No. 24-5714

IN THE SUPREME COURT OF THE UNITED STATES

GERARDO FARIAS-CONTRERAS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

SARAH M. HARRIS
Acting Solicitor General
Counsel of Record

ANTOINETTE T. BACON
SCOTT A.C. MEISLER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals permissibly found that any implicit breach of the government's commitment under the plea agreement to recommend a sentence no higher than the low end of the advisory Sentencing Guidelines range in this case was not clear or obvious, as required to establish reversible plain error under Federal Rule of Criminal Procedure 52(b).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Wash.):

United States v. Farias-Cardenas, No. 19-cr-111 (Feb. 4, 2021)

United States Court of Appeals (9th Cir.):

United States v. Farias-Contreras, No. 21-30055 (June 3, 2024)

IN THE SUPREME COURT OF THE UNITED STATES

No. 24-5714

GERARDO FARIAS-CONTRERAS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1-34) is reported at 104 F.4th 22. The order of the court of appeals granting rehearing en banc and vacating the panel opinion is reported at 83 F.4th 1161. The opinion of the court of appeals panel (Pet. App. 35-76) is reported at 60 F.4th 534.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 2024. The petition for a writ of certiorari was filed on August 27, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Washington, petitioner was convicted of conspiring to distribute more than 500 grams of a mixture and substance containing methamphetamine and a mixture and substance containing heroin, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A)(viii), (b)(1)(C), and 846. Judgment 1. The district court sentenced petitioner to 188 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. After a panel of the court of appeals initially reversed petitioner's sentence and remanded for resentencing, Pet. App. 36-37, the court of appeals granted rehearing en banc and affirmed, id. at 5.

1. Petitioner supplied drug dealers in Washington with large quantities of methamphetamine and heroin. Pet. App. 81-84. A long-running investigation -- which included court-authorized wiretap interceptions, location records, tracking data, and surveillance -- detailed how petitioner used drug runners and couriers to obtain large quantities of drugs from Southern California and transport them to Washington. Ibid. Those individuals then distributed the drugs to customers in Washington at petitioner's direction. Id. at 81.

In July 2019, law-enforcement agents executed a search warrant at a residence in Yakima, where petitioner was living. In petitioner's bedroom, agents found multiple cell phones and a ledger documenting drug debts. Pet. App. 82. In the bathroom,

agents located $13,000 in cash hidden in a plastic bag in the toilet tank. Ibid. And in a co-conspirator's truck, they found approximately 2721 grams of pure methamphetamine. Ibid.

Petitioner pleaded guilty, pursuant to a plea agreement, to a single count of conspiring to distribute more than 500 grams of a mixture and substance containing methamphetamine and a mixture and substance containing heroin, in violation of 21 U.S.C. 841 and 846. Pet. App. 5. Under the terms of the agreement, the government promised to dismiss other counts in the indictment, to recommend against certain Sentencing Guidelines enhancements, and "not to recommend a sentence in excess of the low-end of the guideline range, as calculated by the United States." Id. at 86-87. The agreement permitted petitioner to "recommend any legal sentence," id. at 87, and it specified that it "does not preclude either party from presenting and arguing, for sentencing purposes, additional facts which are relevant to the guideline computation or sentencing, unless otherwise prohibited in th[e] Plea Agreement," id. at 81.

2. Following the issuance of the Probation Office's Presentence Investigation Report (PSR), which calculated a guidelines range of 235 to 293 months of imprisonment, PSR ¶ 243, both parties filed sealed sentencing memoranda, Pet. App. 91-111.[1] Petitioner sought a six-level reduction from the offense level calculated in

[1] The sentencing memoranda and transcript are included in a sealed portion of the petition appendix. This brief recites only information from those materials that has been made public.

the PSR, which would result in a guidelines range of 108-135 months of imprisonment, and he requested a term of incarceration within or below that range based principally on his physical disabilities. Id. at 6; see id. at 97-98. The government's memorandum, filed ten days later, calculated a guidelines range of 151 to 188 months of imprisonment and, "[b]ased on the totality of the circumstances," recommended "a term of incarceration of 151 months," the low end of that range. Id. at 107; see id. at 6.

