13- 552

No. 13-___



IN THE

# Supreme Court of the United States

SCOTT LONG,

*Petitioner*,

v.

UNITED STATES,

*Respondent.*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

STUART BANNER
UCLA SUPREME COURT CLINIC
UCLA SCHOOL OF LAW
405 Hilgard Avenue
Los Angeles, CA 90095

DAVID ADLER
6750 West Loop South
Suite 120
Bellaire, TX 77401

FRED A. ROWLEY, JR.
*Counsel of Record*
ANJAN CHOUDHURY
WILLIAM J. EDELMAN
MUNGER, TOLLES & OLSON LLP
355 S. Grand Ave., 35th Floor
Los Angeles, CA 90071
(213) 683-9100
Fred.Rowley@mto.com

October 30, 2013

*Counsel for Petitioner*

## QUESTION PRESENTED

If a prosecutor makes a promise to a criminal defendant in exchange for a guilty plea, but that promise is omitted from a writing purporting to memorialize the full terms of the plea agreement, does the parol evidence rule bar a court from considering evidence of the government's promise?

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page(s)

**FEDERAL CASES**

**STATE CASES**

**FEDERAL STATUTES**



**OTHER AUTHORITIES**

## PETITION FOR A WRIT OF CERTIORARI

The petitioner, Scott Long, respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit is reported at 722 F.3d 257 (5th Cir. 2013). App. 2a.

## JURISDICTION

The judgment of the U.S. Court of Appeals for the Fifth Circuit was entered on July 2, 2013. A timely petition for rehearing was denied on August 2, 2013. App. 15a-16a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment states, in relevant part: "No person shall ... be deprived of life, liberty, or property, without due process of law."

The Fourteenth Amendment states, in relevant part: "No state shall ... deprive any person of life, liberty, or property, without due process of law."

## INTRODUCTION

The nation's criminal justice system runs on plea agreements. As many as 97% of federal criminal convictions result from guilty pleas, U.S. Sentencing Commission, *2012 Sourcebook of Federal Sentencing Statistics*, fig.C, with "many of these cases involv[ing] some form of plea agreement," U.S. Sentencing Guidelines Manual ch. 1, pt. A(4)(c) (2012). The promises prosecutors make to induce those guilty pleas implicate not only due process concerns, but also "the honor of the government" and "public

confidence in the fair administration of justice." *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986). This case presents the Court with the opportunity to resolve a recurring plea bargaining issue that has divided and vexed the federal circuits as well as the state courts: whether defendants can hold the government to plea bargain promises that are not ultimately included in a written plea agreement with an integration clause.

In its opinion below, the Fifth Circuit held that the parol evidence rule barred Petitioner from attempting to enforce the government's agreement to forgo a sentencing enhancement, because his written plea agreement omitted that promise and included an integration clause. The only extrinsic promise that is enforceable, the court reasoned, is one made by the government in a cover letter.

That approach contrasts sharply with Third and Fourth Circuit precedents, which hold that the Due Process Clause demands that criminal defendants be permitted to enforce promises made by the government even if they are omitted from the terms of a written plea agreement with an integration clause. Two other circuits, the Ninth and the Tenth, swing widely the other way, applying the parol evidence rule strictly to bar evidence of promises outside the four corners of a written plea agreement. And still other circuits have taken a variety of middle paths, applying the parol evidence rule except in inconsistently-defined circumstances. *See* Tina M. Woehr, Note, *The Use of Parol Evidence in Interpretation of Plea Agreements*, 110 Colum. L. Rev. 840 (2010) (describing the split and discussing some of the cases); *State v. Hill*, No. 97143, 2008 WL 440687, at *3-4 (Kan. Ct. App. Feb. 15, 2008) (unpublished) (noting split).

This case provides a good vehicle for resolving that important, recurring question, as the facts are undisputed. The government made a promise to a criminal defendant—confirmed in written correspondence between the defendant's counsel and the prosecutor—not to seek a particular sentence enhancement. That promise, however, was not set forth in the written plea agreement, which included an integration clause. At sentencing, Petitioner attempted to introduce the email exchange to enforce the government's promise to forgo seeking a leadership enhancement. The Assistant United States Attorney ("AUSA") argued: "there's no way that I would have ever agreed to hold this person not to a leadership role," because "[h]e's always been considered a leader." 11/7/11 RT 5-6 (sentencing), ECF No. 717; *accord* App. 8a. The court rejected Petitioner's attempt to use parol evidence to enforce the government's promise, and applied the leadership enhancement to lengthen his sentence.

## STATEMENT OF THE CASE

1. Petitioner Scott Long was charged with three narcotics offenses arising from his participation in a conspiracy to distribute cocaine. App. 3a. During plea negotiations, the AUSA agreed not to seek a sentencing enhancement under section 3B1.1(a) of the Sentencing Guidelines, which provides a four-level upward adjustment "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." U.S. Sentencing Guidelines Manual § 3B1.1(a) (2007).

