No. 20-1057

In the Supreme Court of the United States

ORACLE AMERICA, INC.,
PETITIONER,

v.

UNITED STATES AND AMAZON WEB SERVICES, INC.

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

REPLY BRIEF FOR PETITIONER

R. REEVES ANDERSON
ARNOLD & PORTER KAYE SCHOLER LLP
1144 Fifteenth Street
Suite 3100
Denver, CO 80202
(303) 863-1000

ALLON KEDEM
Counsel of Record
CRAIG A. HOLMAN
SALLY L. PEI
SEAN A. MIRSKI
NATHANIEL E. CASTELLANO
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
allon.kedem@arnoldporter.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Regulations

Other Authorities

In the Supreme Court of the United States

ORACLE AMERICA, INC., PETITIONER,

v.

UNITED STATES AND AMAZON WEB SERVICES, INC.

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

REPLY BRIEF FOR THE PETITIONER

Unless this Court intervenes, a $10 billion government contract will proceed with an admittedly unlawful structure, secured through the criminal misconduct of agency officials. The government's defense of that result—in which the Federal Circuit misapplied two of this Court's decisions—inverts fundamental separation-of-powers principles: It urges judicial intervention where Congress mandated agency decision-making, and judicial abdication where Congress required oversight.

The government does not dispute the importance, recurrence, or timeliness of the questions presented, but instead argues the merits. Its response confirms that the legal issues are joined, ripe, and cleanly presented for review.

I. The Harmless-Error Ruling Warrants Review

Agencies are fallible. And when they err, administrative law imposes dual obligations on a reviewing court: First, "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943). Second, "due account [must] be taken of the rule of prejudicial error." 5 U.S.C. §706. The question is whether the Federal Circuit has reconciled those two principles appropriately.

As this case illustrates, it has not. The Federal Circuit has construed the harmless-error exception so broadly as to nullify *Chenery*.

A. The Rule of Prejudicial Error Does Not Trump *Chenery*

1. Courts reviewing agency errors must ask whether the agency's decision-making can nevertheless be sustained in light of "grounds … upon which the record discloses that its action was based." *Chenery*, 318 U.S. at 87. Properly understood, this inquiry fits with the prejudicial-error rule: If the agency's decision "was based" on valid reasoning, then ancillary mistakes can be disregarded as harmless; such errors "ha[ve] no bearing on the procedure used or the substance of decision reached." *Mass. Trs. of E. Gas & Fuel Assocs.* v. *United States*, 377 U.S. 235, 248 (1964). But if the agency's decision "was based" on *invalid* reasoning, then by definition the error is *not* harmless. Pet. 18-19. Even if the agency might reach the same conclusion through different reasoning, the agency—not a reviewing court—must take that step. See Henry J. Friendly, Chenery *Revisited*, 1969 Duke L.J. 199, 213 ("granted there could be little doubt what the SEC would do on remand [in *Chenery*], it was important to put the agency through the paces").

The government and the Federal Circuit conceive of the judiciary's role quite differently:

> [The] inquiry … by its nature requires asking a hypothetical question: whether the outcome would have been different had the error *not* been made.

Opp. 19. The Federal Circuit has thus transformed a record-based inquiry about what the agency *actually* said into a "hypothetical" inquiry into what the agency "would have" done "had the error not been made." Under the Federal Circuit's approach, judicial speculation is a feature, not a flaw.

Sound principles of administrative law counsel otherwise. Confining judicial review to what the agency actually said shows respect for the agency's decision-making prerogatives. The government disparages this judicial modesty (at 19) as "[r]equiring the agency to spell out in advance what it would do" absent the error. That response is telling. An agency is not *required* to do anything "in advance." If the agency opts to explain ex ante how it would decide alternative scenarios or redo a potential error, a record will exist; but if the agency demurs, a remand leaves the choice to the agency itself, where it belongs.

2. Contrary to the government's contention (at 19-20), this Court's decisions do not support the Federal Circuit's speculative approach to harmless error. The cited cases found remand unnecessary because the errors at issue were procedural foot-faults that "had no bearing" on the substance of agency decisions. *Nat'l Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 659 (2007). Indeed, these decisions show how the rule of prejudicial error is properly reconciled with *Chenery*.