In explaining the basis for its recommendation, the government pointed to the seriousness and duration of petitioner's drug-trafficking offense, cited national statistics on drug overdoses, and included quotes from a book "about the families of living drug addicts," as well as from an appellate decision that compared the gravity of drug dealing with murder. Pet. App. 6-7. The government described petitioner as "the top of criminal culpability in this case" and observed that he was dedicated to the lifestyle of drug trafficking, having engaged in such activity dating back to 1990. Id. at 7. The government acknowledged that petitioner suffers from significant physical limitations, but stated that he "had not let his physical impairment stop him from engaging in" the drug-dealing conduct, and that a significant sentence was warranted to protect the community and to deter him and others. Ibid.; see id. at 7-8, 110-111.

At the sentencing hearing, petitioner again requested a sentence as low as 108 months. Pet. App. 8. As in his sentencing

memorandum, petitioner focused on his physical condition, arguing that, as a result of gunshot wounds, he had to use a colostomy bag and a catheter, still used "manual methods in order to relieve himself," and could not walk without braces and a walker. Ibid. In responding to petitioner's arguments, the prosecutor stated that the government stood by the recommendation in its sentencing memorandum and that she hoped it "came through" in the memorandum that "the number" the government recommended "was something that was of much discussion." Id. at 8, 129. When the district court asked where that discussion took place, the prosecutor explained that she was referring to discussion within the U.S. Attorney's Office and stated that petitioner "is at the top of the food chain in terms of criminal culpability, in terms of personally directing and organizing the distribution of a massive, massive amount of drugs." Id. at 8. The prosecutor explained that "everyone" in the U.S. Attorney's Office "was very sympathetic to [petitioner's] physical condition," but that prosecutors were "unanimous in coming back to" the fact that petitioner's "physical condition has not deterred his conduct whatsoever." Id. at 9. Based on those considerations, the prosecutor stated that the government was "recommending the term of incarceration that it outlined in its sentencing memorandum." Ibid.; see id. at 131. During the hearing, defense counsel "told the court that the prosecutor had been 'straightforward and level and frank,' 'honest,' and 'fair.'" Id. at 27.

The district court sentenced petitioner to 188 months of imprisonment, the high end of the guidelines range calculated by the government. Pet. App. 9. The court began by acknowledging petitioner's "serious limitations," recognizing that his medical conditions "are difficult and embarrassing" and that "incarceration is not going to be easy," and making clear that it had "taken that into account," along with its concern about "disparate sentencing" for members of the conspiracy. Id. at 9, 134-135. The court then emphasized that it had "spent a lot of time in" the PSR and recited by number several paragraphs it viewed as particularly pertinent. Id. at 67, 135; see id. at 67-68, 135-137. The court remarked that petitioner was one of the "top dogs" in the drug-trafficking conspiracy and that such activities affected the lives, families, jobs, and health of the community. Id. at 29, 137; see id. at 9. And the court made clear that it found the government's recommendation was "too low" and had instead determined to impose a sentence at the high end of the calculated guideline range. Id. at 28, 138.

3. On appeal, petitioner argued for the first time that the government's advocacy at sentencing implicitly breached the government's commitment under the plea agreement to recommend a sentence no higher than the low end of the government's calculated guidelines range. Pet. C.A. Br. 3. Petitioner acknowledged that he had forfeited that claim by failing to object at sentencing and that he had to satisfy Federal Rule of Criminal Procedure 52(b)'s

plain-error test -- which includes a requirement to show that any error was clear or obvious -- to secure relief. Pet. C.A. Br. 11-12. But petitioner argued that he could satisfy the clear or obvious requirement based on prior circuit decisions addressing implicit breach. Id. at 17 (citing United States v. Whitney, 673 F.3d 965, 972 (9th Cir. 2012)).

