No. 24-____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 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.

CORPORATE DISCLOSURE STATEMENT

Petitioner-Appellee National Association of REALTORS® ("NAR") certifies that it has no parent companies and there are no publicly held companies with a 10% or greater ownership interest in NAR.

RELATED PROCEEDINGS

United States District Court (D.D.C.):

National Ass'n of Realtors v. United States, No. 20-cv-3356 (Jan. 25, 2023)

United States Court of Appeals (D.C. Cir.):

National Ass'n of Realtors v. United States, No. 23-5065 (Apr. 5, 2024)

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PETITION FOR A WRIT OF CERTIORARI

"When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *United States v. Winstar Corp.*, 518 U.S. 839, 895 (1996) (plurality op.) (citation omitted). That bedrock rule ensures fairness and predictability for the government's contracting partners. It also embodies a rule-of-law "principle as old as the Nation itself:" when the government makes a promise in an enforceable contract, it must "honor its obligations." *Maine Cmty. Health Options v. United States*, 590 U.S. 296, 328 (2020) (citation omitted).

In the decision below, a divided D.C. Circuit panel starkly departed from those principles. The court accepted the invitation of the Antitrust Division of the Department of Justice (DOJ) to "go where no court has gone before" by allowing the government to repudiate a binding contract based solely on its preference to do so—grounds a private party could never successfully invoke. App. 33a (Walker, J., dissenting). That holding directly conflicts with decisions of this Court and other federal courts of appeals on multiple significant questions of federal contract interpretation. And the decision has exceptionally important practical implications for the wide range of individuals and entities that contract with the federal government. This Court's review is warranted to restrain the government's overreach on issues of critical legal and economic significance.

The parties' dispute arises from a DOJ investigation into two policies of the National Association of Realtors (NAR)—the nation's largest trade association and a critical advocate for real estate professionals and consumers in the real-estate sector of the economy. App.

3a-4a. In November 2020, the parties entered into an agreement under which DOJ agreed to "close[] its investigation into" those two policies in return for modifications to other NAR policies. App. 80a. NAR kept its end of the bargain. But soon after the change in administrations in January 2021, DOJ decided to resume the investigation it had committed to "close." App. 40a. DOJ did not cite any breach by NAR or change in the challenged rules; DOJ's only stated basis for resuming the closed investigation was that it had a newfound policy preference to do so. App. 10a.

NAR moved to quash DOJ's new civil investigative demand (CID). App. 37a. The district court granted the motion, explaining that DOJ's position that it could resume the investigation at any time and for any reason would render its promise to close the investigation "worth nothing but the paper on which it was written." App. 46a, 48a-49a. As the court put it, "[t]he government, like any party, must be held to the terms of its settlement agreements, whether or not a new administration likes those agreements." App. 48a-49a.

DOJ appealed to the D.C. Circuit, which reversed in a divided decision over a vigorous dissent by Judge Walker. The panel majority accepted the government's view that DOJ's promise to close the investigation in return for binding consideration did not impose any future obligation on DOJ; rather, the majority concluded that the government was free to resume the investigation at its discretion. App. 12a. As Judge Walker's dissent explained, "[n]o court identified by DOJ" has ever "endorsed such a reading" of a government contract—a reading that renders the government's promise "meaningless." App. 22a, 31a.

The panel majority attempted to justify its unprecedented decision by relying on a canon of construction that DOJ did not invoke in the district court: the "unmistakability doctrine," which purportedly requires courts to allow government entities to escape contractual commitments to forebear from future sovereign acts unless those commitments are made in unmistakable terms. App. 12a-13a, 13a n.8. The panel majority also relied on an argument that DOJ repudiated in the court of appeals—that NAR received a benefit under the contract because DOJ waited roughly eight months to breach it. App. 18a, 25a & n.6, 31a.

As Judge Walker's dissent observed, "DOJ has not cited a single precedent allowing" it to do what the majority permitted. App. 31a. To the contrary, the majority's position conflicts with at least three separate lines of established precedent from this Court and lower courts that do not allow such special treatment for the government. First, the majority read the contract to permit DOJ to make an illusory promise in exchange for meaningful consideration, a paradigmatic contract-law violation. *M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 440 (2015). Second, the majority applied the unmistakability doctrine far beyond its bounds, creating a conflict with the many cases in which this Court and others have applied neutral contract principles to settlements of government enforcement actions or prosecutions. *See, e.g.*, *Puckett v. United States*, 556 U.S. 129, 137 (2009). Third, the majority devised arguments in favor of the government's position that the government did not present—a treatment courts do not afford anyone. *United States v. Sineneng-Smith*, 590 U.S. 371, 375-76 (2020).