On December 23, 2010, defense counsel emailed the AUSA to confirm the terms of the agreement, including the promise not to recommend a leadership enhancement:

> I want to make sure I understand your position on Scott Long's case. I don't want to give my client any incorrect information, especially since he is still having a lot of difficulty with his son's death.
>
> My recollection of our conversation was that you would not agree to recommending that the career offender status was inappropriate in this case but that you would not argue in favor of it either. You would, however, agree to not seek any statutory enhancements based upon his prior convictions. You would not argue for a manager/supervisor, etc., enhancement. You believe the drug weight would be based on approximately 1/2 kilo of cocaine per month from 2007 to 2009. You would not seek an enhancement based on the gun found in Florida.
>
> ...
>
> Please let me know if I misunderstood anything we discussed.

App. 19a-20a.

The AUSA did not respond to this email. Defense counsel accordingly re-sent the email on January 6, 2011. App. 19a. This time the AUSA did respond, the same day, by confirming the terms of the agreement:

> Sorry I did not respond earlier. I blame the holidays.
>
> *I believe you have stated everything correctly.*
>
> Let me know when we can get this done.

App. 18a-19a (emphasis added).

Long pleaded guilty two weeks later, on January 21. App. 5a. Under the terms of the plea agreement, the government agreed to dismiss two of the three charges and to refrain from opposing Long's request for a downward adjustment for acceptance of responsibility. *Ibid.* The plea agreement did not, however, include the government's promise not to recommend a sentencing enhancement for Long's alleged leadership role. *Ibid.*

The plea agreement concluded with an integration clause, which provided:

> This written plea agreement, including the attached addendum of defendant and his attorney, constitutes the complete plea agreement between the United States, defendant and his counsel. No promises or representations have been made by the United States except as set forth in writing in this plea agreement. Defendant acknowledges that no threats have been made against him and that he is pleading guilty freely and voluntarily because he is guilty.

App. 6a.

At Long's guilty plea hearing, the district court asked him whether there was "any secret agreement out there someplace" or there were "any other or different promises or assurances that were made to you in an effort to persuade you to plead guilty that did not get written down in the plea agreement?" Long replied that there were not. *Ibid.*

2. In its presentence report, the Probation Office recommended a four-level enhancement pursuant to section 3B1.1(a) of the Sentencing Guidelines, based on Long's role as a leader/organizer. App. 6a-7a. Long filed an objection to the presentence report,

arguing that no evidence supported a leadership enhancement. App. 7a.

He also promptly emailed the AUSA, to remind him that:

> In an e-mail exchange we had between December 23, 2010 and January 6, 2011, you agreed not to seek enhancements for the guns or the organizer/manager role. (Let me know if you'd like me to forward the messages.)

*Ibid.*

The prosecutor did not respond for nearly two weeks. Finally, the AUSA sent this response:

> Can you send me the email where I agreed to not seek the enhancement for Organizer/manager. I can't remember that email. I'm not saying I never agreed to that, I just don't remember discussing role. I remember the rest.

*Ibid.* Defense counsel duly forwarded the email exchange to the AUSA. The AUSA never replied. App. 18a. A few weeks later, however, the government filed a "Response Under Local Rule 32.6" stating that the government had "no issue with the factual content of the" presentence report, that it believed the report to be "accurate," and that it had no objection "to the Guideline computation reached in the presentence report." App. 8a.

Shortly before sentencing, Long filed a motion to enforce the government's agreement not to recommend a sentencing enhancement for leadership role. *Ibid.* The motion cited the email exchange from December and January as evidence of the agreement. *Ibid.* At the sentencing hearing, the AUSA responded to the motion as follows:

> Your Honor, the plea agreement states what the agreement is. I think that Mr. Adler cites an e-mail between he and I, which is short and sweet. I think I've abided by the plea agreement. I've done everything else. I think their problem is with the leadership role. There's no way that I would have ever agreed to hold this person not to a leadership [r]ole. The caption of the case is United States versus Scott Long. He was always the target of our investigation. He's always been considered a leader. I think that he's just grasping at straws here and he's desperate and he doesn't want to get hit with a four-point enhancement.

11/7/11 RT 5-6 (sentencing), ECF No. 717.

The district court denied Long's motion. App. 9a. The court accepted the Guideline calculation recommended by the Probation Office, and endorsed by the government. *Ibid.* That calculation included the four-level enhancement for Long's leadership role. *Ibid.* The court sentenced Long to 235 months of imprisonment followed by five years of supervised release. *Ibid.*

3. The Fifth Circuit affirmed. App. 3a. The court began its analysis by observing that "[t]his court applies general principles of contract law in interpreting the terms of a plea agreement." App. 10a. One of those principles was the parol evidence rule. Parol evidence, the court explained, "is inadmissible to prove the meaning of an unambiguous plea agreement. Thus, when a contract is unambiguous, this court generally will not look beyond the four corners of the document." *Ibid.* (citation omitted).

The Fifth Circuit acknowledged, however, that in one of its prior cases, it had considered extrinsic evidence in interpreting a plea agreement. *Ibid.* In *United States v. Melton*, 930 F.2d 1096 (5th Cir. 1991), the prosecutor had promised to recommend a downward departure at sentencing. App. 11a. The promise was contained in a cover letter attached to the plea agreement, but it was not included in the plea agreement itself. *Ibid.* At sentencing, the prosecutor declined to recommend a downward departure. *Ibid.* *Melton* held that the promise was nevertheless enforceable, if the defendant had relied upon it in pleading guilty. App. 12a. The Fifth Circuit observed that the Fourth Circuit had likewise held that a promise contained in a cover letter to a plea agreement, but not in the agreement itself, was enforceable. *Ibid.* (citing *United States v. Garcia*, 956 F.2d 41 (4th Cir. 1992)).