In *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367, 2385 (2020), the agency failed to "publish a document entitled 'notice of proposed rulemaking,'" but instead "issued an [interim final rule] that explained its position in fulsome detail" and invited public comment. Under those circumstances, this Court concluded, "any harm from the title of the document" did not justify remand. *Ibid.* In *Department of Commerce* v. *New York*, 139 S. Ct. 2551, 2573 (2019), the Secretary failed to submit two separate reports, and instead submitted a single, consolidated report that nonetheless "fully informed Congress of, and explained, his decision." And in *Defenders of Wildlife*, the EPA memorialized its decision in a Federal Register notice, but also included an arguably

incorrect statement that was "simply not germane to the final agency … decision." 551 U.S. at 659. The Court found no need to remand because of that "stray statement, which could have had no effect on the underlying agency action being challenged." *Ibid.*

The agency error here is qualitatively different. The Department violated federal law by structuring JEDI as a "legally improper" single-source procurement. App. 16a. Unlike the de minimis procedural errors held harmless by this Court, the Department's single-source decision is a defining feature of the challenged procurement that plainly bears on "the substance of decision reached." *Mass. Trs.*, 377 U.S. at 248. The government identifies no opinion of this Court—or any other court outside the Federal Circuit—applying harmless error under comparable circumstances.

The government nevertheless insists (at 19) that *Chenery* is inapplicable because the Federal Circuit "did not 'uphold' the single-award approach," but merely left it in place. With $10 billion of taxpayer money at stake, this appeal to semantics is misguided: Absent this Court's intervention, the JEDI contract will proceed for the next decade as an illegal single-source award. The government's argument also ignores that bid protests serve an important public function, Pet. 23-24, which is why Congress authorized any "interested party" to raise "any alleged violation of statute or regulation in connection with a procurement." 28 U.S.C. § 1491(b)(1). The government does not dispute that Oracle is an "interested party," with standing and within the zone of interests.

3. The government separately defends the Federal Circuit's harmless-error ruling (at 15-16) on the ground that Oracle did not satisfy JEDI's minimum security requirements "at the time of the solicitation." This argument rests on the same conceptual mistake identified above—namely, that a

reviewing court should ask whether the outcome "would have been different" under the *hypothetical* record that "would have" existed, absent the error, at the time of the agency's original decision. Opp. 19. *Chenery* does not permit courts to usurp administrative decision-making through time travel. When error is found, the court must remand unless the agency has stated its views on the *existing* record. In any event, a remand would change the outcome here even if the Department retained the Gate 1.2 security requirements, which Oracle now satisfies.

The government's discussion of security requirements (at 15-19) illustrates the Federal Circuit's flawed approach. Using phrases like "the agency made clear" and "[a]s the agency repeatedly explained," the government insists that the Department *already* decided which security requirements would apply to a multiple-award contract. Opp. 16. One might expect citations to the administrative record to follow. Instead, the government cites statements by the Claims Court and the Federal Circuit. *Ibid.* (citing App. 3a, 22a-23a, 97a). This sleight-of-hand—substituting judicial conclusions for agency decision-making—is precisely the problem.

The government's few citations to the administrative record (C.A. App. 100,947-948, 100,955-956) say nothing about using multiple cloud providers, much less how the agency would address security in a multi-provider scenario. The many options on remand include: whether to use FedRAMP or a different protocol; whether to require certification as of contract performance or another time; and whether to apply different security requirements for multiple awards. Pet. 19-20.

Those questions were first answered not by the agency, but by counsel at oral argument. Pet. 10-11.[*] The Claims Court then turned counsel's speculation into a judicial conclusion, App. 97a, which the Federal Circuit treated as a factual finding to be upheld unless "clearly erroneous," App. 17a. Entirely missing from this discussion about how to structure a multiple-award solicitation is the one consideration *Chenery* requires: whether "the agency itself has articulated [a] position on the question." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

B. Review Is Warranted Now

1. The government does not dispute that the ruling below reflects the Federal Circuit's consistent approach to harmless error. Pet. 21-22 (discussing similar cases). This case typifies "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." Claybrook Amicus Br. 6-7.

---

[*] Selectively excerpting the transcript (at 18), the government asserts that "Rayel on the facts" concerned only "a 'surge capacity' requirement in Gate 1.1—not the data-security requirements in Gate 1.2." The immediately following colloquy shows otherwise:

> MR. RAYEL: Because, I mean, this was a single award. So the agency didn't—I'll admit it doesn't say in [the deputy director's] memorandum ["]and my decision would be the same if there were multiple awards.["]
>
> THE COURT: Right.
>
> MR. RAYEL: But that's—we can look at what the requirements are, what the justifications are and say, is this likely a change in a multiple award scenario? *And I think the answer is no for both 1.1 and 1.2, in particular*. I mean, the agency needs security whether it has one or two or three contractors.