A divided panel of the court of appeals accepted those arguments, vacated petitioner's sentence, and remanded for resentencing. Pet. App. 35-76. The panel majority took the view that the government had implicitly breached the plea agreement, and that such a breach was clear or obvious "[g]iven the clear, binding, and longstanding precedent governing a prosecutor's promise not to recommend a sentence exceeding the low-end of the guideline range." Id. at 52. Judge Bennett dissented, explaining that the government's advocacy at sentencing did not breach the plea agreement, that any breach was not plain under circuit precedent, and that petitioner failed to show that any implicit breach had affected the sentence that he received. Id. at 64-76.

4. After sua sponte granting rehearing en banc, the court of appeals took the view that the government had implicitly breached the plea agreement, but that the error was not clear or obvious for purposes of the plain-error standard in Rule 52(b). Pet. App. 1-34. The court therefore affirmed petitioner's sentence.

Although calling it "a close question," a majority of the en banc court of appeals took the view that "the government's conduct crossed the line from permissible advocacy to an improper end-run of" of its promise to recommend a low-end sentence. Pet. App. 14. The court noted several factors that pointed toward an implicit-breach determination under its precedents, including that the government had argued that that petitioner should be a given a "significant sentence" in its sentencing memorandum and at the sentencing hearing, that several of those arguments were "inflammatory," and that the prosecutor "invite[d] the district court's skepticism as to its recommendation" of a low-end sentence by referring to internal office deliberations. Id. at 12-13. At the same time, the court observed that "a number of facts weigh against finding a breach," including that "the government did, as promised, recommend the low-end of the guidelines," and that the plea agreement did not preclude "the government from responding to [petitioner's] request for a below-guidelines sentence," but in fact "allowed either party to present and argue 'additional facts'" relevant to sentencing. Id. at 14. Weighing those competing considerations, the court ultimately determined that "[t]he prosecutor simply went too far" and that the government "implicitly breached" the plea agreement. Id. at 14-15.

The court of appeals further determined, however, that "the error was not plain." Pet. App. 15. The court explained that "[a]n error is plain when it is 'clear or obvious, rather than

subject to reasonable dispute,'" and that this Court had observed that "'[n]ot all [plea-agreement] breaches will be clear or obvious.'" Ibid. (quoting Puckett v. United States, 556 U.S. 129, 135, 143 (2009)). The court of appeals then reviewed the principal implicit-breach precedents on which petitioner relied, explaining that none was "sufficiently clear" on a key aspect of this case -- namely, the question of the extent to which "the government may respond to a defendant's request for a downward departure without implicitly breaching the plea agreement." Id. at 16; see id. at 15-16. And the court found that one of its previous decisions rejecting an implicit-breach claim under "facts substantially analogous to those here," id. at 16 (discussing United States v. Moschella, 727 F.3d 888 (2013)), created at least "a reasonable dispute as to whether the government's sentencing arguments crossed the line," ibid. (citation and internal quotation marks omitted).

Having resolved the case at the second step of the plain-error analysis, the court of appeals did not reach the government's contention that petitioner failed to show that any error affected his substantial rights. See Gov't C.A. Supp. Br. 1, 20. The en banc majority did, however, "take th[e] opportunity * * * to clarify [circuit] law" on implicit breach stemming from the government's response to defense arguments for leniency. Pet. App. 16. The court stated that, when faced with such a claim, reviewing "courts must look first to the plain language of the plea agree-

ment," and where "the plea agreement is silent on the issue," the "default rule" is that "the government can respond," so long as its response is "tethered to its obligations under the plea agreement." Id. at 16-17.

Judge Gould, joined by two other judges, concurred to express the view that the court of appeals' implicit-breach determination was supported by both "fundamental principles of contract law" and "the constitutional protections given to plea bargains." Pet. App. 18; see id. at 18-24.