Individually, those are three distinct conflicts with this Court's precedent and decisions of other federal courts of appeals. Taken together, they are one substantial departure from the Court's instruction to treat the United States the same as anyone else when interpreting its contractual promises. *Winstar*, 518 U.S. at 895 (plurality op.).

The question presented by that conflict is exceptionally important. Every day, federal agencies resolve civil and criminal enforcement actions through agreements with private parties. It is critical that the government honor its word in those contracts, no matter who occupies the White House or leads DOJ. Without intervention from this Court, the position adopted by the panel majority will expose businesses and private citizens to perpetual uncertainty regarding the government's commitments or representations when settling investigations—particularly in the wake of changes in control of the Executive Branch. *See, e.g.*, U.S. Chamber of Commerce C.A. Amicus Br. 3. That destabilizing result undermines the rule of law and introduces uncertainty into transactions that play a critical role in the national economy. This Court should grant review.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 97 F.4th 951. The opinion of the district court (App. C) 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, and rehearing was denied on July 12, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Antitrust Civil Process Act, 15 U.S.C. §§ 1311-1314, and Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, are reproduced in an appendix to this petition.

STATEMENT

A. Factual Background

1. DOJ's Investigation Of NAR

NAR is the nation's leading trade association for professionals in the real-estate industry. C.A. J.A. 153. Among other functions, NAR maintains optional and mandatory rules and policies for local associations of REALTORS® that operate "multiple listing services" (MLSs): compilations of information about homes listed for sale in a particular geographic area. C.A. J.A. 13.

In 2019, the DOJ Antitrust Division opened an investigation concerning various NAR policies relating to MLSs, including the Participation Rule and the Clear Cooperation Policy.[1] As part of the investigation, DOJ issued CIDs to NAR in April 2019 and June 2020 seeking a broad array of information related to those two rules. C.A. J.A. 209-19, 220-30.

2. The Settlement Between NAR And DOJ

From the beginning of the investigation, NAR both maintained the legality of all the relevant policies and

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[1] The Participation Rule required a broker who chooses to participate in an MLS following NAR's rules to make an offer of compensation—of any amount—to other brokers who help sell the property. The Clear Cooperation Policy requires MLS participants to submit a listing to the MLS within one business day of marketing the property to the public.

sought to cooperate with DOJ to address its concerns. *See* C.A. J.A. 243-44. In November 2020, the parties agreed on a settlement: NAR would accept a consent decree requiring it to modify four specified policies. App. 5a & n.3.[2] In return, DOJ would issue a letter stating that it had closed its investigation into the Clear Cooperation Policy and Participation Rule and that NAR would not have to respond to corresponding CIDs. App. 6a-7a.

To implement the parties' agreement, DOJ filed a complaint alleging that the four separate MLS-related policies—but not the Participation Rule or Clear Cooperation Policy—violated the Sherman Act. C.A. J.A. 151-61. DOJ filed a Proposed Final Judgment (*i.e.*, consent decree) that would resolve the claims in the Complaint without an admission of liability from NAR or acceptance of DOJ's allegations. C.A. J.A. 162-77. The Proposed Final Judgment required NAR to make changes to the MLS-related policies addressed in the complaint and undertake related obligations. C.A. J.A. 165-174. The parties also filed a stipulation providing that NAR would comply with certain terms in the Proposed Final Judgment until it was approved and that DOJ could withdraw from the Proposed Final Judgment before its entry by the district court. C.A. J.A. 147-49.

Finally, DOJ sent NAR the contemplated letter closing the investigation. The letter stated in full:

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[2] These separate NAR policies related to the disclosure and filtering of certain information on MLSs and to access to lockbox keys by non-MLS participants.

> [T]he Antitrust Division has closed its investigation into the … Clear Cooperation Policy and Participation Rule. Accordingly, NAR will have no obligation to respond to CID Nos. 29935 and 30360 … .
>
> 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.

App 80a. NAR promptly complied with its obligations under the consent decree. *See* C.A. J.A. 22.