The Fifth Circuit then distinguished *Melton* and *Garcia* from the present case. In *Melton* and *Garcia*, the court reasoned, "the extrinsic promise was contained in a cover letter attached to the plea agreement. *See Melton*, 930 F.2d at 1098; *Garcia*, 956 F.2d at 44. In the instant case, the e-mail exchange was not attached to the plea agreement, was completed weeks prior to Long's guilty plea, and copies thereof were not transmitted contemporaneously with the plea. Accordingly, *Melton* and *Garcia* are inapposite." App. 13a.

The court of appeals noted that during Long's plea colloquy, when the district court asked him whether he had received any promises that were not included in the plea agreement, Long responded in the negative. App. 14a. The court concluded that Long's reliance on the email exchange was unreasonable, in

light of the integration clause in the plea agreement. *Ibid.*

## REASONS FOR GRANTING THE PETITION

The Fifth Circuit's opinion adds to the acknowledged disarray among the circuits on how the parol evidence rule applies to written plea agreements. *E.g.*, *United States v. Ajugwo*, 82 F.3d 925, 928 (9th Cir. 1996), *cert. denied*, 519 U.S. 1079 (1997) (recognizing split); *United States v. White*, 366 F.3d 291, 309 (4th Cir. 2004) (Williams, J., dissenting) (same). The circuits have been all over the map on whether the parol evidence rule prevents criminal defendants from enforcing promises omitted from a purportedly integrated, written plea agreement:

- Two circuits—the Third and Fourth—refuse to apply the parol evidence rule on the ground that plea agreements are different from ordinary commercial contracts. Courts in those circuits consider extrinsic evidence of promises made by the prosecutor notwithstanding the existence of a written plea agreement with an integration clause.

- Two circuits—the Ninth and Tenth—take the opposite approach and strictly apply the parol evidence rule. In those circuits, courts refuse to consider extrinsic evidence of promises not reflected in a purportedly integrated writing memorializing the plea agreement.

- The opinion below places the Fifth Circuit alongside four other circuits—the First, Second, Sixth, and Seventh—that have taken an intermediate position. These circuits generally

apply the parol evidence rule, but have adopted or suggested a variety of exceptions. Many of these exceptions remain undefined or unapplied, leaving the enforceability of omitted promises unclear.

- The Eleventh Circuit has taken different positions on the matter. In some cases it has said that the parol evidence rule applies absent allegations of "government overreaching," and in others it has suggested that "oral understandings" are always relevant in determining the scope of a written plea agreement.

As these divided holdings show, the interplay between the parol evidence rule and omitted promises is a recurring one, with deep significance to the fair administration of justice in the federal courts. This Court has held that "when a plea results in any significant degree on a promise or agreement of the prosecutor," that "promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262 (1971). The enforceability of plea-related promises is a matter of system-wide importance. The vast majority of criminal cases are now resolved by way of plea bargaining and plea agreements, and many of those agreements are reduced to a standard written contract. Indeed, the U.S. Department of Justice *requires* that negotiated plea agreements to felony charges "be in writing and filed with the court." United States Attorney's Manual § 9-27.450(A) (1997).

The inconsistency of the approaches taken by the circuits to evidence of extrinsic government promises threatens to undermine the fairness of the plea bargaining process. It makes the enforceability of a federal prosecutor's promise turn on the circuit in

which the charges were brought, and creates legal uncertainty where the rules ought to be clear. If this were not enough, a similar confusion—with equally corrosive effects—pervades state court precedents on the application of the parol evidence rule to written plea agreements.

This case is a good vehicle for addressing the issue and clarifying that the parol evidence rule does not empower prosecutors to renege on promises made in exchange for a guilty plea. This is not a situation where the extrinsic promise turns on a factual dispute about what the government said or did. *Cf. United States v. Graves*, 374 F.3d 80, 85 (2d Cir. 2004) (noting "factual issues" about what the defendant "was led to believe"). The promise at issue is memorialized in an email whose authenticity the government has never contested. The parol evidence issue was squarely addressed by the Fifth Circuit, and its holding inserts the circuit directly into the existing conflict among the courts of appeals. This Court should grant review and vindicate the important due process rights invoked by the government's plea bargaining promises.

## I. The Circuits Are Deeply Divided on Whether the Parol Evidence Rule Bars Enforcement of Promises Omitted from a Written Plea Agreement

The opinion below further divides the courts of appeals on an issue of criminal procedure that ought to have uniform standards, but that has generated conflicting holdings for more than a decade: the application of the parol evidence rule to promises made by the government, but omitted from a written plea agreement.

### A. In the Third and Fourth Circuits, the Parol Evidence Rule Does Not Bar Defendants From Offering Evidence of Promises Omitted From Written Plea Agreements

The Third Circuit has drawn a sharp distinction between ordinary commercial contracts, which are governed by the parol evidence rule, and plea agreements, which are not. That court has cautioned that "the parol evidence rule should not be rigidly applied to bar evidence which would aid the trial court in properly construing the plea agreement." *United States v. Swinehart*, 614 F.2d 853, 858 (3d Cir.), *cert. denied*, 449 U.S. 827 (1980). And it has applied this principle to enforce a promise made by the government in exchange for the defendant's guilty plea, where that promise was not included in an integrated, written plea agreement.

