No. 20-1057

In the
Supreme Court of the United States

ORACLE AMERICA, INC.,

***Petitioner*,**

v.

**UNITED STATES and
AMAZON WEB SERVICES, INC.,**
***Respondents*.**

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

BRIEF *AMICUS CURIAE* OF FREDERICK W. CLAYBROOK, JR.
in Support of the Petitioner

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INTERESTS OF THE *AMICUS CURIAE*[1]

Frederick W. Claybrook, Jr., is a well-published practitioner of over forty years in government contracts law. He has specialized in bid protest actions and claims and has practiced extensively in the Court of Federal Claims, federal district courts, and courts of appeals, including the Federal Circuit. His publications include:

- *Wrong from the Start: Withholding Implied-in-Law Contract Jurisdiction from the Court of Claims*, 46 Pub. Cont. L.J. 1 (2016).
- *A Twice-Told Tale: The Strangely Repeated Story of 'Bad Faith' in Government Contracts*, 24 Fed. Cir. Bar J. 35 (2014).
- *Please Check Your Crystal Ball at the Courtroom Door—A Call for the Judiciary in Bid Protest Actions to Let Agencies Do Their Job*, 38 Pub. Cont. L.J. 375 (2009).
- *It's Patent That "Plain Meaning" Dictionary Definitions Shouldn't Dictate: What* Phillips *Portends for Contract Interpretation*, 16 Fed. Cir. Bar J. 91 (2006).
- *Standing, Prejudice, and Prejudging in Bid Protest Cases*, 32 Pub. Cont. L.J. 535 (2004).
- *The Initial Experience of the Court of Federal Claims in Applying the Administrative Procedure Act in Bid Protest Actions—Learning*

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[1] The parties were provided appropriate notice and have consented to the filing of this brief in writing. No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus* made a monetary contribution intended to fund the preparation or submission of this brief.

Lessons All Over Again, 29 Pub. Cont. L.J. 1 (1999).

- *Good Faith in the Termination and Formation of Federal Contracts*, 56 Md. L. Rev. 555 (1997).
- *The Federal Courts Improvement Act Needs Improvement: A Renewed Call for Its Amendment*, 21 Pub. Cont. L.J. 1 (1991).
- *Section 1981 and Discrimination in Private Schools*, 1976 Duke L.J. 125.
- *Implied Waiver of a State's Eleventh Amendment Immunity*, 1975 Duke L.J. 925.

His professional awards include recognition by the Board of Contract Appeals Bar Association of one of his articles as the article of the year in the government contracts field, and he was evaluated in SCOTUSblog as one of the best *amicus* merits brief writers for this Court's 2017-18 Term.

Mr. Claybrook in his professional writings has taken a particular interest in the subject matter presented by this petition. In three articles cited below, he discussed how the Federal Circuit has repeatedly misstated and misapplied the harmless error standard of the Administrative Procedure Act ("APA"), in conflict with its text and with this Court's precedent.

SUMMARY OF ARGUMENT

The Federal Circuit's "no prejudice" determination in the decision below is but the latest example of its supplanting the agency's authority by overstating and misapplying the APA's harmless error standard, which controls in procurement review actions. *See* 28 U.S.C. § 1491(b)(4) (incorporating 5 U.S.C. §

706); *Nat'l Ass'n of Home Bldrs. v. Defenders of Wildlife*, 551 U.S. 644, 659-60 (2007) (describing § 706 as a harmless error rule for administrative law). After confirming that the agency committed legal error in its initial procurement decision, the Federal Circuit gave "clearly erroneous" deference to the no "substantial" prejudice finding of the Court of Federal Claims ("CFC"). *Oracle Am., Inc. v. United States*, 975 F.3d 1279, 1291-92 (Fed. Cir. 2020). That finding was, instead, entitled to no deference, as the CFC's forward-looking determination of what the agency most likely would do on remand exceeded the CFC's authority as a matter of law. Moreover, the Federal Circuit applied a heightened, "substantial" prejudice formulation, *id.* at 1292, one neither found in the text of the APA nor used by this Court or other courts of appeal. This Court should issue the writ to correct this longstanding and continuing arrogation of power by the Federal Circuit and the CFC.