C.A. App. 2296 (emphasis added).

The government also does not dispute that other Circuits handle harmless error differently. Pet. 18-19. Indeed, these courts resist the government's frequent attempts "to dissolve the *Chenery* doctrine in an acid of harmless error." *Spiva* v. *Astrue*, 628 F.3d 346, 353 (7th Cir. 2010). They understand that "an error cannot be dismissed as 'harmless' without taking into account the limited ability of a court to assume as a judicial function, even for the purpose of affirmance, the distinctive discretion assigned to the agency." *Braniff Airways, Inc.* v. *Civil Aeronautics Bd.*, 379 F.2d 453, 465-66 (D.C. Cir. 1967).

Finally, the government does not dispute that the issue, which goes to the heart of agency accountability, is important and recurring. Pet. 23-25; Claybrook Amicus Br. 7.

2. To discourage review, the government resuscitates a "tortured" argument, App. 95a, that the Federal Circuit found contrary to the "plain language of the statute," App. 14a. Namely, the government insists (at 23-25) that a single-source award was lawful all along. That argument is both meritless and not before the Court: The government chose not to cross-petition its loss on that issue, which falls outside the Question Presented even as the government articulates it (Opp. I). Indeed, if the mere *existence* of a meritless, judicially rejected, alternative argument outside the QP were enough to scuttle certiorari, this Court's merits docket would all but disappear.

II. The Conflict-of-Interest Ruling Warrants Review

Like the Federal Circuit, the government accepts that the JEDI procurement involved criminal conflicts of interest, implicating officials who "personally and substantially" participated despite their personal stake in its outcome. 18 U.S.C. § 208; see C.A. App. 104,860-862 (admission). Per this Court's instructions, the contract should have been set aside "to protect the public from the corrupting influences that might

[have] be[en] brought to bear." *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 563 (1961).

In response, the government argues only that Oracle—and even the Federal Circuit, to a degree—are wrong on the merits. The issue is thus squarely joined, and this Court's review is needed to clarify legal principles affecting scores of government contracts and billions of taxpayer dollars annually.

A. This Court Should Clarify the Scope and Application of *Mississippi Valley*

The government disputes (at 28) that *Mississippi Valley* announced a "per se rule" requiring non-enforcement of contracts involving criminal conflicts of interest. The government's response tees up two legal issues that are significant, outcome-determinative, and worthy of immediate review.

1. The government (at 27) reads *Mississippi Valley* as holding only that a conflicted contract is "voidable" by the government, rather than "void." Yet the Court said that when a contract "arises out of circumstances that would lead enforcement to offend the essential purpose of" the criminal conflict-of-interest statute, the "contract is not to be enforced." 364 U.S. at 563. Indeed, the "essential purpose" of Section 208 has always been "to guarantee the integrity of the federal contracting process," which is a public good. *Id.* at 565. Just as the Judiciary may not "sanction[] the type of infected bargain which the statute outlaws," *id.* at 563, neither may the Executive Branch.

But even if *Mississippi Valley* left the void-versus-voidable question open, that only further supports certiorari. The government's position conflicts with the decision below, App. 25a-26a, and a long line of Federal Circuit precedent. *E.g.*, *Long Island Sav. Bank, FSB* v. *United States*, 503 F.3d 1234,

1237 (Fed. Cir. 2007) ("[W]e hold that the contract is tainted from its inception by fraud and thus void ab initio."); accord *Quinn* v. *Gulf & W. Corp.*, 644 F.2d 89, 94 (2d Cir. 1981). The D.C. Circuit, by contrast, has accepted the government's position. *U.S. ex rel. Siewick* v. *Jamieson Sci. & Eng'g, Inc.*, 214 F.3d 1372, 1377 (D.C. Cir. 2000). Review would resolve this disagreement.

2. Next, the government endorses (at 27-28) the Federal Circuit's test, under which a contract is unenforceable only if a "causal link" can be shown between the criminal misconduct and the contract's terms. But the Court in *Mississippi Valley* asked only two questions: first, whether the conduct at issue violated Section 208's predecessor statute; and second, whether "that fact alone" rendered the contract unenforceable. 364 U.S. at 525. The Court answered yes to both questions. Pet. 26-27.