3. DOJ Resumes The Investigation

Soon after the change in presidential administrations in January 2021, DOJ approached NAR with a proposal to modify the settlement on the grounds that it "does not adequately protect the [DOJ]'s ability to investigate in the future NAR rules that may harm competition." C.A. J.A. 201. NAR declined to accept DOJ's proposals without assurance that DOJ would not resume the investigation into the Participation Rule and Clear Cooperation Policy that it had agreed to close. App 40a. DOJ refused to provide that assurance. *Id.*

In July 2021, it became clear why DOJ would not do so. Notwithstanding its promise to close the investigation into the Participation Rule and Clear Cooperation Policy, DOJ "resum[ed] … its investigative efforts" into those very rules. App. 40a-41a. DOJ did not assert that the rules had changed or that NAR had failed to carry out any aspects of its obligations under the settlement. Instead, DOJ informed the district court that it had withdrawn its consent to entry of the proposed Final

Judgment so that it could "eliminate any potential limitation on the future ability of the United States to investigate and challenge additional potential antitrust violations committed by" NAR. C.A. J.A. 207-08. At the same time, DOJ issued a press release explaining that it was "taking this action to permit a broader investigation of NAR's rules" and "cannot be bound by a settlement that prevents [its] ability to protect competition." App. 81a.

Days later, the government sent a CID (the "2021 CID") to NAR that copied most of the requests regarding the Participation Rule and Clear Cooperation Policy—sometimes almost verbatim—from the requests in the prior CIDs that the government had agreed to withdraw and had told NAR it "w[ould] have no obligation to respond to." C.A. J.A. 178, 209-42.

B. Procedural History

1. District Court Proceedings

NAR timely petitioned to quash the 2021 CID under the Antitrust Civil Process Act ("ACPA"), which authorizes a court to set aside a CID "based upon any failure of such demand to comply with the provisions of [the ACPA], or upon any constitutional or other legal right or privilege." 15 U.S.C. § 1314(b)(2). As pertinent here, NAR contended that the 2021 CID was barred by DOJ's agreement to "close[] its investigation into the" Participation Rule and Clear Cooperation Policy and its commitment that "NAR will have no obligation to respond to" the previously issued CIDs. App. 80a. The district court agreed, setting aside the 2021 CID because it was barred by "a validly executed settlement agreement." App. 43a.

Applying principles of "contract interpretation," the district court found that the parties' settlement "encompasse[d]" two parts: (i) NAR's "agree[ment] to the consent decree," and (ii) DOJ's reciprocal commitment to "close its investigations into the Participation Rule and Clear Cooperation Policy and effectively rescind the CIDs." App. 43a-45a. The court emphasized that DOJ's promise "was essential to the parties' reaching a settlement" and "must be considered part of the overall agreement." App. 45a.

"With that common-sense interpretation of the parties' settlement in hand," the district court held, "it is not hard to conclude that the [2021] CID violates the agreement." *Id.* "Because the agreement included the Antitrust Division's commitment to close its investigation into NAR's current Participation Rule and Clear Cooperation Policy, the government breached the agreement by reopening the investigation into those same rules and serving the [2021] CID." *Id.*

The court rejected any suggestion that the 2021 CID was part of a "new investigation," finding that the Participation Rule and Clear Cooperation Policy "have not 'been changed, modified, or amended since the Antitrust Division closed its investigation in 2020,'" the 2021 CID was not materially different from "the CIDs issued previously," and DOJ "itself has described its actions as '*resum[ing]* its investigative efforts.'" App. 46a n.2. Indeed, the court found, "the only intervening change was that in presidential administrations." App. 48a.

The district court also rejected DOJ's contention that its obligations under the settlement agreement required nothing more than sending a letter "confirming

closure of its investigation." App. 46a. Under that reading, the court explained, "the agreement contemplated only a letter worth nothing but the paper on which it was written." *Id.* The court found that "NAR explicitly negotiated for a letter 'giv[ing it] relief from the investigations,'" and the "letter would hardly provide such 'relief' if the Antitrust Division was free to reopen the investigations into both the Participation Rule and Clear Cooperation Policy and reissue substantially similar CIDs right after closing the same." *Id.*

Finally, the district court underscored that its decision did not mean "that the Antitrust Division has agreed to never investigate NAR or some future version or application of NAR's Participation Rule and Clear Cooperation Policy." App. 48a. Rather, the court held "only that the government, in committing to close an investigation into these policies one year and then reopening it the next—when the only intervening change was that in presidential administrations—violated the parties' agreement." *Id.*

2. Court Of Appeals Proceedings

On appeal, DOJ contended that its "promise … to close the investigation and rescind the CIDs left it free to resume the investigation and reissue the CIDs based solely on its preference to do so." App. 10a (citation omitted). Relying in part on the government-favoring "unmistakability principle," the panel majority agreed with DOJ reasoning that its promise to close the investigation in return for consideration from NAR included "no commitment …—express or implied—to refrain from either opening a new investigation or reopening its closed investigation." App. 12a-13a.

