No. 24-5714

IN THE SUPREME COURT OF THE UNITED STATES

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GERARDO FARIAS-CONTRERAS,
aka, Tomas Gomez,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The Court in *Puckett v. United States*, 556 U.S. 129, 137 (2009), recognizes that "plea bargains are essentially contracts:"

1. Does "plain-error review" of a defendant's claim that the government breached a plea agreement focus on the "scope of the Government's commitments" to determine whether those commitments are "clear or obvious" to establish that an error resulting from the government's breach of the agreement is "plain" under Fed. R. Crim. P. 52(b), as contemplated in *Puckett*, 556 U.S. at 143?

1. **Introduction.**

This petition asks the Court to take the opportunity to instruct the federal circuit courts on the proper analysis to employ for determining when a government breach of a plea agreement constitutes an error that is "plain" under Fed. R. Crim. P. 52(b). This petition presents the Court with a unique set of facts wherein the Ninth Circuit concluded that the government's conduct in its sentencing memorandum and at the sentencing hearing breached its promise "not to recommend a sentence in excess of the low-end of the guideline range, as calculated by the United States" in Farias-Contreras's plea agreement. Appendix (App.) 14; App. 86-87. Nevertheless, the Ninth Circuit concluded that the government's breach of that unambiguous commitment in Farias-Contreras's plea agreement did not constitute an error that was "plain." App. 16. In doing so, the Ninth Circuit applied a "qualified immunity" type analysis and concluded that it's "precedent does not make it sufficiently clear to what extent the government may respond to a defendant's request for a downward departure." *Id.*[1]

a. **A "qualified immunity" methodology for determining whether a government breach of a plea agreement constitutes an error that is "plain" jeopardizes consistent outcomes among the different circuit courts and fails to promote uniform application of the plain error standard of review.**

Throughout its brief in opposition to the petition, the government insists that a "qualified immunity" type analysis, where the individual circuits rely on varying and inconsistent precedent on the subject, is an appropriate method for determining whether a government breach of a plea agreement constitutes an error that is "plain." The government states that the Ninth Circuit correctly determined that the government's breach was not "plain" because "the court found that

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1 *See*, Petition (Pet.) 24 n. 8.

one of its previous decisions rejecting an implicit breach-claim under 'substantially analogous facts to those here …' created at least 'a reasonable dispute as to whether the government's sentencing argument crossed the line.'" Brief in Opposition (Opp.) 9. The government then states: "turning to precedent to assess the clarity or obviousness of an error may be particularly appropriate when considering errors like implicit breach." Opp. at 13. The government further maintains that "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." Opp. 14.

It is one thing for the several circuit courts to look to precedent to determine if a breach or legal error occurred, as the Ninth Circuit did here. Opp. 13; *see*, App. 12-15. It is quite another thing when a court of appeals is determining whether the "breach/legal error" is "clear or obvious." *See*, *Puckett v. United States*, 556 U.S. 129, 135 (2009) ("Second, the legal error must be clear or obvious."). When referencing "the second prong of plain-error," *Puckett* specifically pointed to "the scope of the Government's commitments." *Id.* at 143. If "the scope of the Government's commitments" in a plea agreement is "open to doubt," a legal error may not be "plain." *Id.*[2]

The converse is also true. If the "scope of the Government's commitments" is *not* "open

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2 The government mentions *Puckett*'s statement that "the Government will often have a colorable (albeit ultimately inadequate) excuse for its nonperformance." Opp. 12 and 15; *Puckett*, 556 U.S. at 143. *Puckett* references footnote 2 as an example wherein the Court indicated "the Government might well have argued that it was excused from its obligation to assert 'demonstrated acceptance of responsibility' because Puckett's ongoing criminal conduct hindered performance." *Id.* at 140 n. 2. No such circumstance exists in this case, nor has the government asserted it had a reason for nonperformance of its obligation "not to recommend a sentence in excess of the low-end of the guideline range." App. 86-87.

to doubt," then the legal error resulting from the government's breach of a plea agreement "has some bite," and is "plain." *Id.* Nonetheless, the government argues that "[n]othing in the Court's brief discussion of the plainness prong [in *Puckett*] forecloses consideration of appellant precedent in the distinct scenario where 'the scope of the Government's commitments,' turns on sources that that are derived from that appellate precedent, rather than the agreement itself." Opp. 16 (citing *Puckett*, 556 U.S. at 143).

