No. 24-1073

IN THE

# Supreme Court of the United States

GHISLAINE MAXWELL, AKA SEALED DEFENDANT 1,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## REASONS FOR GRANTING THE PETITION

This case presents a straightforward and important question about the government's obligation to honor its promises in plea and non-prosecution agreements. The petition asks whether a U.S. Attorney's promise made on behalf of "the United States" binds the entire United States. The government's Brief in Opposition only underscores the importance of this question.

Most significantly, the government concedes a circuit split on this issue, effectively admitting that defendants' rights hinge on the happenstance of geography. Opp.13. Such an acknowledged conflict among the circuits demands this Court's intervention.

Rather than grapple with the core principles of plea agreements, the government tries to distract by reciting a lurid and irrelevant account of Jeffrey Epstein's misconduct. But this case is about what the government promised, not what Epstein did.

Even more remarkably, the government advances an interpretation of its non-prosecution agreement that flips its plain meaning on its head. Promising "not to prosecute" somehow meant preserving the right to prosecute. That is not contract interpretation; it is alchemy. Plea agreements are supposed to be strictly construed against the government, yet here the government isn't even asking for the benefit of the doubt; it is asking for a blank check to rewrite its own promise after the fact. The government's only real argument is that the Second Circuit rule is correct on the merits while the other circuits have it wrong. We obviously disagree, but regardless, the Court should grant certiorari so that all circuits employ that same rule.

This circuit split presents an exceptionally important question. Plea and non-prosecution agreements resolve nearly every federal case. They routinely include promises that extend to others—co-conspirators, family members, potential witnesses. If those promises mean different things in different parts of the country, then trust in our system collapses. The Court should grant certiorari and restore consistency, and credibility, to the government's word.

## I. The government concedes that the circuits are split as to whether a promise on behalf of the "United States" by a United States Attorney's office in one district is binding upon other districts.

The government (like the Second Circuit in the opinion below) agrees that there is a clear circuit split on the precise question posed by this Petition. Opp.13;[1] *United States v. Maxwell*, 118 F.4th 256, 263 n.11 (2d. Cir. 2024) ("recogniz[ing] that circuits have been split on this issue for decades."). As the Second Circuit noted, this conflict is well-documented and longstanding. Indeed, the government points out that litigants have sought the Court's clarification of this issue at least as far back as 2011, when this Court denied certiorari in *Prisco v. United States*, 562 U.S. 1290 (2011), No. 10-7895.

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[1] The United States argues that the split is 3-2 in favor of Petitioner, not 4-2, claiming that that the "Ninth Circuit has not expressly addressed the matter at issue here." Opp.13. While not express, the Ninth Circuit is pretty clear that it agrees with Petitioner's position, holding that a U.S. Attorney can bind other districts and agencies, *Thomas v. INS*, 35 F.3d 1332 (9th Cir. 1994), and when in doubt, "the government must bear responsibility for any lack of clarity in those terms," *United States v. Johnston*, 199 F.3d 1015, 1020 (9th Cir. 1999).

The government seeks to minimize the split as of "limited importance" because "the scope of a plea or similar agreement is under the control of the parties to the agreement." Opp.14. This turns a blind eye to the problem. The very premise of Petitioner's argument is that the parties to the NPA *did* seek to control the scope of the relevant clauses by narrowing the scope of immunity for Epstein through the use of narrow language specifying enforceability only in the Southern District of Florida, and then expanding the scope of it as to his co-conspirators by using the broad term "the United States." (App. 30-31). While doing so, Epstein's lawyers were no doubt informed by how that language was interpreted in the jurisdiction in which they were practicing.

Yet by definition, the issue presented in this case and every other like it *only* arises when the language in question is being interpreted in a *different* jurisdiction than the one where the agreement was negotiated. Accordingly, uniformity in interpretation of such a provision is unusually and particularly compelling. The very nature of a clause of this nature (unlike most other clauses in an agreement, which are not cross-jurisdictional in nature) cries out for nationwide symmetry.

The government also contends, rather bizarrely, that "this is not itself a case that turns on any default rule." Opp.14. To the contrary, it is *precisely* the Second Circuit's default rule, adopted in *United States v. Annabi*, 771 F.2d 670 (2d Cir. 1985), that doomed Petitioner to stand trial on a case that would have been dismissed outright in at least half the country. The primary reason this Court should grant certiorari is to create one single default rule across the country as to

what parties mean when they use the term "the United States" without further qualification.

## II. The Second Circuit's decision below is wrong and violates the principles set forth in this Court's prior opinions.

In attempting to defend the Second Circuit's outcome, the government advances a series of contentions about the Epstein NPA's scope, the U.S. Attorney's authority, contract law doctrines, and canons of construction. Each lacks merit.

As the government acknowledges, Opp.8, the starting point in any contract is the text. Here, the text could not be more clear. In exchange for Epstein's guilty plea and other penalties and concessions, "the United States also agrees that it will not institute any criminal charges against any ***potential*** co-conspirators of Epstein, ***including but not limited to*** [four names]." (emphasis added).