Judge Bennett, joined by Judges Miller, Bress, and Bumatay, concurred in the judgment. Pet. App. 24-34. Those judges would have found that the government "fulfilled [its] promise" to recommend a sentence at the low end of the guidelines range where it had repeated that recommendation multiple times; its arguments were authorized by the express terms of the agreement; and the arguments served the "valid purpose" of countering petitioner's request for a lower sentence. Id. at 24; see id. at 29-32.

ARGUMENT

Petitioner contends (Pet. 18-37) that the court of appeals erred in finding that any breach of the government's commitment under the plea agreement was not clear or obvious for purposes of Rule 52(b). The court of appeals correctly applied the plain-error test to the facts of this case, and its decision does not conflict with any decision of this Court or another court of appeals. This case would also be an unsuitable vehicle for address-

ing the limitation that petitioner now asserts on the scope of the plainness inquiry under Rule 52(b), which petitioner did not squarely urge in the court of appeals and which would not entitle him to relief even if it were adopted. Further review is unwarranted.

1. The court of appeals correctly recognized that petitioner was not entitled to relief on his forfeited claim that the government implicitly breached the plea agreement.

a. This Court has long recognized the "procedural principle" that rights "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." Yakus v. United States, 321 U.S. 414, 444 (1944). When that forfeiture occurs in a criminal case, Federal Rule of Criminal Procedure "52(b)'s plain-error standard applies" on appeal. Greer v. United States, 593 U.S. 503, 507 (2021). To prevail under that standard, a defendant must establish (1) "an error" (2) that was "clear or obvious, rather than subject to reasonable dispute," (3) that affected his "substantial rights," and (4) that "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'" Puckett v. United States, 556 U.S. 129, 135 (2009) (citation omitted); see Greer, 593 U.S. at 507-508.

In Puckett v. United States, the Court held that this four-element test applies to a forfeited claim that the government breached a plea agreement. 556 U.S. at 133-134. In doing so, the

Court expressly emphasized that the plainness requirement "will often have some 'bite' in plea-agreement cases," because "[n]ot all breaches will be clear or obvious." Id. at 143. The Court noted that "[p]lea agreements are not always models of draftsmanship, so the scope of the Government's commitments will on occasion be open to doubt." Ibid.

"Moreover," the Court continued, "the Government will often have a colorable (albeit ultimately inadequate) excuse for its nonperformance." Puckett, 556 U.S. at 143. As an example of that performance-related scenario, the Court pointed back to its earlier observation that in Puckett itself, the government -- rather than conceding a breach of its promise to recommend a Sentencing Guidelines reduction for the defendant's acceptance of responsibility -- might have argued that the defendant's continued criminal activity while awaiting sentencing "hindered performance." Id. at 140 n.2.

b. The en banc court of appeals correctly applied Rule 52(b)'s plainness requirement to the particular circumstances of this case.

To determine whether petitioner established error in the first place, the court of appeals considered the pertinent provisions of the plea agreement, including both the government's promise "not to recommend a sentence in excess of the low-end of the guideline range" that it calculated and the separate provision permitting "either party to present and argue 'additional facts

which are relevant to the guideline computation or sentencing.'" Pet. App. 12, 14. The court recognized, however, that petitioner's claim of error did not turn on the language of those provisions alone. See id. at 14-16.

Instead, petitioner invoked -- and the court of appeals assessed -- a line of circuit precedent that had deemed it to be "[a]n implicit breach of the plea agreement" when the government makes its promised low-end recommendation but also offers comments or information that can serve no other purpose than seeking a sentence above the recommended term. Pet. App. 12 (quoting United States v. Heredia, 768 F.3d 1220, 1231 (9th Cir. 2014)); see Pet. C.A. Supp. Br. 13-16. In concluding that an error had occurred on the facts of this case, the court in this case took the view that the government's conduct fell within that line of precedent. Pet. App. 15.

Because the court of appeals' assessment of whether an error occurred at all was grounded in its precedent, it was entirely proper for the court to likewise focus on the contours of its precedents in its subsequent assessment of whether the perceived error was "clear or obvious." Puckett, 556 U.S. at 135. Indeed, turning to precedent to assess the clarity or obviousness of an error may be particularly appropriate when considering errors like implicit breach.