The problem with the government's position is that each of the federal circuit courts have varying methods on the second prong of plain-error review for breach cases. Pet. 24-34 (citing cases that apply an analysis consistent with *Puckett*, and others that apply a "qualified immunity" type analysis on the second prong). If the circuit courts are left without guidance from the Court, then what constitutes an error that is "plain" in breach cases will have inconsistent outcomes depending on the circuit courts' varying precedent. This approach fails to promote uniformity among the federal circuit court decisions in cases where a circuit court concludes that the government breached a plea agreement. In particular to plain error in the context breaching a plea agreement, an analysis focusing on the written terms of the plea agreement promotes both uniformity and consistency.

United States v. Rodriguez-Barosa, 762 Fed. Appx. 538 (10th Cir. 2019), cited by the government, makes the point. Opp. 20. In that case, the government promised to recommend a sentence within the guideline range. The guideline range was 30 to 37 months in prison, nonetheless, after the prosecution's sentencing comments, the district court sentenced the defendant to 55 months in prison, a sentence above the agreed guideline range. *Rodriguez-Barosa.* at 540-41.

The defense requested a downward variance to 24 months in prison. The government opposed the downward variance. The government instructed the district court on changes to the Sentencing Guidelines that lowered the guideline ranges the defendant faced in 2001 and 2010 for the same crime on convictions for returning to the United States after deportation pursuant to 8 U.S.C. § 1326(a), (b)(2). *Id.* at 538-40. The prosecutor emphasized the defendant's two prior sentences of 41 months and 51 months in prison, and stated, "the fact that his guideline range now is 30 to 37 months seems, if anything, almost an anti-deterrent, that he is looking at a significantly lower sentence than he received the first two times he was convicted of this exact same crime." The prosecutor further stated,

> My position is that his history reflects … a steady pattern of disregard for the law, of willingness to violation the law, not just the laws relating to immigration and lawful entry into this country, but multiple other state-type violations that appear to be consistent and ongoing. So I am certainly opposed to the motion of 24 months of imprisonment. I am asking the Court to impose the top of the guideline range of 37 months in prison.

Id. at 450.

Based on the prosecutor's inflammatory comments, the Tenth Circuit "assume[d] that the prosecutor breached the plea agreement." *Id.* at 543. The court did so after referring to prior circuit decisions that prohibits a prosecutor from "inject[ing] material reservations about the agreement to which the government has committed itself." *Id.* at 542 (citing *United States v. Cachucha*, 484 F.3d 1266, 1270-71 (10th Cir. 2007)). The court then "move[d] to the second prong of plain error." *Id.* at 543.

Even though the scope of the government's commitment to recommend a sentence within the guideline range of 30 to 37 months in prison is clear, the Tenth Circuit, nonetheless,

conducted a "qualified immunity" type analysis to determine whether the legal error resulting from the government's breach was plain. *Id.* at 451-43. The Tenth Circuit reviewed two of its prior decisions that had similar facts but had differing outcomes. *Id.* After a review of both decisions, the Tenth Circuit concluded, "we do not think the prosecutor's conduct constituted a breach of the plea agreement that was clear or obvious under well-settled law." *Id.* at 543.[3]

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3 Three decisions from the First Circuit illustrate inconsistent outcomes that result when a circuit court uses a "qualified immunity" approach, instead of focusing on whether the prosecutor's breach involved a clear obligation in a plea agreement, to determine whether a breach of a plea agreement is plain under the second prong.