ARGUMENT

Oracle in its petition sets out multiple ways in which the agency, after correcting its legal error, could modify the procurement on remand, such that Oracle would be a viable, qualified competitor for this multi-year, multi-billion-dollar procurement. (Pet. at 17, 19-20.) The agency made no showing that such modifications were not within its discretion or would be contrary to law, and, indeed, some might be required (or at least encouraged) by law. (Pet. at 17-20.) On a proper harmless error analysis under the APA, this should have been the end of the story, with the matter remanded to the agency for further proceedings in accordance with law.

Instead, the Federal Circuit, building on its prior, faulty precedent, foreclosed reconsideration by the agency. The key language of the court of appeals is this:

> This appeal is a review of a [CFC] decision on an administrative record. We review a finding of prejudice or no prejudice by the [CFC] in a trial on an administrative record under the clearly erroneous standard. To establish prejudicial error, a party must show that but for the error, it would have had a substantial chance of securing the contract. In light of the [CFC]'s careful consideration of the record evidence, the court's conclusion that the Defense Department would have included [the requirement] even if it had modified the solicitation to allow for multiple awards, and that Oracle therefore would not have had a substantial chance of securing the contract, is not clearly erroneous. We therefore will not disturb the [CFC]'s determination that the case did not need to be remanded to the Defense Department for a further determination whether a single-source award is appropriate.

Id. at 1291-92 (footnotes, citations, and quote marks omitted) (App. 17a-18a). In this single passage, the Federal Circuit (a) sanctions the CFC deciding for itself what the agency likely would do on remand after it has corrected its legal error, (b) articulates a prejudice standard more exacting than that specified by the APA, and (c) misstates the appellate review standard for determinations made on the written administrative record. These errors, both individually

and in combination, provide ample reasons for this Court to grant the petition.

I. The Federal Circuit Has Repeatedly Applied a Prejudice Standard That Violates the *Chenery* Rule: Reviewing Courts Must Remand to the Agency After Finding Error Unless the Administrative Record of the *Initial* Determination Demonstrates That the Error Was Harmless, Not Hypothesize About How an Agency Will Exercise Its Discretion on Reconsideration

When an agency has committed procurement error, the reviewing court must then determine whether the error was prejudicial. *See* 5 U.S.C. § 706. That determination must be made on the existing record of the *initial* agency decision. For example, if the initial award is based solely on low price, the protestor lost by $1,000, and the agency's legal error only had a $100 effect, the error would be harmless. But, as this example shows, this is a *backwards-looking* analysis, not a forward-looking one. The prejudice analysis *never* gives the reviewing court authority to prognosticate what the agency might later do on remand, as the CFC did in *Oracle*.

That is the principle established by this Court in the *Chenery* cases: the prejudice determination does not give a reviewing court authority to take over the agency's responsibilities by speculating about how the agency might exercise its discretion on remand. *See SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) ("*Chenery I*"). Remand allows the agency to "deal with the problem afresh, performing the function delegated

to it by Congress. . . . Only in that way [can] the legislative policies embodied in the [relevant] Act be effectuated." *SEC v. Chenery Corp.*, 332 U.S. 194, 201 (1947) ("*Chenery II*").

A prejudice analysis, when performed properly, necessitates neither omniscience nor divination by the court. Instead, it requires a review of the *existing* administrative record and a finding of "no prejudice" only when, from the record *already made* by the agency, it is obvious that the error, if it had not occurred, would have made no difference in the agency's ultimate decision as *initially* reasoned.

The CFC and the Federal Circuit in *Oracle* deviated from a proper analysis consistent with the *Chenery* rule. The CFC did *not* base its prejudice ruling solely on the existing administrative record, and it did *not* determine that, if the error had not occurred, the *initial* award decision would, without a doubt, have been the same. It instead made "findings" that were actually hypothesizing about what the agency would likely do in a new procurement action on remand after correcting for its legal error. In so doing, it usurped the procuring agency's prerogatives and exceeded its own proper sphere.