Appellate findings of implicit breach -- which are akin to determinations that the government violated the implied covenant

of good faith and fair dealing, see Pet. App. 17 -- are highly fact-dependent, looking to "the totality of the circumstances," United States v. Cortés-López, 101 F.4th 120, 128 (1st Cir. 2024). Accordingly, determining whether it should have been clear or obvious to the district court and the parties that an implicit breach was occurring can require examining whether appellate precedent contained a guidepost decision with sufficiently similar facts.

Here, the court of appeals correctly found that no such guidepost existed. Pet. App. 15-16. Petitioner disputes (Pet. 16-17, 21-22) the court's determination that its decision in United States v. Moschella, 727 F.3d 888 (2013), "create[d] at least a 'reasonable dispute' as to whether the government's sentencing arguments crossed the line." Pet. App. 16 (quoting Puckett, 556 U.S. at 135). According to petitioner, Moschella is distinguishable from this case because the plea agreement there expressly reserved the government's right to oppose a defense request for a sentence below the guidelines range, 727 F.3d at 892, whereas the agreement in this case did not contain such language. But the court expressly recognized, but did not attach the same level of significance, to that distinction. Pet. App. 14.

The court of appeals agreed with petitioner that Moschella left room for it to find a breach in the circumstances of this case -- as, indeed, the court did. Pet. App. 14. But the court identified Moschella as an illustration of why circuit precedent as a whole did not speak with sufficient clarity to the distinct

factual circumstances here -- i.e., the government's response to a defense request for leniency where "the plea agreement is silent on the issue," id. at 17 -- for the error to be obvious, see id. at 15-16. Indeed, even petitioner himself appears to agree at least "in the abstract" with the default rule that the court adopted for that circumstance, and disagrees only with its fact-intensive application. Pet. 22.

c. Contrary to petitioner's contention (Pet. 18-24), the court of appeals' analysis is fully consistent with this Court's decisions. Petitioner suggests (Pet. 17, 20-23) that, under Puckett, the plainness of a particular breach turns solely on the clarity of "the Government's commitments," 556 U.S. at 143, as established by the plea agreement's terms. But Puckett contains no such limitation.

To the contrary, Puckett provided two examples of why the requirement of showing clear or obvious error "will often have some 'bite' in plea-agreement cases": (1) because the "draftsmanship" of plea agreements will sometimes leave "the scope of the Government's commitments * * * open to doubt," and (2) because "the Government will often have a colorable (albeit ultimately inadequate) excuse for its nonperformance." 556 U.S. at 143. Those illustrative examples confirm that a lack of clarity precluding plain-error relief can arise from, at a minimum, an agreement's draftsmanship and aspects of the government's nonperformance.

Moreover, Puckett did not address the distinct category of implicit-breach claims at issue here, where "the scope of the Government's commitments," 556 U.S. at 143, is defined not solely by contractual language but by appellate case law. To the contrary, Puckett involved a conceded breach of a plea agreement's express written terms: the government there opposed at sentencing a reduction to the Sentencing Guidelines range that it had promised, in the plea agreement, to support. See id. at 133. Nothing in the Court's brief discussion of the plainness prong forecloses consideration of appellate precedent in the distinct scenario where "the scope of the Government's commitments," turns on sources that are derived from that appellate precedent, rather than the agreement itself. Id. at 143.

Petitioner's reliance (Pet. 18-20) on Santobello v. New York, 404 U.S. 257 (1971), and United States v. Benchimol, 471 U.S. 453 (1985) (per curiam), is equally misplaced. Neither case involved plain-error review. In Santobello, which arose on direct review from a state court, the Court simply stated the rule that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. at 262. The State there conceded that it had inadvertently breached the agreement, ibid.; the Court observed that such inadvertence "does not lessen [the breach's] impact," ibid.; and the Court left to the "discretion of the state court" the determination of "[t]he

ultimate relief to which petitioner is entitled," id. at 263. None of that is inconsistent with the decision below.

