No. 24-417

In the Supreme Court of the United States

NATIONAL ASSOCIATION OF REALTORS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the government had made no commitment to refrain from reopening an antitrust investigation that the government had closed.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 97 F.4th 951. The opinion of the district court (Pet. App. 37a-49a) is not published in the Federal Supplement but is available at 2023 WL 387572.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 2024. A petition for rehearing was denied on July 12, 2024 (Pet. App. 51a-52a). The petition for a writ of certiorari was filed on October 10, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner "is a trade organization with 1.4 million members who work in the real-estate industry." Pet. App. 2a. "For decades," petitioner has promulgated various rules that its "members must follow when brokering real-estate transactions." *Id.* at 2a-3a.

In 2018, after receiving a complaint from an industry participant, the Department of Justice's Antitrust Division (Division) opened an investigation into the competitive effects of some of petitioner's rules. Pet. App. 3a. As part of that investigation, the Division served on petitioner two civil investigative demands (CIDs), numbered 29935 and 30360. C.A. App. 209-230; see 15 U.S.C. 1312(a). Together, the CIDs sought information about a number of rules, including two rules known as the Participation Rule and the Clear Cooperation Policy, which governed the use of multiple-listing services (MLSs). Pet. App. 3a-4a.

"An MLS is an online, subscription-based database that lists properties that are on the market in a particular geographic area." Pet. App. 3a. "Brokers representing sellers (or 'listing brokers') post information about homes that are for sale on an MLS, where buyer-brokers can view that information." *Ibid.* The Participation Rule required listing brokers to "offer the same commission to all buyer-brokers when listing a property on an MLS." *Ibid.* The Clear Cooperation Policy generally requires "listing brokers to post a property on an MLS within one day of when they begin to market the property." *Id.* at 4a.

2. In 2020, the Division began negotiating with petitioner to resolve the Division's investigation. Pet. App. 4a. During negotiations, petitioner asked whether the Division would agree to "close its investigation regarding [petitioner's] rules and policies" and to "stipulate that [petitioner's] Participation Rule would not be subject to further investigation any time in the next ten years." C.A. App. 247. In a letter dated July 13, 2020, the Division responded that it could not make "a commitment to not challenge [petitioner's] rules and poli-

cies in the future." *Id.* at 248. The Division explained that it viewed such a commitment as "a nonstarter, especially in light of longstanding Department policies concerning settlements that affect future potential investigations." *Ibid.*

In a subsequent letter, the Division reiterated that, though it was "willing to close its investigation into [petitioner's] Participation Rule," it could not "commit to never challenge [petitioner's] rules and policies in the future in light of longstanding Department policies on such commitments." C.A. App. 252. After petitioner responded with a counterproposal, *id.* at 256-257, the Division replied in a letter dated August 12, 2020, *id.* at 258-259. In that letter, the Division offered to "close [its] investigation into [the] Participation Rule as a part of [a] settlement" and to "send a closing letter to [petitioner] confirming that the Division has closed its investigation into the Participation Rule." *Id.* at 259. The Division emphasized again, however, that "the Division cannot commit to never investigating or challenging [petitioner's] rules and policies in the future." *Ibid.*

In response, petitioner "accept[ed] the Division's August 12 settlement proposal concerning the Participation Rule." C.A. App. 260; see *id.* at 126 (reiterating that petitioner understood the "terms" of the settlement to be "consistent with what [the Department of Justice] agreed to in [the Division's] August 12 letter"). The parties subsequently agreed to "extend the contemplated terms of the closing letter to cover the Clear Cooperation Policy." *Id.* at 126. The parties also agreed to enter into a proposed consent judgment that would require petitioner to modify four of its other rules, known as the Commission-Concealment Rules, the Free-Service Rule,

the Commission-Filter Rules and Practices, and the Lockbox Policy. Pet. App. 5a & n.3.

3. On November 19, 2020, the Division filed the proposed consent judgment in the United States District Court for the District of Columbia. C.A. App. 162-177. The parties stipulated that the United States could "withdraw its consent at any time" before entry of the proposed consent judgment. *Id.* at 147. The parties further stipulated that the court could enter the proposed consent judgment after compliance with the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, which required the United States to publish the proposed consent judgment for public comment, 15 U.S.C. 16(b) and (d). See C.A. App. 147.