In a conspiracy to commit mail fraud case, the First Circuit concluded that the government breached a plea agreement where the parties agreed to a specific 27 to 33 month guideline range based on an agreed amount of loss caused by the fraud. *United States v. Cortez-Lopez*, 101 F.4th 120, 124 (1st Cir. 2024). At sentencing, the prosecutor argued that the higher guideline range of 78 to 97 months in the PSR was the correct calculation on guideline enhancements that were the subject of the defendant's objections. *Id.* at 125. The First Circuit concluded that the government breached the agreement, stating, "the government did not simply give a nod to the accuracy of the probation's guidelines calculations[,] [i]t announced that the PSR and not the plea agreement reflected the 'correct loss amount,' thereby completely undermining the previously bargained-for and promised numbers." *Id.* at 131-32. Therefore, the government's breach met both the first and the second prong of plain error review. *Id.* While the First Circuit did not cite *Puckett*, its methodology is consistent with *Puckett,* where it stated, "the prosecutor's 'overall conduct [was] [not] reasonably consistent with making [*the promised*] *recommendation*…" *Id.* at 133 (emphasis added). In other words, the "scope of the Government's commitments" to recommend a specific guideline range based on a specific loss amount is clear and obvious in the plea agreement. *Puckett*, 556 U.S. at 135, 143.

In *United States v. Acevedo-Osorio*, First Circuit, took a different, "qualified immunity," approach to determine whether the government's breach of a plea agreement was clear. The court concluded that the prosecutor breached its plea agreement by "fail[ing] to provide at least some explanation" for its plea agreement that required a joint sentencing recommendation of 120 months in prison for the defendant who pleaded guilty to coercion and enticement of a minor, and after the PSR calculated much harsher guideline range of 292 to 365 months in prison. 118 F.4th 117, 124-25, 132-33 (1st Cir. 2024). The First Circuit concluded that the prosecutor's silence "likely caused the district court to view the government's 'stand by' statement as just hollow words, undermining any notion that the government viewed the plea agreement as fair and appropriate." *Id.* at 132-33 (quoting *Cortez-Lopez*, 101 F.4th at 133) (quotations in original).

b. **Petitioner argued below that the second prong of plain-error review in breach of plea agreement claims should be governed by the terms of the agreement under contract standards.**

Next, the government states the "petitioner did not raise in the court of appeals – and the court did not expressly address – any methodological question concerning the plainness

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The First Circuit then used a "qualified immunity" type analysis to determine whether the government's breach constituted an error that was plain, writing, "[o]ur analysis ends … with the second requirement: that the government's breach had to be clear and obvious in light of existing law" *Id.* at 133 (citation omitted). The Fist Circuit concluded that, "ambiguous case law does not give rise to the clear or obvious error necessary to comport with the plain-error construct … required to vacate Acevedo's sentence." *Id.* at 133–34 (citation omitted). Here, the "scope of the Government's commitments" in the plea agreement is clear. *See Puckett*, 556 U.S. at 143. The government was required to recommend a mandatory minimum sentence of 120 months in prison, and the First Circuit concluded it did not fulfil that clear obligation in the plea agreement. Thus, this outcome is inconsistent with *Cortez-Lopez*.

A third, and more recent, case from the First Circuit embraces *Puckett*. *United States v. Fargas-Reyes*, 125 F.4th 264 (1st Cir. 2025). There, "one key provision" of the plea agreement for a defendant who pleaded guilty to felon in possession of a firearm was that the government agreed to recommend a "prison term within the range of 57 to 71 months." *Id* at 270. The PSR calculated a guideline range of 70 to 87 months in prison. The prosecutor recommended that the district court impose a 71-month term in prison *Id.* 269-70. After the district court imposed 120 months in prison, *Id.* at 269, the defendant appealed. He claimed that "the prosecutor 'emphasiz[ed] aggravating facts,' without modifying her pitch[]' to probation's recently proposed 71-87-month range[,] [a]nd 'given the context,' her 'arguments read as reasons' – made with knowing winks and nods – 'to drive the sentence upward within' probation's calculated 'range' and 'even beyond." *Id.* at 271.