In Benchimol, this Court summarily reversed a Ninth Circuit decision that had required the government not merely to make a promised sentencing recommendation, but "to state its recommendation clearly to the sentencing judge and to express the justification for it." 471 U.S. at 454 (citation omitted). The Court held that the Ninth Circuit erred by "imply[ing] as a matter of law a term which the parties themselves did not agree upon." Id. at 456.[2] This Court's rejection of "implied-in-law terms" for plea agreements, id. at 455, does not suggest that case law establishing the metes and bounds of permissible government conduct under a plea agreement cannot be consulted in determining whether a breach is clear or obvious.

2. Petitioner contends (Pet. 24-34) that this Court's review is warranted to address division among the courts of appeals over the methodology for determining whether the government's breach of a plea agreement is clear or obvious for purposes of

---

[2] Contrary to petitioner's suggestion (Pet. 20), the Court in Benchimol did not "cite[] favorably" two lower court decisions on which the Ninth Circuit had relied in requiring "enthusiasm" from the prosecutor. See 471 U.S. at 456 (discussing United States v. Grandinetti, 564 F.2d 723 (5th Cir. 1977), and United States v. Brown, 500 F.2d 375 (4th Cir. 1974)). The Court instead distinguished those cases as involving the distinct scenario where "the Government attorney appearing personally in court at the time of the plea bargain expressed personal reservations about the agreement to which the Government had committed itself." Ibid. The Court had no need to, and did not, directly address that scenario, which presented "quite a different proposition." Ibid.

plain-error review. Petitioner asserts (Pet. 24) that some courts consider solely the clarity or ambiguity of the plea agreement's terms, while others ask whether "the breach was clearly established by prior circuit case law." Petitioner's cited decisions reveal no conflict. Instead, courts of appeals uniformly consider multiple sources bearing on the clarity or obviousness of a given breach; the degree to which they consult prior case law depends on the nature of the breach claimed and the sources of a law that establish the scope of the government's perceived obligations.

a. As an initial matter, petitioner's citations establish no conflict over assessing plainness for the category of plea-breach claims that the court of appeals addressed here -- i.e., those involving arguments that the prosecutor's advocacy at sentencing implicitly breached, or was an end-run around, a promise to recommend a specific sentence. Pet. App. 11-12.

Petitioner identifies (Pet. 28) only one case involving such a circumstance -- the First Circuit's decision in United States v. Cortés-López -- which he views as "consistent with Puckett." And the plain-error inquiry in Cortés-López, consistent with the plainness inquiry in the decision below, examined at length both prior circuit precedents deeming government actions to "have fallen short" of its perceived obligations as well as those "on the 'no breach' side of [its] case law," 101 F.4th at 130; see id. at 130-131; drew a governing principle from the "sum of [its] case law," id. at 131; and only then determined that "the individual

circumstances of the case at bar" established a breach that was clear under the "clear pattern" of its precedents, ibid.; see id. at 131-133.

The First Circuit follows the same mode of analysis in other implicit-breach cases. In United States v. Acevedo-Osorio, 118 F.4th 117 (1st Cir. 2024), for example, the court relied in part on its decision in Cortés-López; took the view that the government implicitly breached the plea agreement by failing to explain its recommendation of a sentence well below the advisory range calculated in the PSR; but further determined that the breach was not plain under existing law. Id. at 130-134. The court could not conclude "that the government's omission of an explanation * * * was a clear or obvious breach" given that its prior decisions finding implicit breach had typically involved "affirmative conduct by the government signaling its dissatisfaction" with a sentence, rather than an "omission" by the government; "the general principle that the government has 'no affirmative obligation of either advocacy or explication'"; and "the various factors distinguishing [the defendant's] circumstances from those present in Cortés-López." Id. at 134 (citation omitted).

Most recently, in United States v. Fargas-Reyes, No. 23-1502, 2025 WL 65824 (Jan. 10, 2025), the First Circuit found no plain error when the government requested a sentence within the range permitted by the plea agreement, but did not "tailor [its] 'pitch' to push back" on the higher range proposed by the Probation Office.

