their motives, sift their intentions, and penetrate their designs; and that it [is] therefore, an unimpeachable right in them to censure as well as to applaud; to condemn or to acquit . . . as the most severe scrutiny might advise.²³⁶

CONCLUSION

The New York OAG, while its sense of constitutional obligation leaves a great deal to be desired, is apparently committed to keeping irony alive. The OAG was one of the lead plaintiffs in a federal lawsuit filed in March 2019 challenging a recent rule issued by the federal Department of Health and Human Services.²³⁷ The suit alleged that the rule was unlawful on several grounds, one of which was that it "compels . . . [plaintiff] States . . . to infringe upon the free speech rights of health care providers as a condition of securing Title X funds by prohibiting them from referring pregnant patients for abortion."²³⁸ Putting aside the merits of this claim, it goes without saying that the OAG's decision to advance an unconstitutional-conditions argument of this sort displays an astounding lack of self-awareness.

Speaking of a lack of self-awareness, I will conclude by coming around full-circle and revisiting current New York AG Letitia James' self-important 2019 Law Day speech, during which she proclaimed

²³⁵ Queen v. Tutchin, 14 State Trials 1095, 1128 (Q.B. 1704); see CHARLES GRANT ROBERTSON, SELECT STATUTES, CASES AND DOCUMENTS TO ILLUSTRATE ENGLISH CONSTITUTIONAL HISTORY, 1660-1832 268 (1904).

²³⁶ APPENDIX, NOTE G, 1 BLACKSTONE'S COMMENTARIES *15 (George Tucker ed., 1803).

²³⁷ Oregon v. Azar, 389 F. Supp. 3d 898 (D. Or. 2019) (No. 6:19-cv-00317-MC).

²³⁸ Complaint at 101, Oregon v. Azar, 389 F. Supp. 898 (D. Or. 2019) (No. 6:19-cv-00317-MC).

that she “believe[s] that our founders got it right. They knew that the right to speak . . . freely was paramount to a free society” and “must not be restrained [T]he[se] freedoms . . . are among the greatest bulwarks of liberty and can never be subverted except by despotted [sic] governments.”²³⁹

It is refreshing to hear that the New York AG and I agree on first principles. It would be even more refreshing to hear that her Office was ending its policy of compelling settling targets of state investigations to hand over their fundamental rights at what might as well be gunpoint. The OAG’s voluntary cessation of this practice would save the victims thereof the burden and expense of litigating constitutional challenges to the suppression of their speech. Failing that, however, I will place my enthusiastic support behind any litigation brought by these affected parties in order to secure a judicial declaration forever forbidding the New York OAG from shamelessly trampling on the First Amendment in the manner in which it has done for the last decade. And while they are at it, perhaps courts can also realize the Second Circuit’s error in *Romeril* and bring a long-overdue end to the SEC and CFTC’s similar infringements upon free expression.

²³⁹ Keynote Speech, *supra* note 2.