In arguing that *Mississippi Valley* requires a causal link, the government relies on language from the *first* part of the opinion, where the Court decided whether a conflict even existed. Opp. 27-28 (citing 364 U.S. at 552, 554). But in answering the second question—the contract's enforceability—the Court did not attempt to judge the practical impact of the conflict. Indeed, the Court *disclaimed* both the relevance and feasibility of such an inquiry. 364 U.S. at 565 ("It is this inherent difficulty in detecting corruption which requires that contracts made in violation of Section [208] be held unenforceable … .").

The government says (at 27-28) that *Mississippi Valley* "had no occasion" to decide whether proof of practical impact is necessary. That is incorrect. 364 U.S. at 559; see Pet. 28. But even if *Mississippi Valley* had left the question open, the Court should decide it now.

3. Finally, the government doubles down (at 26) on the rule of prejudicial error. But harmless-error reasoning is incompatible with a doctrine whose "primary purpose is to guarantee the

integrity of the federal contracting process." 364 U.S. at 565. Unsurprisingly, *no court* has accepted the government's harmless-error argument in a criminal conflict-of-interest case. Below, both courts addressed Oracle's conflict-of-interest arguments on the merits, despite finding the Department's single-award choice harmless as to Oracle. App. 27a, 107a. In any event, the government's harmless-error argument is toothless: The government admits (at 26) that at least one conflicted agency official participated in developing Gate 1.2, the very requirement under which Oracle's bid was rejected.

B. No Deference Is Due to Agencies in Policing Their Own Criminal Misconduct

Even if a materiality inquiry were appropriate (but see *Mississippi Valley*), a court must perform it. The Federal Circuit should not have allowed the conflicted agency to decide the significance of its *own* misconduct, subject only to "highly deferential" review. App. 26a.

1. The government concedes (at 30) that "no statute expressly charges administrative agencies with administering Section 208." Yet the government responds (*ibid.*) that "it does not matter whether a particular statute expressly *authorizes* agencies to assess the impact of conflicts on a procurement; it matters only if a statute *prohibits* such an assessment." That breathtaking assertion of administrative authority inverts sound principles of judicial deference: Courts defer to agencies if—and *only* if—Congress authorized them to resolve certain questions in the first instance. See *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2412 (2019). Since Congress did *not* authorize agencies to administer Section 208, "it would be contrary to the purpose of the statute for [a] Court to bestow such a power upon those whom Congress has not seen fit to so authorize." *Mississippi Valley*, 364 U.S. at 561.

The government (at 28) treats the Section 208 inquiry as if it were an APA adjudication, inviting agencies to erect "findings" and "conclusions" to shield their decision-making from judicial scrutiny. But the government cites nothing to support that analogy, and nothing does. *Mississippi Valley* emphasized the Court's need to "mak[e] an *independent determination* as to the legal conclusions and inferences which should be drawn from [the record]." 364 U.S. at 526 (emphasis added). That "independent determination" requires judicial judgment, not APA-style deference.

2. The government is also wrong (at 29) that independent judicial review would be "in tension with the Federal Acquisition Regulation." The cited FAR section *excludes* Section 208 violations from its scope. 48 C.F.R. §§ 3.104-2(b)(2), 3.104-3(c)(4). The statute that authorizes it, 41 U.S.C. § 1303(a)(1), similarly makes no mention of Section 208 or criminal law-enforcement duties. But if any "tension" did exist between Section 208 and the FAR, the statute would control.

3. The government argues (at 31) that Oracle "could not prevail even under de novo review," and provides an account of Deap Ubhi's impact on the procurement (at 31-32) so divorced from reality that correcting its many errors would easily consume the word limit. But resolution of these competing factual narratives is an issue for remand.

What matters here is that neither court below conducted an independent review. The Federal Circuit held only that "the contracting officer's investigation … was sufficient," App. 32a, while the Claims Court focused on "whether the [contracting officer's] conclusion of no impact is reasonable." App. 108a. Once this Court resolves the legal questions—who decides, and under what standard?—the lower courts can apply the appropriate standard to the record.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

R. REEVES ANDERSON
ARNOLD & PORTER
KAYE SCHOLER LLP
1144 Fifteenth Street
Suite 3100
Denver, CO 80202
(303) 863-1000

ALLON KEDEM
Counsel of Record
CRAIG A. HOLMAN
SALLY L. PEI
SEAN A. MIRSKI
NATHANIEL E. CASTELLANO
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
allon.kedem@arnoldporter.com

MAY 2021