Id. at *4 (brackets omitted). In reaching that conclusion, the court explained that the defendant "point[ed] to no plea-agreement language obliging the prosecutor" to tailor the pitch in that way, and the defendant cited "no binding authority finding a breach in the specific circumstances of his case." Ibid. That analysis accords fully with the court of appeals' approach to plain-error review in this case and that of other courts addressing implicit-breach claims under the plain-error framework. See Pet. App. 15-16; United States v. Rodriguez-Barbosa, 762 Fed. Appx. 538, 543-544 (10th Cir. 2019) (holding that any breach was not "clear or obvious under well-settled law" where prosecutor's conduct was similar to one prior decision rejecting breach claim and distinguishable from another decision finding an end-run).

b. Nor do the decisions petitioner cites outside of the implicit-breach context show a conflict in the circumstances of this case. Those decisions likewise illustrate that courts regularly consider various sources -- including circuit precedent -- as part of the plainness inquiry. To the extent that any of the cases rested solely on the plea agreement's language, that suggests only that the courts needed to look no further to evaluate plainness in the particular circumstances, not that courts are categorically barred from considering circuit precedent when appropriate.

In United States v. Navarro, 817 F.3d 494 (2016), for example, the Seventh Circuit concluded that, by advocating for an upward

departure at sentencing, the government breached a provision in the plea agreement that barred it from "seek[ing] a sentence outside the applicable Guideline range." Id. at 499 (citation omitted). The court then reasoned that the breach was plain because the language of "[t]he guidelines themselves" and "governing" circuit precedent made clear that the departure requested by the prosecutor qualified as "a sentence above the guidelines range." Id. at 499-500 (citing United States v. O'Neill, 437 F.3d 654, 662 (7th Cir. 2006)).

The Eighth Circuit's decision in United States v. Lovelace, 565 F.3d 1080 (2009), follows a similar approach. The court first concluded that the government breached a plea agreement by advocating at sentencing a higher offense level than specified in the plea agreement. Id. at 1087. And it reasoned that the breach was plain after explaining that the prosecutor had committed the same error "[a]s in" a prior decision finding a breach. Ibid.; see id. at 1087-1088 (discussing United States v. DeWitt, 366 F.3d 667 (8th Cir. 2004)).

The Sixth Circuit likewise considers circuit precedent as part of the plainness inquiry in cases involving asserted breaches of a plea agreement. See, e.g., United States v. McMullen, No. 21-3379, 2022 WL 2289036, at *3-*4 & n.1 (June 24, 2022) (finding, after considering the plea agreement's language and the absence of binding case law, that any government breach was not clear under current law); United States v. Smith, 613 Fed. Appx. 522, 528

(2015) (finding no plain error in light of circuit precedent and "comparable precedent from other circuits" that prosecutor's failure to object to PSR did not constitute a breach). In suggesting otherwise, petitioner cites the statement in United States v. Simmonds, 62 F.4th 961 (6th Cir.), cert. denied, 144 S. Ct. 163 (2023), that a plea breach cannot be clear or obvious "[i]f, upon reading the plea agreement, the scope of the government's promises presents an arguable interpretive question" or the relevant language is "ambiguous." Id. at 967. The quoted passage, however, describes circumstances sufficient to preclude a finding of clear or obvious error; it does not suggest that the Sixth Circuit views the clarity of an agreement's terms as the lone criterion for determining plainness.