On the same day that the Division filed the proposed consent judgment, it also sent to petitioner the following closing letter:

> This letter is to inform you that the Antitrust Division has closed its investigation into the National Association of REALTORS' Clear Cooperation Policy and Participation Rule. Accordingly, NAR will have no obligation to respond to CID Nos. 29935 and 30360 issued on April 12, 2019 and June 29, 2020, respectively.
>
> No inference should be drawn, however, from the Division's decision to close its investigation into these rules, policies or practices not addressed by the consent decree.

Pet. App. 80a.

The following day, petitioner filed the Division's letter in a then-pending antitrust case brought by private litigants to challenge the Clear Cooperation Policy. Pet. App. 18a-19a.

4. After receiving public comments on the proposed consent judgment, the Division sought petitioner's consent to modify the judgment, but petitioner refused to provide it. See C.A. App. 201; D. Ct. Doc. 1-15 (Sept. 13, 2021). In July 2021, approximately eight months after sending the closing letter and with petitioner still not having provided consent to modify, the Division exercised its right to withdraw its consent from the proposed consent judgment. C.A. App. 207-208. The Division then served on petitioner a new CID, numbered 30729, seeking information about the Participation Rule, the Clear Cooperation Policy, and other rules. *Id.* at 61-71. Petitioner filed in the district court a petition to set aside the new CID. *Id.* at 7-50.

In January 2023, the district court granted that petition. Pet. App. 37a-49a. The court observed that the Division had agreed to "close its investigation" into the Participation Rule and the Clear Cooperation Policy as part of a settlement with petitioner. *Id.* at 45a. The court then concluded that the Division had "breached the agreement by reopening the investigation into those same rules and serving the new CID." *Ibid.* The court held that, because the new CID violated the settlement agreement, it had to be set aside. *Id.* at 37a.

5. In April 2024, the court of appeals reversed and remanded for further proceedings. Pet. App. 1a-34a. The court "accept[ed] the parties' apparent assumption that the closing letter is a binding agreement that remains enforceable, notwithstanding the withdrawal of the Proposed Consent Judgment." *Id.* at 10a. The court then concluded that the new CID did not violate the parties' agreement. *Id.* at 11a.

In reaching that conclusion, the court of appeals relied on the closing letter's "plain language." Pet. App.

11a. The court explained that "[t]he words 'close' and 'reopen' are unambiguously compatible," and that by agreeing to close the investigation into the Participation Rule and the Clear Cooperation Policy, the Division had made "no commitment" to refrain from "reopening" that investigation. *Id.* at 12a. The court found additional support for that conclusion in the letter's "no inference" clause, which states that "'[n]o inference should be drawn . . . from the Division's decision to close its investigation.'" *Ibid.* (citation omitted; brackets in original). The court understood that clause to "confirm[] that [the Division] did not intend to imply any additional terms in the letter, such as one prohibiting a reopened investigation." *Ibid.* The court also invoked the "unmistakability principle," which holds that a contract should not be interpreted "to cede a sovereign right of the United States unless the government waives that right unmistakably." *Id.* at 12a-13a. In the court of appeals' view, that principle provided further support for the court's interpretation because the letter "contains no 'unmistakable term' ceding [the Division's] power to reopen its investigation." *Id.* at 13a.

The court of appeals rejected petitioner's contention that, if the letter permitted the Division to reopen its investigation, the letter was "worth nothing but the paper on which it was written." Pet. App. 18a (citation omitted). The court explained that petitioner had "gained several benefits from the closing of [the Division's] pending investigation in 2020," including relief from the obligation of having "to respond to the two outstanding CIDs"; "the possibility that [the Division] would not reopen its investigation at all, or for a substantial period of time"; "avoid[ance]" of "the risk that [petitioner's] responsive documents would be publicized in conjunction with a po-

tential future complaint filed by [the Division]"; and use of "the closing letter to [petitioner's] advantage in other, private litigation that was pending when the closing letter was negotiated and issued." *Ibid.*

Judge Walker dissented. Pet. App. 22a-34a. While acknowledging that "'closed' and 'reopen' are sometimes compatible," *id.* at 28a, he expressed the view that treating them as compatible here would "nullify what [petitioner] gained" from the settlement agreement, *id.* at 22a.

6. The court of appeals denied rehearing en banc without noted dissent. Pet. App. 51a-52a.

ARGUMENT

The court of appeals in this case determined that the government had made no commitment to refrain from reopening an antitrust investigation that the government had closed. That decision is correct, and it does not conflict with any decision of this Court or another court of appeals.