In *United States v. Baird*, the defendant claimed that the prosecutor breached a promise not included in a written plea agreement. 218 F.3d 221 (3d Cir. 2000). The prosecutor promised the defendant that it would not use his incriminating statements against him if he pleaded guilty. *Id.* at 226. That promise was referenced in a letter sent to the defendant a few months before the plea agreement was executed, but it was not included in the plea agreement itself. *Id.* at 226, 230.

Nevertheless, the Third Circuit held the United States to its promise. "The government may not rely upon a rigid and literal construction of the terms of a plea or cooperation agreement," the court held. *Id.* at 229. "Such agreements are unique and are to be construed in light of special due process concerns. Courts must determine whether the government's conduct was inconsistent with what was reasonably understood by defendant when entering the plea of

guilt." *Ibid.* (citation and internal quotation marks omitted).

Applying these principles, the Third Circuit considered extrinsic evidence of the government's promise even though the defendant's plea agreement included an integration clause. *Id.* at 230. That clause was "obvious boilerplate," the court explained, and "d[id] not contain language purporting to supersede the December 9 letter." *Ibid.* "In light of these considerations and the special due process concerns in the criminal arena, the integration clause has no effect in this context." *Ibid.*

Like the Third Circuit, the Fourth Circuit has cautioned that "courts ought not rigidly apply commercial contract law to all disputes concerning plea agreements." *United States v. Garcia*, 956 F.2d 41, 44 (4th Cir. 1992). In *Garcia*, the government "d[id] not dispute that it made the promise," which was to recommend a specific sentence without requiring the defendant's cooperation, but sought to invoke the parol evidence rule to preclude the defendant from introducing evidence of that promise. *Ibid.* The Fourth Circuit rejected that attempt, reasoning that the government "just want[ed] to take advantage of a rule of contract law to profit from an omission in a contract it prepared," and that the court could not "countenance such unfair dealing." *Ibid.*

Though *Garcia* involved a written promise omitted from a plea agreement, the Fourth Circuit later held that the parol evidence rule would not bar the enforcement of an oral promise not mentioned in a purportedly integrated contract. In *United States v. White*, 366 F.3d 291 (4th Cir. 2004), the defendant sought reformation of his plea agreement with the United States on the ground that the prosecutor had orally promised a conditional guilty plea, which

would allow the defendant to appeal a suppression ruling. *Id.* at 292-93. The written plea agreement did not incorporate that promise, and included an integration clause. *Id.* at 293. At his guilty plea hearing, White stated that the government had not made any promises that were not reflected in the plea agreement. *Id.* at 299.

The Fourth Circuit concluded that "if a Government representative orally promised White that he could conditionally plead, White would be entitled to the relief he's asking for despite his attorney's failure to preserve this right in the written plea agreement." *Id.* at 295 (internal quotation marks omitted). The court remanded for an evidentiary hearing on whether the government made the alleged promise, *id.* at 302, over a dissent citing authority from the Fifth, Seventh, Ninth, and Tenth Circuits "applying the parol evidence rule to exclude extrinsic evidence of promises not included in unambiguous written plea agreements," *id.* at 309 (Williams, J., dissenting). In reaching this result, the court made clear that language in a prior Fourth Circuit case suggesting a more strict application of the parol evidence rule, *see Hartman v. Blankenship*, 825 F.2d 26, 29 (4th Cir. 1987), was dicta, and had been rejected in the holdings of subsequent cases, *see White*, 366 F.3d at 295 n.3.

### B. In the Ninth and Tenth Circuits, the Parol Evidence Rule Bars Claims that the Government Breached a Promise Not Included in a Written Plea Agreement

The Ninth and Tenth Circuits take the opposite approach and strictly apply the parol evidence rule to bar claims by criminal defendants that the government breached a promise not mentioned in their written agreement. Those circuits will not

consider any extrinsic evidence of a promise omitted from a written plea agreement if it includes an integration clause.

The Ninth Circuit addressed an omitted promise claim in *United States v. Ajugwo*, where the defendant argued that the prosecutor had verbally promised not to oppose application of a certain prong of the Sentencing Guidelines' safety valve provision, § 5C1.2(5), and then broke that promise during the sentencing hearing. 82 F.3d 925, 928 (9th Cir. 1996), *cert. denied*, 519 U.S. 1079 (1997).

The Ninth Circuit held that "[b]ecause the language of the [written] plea agreement is unambiguous and completely integrated, we reject the defendant's argument that the plea agreement has been breached." *Id.* at 929; *see also United States v. Pacheco-Osuna*, 23 F.3d 269, 271 (9th Cir. 1994). In arriving at that conclusion, the court acknowledged conflicting precedent in the First and Fourth Circuits, but declined "to examine cases from other circuits given that there is binding precedent in this circuit." 82 F.3d at 928.