The panel majority acknowledged that, under its interpretation, DOJ would have been free to resume the investigation *immediately after closing it*. App. 15a-16a. But that was irrelevant, in the panel majority's determination, because DOJ's resumption of the investigation "occurred eight months after the original settlement agreement was reached" so it had no need "to consider th[e immediate-reopening] scenario." App. 19a-21a. The panel majority also repeatedly expressed its view "that the closing letter likely became unenforceable" when DOJ unilaterally withdrew from the consent decree, but stated that it was formally accepting the parties' shared position that the settlement "is a binding agreement that remains enforceable." App. 10a & n.5; *see* App. 29a n.9.

Judge Walker dissented. He explained that, based on DOJ's proposed interpretation of the settlement and argument before the court, "the sole question is whether DOJ is correct that it could have immediately reopened its investigation of [the relevant NAR policies] after contracting to close that investigation." App. 25a. "Because DOJ's sole argument is wrong," he would have affirmed the district court's decision. *Id.*

Judge Walker explained that NAR's reading of the settlement was the only one in which "both sides of the exchange … have real meaning," as required by undisputed principles of contract law. App. 30a. "In contrast, DOJ's reading invests one side of the exchange with no real meaning at all"; under DOJ's position, accepted by the panel, NAR "gave up something (a lot, actually) in exchange for nothing more than a promise by DOJ to close an investigation it could immediately reopen." *Id.* Accepting that result, Judge Walker cautioned, required the panel majority "to go where no court has

gone before—or at least no court identified by DOJ." App. 33a.

REASONS FOR GRANTING THE PETITION

The D.C. Circuit's divided decision is both exceptionally wrong and exceptionally important. As elaborated by Judge Walker's forceful dissent, the majority's position permitted DOJ to evade its contractual obligations based solely on its preference to do so—a result that no other litigant could obtain and no other court would permit. The decision below thus directly conflicts with this Court's precedent—as well as the uniform precedent of other courts of appeals—requiring courts to hold the federal government to its contractual obligations as if it were any other party.

Restoring that principle is critical because the government enters into contracts in a vast range of contexts, from settlements in civil and criminal enforcement matters to agreements with state and local governments implementing federal programs, in which contracting partners rely on the government to keep its word. A rule that the government receives special treatment permitting it to easily escape its contractual commitments would create profound instability, along with basic unfairness. "If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them." *Niz Chavez v. Garland*, 593 U.S. 155, 172 (2021). To preserve core rule-of-law principles and provide needed certainty in the important realm of federal contracts, the Court should grant certiorari and reverse the decision below.

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

The first and most venerable principle of federal contracts is that the "United States are as much bound by their contracts as are individuals." *Sinking Fund Cases*, 99 U.S. 700, 719 (1878). If government officials "repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies." *Id.*; *see Winstar*, 518 U.S. at 895 (plurality op.); *Perry v. United States*, 294 U.S. 330, 351-52 (1935); *Lynch v. United States*, 292 U.S. 571, 579-80 (1934).

The decision below conflicts with that principle in multiple respects. To allow DOJ to escape the plain meaning of its contractual promise to "close" its investigation of two NAR policies, the D.C. Circuit' s decision treated the government with special favor in at least three significant ways, each of which itself contradicts precedents of this Court and of the other courts of appeals. First, the decision construed the government's contractual commitment to be meaningless, thereby permitting it to reap the benefits of a contract while making only an illusory promise. Second, the decision expanded the government-favoring "unmistakability doctrine" to an unprecedented new context, significantly altering the balance of power between the federal government and regulated parties. Third, the decision ruled in the government's favor based on an argument that it had repudiated, an approach this Court and others have consistently found improper. Each of those departures from precedent independently warrants this Court's review. Collectively, they make this a critically important case for this Court's intervention to clarify core principles of federal contract interpretation.

A. The Decision Below Violated The Illusory Promises Doctrine

The illusory promises doctrine "instructs courts to avoid constructions of contracts that would render promises illusory because such promises cannot serve as consideration." *M&G Polymers*, 574 U.S. at 440; *see, e.g.*, 11 Williston on Contracts § 32:11 (4th ed. Supp. May 2024) ("[C]ourts generally prefer a construction of a contract which will make the contract effective rather than one which will make it illusory or unenforceable." (citation omitted)); 11 Williston on Contracts § 32:5 (4th ed. Supp. May 2024) (similar).