Petitioner similarly errs (Pet. 26-27, 30) in his reliance on decisions of the D.C. and Fourth Circuits. In United States v. Murray, 897 F.3d 298 (2018), the D.C. Circuit found that neither of the two breaches that it identified amounted to obvious error, where one of them required resolving "two silences" in the agreement's language against the government, id. at 307, and the other involved government advocacy that adhered to the agreement's "literal[]" terms, id. at 310. Far from suggesting that other considerations are categorically excluded from the plainness inquiry, the court also considered "[t]he absence of a factual record" concerning one aspect of the government's performance. Id. at 308. And in United States v. Edgell, 914 F.3d 281 (2019), while

the Fourth Circuit concluded the government's deviation from the drug-quantity stipulation in the plea agreement constituted a clear or obvious breach given the "unambiguous" nature of the stipulation, id. at 289, it arrived at that conclusion only after examining cases in which other courts of appeals had held that similar conduct "crossed the line," including a decision from a sister circuit "consider[ing] th[at] precise question." Id. at 288.[3]

3. At all events, this case would be an unsuitable vehicle for resolving the question presented, for two principal reasons.

First, petitioner did not raise in the court of appeals -- and that court did not expressly address -- any methodological question concerning the plainness requirement of the plain-error

---

[3] Petitioner does not suggest that the Second Circuit's approach differs from the approach in the decision below (see Pet. 34; Pet. Supp. Br. 3-5), and his criticisms of the Second Circuit's approach are mistaken. In United States v. Rivera, 115 F.4th 141 (2d Cir. 2024), the court looked to the absence of decisional law clarifying a plea-agreement term only after rejecting both parties' readings of the plea agreement's terms in favor of "a middle ground," and also rejecting the government's "reliance on various cases" that had involved similar government conduct but different plea-agreement language. Id. at 148; see id. at 148-150. And petitioner acknowledges (Pet. 33) that, in United States v. MacPherson, 590 F.3d 215 (2d Cir. 2009) (per curiam), "the outcome may have been the same" had the court focused only on the plea agreement's language. See id. at 220-223 (Newman, J., concurring). Nothing in either decision indicates that the Second Circuit would require a prior on-point decision before deeming the government's breach of a plea agreement's unambiguous terms to be plain. Nor would this case from the Ninth Circuit be an appropriate vehicle for addressing any differences between the Second Circuit and other circuits.

test. To the contrary, petitioner argued in his principal brief that the asserted error was plain under the Ninth Circuit's decision in United States v. Whitney, 673 F.3d 965 (2012), quoting language from Whitney in which that court had deemed an error to be "'clear and obvious under the law'" "[i]n light of" an earlier circuit precedent, United States v. Mondragon, 228 F.3d 978 (9th Cir. 2000). Pet. C.A. Br. 17 (citation omitted). And in his supplemental brief to the en banc court, petitioner again parsed circuit precedent on implicit breach, arguing that the error was plain because the facts here were more similar to three Ninth Circuit cases finding an implicit breach than to a fourth case on which the government relied. Pet. C.A. Supp. Br. 20-21; see id. at 21 ("[T]he error here is plain and obvious under this Court's preceden[ts]."). Petitioner thus urged the very type of precedent-focused inquiry that he now faults the court of appeals for conducting.

Second, even if the plainness question were resolved in his favor, petitioner cannot satisfy his further plain-error burden of showing a "reasonable probability," Greer, 593 U.S. at 507-508 (citation omitted), of a lower sentence absent the asserted breach. See Puckett, 556 U.S. at 142 n.4 ("When the rights acquired by the defendant relate to sentencing, the 'outcome' he must show to have been affected is his sentence.") (internal quotation marks omitted). This is instead a case where the district court understood the government's low-end recommendation, see Pet. App. 138 (call-

ing that recommendation "too low"), but chose to deviate from it based on aggravating aspects of the record that the court had independently learned from its thorough review of the PSR. See id. at 73-75 (Bennett, J., dissenting); id. at 135. In those circumstances, petitioner cannot establish the requisite probability that any implicit breach resulted in a higher sentence. Cf. United States v. Gonzalez-Aguilar, 718 F.3d 1185, 1188 (9th Cir. 2013) (mere fact that the sentencing judge echoed some language from government's sentencing presentation does not establish reasonable probability of lower sentence).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SARAH M. HARRIS
Acting Solicitor General

ANTOINETTE T. BACON
SCOTT A.C. MEISLER
Attorneys

JANUARY 2025