The Tenth Circuit likewise holds that "it is well-settled that the parole [sic] evidence rule precludes parties from admitting extrinsic evidence to contradict or add to the terms of a binding and completely integrated [plea] agreement." *United States v. Reyes Pena*, 216 F.3d 1204, 1212 (10th Cir.), *cert. denied*, 531 U.S. 973 (2000). In *United States v. Rockwell International Corp.*, 124 F.3d 1194 (10th Cir. 1997), *cert. denied*, 523 U.S. 1093 (1998), defendant Rockwell offered extrinsic evidence in an effort to establish that the government had made a qualified promise not to intervene in a pending civil suit against Rockwell. *Id.* at 1198, 1200. The Tenth Circuit held that "[r]egardless of whether Rockwell's

extrinsic evidence vindicates its assertion that the government agreed to be so limited in intervening in the [civil] suit, the parol evidence rule forbids Rockwell from asserting this additional term." *Id.* at 1200.

### C. The First, Second, Fifth, Sixth, and Seventh Circuits Take Intermediate, But Varying Approaches in Applying the Parol Evidence Rule to Omitted Promises

By its opinion below, the Fifth Circuit has joined four other circuits that neither strictly apply the parol evidence rule to plea agreements nor liberally enforce prosecution promises omitted from such agreements. These circuits have taken a range of intermediate approaches, treating the parol evidence rule as a general bar to evidence of extrinsic promises, but recognizing—with varying degrees of specificity and clarity—exceptional cases. The Fifth Circuit has identified a specific form of parol evidence it will consider: cover letters to plea agreements. Two circuits (the Second and Seventh) have concluded that only parol evidence showing government overreaching or fraud can be considered. And two other circuits (the First and Sixth) have left open the possibility of exceptions to the parol evidence rule in "unusual" (First Circuit) or "exceptional" (Sixth Circuit) circumstances, but have yet to define those standards in any meaningful way. The different approaches taken by these circuits underscore the need for this Court's intervention and guidance.

***Cover Letter Exception***: As reflected in the opinion below, the Fifth Circuit applies the parol evidence rule as a general rule. The opinion states clearly that "parol evidence is inadmissible to prove the meaning of an ambiguous plea agreement." App.

10a (quoting *United States v. Ballis*, 28 F.3d 1399, 1410 (5th Cir. 1994)). The only exception carved out by the Fifth Circuit—which availed Petitioner of no relief here—is a narrow one for government promises set out in "a cover letter attached to the plea agreement." App. 13a; *United States v. Melton*, 930 F.2d 1096, 1098 (5th Cir. 1991).

***Government Misconduct Exception***: The Second Circuit likewise has stressed that when a written plea agreement contains an integration clause, the "usual principles of contract law" provide that "oral representations cannot alter the terms of a written agreement." *United States v. Graves*, 374 F.3d 80, 84 (2d Cir. 2004). That court has recognized a narrow exception only for extrinsic evidence showing that the government intentionally misled the defendant. *See id.* ("[I]f Graves was induced to enter into the plea agreement by representations that were made and not intended to be carried out, that sort of improper inducement might well provide a basis for invalidating the agreement, or at least for permitting withdrawal of the plea."). While the Second Circuit has suggested, in dicta, the possibility of "relaxing the parol evidence rule in order to hold the Government to the most meticulous standards of promise," *In re Altro*, 180 F.3d 372, 376 (2d Cir. 1999) (internal quotation marks omitted), the only circumstance it has recognized is the intentional misconduct suggested in *Graves*.

The Seventh Circuit has suggested the same intentional misconduct exception, though it has yet to actually set aside parol evidence limitations to enforce an omitted government promise. In *United States v. Cieslowski*, the court observed that "[p]lea agreements are governed under the principles of contract law, and oral representations cannot alter

the terms of a written agreement." 410 F.3d 353, 361 (7th Cir. 2005) (internal citation omitted), *cert. denied*, 546 U.S. 1097 (2006). Citing the Second Circuit's *Graves* decision, the court suggested "there may be circumstances that merit an inquiry into whether oral promises may have induced a plea," but did not find "those circumstances" on the facts before it. *Ibid.* *Ceislowski*'s reasoning tracks an earlier case in which the Seventh Circuit suggested that the "ordinary rule of contract law forbidding resort to extrinsic evidence ... may be suspended if it can be demonstrated that the government engaged in overreaching in negotiating the plea," without holding that the government had done so there. *Doe v. United States*, 51 F.3d 693, 702 (7th Cir.), *cert. denied*, 516 U.S. 876 (1995); *cf. United States v. Rutledge*, 900 F.2d 1127, 1132 (7th Cir.), *cert. denied*, 498 U.S. 875 (1990).

***Vague and Fact-Bound Exceptions*:** The First Circuit has held that where "an unambiguous plea agreement contains an unqualified integration clause, it *normally* should be enforced according to its tenor. That means, of course, that an inquiring court should construe the written document within its four corners, unfestooned with covenants the parties did not see fit to mention." *United States v. Alegría*, 192 F.3d 179, 185 (1st Cir. 1999) (emphasis added) (internal quotation marks omitted); *see also United States v. Sandoval*, 204 F.3d 283, 286 n.1 (1st Cir. 2000).