This Court has long enforced that principle. For example, in *Murray v. City of Charleston*, 96 U.S. 432 (1877), the Court rejected an interpretation of a contract for the government to repay a private loan that "involve two contradictory things: an obligation to do, and a right not to do; an obligation to pay a certain sum, and a right to retain it in the shape of a tax." *Id.* at 445 (citation omitted). In short, the Court established that "[a] promise to pay, with a reserved right to deny or change the effect of the promise" is illusory and thus an "absurdity" that it would not read into the contract. *Id.*; *accord Winstar*, 518 U.S. at 921 ("[T]he Government in effect said 'we promise to regulate in this fashion for as long as we choose to regulate in this fashion'—which is an absolutely classic description of an illusory promise." (Scalia, J., concurring) (citation omitted)); *Appleby v. Delaney*, 271 U.S. 403, 413 (1926) (refusing to interpret an agreement to allow the government "the absolute right completely to nullify the chief" reason for it).

Lower courts too have uniformly adhered to this Court's prohibition on reading contracts to contain illusory promises. For instance, in *United States v. Hunter*, 835 F.3d 1320 (11th Cir. 2016), the Eleventh Circuit relied on *M&G Polymers* to conclude that certain exceptions in a plea agreement could not have been triggered by the defendant's *pre-agreement* acts because "if, at the time it offered the plea agreement, the government was aware of facts that would allow it to employ the exceptions and avoid its promise therein, then it would be extending an illusory promise." *Id.* at 1326; *see, e.g.*, *United States v. Franco-Lopez*, 312 F.3d 984, 991 (9th Cir. 2002) ("[W]e prefer a contractual interpretation that gives some effect to the government's apparent promises contained in the agreement."). And in the civil context, courts have explained that they will not construe the government's contractual rights, such as a "[t]ermination for convenience" clause, to "vitiate the consideration" that the government offered because "[s]uch a reading … would destroy the contract." *Torncello v. United States*, 681 F.2d 756, 770 (Ct. Cl. 1982).

The panel majority opinion departs from that prohibition on reading contracts to contain illusory promises and "invests one side of the exchange with no real meaning at all." App. 30a. The parties' settlement agreement required consideration from NAR: entry into a consent decree compelling NAR to modify four policies that DOJ had identified. C.A. J.A. 162, 165. In exchange, DOJ agreed to close "its investigation into the … Clear Cooperation Policy and Participation Rule" and told NAR that it "will have no obligation to respond to" the corresponding CIDs. C.A. J.A. 178. Its promise was thus meaningful and plain—DOJ could not investi-

gate or require NAR to answer the abandoned CIDs regarding the Participation Rule or Clear Cooperation Policy absent a material change to those rules. But as construed by the panel majority, DOJ's agreement had no practical effect and thus delivered no consideration to NAR; it imposed no constraint on DOJ "to refrain from either opening a new investigation or reopening its closed investigation, which might entail issuing new CIDs related to NAR's policies." App. 12a-13a.

Indeed, as Judge Walker's dissent explained, DOJ expressly argued that it could "*immediately* reopen its investigation" regardless of NAR's compliance with its side of the bargain. App. 22a; *see also* App. 25a & n.6. Put differently, DOJ said that it enjoyed precisely the same degree of investigative discretion at the moment *after* it entered into the agreement as it had *before* it entered into the agreement. Thus, from the perspective of the government's freedom to investigate—the only form of consideration that DOJ purported to provide NAR and that the panel majority could thus rely on—the commitment to close the investigation was a nullity, or more precisely, "an absolutely classic description of an illusory promise." *Winstar*, 518 U.S. at 921 (Scalia, J., concurring).