This promise is unqualified. It is not geographically limited to the Southern District of Florida, it is not conditioned on the co-conspirators being known by the government at the time, it does not depend on what any particular government attorney may have had in his or her head about who might be a co-conspirator, and it contains no other caveat or exception. This should be the end of the discussion. *See Santobello v. New York,* 404 U.S. 257 (1971) ("[W]hen 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.") (ignored by the government in its opposition).

The government seeks to evade this straightforward language by focusing on other clauses in the NPA and on extrinsic context, Opp.8-10, but its efforts only

underscore that the plain meaning favors Petitioner. First, the government notes (as did the Second Circuit) that the NPA explicitly limited Epstein's own immunity to the Southern District of Florida, pointing to a clause stating that after Epstein fulfilled the agreement, "no prosecution for the offenses set out on pages 1 and 2 of this Agreement… will be instituted *in this District*." (App. 26a). The government then urges the Court to follow it through the looking glass, offering the inexplicable suggestion that the absence of a similar "in this District" qualifier in the co-conspirator clause should be ignored as immaterial. Opp.9.

Of course, basic interpretive canons point in exactly the opposite direction. When parties include an express territorial limitation in one clause of a contract and omit it in another, the omission must be presumed intentional. Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (2012). As Justice Scalia and Bryan Garner have explained, "a material variation in terms suggests a variation in meaning." *Id.* at 170. Here, the drafters knew how to confine the promise to a single district – they did so for Epstein's personal non-prosecution assurance. Yet when it came to Epstein's "potential co-conspirators," the drafters chose broad, unqualified language. In fact, not only did the parties use an unrestricted jurisdictional clause for the co-conspirators, they amended the document from a previous draft in which the co-conspirator immunity was limited to the Southern District of Florida, changing it to refer more broadly to the "United States." (Pet. 3; App. 95, 108-126).

The government's interpretation cannot be correct because it would render superfluous the phrase "in this District" in the Epstein clause. If the "United States" means just the Southern District of Florida,

why specify the district for Epstein? The only logical inference is that the co-conspirator promise was meant to reach more broadly, in line with its different phrasing.[2] At the *very* least there is a textual ambiguity, and under *Santobello* and the contract interpretation principle *contra proferentum*, such ambiguity must be construed against the government as the drafter and promisor. *See, e.g., United States v. Carmichael*, 216 F.3d 224 (2d Cir. 2000) ("[W]e 'construe plea agreements strictly against the Government.'") (internal citation omitted); OPR report ("OPR") at 80, 166 (confirming that AUSA wrote the specific language in question). Under any normal reading of this contract, then, no federal charges can be brought against any co-conspirator in any district in the United States.

Reading the NPA "as a whole" means giving effect to the deliberate difference in phrasing between the Epstein-focused clause and the co-conspirator clause.[3]

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[2] It is not, as the government contends, "extremely strange" for Epstein to have secured broader immunity for his co-conspirators than he was getting for himself, Opp.9. Defendants always try to get as many benefits in a plea agreement as they can – here, Epstein was able to obtain an additional benefit for his co-conspirators that he was unable to secure for himself, no doubt because the government attorneys "wouldn't have been interested in prosecuting anyone else." OPR:70; *see also* OPR:80, 168. Epstein "wanted to make sure that he's the only one who takes the blame for what happened." OPR:167 (internal quotation omitted). In addition, Epstein was concerned that if a co-conspirator was charged elsewhere, he might be called to testify, opening him up to potential charges in a different part of the country. This was antithetical to the global resolution Epstein sought.

[3] The government is right about one thing: the scope of a particular agreement *is* under the control of the parties. Opp.14. As the National Association of Criminal Defense Lawyers observes in its *amicus* brief, federal prosecutors know well how to draft

It means recognizing that when the parties intended to mean "only in the Southern District of Florida," they said so explicitly, and that their use of the all-encompassing term "the United States" in the co-conspirator clause was purposeful.

The government's invocation of "context" and the purported purpose of the NPA is no more persuasive. The government suggests that a broad grant of immunity cannot have been made because there was no consultation with the Southern District of New York. Opp.10. The record does not permit such a conclusion, as the district court denied a hearing and the Petitioner was not granted any discovery, so there is no way to confirm who was consulted. But the record is clear in any event that the NPA was signed on behalf of the United States Attorney for the Southern District of Florida, who was heavily involved in the negotiation and approval process. In addition, representatives of the Department of Justice were also actively involved in the drafting and approval process, including the Chief of the Child Exploitation and Obscenity Section and the Principal Deputy Assistant Attorney General for the Department's Criminal Division. OPR:27, 28, 84.

If these officials failed to do what their internal policy suggested was appropriate, it is irrelevant. The provision in the U.S. Attorneys' Manual advising U.S. Attorneys not to bind other districts was relevant in OPR's review of the government attorneys' actions in this case. It does not inform the outcome here, however, despite the government's heavy reliance on it

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agreements to limit their scope when that is what they intend, and the burden is on them to be specific. When they decline to use simple narrowing terms, this Court should make clear that the broad language they use will be given its ordinary meaning.

throughout its brief. What a prosecutor *should* have done is not relevant; whether or not the Southern District of Florida *should* have prohibited the Southern District of New York from prosecuting Ghislaine Maxwell, it clearly did so.