The court did not elaborate on what it meant by "normally," but its decision in *Bemis v. United States*, 30 F.3d 220 (1st Cir. 1994), provides some guidance. There, the court said that the parol evidence rule is "subject to exception in unusual cases," and went on to identify six factors that it concluded warranted an

exception on the particular facts before it: (1) the defendant's evidence of the promise, including affidavits from the prosecutors involved, was strong; (2) the defendant alleged that his lawyer and the prosecutor told him that the promise did not need to appear in the written agreement; (3) the defendant alleged that his lawyer's conduct amounted to ineffective assistance of counsel; (4) the written agreement's requirement that any amendments be in writing was later ignored by the government; (5) the breach occurred after the defendant had been sentenced; and (6) the district court summarily dismissed the claim. *Id.* at 222-23. Thus, in the First Circuit, the parol evidence rule applies except in cases presenting comparable facts and circumstances.

The Sixth Circuit has held that "[t]o allow [the] defendant to attempt to prove by affidavit that the [plea] agreement is otherwise than it appears, unambiguously, on a thorough record would violate established contract-law standards." *Baker v. United States*, 781 F.2d 85, 90 (6th Cir.), *cert. denied*, 479 U.S. 1017 (1986). The court left open the possibility, however, that an exception might be made in "extraordinary circumstances" or where the defendant has "some explanation of why [he] did not reveal other terms" of the agreement during the plea colloquy. *Ibid.* The court has not yet confronted any "extraordinary circumstances" calling for an exception nor had occasion to describe what they would look like.

### D. The Eleventh Circuit Has Taken Inconsistent Positions

The Eleventh Circuit has decided the issue in different ways. In one line of cases, the court has demonstrated a willingness to enforce oral promises not included in an integrated written plea agreement.

*See, e.g., United States v. Jefferies*, 908 F.2d 1520, 1523 (11th Cir. 1990) (considering "oral understandings and the negotiating history of the agreement," as supported by "the original draft of the plea agreement and affidavits from [the defendants'] attorneys who attended the plea negotiations"). The court has gone so far as to suggest, in this vein, that "the written agreement should be viewed against the background of negotiations and should not be read to directly contradict an oral understanding." *United States v. Rewis*, 969 F.2d 985, 988 (11th Cir. 1992) (internal quotation marks omitted).

Another line of cases suggests, however, that "[p]arol evidence may be considered only where the language of the agreement is ambiguous or where government overreaching is alleged," and an allegation that the government unintentionally misled the defendant by making a promise not reflected in the written agreement does not qualify for the "overreaching" exception. *United States v. Al-Arian*, 514 F.3d 1184, 1191, 1193 (11th Cir.), *cert. denied*, 555 U.S. 887 (2008); *see also Raulerson v. United States*, 901 F.2d 1009, 1012 (11th Cir. 1990).

Viewed against the broader disagreement among the circuits, the internal conflict within the Eleventh Circuit is just one illustration of the lower courts' confusion over the interplay between the parol evidence rule and plea agreements.

### E. State Courts Are Also Divided

This question has not been litigated in state courts as often as in the federal courts, but the states too are split. The highest court of Colorado does not apply the parol evidence rule to bar claims of promises omitted from written plea agreements, in

contrast to Maryland's high court, which does. S
intermediate appellate courts are likewise divided

The Colorado Supreme Court has held "[b]ecause the defendant's due process rights a issue, the courts may consider extrinsic eviden an aid to ascertaining the existence and scope o promises at issue, even under circumstances w such evidence would not be properly considered i realm of ordinary civil contracts." *Craig v. P* 986 P.2d 951, 961 (Colo. 1999). "Indeed, in ad to the relevant written documents, the courts consider 'any oral statements made to the defe as well as extrinsic evidence relating t circumstances of the government's dealings wi defendant.'" *Ibid.* (quoting *People v. Romer* P.2d 1003, 1010 (Colo. 1987), *cert. denied*, 48 990 (1988)). The *Craig* court accordingly exa the extrinsic evidence surrounding the defer claim of a promise omitted from the writing concluding that no such promise was made. 962-63.

In Maryland, by contrast, "extrinsic evid what the defendant's actual understanding have been is irrelevant to the inquiry." *Cu State*, 7 A.3d 557, 566 (Md. 2010). This is "any question that later arises concerni meaning of the sentencing term of a bindi agreement must be resolved by resort *solel* record established at the ... plea proceeding. 565. Applying *Cuffley*, a Maryland appella has flatly rejected a defendant's claim t prosecutor made a promise not reflected in proceeding. *See Buzbee v. State*, 24 A.3d (Md. Ct. Spec. App. 2011), *cert. denied*, 133 S (2012).

State intermediate appellate courts are also at odds. A Florida appellate court refused to apply the parol evidence rule to bar defendant from showing that he was orally promised a sentence of less than five years, holding that "a signed, written plea agreement, standing alone, is insufficient to refute a defendant's claim that ... other promises were made to induce the plea." *Cox v. State*, 974 So. 2d 474, 475 (Fla. Dist. Ct. App. 2008). In contrast, three other states' intermediate appellate courts have strictly applied the parol evidence rule to reject claims of promises omitted from a written plea agreement. *See State v. Hill*, No. 97143, 2008 WL 440687, at *3-4 (Kan. Ct. App. Feb. 15, 2008) (unpublished) (recognizing split of authority); *In re Murillo*, 142 P.3d 615, 622 (Wash. Ct. App. 2006); *State v. Cook*, No. 95-1497-CR, 1996 WL 194939, at *2 (Wis. Ct. App. Apr. 24, 1996) (unpublished).

