No. 24-417

IN THE
Supreme Court of the United States

NATIONAL ASSOCIATION OF REALTORS,
Petitioner,
v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST DIVISION; JONATHAN KANTER, IN HIS OFFICIAL CAPACITY AS ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

This petition presents a clean vehicle to resolve a matter of profound importance in federal contracting: whether the federal government, when it enters into a contract with a private party, is subject to the same rules of contract interpretation as everyone else. The Department of Justice (DOJ) barely addresses that issue in its opposition brief, and it is easy to see why. This Court and many courts of appeals have established that the "United States are as much bound by their contracts as are individuals." *Sinking Fund Cases*, 99 U.S. 700, 719 (1878); *see* Pet. 13. But the divided D.C. Circuit, over Judge Walker's persuasive dissent, declined to apply that rule to DOJ here. Given the far-reaching implications of that erroneous decision, this Court should grant certiorari to clarify that the government must keep its contractual promises just like other parties.

The contract terms at issue tee up the matter starkly. In November 2020, DOJ promised to close its investigation of two rules adopted by petitioner the National Association of Realtors (NAR) in return for NAR's acceptance of a consent decree modifying other policies. NAR kept its end of the bargain. But after the 2021 change in presidential administrations, DOJ resumed the investigation that it had promised to close. DOJ's position, rejected by the district court and Judge Walker but accepted by the panel majority, was that its promise to close the investigation simply required *saying* that the investigation was closed, while retaining the same discretion to continue investigating that it possessed before entering into the contract.

That position would not have been accepted if offered by a private party; an employer who agreed to

close a discriminatory hiring program as part of a settlement, for example, could never get away with resuming that very program on the theory that closing it only required doing so momentarily. The D.C. Circuit countenanced DOJ's implausible reading only by applying a series of special rules to the government, including allowing DOJ to make an illusory promise, requiring NAR to meet a heightened standard of "unmistakability" in holding DOJ to its bargain, and adopting contract interpretations that DOJ itself had disclaimed. Pet. 13-23. As Judge Walker's dissent correctly observed, ruling for DOJ required the D.C. Circuit majority to "go where no court has gone before." Pet. App. 33a.

DOJ's brief in opposition attempts to defend the decision below but only reinforces its break with precedent and the need for this Court to intervene. DOJ fails to identify any obligation that it incurred under its reading of the contract, confirming that the court below allowed it to make an illusory promise. DOJ cites no precedent for applying the unmistakability doctrine to a settlement of an enforcement action like this one, underscoring the D.C. Circuit's vast extension of that government-favoring canon. And DOJ does not deny that the court of appeals repeatedly invoked arguments that the government had not made and in fact disclaimed.

The D.C. Circuit's errors on fundamental matters of federal contract interpretation are cleanly presented, and this Court's review is particularly important given the role of the D.C. Circuit in interpreting government contracts. Thousands of people rely every day on the federal government to honor its contractual promises, and the decision below threatens to both unsettle prior settlement agreements and deter new ones. As Judge Walker observed, "[a]fter today, behind the facade of its

promise to close an investigation, the government can lure a party into the false comfort of a settlement agreement, take what it can get, and then reopen the investigation seconds later." Pet. App. 33a-34a. This Court should grant review to reject that unwarranted power and reiterate the government's duty to comply with settled principles of contract law.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS

A. The Decision Below Violated The Illusory Promises Doctrine

The government accepts, as it must, that the illusory promises doctrine requires courts to "avoid constructions of contracts that would render promises illusory because such promises cannot serve as consideration." Opp. 10-11 (quoting *M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 440 (2015)). And DOJ disputes neither NAR's characterization of that doctrine nor how this Court and others have uniformly applied it. Pet. 14-15.

Under that settled understanding, the D.C. Circuit should have accepted NAR's meaningful reading of the government's promise to "close" its investigation into the two specified policies instead of crediting DOJ's nullifying interpretation that it could resume its closed investigation at any point after it sent the closing letter. Pet. 15-17. After all, a promise that left DOJ with exactly the same investigative discretion the moment after it entered into the agreement as it had the moment before is a classic illusory promise. Pet. 16; *see Johnson Enters. v. FPL Grp., Inc.*, 162 F.3d 1290, 1311 (11th Cir.