The panel majority attempted to avoid its embrace of an illusory promise by emphasizing that DOJ did not actually reopen the investigation for eight months. App. 2a, 15a, 19a-20a. But "contracts are to be construed in the light of the relations between the parties at the time they were executed," not the circumstances that happen to later arise. *United States v. Kansas Flour Mills Corp.*, 314 U.S. 212, 214 (1941); *see* 11 Williston on Contracts § 32:7 (4th ed. Supp. May 2024) (similar). Thus, a contract that lacks valid consideration at

its inception does not somehow gain it simply through the passage of time. And for that reason, the lack of consideration produced by the panel majority's interpretation is not merely a "hypothetical" problem. App. 19a. Under the majority's interpretation, DOJ in fact gave up nothing—*i.e.* made an illusory promise—when it contracted with NAR, even though DOJ did not actually reopen the investigation for eight months. That interpretation conflicts with precedent of this Court and other courts of appeals; the law of contracts, like the Constitution, "does not leave" private citizens "at the mercy of" the government's good will. *United States v. Stevens*, 559 U.S. 460, 480 (2010); *see id.* ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

B. The Decision Below Improperly Extended The Unmistakability Doctrine

The D.C. Circuit's decision also conflicts with this Court's precedents governing the unmistakability doctrine, which directs courts to "not interpret a contract to cede a sovereign right of the United States unless the government waives that right unmistakably." App. 12a-13a. The unmistakability doctrine arises from cases in which the government allegedly breached a contract as a result of a subsequent act of *legislative* power—*e.g.*, when Congress changed the law in a way that affected contracts previously entered into by the Executive. *See Winstar*, 518 U.S. at 871-80 (plurality op.) (surveying the doctrine). In that rare fact pattern, the Court has required a contract to contain a clear statement of intent to relinquish sovereign legislative authority as a means to protect "Congress' reserved power to alter the law." *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 54 (1986).

But that is as far as the doctrine goes. The Court has specifically rejected an "expansion of the unmistakability doctrine beyond its historical and practical warrant." *Winstar*, 518 U.S. at 883 (plurality op.). And the Court routinely follows that warning by construing government settlements, plea bargains, consent decrees, or other enforcement-related agreements under traditional contract principles. *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 238 (1975); *see Garza v. Idaho*, 586 U.S. 232, 238 (2019) ("[P]lea bargains are essentially contracts." (citation omitted)); *Santobello v. New York*, 404 U.S. 257, 262 (1971) (similar).

In keeping with traditional rules of contract interpretation—as with traditional rules of statutory interpretation—the Court thus does not place an unmistakability "thumb on the scale in favor of the government" when interpreting its agreements. *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 140 S. Ct. 789, 790 (2020) (statement of Gorsuch, J.); *see Kisor v. Wilkie*, 588 U.S. 558, 632 (2019) (Kavanaugh, J., concurring) (similar). Instead, as "[i]n the business of statutory interpretation," if a certain reading of a contract "is not the best, it is not permissible" for a court to follow it. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2266 (2024); *see also Scenic Am., Inc. v. Dep't of Transp.*, 583 U.S. 936 (2017) (statement of Gorsuch, J., joined by Roberts, C.J., and Alito, J., respecting denial of certiorari) (expressing doubt that *Chevron* deference would apply to interpretation of government contracts). Indeed, if anyone gets a thumb on the scale, it is the party *opposing* the disproportionately powerful federal government's interpretation of contract language that it drafted. *See* Restatement (Second) of

Contracts § 207 (1981) ("The rule preferring an interpretation which favors an interest of the public … does not prefer the interest of a governmental agency as a party to a contract."); 11 Williston on Contracts § 32:12 (4th ed. Supp. May 2024) (similar).

Given that clear precedent, it appears that no court has applied the unmistakability doctrine in a similar context. Indeed, although there are thousands of cases a year interpreting federal-government enforcement agreements or plea deals, *see* p. 22, *infra*, DOJ cannot point to even one case applying the unmistakability doctrine in such a context. Instead, every court of appeals follows this Court's instruction that government settlements and plea deals are to be interpreted "in accordance with principles of contract law." *United States v. Vaval*, 404 F.3d 144, 152 (2d Cir. 2005). And as explained, if any party-favoring presumption applies, it is the *opposite* of the unmistakability doctrine—plea deals and enforcement agreements are construed "strictly *against* the government," and courts "do not 'hesitate to scrutinize the government's conduct to ensure that it comports with the highest standard of fairness." *Id.* (emphasis added; citation omitted); *accord, e.g.*, *United States v. Burgos-Balbuena*, 113 F.4th 112, 118 (1st Cir. 2024); *United States v. Elbeblawy*, 899 F.3d 925, 934 (11th Cir. 2018); *United States v. Spear*, 753 F.3d 964, 968 (9th Cir. 2014); *United States v. Munoz*, 718 F.3d 726, 729 (7th Cir. 2013); *United States v. Lew*is, 673 F.3d 758, 763 (8th Cir. 2011); *United States v. Rodriguez-Rivera*, 518 F.3d 1208, 1212-13 (10th Cir. 2008); *United States v. William*s, 510 F.3d 416, 422 (3d Cir. 2007); *United States v. Farias*, 469 F.3d 393, 397 (5th Cir. 2006); *In re Altro*, 180 F.3d 372, 375 (2d Cir. 1999);

United States v. Johnson, 979 F.2d 396, 399 (6th Cir. 1992).