## II. The Court Should Resolve This Important Issue

If Scott Long had pleaded guilty in the Third or Fourth Circuits, he would have been permitted to prove up, and attempt to enforce, the AUSA's written promise. But in the Fifth Circuit, even written proof cannot establish the existence of a promise binding the government where that promise was omitted from a written plea agreement with an integration clause; only an omitted promise in a cover letter would have been enforceable. The same result would flow from Ninth and Tenth Circuit precedents, which apply parol evidence principles strictly to bar evidence of extrinsic promises made by the government.

Worse yet, it is unclear how Long would have fared in the First, Second, Sixth, and Seventh Circuits. Perhaps written proof of the promise would be sufficiently "unusual" (First Circuit) or

"extraordinary" (Sixth Circuit) to qualify for one of those circuits' exceptions to the parol evidence rule. And perhaps the facts here amount to government "overreaching" (Seventh Circuit) or would warrant an evidentiary hearing as to whether the government intentionally misled Long (Second Circuit). Or maybe not, as the parol evidence exceptions recognized in those circuits have been too vaguely defined to make any confident prediction about how these straightforward facts would play out.

This sort of confusion and uncertainty is especially problematic in the plea bargaining context. A valid guilty plea requires "aware[ness] of the ... actual value of any commitments made to [the defendant] by the ... prosecutor." *Brady v. United States*, 397 U.S. 742, 755 (1970) (citation omitted). And the advantages of plea bargaining "presuppose fairness in securing agreement between an accused and a prosecutor." *Santobello v. New York*, 404 U.S. 257, 261 (1971). Confusion surrounding which of a prosecutor's promises can be enforced compromises the fairness of the negotiation process.

Because this issue implicates every plea bargain between defendants and federal prosecutors, it reaches the overwhelming majority of criminal cases in the federal system. As this Court has emphasized, plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992)). Recent studies suggest that as many as 97% of federal defendants plead guilty, many of them

under plea agreements with the United States.[1] Scholars estimate that the percentage of criminal defendants in the state courts who plead guilty under plea bargains is similar—roughly 90 to 95%. *See* Bureau of Justice Assistance, *Plea and Charge Bargaining* 1 (2011), *available at* https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf.

Given the prevalence of plea bargaining in criminal cases, this Court should intervene to ensure that the government and sentencing courts treat omitted promises in a consistent and evenhanded way. Each plea bargain involves negotiation over "a series of fundamental rights." *United States v. Mezzanatto*, 513 U.S. 196, 209 (1995). The due process protections that attach when a defendant bargains away those fundamental protections should not be a function of where the defendant happened to be charged.

While these basic fairness concerns alone warrant this Court's guidance, *cf. Santobello*, 404 U.S. at 261 (applying due process principles in challenge to state prosecution), they are magnified here by the strong federal interest in establishing a uniform approach to the construction of plea agreements and promises. Plea agreements entered into by the Department of Justice and federal criminal defendants are federal

---

[1] *See* Gary Fields & John R. Emshwiller, *Federal Guilty Pleas Soar As Bargains Trump Trials*, Wall St. J. (Sept. 23, 2012 10:30 PM), http://online.wsj.com/news/articles/SB10000872396390443589304577637610097206808; *see also U.S. District Courts: 2012 Annual Report of the Director*, U.S. Courts, http://www.uscourts.gov/Statistics/JudicialBusiness/2012/us-district-courts.aspx (finding that roughly 89% of the 94,121 criminal defendants charged in U.S. District Court pleaded guilty).

contracts. "Federal plea agreements must be governed by the Constitution and federal law, otherwise identical agreements would be subject to different interpretations depending upon which state rule was being applied." *United States v. Herrera*, 928 F.2d 769, 773 (6th Cir. 1991). Whether the principles governing omitted promises are ultimately held to be constitutional, federal common law, or a mixture of these sources, the controlling law is federal and the federal interest in uniformity is palpable.

The split in authority is mature and persistent, and requires this Court's intervention. As the many opinions in both the courts of appeals and the district courts illustrate, the issue is recurring. The circuits have acknowledged the conflict, *e.g.*, *White*, 366 F.3d at 309 (Williams, J., dissenting); *Ajugwo*, 82 F.3d at 928, but no prevailing view has emerged, nor have any circuits reconsidered their positions in light of the split. The issue has been hashed out in reasoned opinions in ten of the courts of appeals, leaving little room for new contributions to the debate. Further delay would serve no purpose.

## III. This Case Is a Good Vehicle for Deciding Whether the Parol Evidence Rule Precludes Enforcement of Promises Omitted From Written Plea Agreements

This case cleanly presents the conflict between the parol evidence rule and a criminal defendant's due process rights. The government's promise was documented in an email that is part of the record. App. 17a-20a. The written plea agreement contained no terms reflecting that promise, App. 5a, but did include an integration clause disclaiming the existence of other promises, App. 6a. Long preserved

his objection to the prosecutor's breach in the district court and timely appealed. App. 8a-9a.

Long pressed only this issue on appeal. The Fifth Circuit squarely addressed the issue and decided the case solely on the ground that no enforceable promise survived the plea agreement's integration clause and Long's disavowal of any extrinsic promises during the plea colloquy. App. 13a-14a. Whether the parol evidence rule extinguished the omitted promise is thus outcome-determinative. If the Fifth Circuit took the approach of the Third and Fourth Circuits and permitted the defense to prove up the government's promises, regardless of how they were recorded, Long would have prevailed on the question presented.