Nor can the government's appeal to context exclude Petitioner from the clear "including but not limited to" language which unmistakably signaled an intent to cover *all* "potential coconspirators," not just those who were specifically named. Indeed, the broad "including but not limited to" clause shows the parties contemplated both known and unknown accomplices, and it was the government who drafted in the "final broad language," intentionally declining to further enumerate individuals. OPR:70,166. The purpose was to assure Epstein that pleading guilty would protect all his associates from federal prosecution[4] – effectively "closing" the federal case completely.[5] That purpose is perfectly consistent with the plain text; it is the government's after-the-fact spin that is inconsistent,

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[4] The government cherry picks snippets of testimony from the OPR report, many of which are inconsistent with other statements from the same government attorneys, or which offer the perspective of those who admitted to unclear memories, or who were on vacation or otherwise disengaged at the relevant time. App.108, OPR: 36-37. There was a lengthy back-and-forth negotiating process to the inclusion of this clause, some of it recorded by the OPR report, some not. *See* OPR:36. None of this is relevant; the document says what it says in plain language, so the after-the-fact and self-serving statements of various participants to the process should be ignored.

[5] The OPR is riddled with statements reflecting that the government was very concerned about the strength of its case, that it had doubts it would result in a guilty verdict, and that many of the alleged victims did not want any aspect of the case to go to trial. *See, e.g.,* OPR:28, 29, 36, 37, 14, 147.

attempting to import unwritten limits that the deal-makers did not include.

The government's argument, across the board, is essentially an appeal to what it wishes the agreement had said, rather than what it actually says. Of course, if wishful thinking were the standard, the whole NPA would have been thrown out long ago. The government has spent years lamenting that agreement, and initiated a massive OPR investigation into its execution which resulted in OPR's conclusion that the attorneys who negotiated it on behalf of the government did many things contrary to internal government policy and typical practice. (App.55) (district court order noting OPR's findings that the NPA was "unusual in many respects, including its breadth, leniency, and secrecy."); *see also, e.g.,* App. 99.

The entire co-conspirator provision itself (putting aside the issue of the jurisdiction(s) in which it is enforceable) was, according to OPR, unusual for such an agreement (App. 125). But, as the *amicus* notes, the fact that the deal was unconventional does not license the government (or the courts) to rewrite it to conform to ordinary or preferred governmental practice. Amicus Br. 5. To the contrary, it underscores that Epstein's negotiators sought, and obtained, an expansive guarantee.

The government also suggests that Petitioner is not entitled to enforce the NPA because she was not a party to it and was not named in it. Opp.15. But as the court below recognized and as hornbook contract law dictates, Maxwell has standing to enforce the agreement as a third party beneficiary. App.10. Petitioner falls squarely within the class of persons – "any potential co-conspirators of Epstein" – that the NPA expressly protected. She is therefore an intended beneficiary of the agreement, and she has standing to enforce it.

*See, e.g., United States v. Andreas*, 216 F.3d 645, 663 (7th Cir. 2000) (providing that individuals who are not parties to a plea agreement may enforce it, like other third-party beneficiaries, when the original parties intended the contract to directly benefit them as third parties).

Petitioner's alleged status as Epstein's co-conspirator was the entire basis of her prosecution. The NPA's language demonstrates that the parties anticipated that there were additional co-conspirators beyond those already known. By using "including but not limited to" before naming some individuals, the government knowingly extended the benefit of the bargain to other unnamed individuals who participated in Epstein's offenses. Whether the government attorneys personally knew the identities of every such person is beside the point; they certainly knew there could be others (hence the language). Ghislaine Maxwell's name was well known to Epstein's circle and was referenced in public reporting at the time of the NPA. But even if she had been entirely unknown, the broad language of the NPA evidences an intent to cover whoever might later be deemed a co-conspirator. Accordingly, Petitioner can rely on the immunity clause in the NPA. *See, e.g., United States v. Florida West Int'l Airways,* 853 F.Supp.2d 1209, 1228 (S.D. Fla. 2012) (dismissing indictment against employee who fell within the class of employees described in plea agreement).

The government's suggestion that it would have drafted the agreement differently had it specifically had Petitioner in mind is both unprovable and irrelevant. If anything, the inclusion of specific names alongside a general category shows the parties knew some of the players and also wanted to cover any

others to prevent any federal prosecution of Epstein's circle. Whether or not this was wise, it was the deal, and Petitioner is entitled to enforce it.

## III. This case is an ideal vehicle for resolving the split over this important and recurring question.

It is hard to imagine a more compelling scenario for this Court's review: for decades now, the same federal promise has yielded opposite results in different jurisdictions, undermining the uniformity of federal law and the integrity of plea bargains nationwide. This Court's review is warranted.

## CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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