The decision below diverged from that precedent by applying the unmistakability doctrine to a case in which a federal agency relinquished *its own* enforcement or investigative authority in settling a pending action. The panel majority, like DOJ, did not identify any such case to have done so previously. Indeed, the application of the unmistakability doctrine to this case was sufficiently unclear that DOJ did not even "raise the unmistakability principle before the district court." App. 13a n.6; *see id.* (determining that the doctrine "cannot be forfeited"). And as explained, that is for good reason: under this Court's precedent, the doctrine does not apply in cases involving government enforcement-related agreements. The panel majority's application of the unmistakability doctrine to DOJ's resolution of its own enforcement action thus represents an "expansion of the unmistakability doctrine beyond its historical and practical warrant" of precisely the kind this Court has cautioned against. *Winstar*, 518 U.S. at 883 (plurality op.).

C. The Panel Majority Violated The Party-Presentation Rule

"In our adversarial system of adjudication, [this Court] follow[s] the principle of party presentation." *Sineneng-Smith*, 590 U.S. at 375. That means that "in both civil and criminal cases, in the first instance and on appeal" the Court "rel[ies] on the parties to frame the issues for decision and assign[s] to courts the role of neutral arbiter of matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). In fact, the judicial system "is designed around the premise that [parties represented by competent counsel] know

what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in the judgment).

Other courts of appeals faithfully abide by that rule, especially in cases involving the government. As the Third Circuit recently explained, for example, "when … the government is a party, categorically excusing forfeiture would raise separation of powers concerns" because "applying the Court's own novel legal theory … undermine[s] the judiciary's neutrality and encroache[s] upon the executive branch's prosecutorial prerogative to argue its case." *United States v. Dowdell*, 70 F.4th 134, 146 (3d Cir. 2023); *accord, e.g.*, *Baird v. Bonta*, 81 F.4th 1036, 1041 (9th Cir. 2023) ("A district court should not try to help the government carry its burden."); *United States v. US Stem Cell Clinic, LLC*, 998 F.3d 1302, 1312 (11th Cir. 2021) (Jordan, J., concurring) (observing that the "FDA is the quintessential sophisticated litigant—a specialized government agency represented by experienced counsel" and should be held to the party presentation rule); *United States v. Woodard*, 5 F.4th 1148, 1154-55 (10th Cir. 2021) (criticizing the dissent for relying "on an interpretation that the government has disavowed").

The panel majority recited those principles, App. 10a, but then violated them by declining to resolve—and even contradicting—DOJ's lone argument that a proper interpretation of the agreement permitted it to reopen the investigation immediately after closing it. *See* App. 21a ("We … have no occasion to consider that scenario and we decline to opine on whether such conduct by DOJ would constitute a breach of the agreement."). Rather, the panel majority purported to find consideration

in the fact that DOJ did not resume its investigation for eight months. App. 19a-20a. But, as explained and as DOJ itself recognized, that theory has no foundation in the parties' agreement or basic contract principles and therefore cannot support a decision in its favor. *See* App. 26a n.7 ("Th[e 'immediately reopen' argument] is the *only* argument DOJ made on appeal. And if that argument isn't a winner, DOJ's appeal can't be a winner.") (citation omitted).

The panel majority also violated the party-presentation rule by repeatedly expressing its view "that the closing letter likely became unenforceable" when DOJ unilaterally withdrew from the consent decree. App. 10a n.5; *see also* App. 20a n.8. As the decision acknowledged, DOJ did not raise, and in fact disclaimed, any potential argument about the unenforceability of the closing letter. App. 9a-10a. That argument was therefore not an "issue[] for decision" by the court, and the court had no basis to consider it. *Greenlaw*, 554 U.S. at 243. But the panel majority repeatedly did consider it, not only laying out a theory of unenforceability across multiple lengthy footnotes but stating in the body of the opinion that because "reopening occurred eight months after the original settlement agreement was reached," the "reopening was not 'immediate' and there was never a time when NAR was bound by the settlement agreement while DOJ was not." App. 19a-20a. Thus the discussion of unenforceability was not mere excisable dicta, as DOJ suggested below, but actually affected the outcome.