In any event, this case would be a poor vehicle for addressing the question presented in the petition for a writ of certiorari. Contrary to the premise of that question, the decision below did not hold that "the United States enjoys greater rights than a private party to withdraw from a contract based solely on its determination that it no longer wishes to be bound by that contract." Pet. i. The court of appeals did not view the Division's reopening of its investigation as a "withdraw[al] from" the closing agreement. Rather, based on the plain language and various other aspects of that agreement, the court held that the government had made no commitment to refrain from reopening the investigation in the first place. Pet. App. 11a-21a. That "narrow," case-specific holding does not implicate the question pre-

sented in the petition. *Id.* at 11a. Accordingly, the petition should be denied.

1. The court of appeals' decision in this case is correct. There is no dispute that the Division agreed in 2020 to "close[]" its investigation into two of petitioner's rules, the Participation Rule and the Clear Cooperation Policy. C.A. App. 128. There is also no dispute that the Division closed that investigation. Indeed, the closing letter informed petitioner that the Division "ha[d] closed its investigation." Pet. App. 80a. And petitioner acknowledged below that, "[c]onsistent with the terms of the parties' agreement," the Division had in fact done so. C.A. App. 20.

The disputed question is whether, in addition to agreeing to close the investigation, the Division agreed not to reopen it. The court of appeals correctly determined that the Division had made no such commitment. Pet. App. 11a-21a. As the court explained, no such commitment appears in "the plain language" of the parties' agreement. *Id.* at 11a; see *M&G Polymers USA, LLC* v. *Tackett*, 574 U.S. 427, 435 (2015) ("Where the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent.") (citation omitted). Although the Division agreed to close its investigation, "the words 'close' and 'reopen' are not mutually exclusive." Pet. App. 15a; see, *e.g.*, *Webster's Third New International Dictionary* 1923 (1993) (defining "reopen" as "to resume the discussion or consideration of (a closed matter)"); *Marinello* v. *United States*, 584 U.S. 1, 5 (2018) (describing an investigation that the government had "opened, then closed, then reopened"). The Division's agreement to "close" the investigation therefore did not imply an agreement not to "reopen" it. Indeed, the closing letter

instructs that "[n]o inference should be drawn * * * from the Division's decision to close its investigation," Pet. App. 80a—reinforcing the inference that the letter should not be read "to imply any additional terms," such as a commitment not to reopen, *id.* at 12a.

The parties' negotiating history underscores the absence of any such commitment. See *M&G Polymers*, 574 U.S. at 435 (explaining that, under "ordinary principles of contract law," "'the parties' intentions control'") (citation omitted). During negotiations, the Division repeatedly informed petitioner that, even if the Division agreed to close an investigation, it could not commit to refraining from investigating petitioner's rules in the future. See C.A. App. 252, 259; *id.* at 247-248 (rejecting petitioner's proposal that the Division stipulate that the Participation Rule "would not be subject to further investigation any time in the next ten years"). The Division explained that such a commitment was a "nonstarter" because it would violate "longstanding Department policies concerning settlements that affect future potential investigations." *Id.* at 248; see *id.* at 252. And after the Division reiterated in its August 12, 2020 letter that it could not "commit to never investigating or challenging [petitioner's] rules and policies in the future," *id.* at 259, petitioner did not continue to request such a commitment. Nor did petitioner propose that the Division commit to forgoing any new investigation for some period of time shorter than the ten-year forbearance period that petitioner had previously requested. Instead, petitioner "accept[ed]" the terms that the Division had proposed. *Id.* at 260; see *id.* at 126 (restating terms "consistent with what [the Department of Justice] agreed to in [the Division's] August 12 letter" and "extend[ing]" them "to cover the Clear Cooperation Policy"). That history shows

that, when the parties entered into the settlement, they understood that the Division's agreement to close the investigation did not imply any agreement not to reopen it.

That understanding also finds support in the principle that a contract should not be interpreted to "cede a sovereign right of the United States unless the government waives that right unmistakably." Pet. App. 13a; see, *e.g.*, *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982) (explaining that "sovereign power * * * will remain intact unless surrendered in unmistakable terms"). Consistent with that principle, "courts often construe the actual terms of executive branch settlements narrowly on the assumption that they are not intended to bind subsequent administrations and out of respect for executive branch prerogatives." *Authority of the United States to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion*, 23 Op. O.L.C. 126, 146 (1999) (O.L.C. Op.). And here, as the court of appeals observed, "[t]he closing letter contains no 'unmistakable term' ceding [the Division's] power to reopen its investigation." Pet. App. 13a.