If the Federal Circuit's decision in *Oracle* presented only an isolated aberration, it might not merit this Court's review. But it does not. It is just the latest outworking of errors regarding the harmless error standard embedded in the circuit's case law, errors that have resulted in numerous decisions in which the CFC and the Federal Circuit have improperly taken over the role of agency decision makers in the guise of making prejudice

determinations. Your *Amicus* in his publications has noted that, for over two decades, these errors have infected decisions of both the Federal Circuit and the CFC. *See* Frederick W. Claybrook, Jr., *Please Check Your Crystal Ball at the Courtroom Door—A Call for the Judiciary in Bid Protest Actions to Let Agencies Do Their Job*, 38 Pub. Cont. L.J. 375 (2009); Frederick W. Claybrook, Jr., *Standing, Prejudice, and Prejudging in Bid Protest Cases*, 32 Pub. Cont. L.J. 535, 556-64 (2003); Frederick W. Claybrook, Jr., *The Initial Experience of the CFC in Applying the APA in Bid Protest Actions—Learning Lessons All Over Again*, 29 Pub. Cont. L.J. 1, 40-42 (1999).

This burgeoning of wrongly decided cases is not surprising. It is symptomatic of a prejudice standard that focuses on the wrong thing. The prejudice analysis must examine the agency determination *already made*. But the Federal Circuit's test involves the discretionary decision *to be made* by the agency on reconsideration: whether a protestor has a "reasonable likelihood" or "substantial chance" win a recompetition. This test, by definition, violates the *Chenery* rule. And this case, involving as it does a multi-year, multi-billion-dollar procurement, presents an appropriate vehicle for this Court to make the needed course correction for the circuit.

II. The Federal Circuit Has Established a Prejudice Standard That Violates This Court's Precedent: The APA Standard Does Not Require "Substantial" Prejudice, Just Some Prejudice

The Federal Circuit has compounded the problem by upping a successful protestor's burden to prove

prejudice. It requires it to show "substantial" prejudice, as it did in *Oracle*. 975 F.3d at 1292. But Congress in the APA only recites the "rule of prejudicial error" as the standard, not the "rule of *substantial* prejudicial error." *See* 5 U.S.C. § 706. The APA rule requires that there be *no* prejudice. It does not allow the reviewing court to take matters into its own hands and deny remand for discretionary reconsideration by the agency if there is "some harm but not a lot."

The Federal Circuit freely admits that its "substantial prejudice" standard is a higher bar than "no prejudice." *See Statistica, Inc. v. Christopher*, 102 F.3d 1577, 1581 (Fed. Cir. 1996); *see also Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1563 (Fed. Cir. 1996) (holding that a protestor to establish prejudice must prove "a reasonable likelihood, not just a reasonable possibility," of winning on remand). The D.C. Circuit has also observed that "substantial" prejudice is stricter than the APA rule, "which requires only a *possibility* that the error would have resulted in *some* change . . . ." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 521 (D.C. Cir. 1983) (emphasis in original).

Aside from § 706 not specifying "substantial" prejudice and *harmless* meaning without *any* harm, this Court has repeatedly required that there be *no* prejudice to satisfy § 706's harmless error rule. In *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367 (2020), this Court applied § 706 and found that those challenging an alleged procedural irregularity did "not come close to demonstrating that they experienced *any* harm . . . ." *Id.* at 2385 (emphasis added). In *National Association of Home*

Builders, this Court found harmless error under § 706 when the alleged error "could have had *no* effect on the underlying agency action being challenged." 551 U.S. at 659 (emphasis added). And in *Shinseki v. Sanders*, 556 U.S. 396 (2009), this Court reversed the Federal Circuit because it had established an automatic assumption of prejudice for notice failures in veteran benefits cases, even though the applicable statute repeated the APA's harmless error formulation. In applying the APA standard, the Court found no prejudice in one case when there was a showing of no harm, but in a companion case remanded for reconsideration because there was the possibility of some harm due to the notice irregularity. *Id.* at 412-14; *see also Dept. of Commerce v. N.Y.*, 139 S. Ct. 2551, 2573 (2019) (finding harmless error under § 706 when the agency had "*fully* informed Congress," despite the alleged procedural error (emphasis added)).