II. THE QUESTION PRESENTED BY THIS CASE IS EXCEPTIONALLY IMPORTANT

The practical implications of the panel's decision are profound. DOJ and other federal agencies enter into vast numbers of agreements to settle civil and criminal litigation with private parties. For instance, in fiscal year 2022 alone, over 64,000 defendants pled guilty to federal crimes—meaning the government enters tens of thousands of plea agreements every year.[3] The civil arena may well be bigger—settlements resolve "the vast majority of enforcement actions by federal agencies against public companies and other major institutions." Elysa M. Dishman, Public Availability of Settlement Agreements in Agency Enforcement Proceedings 6 (Nov. 29, 2022). And those actions, like criminal cases, number in the thousands a year and are worth many millions of dollars. *See id.* at 4-7; Administrative Conference Recommendation 2022-6, Public Availability of Settlement Agreements in Agency Enforcement Proceedings, 88 Fed. Reg. 2312, 2315 (Jan. 13, 2023) (adopted Dec. 15, 2022) ("[I]n many, perhaps most, [administrative enforcement] proceedings, a settlement is reached.").

In interpreting and enforcing those many civil and criminal agreements, "stability and expectation of fair dealing [is] key to our system." U.S. Chamber of Commerce C.A. Amicus Br. 3. "The fair administration of justice and the public's belief that when the Government is required by law to do something, it *will*, is a fundamental part of our system of government and our

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[3] U.S. Courts, U.S. District Courts–Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Ending September 30, 2022, http://bit.ly/3zPmAq9.

economy." *Id.* But the panel majority's decision—in a court that decides many of the nation's most important government-contract cases—threatens that stability and expectation of fair dealing by creating multiple unprecedented advantages for the government in the interpretation of its voluminous agreements. As the dissent below aptly put it, the panel majority permits the government to agree to "close" a case or investigation to "lure a party into the false comfort of a settlement agreement, take what it can get, and then reopen the investigation seconds later." App. 33a-34a.

That result will inevitably affect private parties' conduct going forward. If private parties "cannot trust that the Government will uphold its end of the bargain, they will be reluctant to enter agreements with the Government at all." U.S. Chamber of Commerce C.A. Amicus Br. 10; *cf.* App. 34a (Walker, J., dissenting) ("**Buyer Beware.**"). When the Government threatens to unilaterally renege, it threatens "the honor of the government" and "public confidence in the fair administration of justice." *United States v. Brown*, 5 F.4th 913, 916 (8th Cir. 2021) (citation omitted). The panel majority's position is thus not only contrary to law and fairness but "at odds with the Government's own long-run interest as a reliable contracting partner." *Winstar*, 518 U.S. at 883 (plurality op.).

Moreover, the panel majority's acceptance of the government's position in this case is all the more troubling because DOJ openly sought to diminish the contractual promises made by—in its terminology—"the previous leadership of the Division," *i.e.*, the Senate-confirmed Assistant Attorney General. App. 23a n.1 (quoting Resp. C.A. Br. 11). That line of argument is not only wrong but alarming, and all the more so given

that it was adopted by an unconfirmed Acting Assistant Attorney General. *See* U.S. Chamber of Commerce C.A. Amicus Br. 5 (describing as "remarkable" DOJ's "argument … that it can renege on its agreements (or artificially narrow them) simply because the Government has changed personnel").

Although a new administration is free to change the government's policies, it is not free to repudiate the government's contracts. *See Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 466 (1985) ("Policies, unlike contracts, are inherently subject to revision and repeal."). The Government may well have changed its mind about the desirability of its agreement with NAR, but "wise or not, a deal is a deal." *Morta v. Korea Ins. Corp.*, 840 F.2d 1452, 1460 (9th Cir. 1988) (emphasizing the "sanctity of contract [as] an important civilizing concept"). In our legal system, "[t]he government, like any party, must be held to the terms of its settlement agreements, whether or not a new administration likes those agreements." App. 48a-49a. This Court should grant review to remedy the stark departure from that principle by the court below.[4]

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[4] As noted in the dissent below, NAR recently entered into a settlement of private antitrust litigation under which NAR repealed the Participation Rule. *See* App. 32a & n.12; *see also* NAR, *National Association of Realtors Provides Final Reminder of NAR Practice Change Implementation on August 17, 2024* (Aug. 16, 2024), bit.ly/3BuMWye. But the private settlement does not address the Clear Cooperation Policy, which is still in place, so the contract-interpretation questions in this case remain live and vitally important.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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