2. Petitioner contends (Pet. 13) that the decision below conflicts with decisions of this Court and other circuits. But petitioner does not identify any decision of this Court or any other that has construed an agreement to "close" as implying an agreement not to "reopen." Instead, petitioner contends (Pet. 13-22) that the decision below departs from various decisions, arising in other contexts, involving the application of the illusory-promises doctrine, the unmistakability principle, and the party-presentation principle. Those arguments lack merit.

a. The illusory-promises doctrine "instructs courts to avoid constructions of contracts that would render prom-

ises illusory because such promises cannot serve as consideration for a contract." *M&G Polymers*, 574 U.S. at 440. Petitioner argues (Pet. 3) that the court of appeals in this case "read the contract to permit [the Division] to make an illusory promise in exchange for meaningful consideration." That characterization of the court's decision is incorrect. The court specifically rejected the contention that its interpretation rendered the Division's promise to close the investigation illusory. Pet. App. 18a-19a. And in doing so, the court identified "several benefits" that petitioner had gained "from the closing of [the Division's] pending investigation in 2020." *Id.* at 18a. There is consequently no merit to petitioner's assertion (Pet. 15) that the court "depart[ed] from th[e] prohibition on reading contracts to contain illusory promises."

To the extent petitioner argues that it did not gain any benefit from the closing of the investigation in 2020, that factbound contention likewise lacks merit and does not warrant this Court's review. The court of appeals correctly determined that petitioner had "gained several benefits." Pet. App. 18a. For example, petitioner "gained some value from the possibility that DOJ would not reopen its investigation at all, or for a substantial period of time." *Ibid.* Petitioner also benefitted from using the closing letter publicly, including by filing it in other pending antitrust litigation. *Id.* at 18a-19a. And, "[m]ost obviously, [petitioner] was relieved of its obligation to respond to the two outstanding CIDs, which required the production of substantial information." *Id.* at 18a. Contrary to petitioner's assertion (Pet. 16), each of those benefits existed at the time of the parties' settlement and thus provided consideration for petitioner's agreement to enter into the proposed consent judgment.

In any event, petitioner is wrong in asserting (Pet. 16) that the closing of the investigation was "the only form of consideration that [the Division] purported to provide." The proposed consent judgment itself offered petitioner several benefits. Petitioner acknowledges (Pet. 6), for instance, that entering into the proposed consent judgment offered the benefit of avoiding "an admission of liability" or "acceptance of [the Division's] allegations" about the four policies that the proposed consent judgment addressed. See *United States* v. *Armour & Co.*, 402 U.S. 673, 681 (1971) (observing that parties enter into consent decrees to "save themselves the time, expense, and inevitable risk of litigation"). And unlike a potential litigated final judgment, the proposed consent judgment was limited to a seven-year term, C.A. App. 175, and would not have collateral-estoppel effect against petitioner in private litigation, 15 U.S.C. 16(a). Of course, the Division ultimately withdrew its consent to the proposed consent judgment, as was its right under the parties' agreement. C.A. App. 147, 207-208. But even apart from the Division's commitment to close the investigation into the Participation Rule and the Clear Cooperation Policy, the proposed consent judgment offered petitioner substantial benefits as consideration.

b. The unmistakability principle holds that a contract should not be interpreted "to cede a sovereign right of the United States unless the government waives that right unmistakably." Pet. App. 13a. Petitioner contends (Pet. 18) that the court of appeals' application of that principle in this case is inconsistent with "traditional contract principles." But under "ordinary principles of contract law," "'the parties' intentions control.'" *M&G Polymers*, 574 U.S. at 435 (citation omitted). And the unmistakability principle is simply a tool for discerning

the parties' intentions when, as here, a sovereign right is at stake. See *United States* v. *Winstar Corp.*, 518 U.S. 839, 913 (1996) (Breyer, J., concurring) ("The simple fact that it is the government may well change the underlying circumstances, leading to a different inference as to the parties' likely intent."); O.L.C. Op. 146 (recognizing that the principle rests on an "assumption" about what the contracting parties "intended"). The unmistakability principle recognizes that, because the government does not lightly contract away its sovereign rights, courts should not conclude that the government has done so unless the government has expressed that intent clearly.