Ironically, the Federal Circuit in *Oracle* quotes this Court's formulation in *Massachusetts Trustees of Eastern Gas & Fuel Associates v. United States*, 377 U.S. 235 (1964), that, for error to be harmless, it must "clearly [have] had *no* bearing on the procedure used or the substance of decision reached." *Id.* at 248 (emphasis added). A standard of "clearly" having "no bearing" is a far cry from casting on a protestor the burden of showing "substantial prejudice" and a "substantial likelihood" that it will prevail. Moreover, this Court in *Massachusetts Trustees* applied a backward-looking prejudice analysis, like it did in *Little Sisters*, *National Association of Home Builders*, *Sanders*, and *Department of Commerce*. It recognized that, when remand would require the agency to perform an "exercise of administrative discretion" and

apply "procedures not undertaken," prejudice is shown and remand to the agency is required to allow the agency to do the job Congress gave it. *Id.* at 247-48.

The Federal Circuit's handling of prejudice in *Oracle* is but the latest example of it improperly implementing a higher prejudice bar than that set by the APA and usurping the agency's function in the process. It is starkly inconsistent with this Court's harmless error precedent and merits review.

III. The Federal Circuit Has Established an Erroneous Appellate Review Standard That Violates This Court's Precedent: A Harmless Error Determination Based on the Administrative Record Is Not Subject to the "Clearly Erroneous" Standard, But *De Novo* Review

The Federal Circuit in *Oracle* also misstated the standard under which it should review the CFC's prejudice determination. When that determination by a trial court is based solely on the written record, as it most often will be, it is the functional equivalent of a summary judgment decision, and review on appeal should be *de novo*. *See, e.g.*, *White v. Pauly*, 137 S. Ct. 548 (2017). In none of its harmless error agency cases has this Court applied a clearly erroneous appellate review standard. *See, e.g.*, *Little Sisters of the Poor*, 140 S. Ct. at 2385 (making harmless error decision *de novo*); *Dep't of Commerce*, 139 S. Ct. at 2573 (same); *Nat'l Ass'n of Home Bldrs.*, 551 U.S. at 659 (same).

The Federal Circuit first articulated that prejudice decisions are *always* entitled to clearly erroneous

review in *Bannum, Inc. v. United States*, 404 F.3d 1346, 1354 (Fed. Cir. 2005). But clearly erroneous review is only called for if the trial court makes witness credibility determinations. Oral testimony may be provided by a protestor to demonstrate that, for example, it would have been able to have bid differently if the agency had not committed the legal error, but it will almost never be needed for agency personnel to explain even their *initial* decision. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (making limited exception to show bias or the like by decision maker). Oral testimony is *never* relevant to hypothesize what the agency might do if the matter were remanded for reconsideration after correction of its legal error. *Chenery I*, 318 U.S. at 88; *Chenery II*, 332 U.S. at 201. Testimony (or counsel representations) about how the agency could have reached its *initial* decision by another path is forbidden, *post hoc* rationalization. *See DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020); *Burlington Truck Lines v. United States,* 371 U.S. 156, 168-69 (1962). Much less was it appropriate for the CFC in *Oracle* to rely on government counsel's representations as to what the agency would likely do on remand, a legal error that the Federal Circuit improperly whitewashed with highly deferential, "clearly erroneous" appellate review. This Court should also grant the petition to correct this legal error that continues to infect the Federal Circuit's decisions.

CONCLUSION

In this case, the CFC judge made his own finding that the agency likely would not alter its requirements if the matter were remanded for reprocurement

untainted by legal error. That prognostication was, by definition, *not* a finding based on the administrative record the agency had generated to justify its *initial* procurement decision. Thus, the CFC acted in violation of the *Chenery* rule and was not entitled to any deference, much less "clearly erroneous" review.

The decision in *Oracle* is not a "one off." It is the latest in a long line of cases making these same errors of law, resulting in the Federal Circuit and the CFC repeatedly overstepping their proper authority. The petition presents an excellent opportunity for this Court to correct this overreach. It has been embedded in the Federal Circuit's case law for far too long.

This Court should grant the petition, reverse the Federal Circuit's opinion, and require remand to the agency for its reconsideration of its procurement actions in accordance with law. As this Court established in *Chenery II*, "[o]nly in that way [can] the legislative policies [established by Congress] be effectuated." 332 U.S. at 206.

Respectfully submitted,
this 22nd day of February, 2021,

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