1998) ("If … 'one of the promises appears on its face to be so insubstantial as to impose no obligation at all on the promisor … then that promise may be characterized as an 'illusory' promise, i.e., 'a promise in form but not in substance.'" (quoting E. Allan Farnsworth, *Contracts* § 2.13, at 75-76 (2d ed. 1990))); *Torncello v. United States*, 681 F.2d 756, 769 (Ct. Cl. 1982) (an "illusory promise" "do[es] not purport to put any limitation on the freedom of the alleged promisor, but leave[s] his future action subject to his own future will" (quoting 1 Corbin on Contracts § 145 (1963))).

The government does not even attempt to show otherwise. Instead, it seeks to evade the issue by pointing to alleged benefits that NAR received from DOJ's decision not to resume its investigation for eight months after sending the closing letter. Opp. 11. But those purported benefits *to NAR* shed no light on what the *government gave up* and thus have no bearing on whether its promise, as understood by the court below, was illusory. Moreover, under DOJ's reading of the settlement, the benefits that NAR purportedly received were the result of mere "*noblesse oblige*," *United States v. Stevens*, 559 U.S. 460, 480 (2010)—the government could have resumed the investigation at any time but allowed NAR eight months of grace. The court's finding of an eight-month benefit for NAR also has no foundation in the text of the contract. Whatever else can be said of the settlement, it cannot be read to contemplate a closure of the investigation *for eight months*.

The government attempts to defend the decision below by citing other features of the agreement and the parties' negotiation history. Opp. 8-10. But none supports the premise that the government made a promise to close the investigation for a mere moment.

First, the government argues that "'close' and 'reopen' are not mutually exclusive." Opp. 8. In this context, however, the only plausible meaning of "closed" must preclude "immediately reopen." Pet. App. 30a. NAR did not surrender four of its policies *in return* for DOJ's promise to close an investigation for one moment and reopen it the next—as the government says it could have done. Pet. App. 29a.

Second, the government stresses that the closing letter said no "inference" was to be drawn from the closing of the investigation. Opp. 9. But NAR is not asking for an "inference" to be drawn from the government's decision to close the investigation, such as an inference about the propriety of its underlying conduct. Nor does NAR seek "to imply any additional terms" into the settlement. *Id.* Rather NAR seeks to give meaningful effect to the explicit term "closed."

Third, the government points to its negotiation statements that a commitment to refrain from investigating NAR was a "nonstarter." Opp. 9. Because "the text of the closing letter is unambiguous," negotiation history is irrelevant. Pet. App. 11a (citing *Brubaker v. Metro. Life Ins. Co.*, 482 F.3d 586, 590 (D.C. Cir. 2007); *Iberdrola Renewables, Inc. v. FERC*, 597 F.3d 1299, 1304 (D.C. Cir. 2010)). But even if that history is considered, it shows at most that the government relented from its initial position in order to reach an agreement—a common occurrence in contractual negotiations. And the extrinsic evidence also includes DOJ's felt need to withdraw from the consent decree, which confirms its own understanding that promising to close

the investigation precluded reopening it based solely on a change of heart. *See* Pet. 7-8.[1]

B. The Decision Below Improperly Extended The Unmistakability Doctrine

Despite this Court's explicit prohibition on "expan[ding] … the unmistakability doctrine beyond its historical and practical warrant," *United States v. Winstar Corp.*, 518 U.S. 839, 883 (1996) (plurality opinion), DOJ posits that the unmistakability doctrine applies in all government-contract cases as a "tool for discerning" parties' intentions. Opp. 10, 12-13. That proposition is as startling as it is wrong. It is startling because it reveals the government's belief that it ought to receive a special form of judicial review in contract cases—a claim directly contrary to this Court's decisions and rule-of-law principles. *Winstar*, 518 U.S. at 895; *cf. Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2266 (2024). And it is wrong because this Court's precedent cabins the unmistakability doctrine to the realm of contracts limiting legislative authority. Pet. 17-20.

DOJ attempts to write off the cases cited by NAR demonstrating that plea bargains and other agreements in which the government limits its enforcement discretion are construed against the government. Pet. 19-20. But DOJ is simply wrong that those cases did not "involve[] the type of sovereign right at issue here." Opp.

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[1] NAR does not suggest that the government "commit[ted] to never investigating or challenging [petitioner's] rules and policies in the future." Opp. 9. DOJ of course retained the discretion to investigate NAR's other rules and policies, or even the policies at issue here had they been materially changed. What it could not do was reopen its investigation into these unchanged policies and reissue identical CIDs at any time—which is exactly what it did.