Indeed, the record in this case shows that when the Division does intend to waive the government's sovereign rights, the Division uses unambiguous language. The record includes a model plea agreement from the Division that states, in unmistakable terms, that "the United States agrees that it will not bring further criminal charges" for specified past conduct. D. Ct. Doc. 21-13, ¶ 15 (Nov. 12, 2021); see D. Ct. Doc. 21-12, ¶ 3 (Nov. 12, 2021) (similarly clear language in a model leniency letter from the Division). The absence of any comparably clear language in the closing letter reinforces the conclusion that the Division made no similar commitment to refrain from investigating the Participation Rule and the Clear Cooperation Policy in the future.

Petitioner's remaining objections to the court of appeals' application of the unmistakability principle likewise lack merit. Petitioner contends (Pet. 17) that the principle applies only when construing possible waivers of "*legislative* power." But courts also apply the principle when construing possible waivers of "executive branch prerogatives." O.L.C. Op. 146. Petitioner contends that courts have sometimes construed agreements "*against*

the government." Pet. 19 (citation omitted). But none of the decisions that petitioner cites (Pet. 19-20) involved the type of sovereign right at issue here. And petitioner's assertion (Pet. 18) that any "thumb on the scale" should have favored petitioner, rather than the government, ignores the fact that petitioner itself proposed the language of the first sentence of the closing letter. See C.A. App. 109, 247; *Lamps Plus, Inc.* v. *Varela*, 587 U.S. 176, 186 (2019) (discussing the rule that "ambiguity in a contract should be construed against the drafter").

In any event, the court of appeals in this case invoked the unmistakability principle only as "support[]" for its interpretation of the parties' agreement. Pet. App. 12a; see Pet. 10 (acknowledging that the court relied only "in part" on the unmistakability principle). The court principally relied on "the plain language" of the closing letter, and there is no reason to believe that the court would have understood that language differently without the unmistakability principle. Pet. App. 11a. Because the court viewed that principle as simply confirming the most natural understanding of the closing letter's text, this case would be a poor vehicle for addressing the principle's scope.

c. Under the party-presentation principle, courts generally "rely on the parties to frame the issues for decision." *United States* v. *Sineneng-Smith*, 590 U.S. 371, 375 (2020) (citation omitted). Petitioner contends (Pet. 21) that the court of appeals violated that principle by ignoring the Division's "lone argument" on appeal. But petitioner's own description of the decision below belies that contention. As petitioner acknowledges, the court "*agreed with* [the Division's] reasoning that its promise to close the investigation * * * included 'no commitment * * * to refrain from either opening a new investigation

or reopening its closed investigation.'" Pet. 10 (quoting Pet. App. 12a-13a) (emphasis added). To be sure, the court declined to address whether the Division would have breached the parties' agreement if it had reopened the investigation "'immediately,'" rather than "eight months after the original settlement agreement was reached." Pet. App. 19a (citation and emphasis omitted). But because the facts of the case before it did not involve an immediate reopening, the court's decision not to address that "hypothetical situation" reflected the court's respect for, not disregard of, the party-presentation principle. *Ibid.*; see *Sineneng-Smith*, 590 U.S. at 376 (emphasizing that courts should "wait for cases to come to them") (brackets and citation omitted).

Petitioner is likewise wrong in asserting that the court of appeals violated the party-presentation principle by "expressing its view 'that the closing letter likely became unenforceable' when [the Division] unilaterally withdrew from the consent decree." Pet. 22 (quoting Pet. App. 10a n.5). That view was not the basis for the court's decision. Rather, in deciding the appeal, the court "accept[ed] the parties' apparent assumption that the closing letter is a binding agreement that remains enforceable, notwithstanding the withdrawal of the Proposed Consent Judgment." Pet. App. 10a. And the court "adopt[ed] th[at] framing of the dispute" precisely because it was the one "advanced by the parties." *Ibid.* (citing *Sineneng-Smith*, 590 U.S. at 375).

3. In any event, this case would be a poor vehicle for addressing the question presented in the petition for a writ of certiorari. The petition frames (Pet. i) the question presented as "[w]hether the United States enjoys greater rights than a private party to withdraw from a contract based solely on its determination that it no

longer wishes to be bound by that contract." But the court of appeals did not conclude that the United States could "withdraw from a contract"—let alone that the United States "enjoys greater rights than a private party" to do so. *Ibid.* Rather, the court determined that the government had made no commitment to refrain from reopening its investigation into petitioner's rules. Pet. App. 11a-21a. The government's decision to reopen the investigation thus involved no withdrawal from, or repudiation of, any "binding" commitment. Pet. 1. Because the decision below does not implicate the question presented in the petition, this case would be a poor vehicle for the Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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