This case presents an opportunity that the Court has not had previously to provide important guidance on this question. We are aware of two previous cases in which the Court has denied certiorari on this issue. *Al-Arian v. United States*, 555 U.S. 887 (2008) (No. 08-137); *Rockwell Int'l Corp. v. United States*, 523 U.S. 1093 (1998) (No. 97-1178). Neither of those cases was a good vehicle for addressing the question. In *Al-Arian*, the defendant had been indicted for criminal contempt, but his trial had not yet taken place, so there was not yet a final judgment. Petition for a Writ of Certiorari at 8, *Al-Arian*, 555 U.S. 887 (No. 08-137), *available at* 2008 WL 3165821.

In *Rockwell*, a case decided more than a decade ago, the petitioner raised this issue as the second of two questions presented, in factually complex and unusual circumstances. The purported promise was both nuanced in its terms and rooted in a mix of parol evidence sources. Petition for a Writ of Certiorari at 2-8, *Rockwell*, 523 U.S. 1093 (No. 97-1178), *available at* 1998 WL 3412703. The defendant alleged that it understood, from plea negotiations, that the

government would not intervene in a parallel False Claims Act case unless "it obtained significant new information increasing the scope and complexity of the fraud." 124 F.3d at 1198. The defendant supported this promise with "correspondence between the government and Rockwell's attorneys, transcripts of testimony by Department of Justice prosecutors, and legislative history of the qui tam provisions of the FCA." *Ibid.*

This case presents no such problems. There are no comparable vehicle issues, and this case centers on a promise concerning a Sentencing Guidelines recommendation, which is surely among most common type of promise that prosecutors make during plea negotiations. The extrinsic evidence is straightforward: the prosecutor agreed to forgo the disputed role enhancement in an undisputed email exchange. If the Court is ever to decide whether the parol evidence rule applies to plea agreements, there will not be a better case than this one.

## IV. The Parol Evidence Rule Does Not Empower Prosecutors to Renege on Promises Omitted From Written Plea Agreements

This Court's precedent makes clear that when a prosecutor's promise induces a defendant to plead guilty, the prosecutor should be held to that promise. *Bordenkircher v. Hayes*, 434 U.S. 357, 362 (1978); *Santobello*, 404 U.S. at 262. That rule aims to ensure "fairness in securing agreement between an accused and a prosecutor." *Santobello*, 404 U.S. at 262. It is unfair for the government to extract a guilty plea with a promise and then refuse to honor it. It is even more unfair for the prosecutor, when confronted with a defendant's request that the government stand by its commitment, to deny the existence of the promise

by pointing to a writing—almost always drafted by the government—that omits the plea-inducing promise. If the promise was made, it should be kept; the principle does not turn on whether or how the promise was memorialized.

Commercial contracts may provide a useful analogy to issues arising from plea agreements, but contract principles are inadequate to address the constitutional principles that apply here. *See Blackledge v. Allison*, 431 U.S. 63, 75 n.6 (1977); *Puckett v. United States*, 556 U.S. 129, 137 (2009) (noting that "the analogy may not hold in all respects"); Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 Yale L.J. 1969, 1974 (1992) ("The analogy between plea bargains and contracts is far from perfect.").

For example, in the commercial context, if the price is not right either party can walk away and deal with someone else. In plea negotiations, the government is a monopolist; the defendant cannot look for a different prosecutor offering a better bargain. Easterbrook, *supra*, at 1975. And, the defendant is bargaining with constitutional rights, which raise "concerns that differ fundamentally from and run wider than those of commercial contract law." 5 Wayne R. LaFave et al., *Criminal Procedure* § 21.2(d) (3d ed.) (quoting *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986)).

Furthermore, in the commercial context, when parties execute written agreements that fail to memorialize their intent, the losses and consequences are private. Plea agreements, on the other hand, implicate the "honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government." *Ibid.* They also result in the

defendant's loss of liberty. Accordingly, the broader constitutional interests accompanying plea bargaining require tempering of contract law rules when the two conflict.

By refusing to "look beyond the four corners of the document," App. 10a, the Ninth, Tenth, and now the Fifth Circuits have foreclosed courts from considering strong evidence of a promise made by a prosecutor in exchange for a guilty plea. In doing so, they have contravened this Court's insistence in *Santobello* that the plea bargaining process "be attended by safeguards to insure the defendant what is reasonably due in the circumstances," including that "when a plea rests in any significant degree on a promise or agreement of the prosecutor ... such promise must be fulfilled." 404 U.S. at 262.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

STUART BANNER
UCLA SUPREME COURT CLINIC
UCLA SCHOOL OF LAW
405 Hilgard Avenue
Los Angeles, CA 90095

DAVID ADLER
6750 West Loop South
Suite 120
Bellaire, TX 77401

FRED A. ROWLEY, JR.
*Counsel of Record*
ANJAN CHOUDHURY
WILLIAM J. EDELMAN
MUNGER, TOLLES &
OLSON LLP
355 South Grand Avenue
Los Angeles, CA 90071
(213) 683-9100
Fred.Rowley@mto.com