The First Circuit dismissed the defendant's claim on the second prong, and relying on *Puckett*, the court stated, "'[n]ot all breaches will be clear or obvious,' our judicial superiors tell us." *Id.* (quoting *Puckett*, 556 U.S. at 143). This "is why plain error's second prong — requiring the complaining party to flag an undeniable mistake -- often has "'bite' in plea-agreement cases." *Id.* Here, the First Circuit determined that the government had no clear obligation in the plea agreement, and the defendant pointed to no provision, requiring the prosecutor to "adjust her 'pitch[] to probation's suggested range in a way he claims she had to." *Id.* In other words, it was not clear or obvious that the "scope of the Government's commitments" in the plea agreement included a requirement that prosecutor had to address the district court with a particular "pitch," therefore, the defendant's complaint was "subject to dispute' and "open to doubt." *Puckett*, 556 U.S. at 135, 143.

requirement of the plain-error test." Opp. at 23-24. At oral argument, counsel for Farias-Contreras argued that a breach of the plea agreement by the government would be plain under *Puckett*.

The en banc court and counsel had the following exchange:

> The Court: … let's assume there is an error here that the government stepped across the line in some instance, then why was that plain …
>
> Counsel: well, the government's obligation under this plea agreement is plain ... and *Puckett* ...
>
> The Court: wait a minute we're positing there's an error – let's say one of these sentences then in the … the transcript goes across the line – just positing that as a hypothetical – there wasn't an objection, right? So, you're gonna have to show us plain error – isn't that right?
>
> Counsel: that's true ….
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> The Court: so what's your best shot?
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> Counsel: the best shot is *United States v. Puckett* when they outline what it means to be plain under a plea agreement … the Supreme Court recognizes that breach cases have some bite. And, what the Supreme Court indicates is, and I'll get to the direct quote – "of course, the second prong of plain-error review also will often have some bite in the plea agreement cases. Not all breaches will be clear or obvious. Plea agreements are not always models of draftsmanship, so the scope of the Government's commitments will on occasion be open to doubt."
>
> There is no doubt in this plea agreement what the government's commitment was. It is clear that the government was committed to not recommend a sentence in excess of the low-end of the guideline range.

See, ca9.uscourts.gov/media/audio/?20240124/21-30055/, at 6:36 to 8:12. Moreover, while counsel did not cite *Puckett* directly regarding the methodology for evaluating breach of a plea

agreement, the brief to the en banc court directly argued that the breach was of the contractual terms of the plea agreement:

> In addition, "plea agreement are contracts between the government and the defendant, and 'are measured by contract law standards.'" *Farias-Contreras*, 60 F.4th at 542 (*quoting United States v. Franco-Lopez*, 312 F.3d 984, 989 (9th Cir. 2002) (citations omitted in original)). When interpreting a plea agreement "and craft[ing] remedies for any breach, [courts] must 'secure the benefits promised [to the defendant] by the government in exchange for surrendering his right to trial,' ..., that is, for surrendering the right to require the government to prove guilt beyond a reasonable doubt." *Id.*

Appellant's Supp. Brief (CA No. 22-30055) (DktEntry 64 at 9-10). The question of methodology relying on contract principles was squarely before the en banc court.

c. **The government seeks a factual determination before the question presented is resolved.**

The government argues that the Court should reject this petition because, "even if the question were resolved in his favor, petitioner cannot satisfy his further plain-error burden of showing a 'reasonable probability[]' of a lower sentence absent the breach." Opp. at 24. The government is in essence seeking a decision on the facts before the Court resolves the question presented. Due to the varying ways the several circuits address the second prong of plain- error review, the Court has an opportunity to set standards that promotes consistency and uniformity on cases involving the plain error standard of review where a court of appeals has concluded that the government breached a plea agreement.