14. Plea agreements, for instance, involve exactly the investigatory and enforcement authority that the government ceded here. In any event, cases involving plea agreements are far more analogous to DOJ's closing of an investigation than cases in which the government may have ceded legislative authority. Critically, DOJ has yet to cite a single case applying the unmistakability doctrine outside that "historical and practical warrant." *Winstar*, 518 U.S. at 883 (plurality opinion).[2]

Contrary to the government's assertion, this case is a suitable vehicle to address the unmistakability doctrine's purview because the court below specifically relied on the doctrine to support the government's position. Opp. 14. That outcome creates a binding precedent—in a court that frequently encounters government contracts—equipping the government with a one-sided rule allowing it to exploit perceived ambiguity when it regrets its contractual guarantees. This Court's precedents do not permit that unprincipled result.

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[2] The OLC opinion that the government cites (Opp. 10, 13) relies on precedents that do not support the government's case. *See Authority of the United States to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion*, 23 Op. O.L.C. 126, 146 (1999) ("OLC Op."). Both *Evans v. City of Chicago*, 10 F.3d 474, 476 (7th Cir. 1993), and *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 392-93 (1992), concern the *ex post facto* modification of consent decrees, not the interpretation of contracts as formed. Meanwhile, *Alliance to End Repression v. City of Chicago*, 742 F.2d 1007 (7th Cir. 1984), expresses a general aversion to "alternative interpretations" with disproportionately harmful "consequences"; it makes no government-specific interpretive assumption. *Id.* at 1013. In reality, "there is no general bar," explicit or assumed, "to executive branch settlements that limit the future exercise of congressionally conferred executive branch discretion." OLC Op. 146.

C. The Panel Majority Violated The Party-Presentation Rule

As with the illusory promises doctrine, the government does not dispute NAR's explanation of the party-presentation rule or its application by courts across the country. Pet. 20-22. Instead, DOJ emphasizes that the court below "agreed with" the government's reasoning that it did not promise to keep the investigation closed. Opp. 14-15. The problem is that the D.C. Circuit supported that reasoning with an argument the government never made: that DOJ gave up consideration by "not resum[ing] its investigation for eight months." Pet. 21-22. Indeed, DOJ admits that the court of appeals "declined to address" its lone argument that it could have reopened the investigation "immediately." Opp. 15. The court thus admittedly violated the party-presentation rule—a result this Court should grant certiorari to correct.

II. THE CASE PRESENTS AN EXCEPTIONALLY IMPORTANT QUESTION AND A CLEAN VEHICLE TO ADDRESS IT

The government rightly does not argue that the question presented lacks importance. Ensuring that the government adheres to its contractual promises—and that courts do not employ government-favoring canons as the court below did—is a concern of the highest order because the government enters into a vast number and variety of contracts with private parties. To preserve confidence in those contracts, courts must ensure that the government "turn[s] square corners" when fulfilling its obligations. *Niz-Chavez v. Garland*, 593 U.S. 155, 172 (2021).

If left in place, the decision below will unsettle the interests of the diverse private parties who routinely contract with the government, from sophisticated firms vital to our nation's economy to criminal defendants confronted with the government's vast prosecutorial advantages. *See* Pet. 23-24; U.S. Chamber of Commerce C.A. Amicus Br. 3 (explaining that "stability and expectation of fair dealing [is] key to our system" of law and government). The decision below also risks eroding the government's sovereign capacity to vindicate national interests through contracts, a concern that transcends the government's desire to escape the particular settlement at issue here. *Winstar*, 518 U.S. at 913 (Breyer, J., concurring).

The government suggests that this case is not a good vehicle for addressing the question presented because the court below simply "determined" that DOJ "made no commitment to refrain from reopening its investigation." Opp. 15-16. That argument only highlights the problem and the need for review. The D.C. Circuit afforded the government special treatment precisely *by* determining—though various improper thumbs on the interpretive scale—that it made no commitment to refrain from reopening the investigation.

Without such deferential treatment, DOJ could not have succeeded with its brazen reinterpretation of the settlement agreement. This case thus squarely presents the Court with an opportunity to reject the troubling view that courts may bend or break the rules of contract interpretation and adversarial litigation in order to free the government of contractual commitments that it no longer prefers to keep.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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