Moreover, the Court in *Santobello v. Unites States*, 404 U.S. 257 (1971), instructs that "the adjudicative process inherent in accepting a guilty plea must be attended by safeguards to insure the defendant what is reasonably due in the circumstances." *Id.* at 499. A "constant factor" in the plea bargain process "is that when a plea rests in any significant degree on a promise or

agreement of the prosecutor, so that is can be said to be part of the inducement or consideration, *such promise must be fulfilled.*" *Id.* (emphasis added).

Here, Farias-Contreras did not receive the "safeguard" on the prosecutor's promise or agreement to recommend a more lenient sentence. And, as the majority of the original panel recognized, "the district court reiterated the arguments and themes that the government articulated throughout its sentencing memorandum and its oral argument." App. 60. Further, "[s]ome of this information, including the dissension within the U.S. Attorney's Office over what would have been a more appropriate sentence, would never have been before the district court, but for the government's choice to inform the judge about the internal discussion." *Id.* "And, the district court here, instead of engaging in a purely independent evaluation, credited the government's arguments made in both the sentencing memorandum and at the hearing" to impose the harsher sentence. App. 61. Under these circumstances, Farias-Contreras establishes that the "'outcome'... affected his sentence." *Puckett*, 556 U.S. at 142 n. 4.

The number of flagrant and inflammatory remarks by the prosecutor in both the sentencing memorandum and at the sentencing hearing, combined with the Ninth Circuit's conclusion that the government breached the plea agreement, where the district court adopted much of the government's inflammatory arguments to impose the harsher sentence, establishes plain error that not only affected Farias-Contreras's substantial rights, but also affected the integrity, fairness and public reputation of his sentencing proceedings. These circumstances justify the Court in granting Farias-Contreras relief under Fed. R. Crim. P. 52(b).

The Court is urged to review the question presented. The methodology as set out in *Puckett* that focuses on the clarity of "the scope of the Government's commitments" in the plea

agreement is best suited for the circuit courts to determine whether the second prong of plain-error review is satisfied.

2. This case is an ideal vehicle for the Court to ensure consistency among the circuit courts and promote uniformity in application of the second prong of the plain error standard of review in Fed. Crim. P. 52(b).

Finally, as Petitioner argued in his opening petition, this case is a particularly good vehicle for the Court to focus on the distinction between error and when the error is plain under Fed. R. Crim. P. 52(b). Pet. 34-37. The analysis of the lower courts rarely diverge in regard to these two prongs. Based on en banc Ninth Circuit decision, the question of how to apply plain error analysis is squarely before the Court. The survey of the circuit courts shows a stark difference between approaches when it comes to this analysis. Pet. 24-34. A focus on the written terms of the plea agreement such as the Sixth Circuit's analysis in *United States v. Simmonds*, 62 F.4th 961, 967-68 (6th Cir. 2023), is an approach that provides a uniform method of evaluating when an error resulting from a government breach is plain. Pet. 26 ("Simmons must show that the government's breach is clear.... If, upon reading the plea agreement, the scope of the government's promises present an arguable interpretive question, then by definition any breach cannot qualify as 'clear or obvious.") (citing *Puckett*, 556 U.S. at 143); *and see*, Pet. 35-36.

An analysis that emphasizes whether a substantially similar case has arisen previously in the circuit and been deemed error results in divergent outcomes between the circuits. And as we have seen in the First Circuit cases discussed *supra* . n. 3, the lack of such direction on the method of analysis has also resulted in intra-circuit inconsistency. The inconsistency among circuit court decisions will continue unabated unless this Court grants review in a case like this one.

3. **Conclusion.**

It is, therefore, requested that the Court grant the petition for writ of certiorari.

Dated this 14th day of February, 2025.

Respectfully submitted,

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