NO. 22-_____

In the Supreme Court of the United States

FRANK CALAPRISTI, AND
OTHER SIMILARLY SITUATED PERSONS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Lynch v. United States*, 292 U.S. 571, 579 (1934) the Court held that when the United States enters into contractual relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.

In *Baltimore & Ohio R.R. Co. v. United States*, 261 U.S. 592, 597 (1923) the Court held that an implied-in-fact contract is one "founded upon a meeting of the minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding."

In *Cienega Gardens v. United States*, 194 F.3d 1231 (Fed. Cir. 1998), *Turping et al. v. United States*, 913 F.3d 1060 (Fed. Cir. 2019), and its ruling below, the Federal Circuit has created a contrary rule that holds that no degree of government involvement or control over a contract between a government contractor and a third party can create an implied contract between the government and that third party under the Tucker Act. 28 U.S.C. § 1491(1).

The Question Presented Is:

Whether the Federal Circuit's rule — that no degree of government involvement or control over a contract between a government contractor and a third party — can create an implied contract binding the government, should be overruled.

PARTIES TO THE PROCEEDINGS

Petitioner and Petitioner-Appellant Below

- Frank Calapristi, and Other Similarly Situated Persons

Respondent and Respondent-Appellee below

- United States of America

LIST OF PROCEEDINGS

United States Court of Appeals for the Federal Circuit

No. 2022-1080

Frank Calapristi, and Other Similarly Situated Persons, *Plaintiff-Appellant*, v. United States, *Defendant-Appellee*.

Date of Final Judgment: November 3, 2022

United States Court of Federal Claims

No. 18-612 C

Frank Calapristi v. United States

Date of Final Judgment: September 28, 2021

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Frank Calapristi requests that this Court issue a writ of certiorari to reverse and remand the decisions below. Mr. Calapristi petitions the Court reverse the United States Court of Claims for the Federal Circuit's dismissal of Mr. Calapristi's complaint under RCFC 12(b)(6) and overrule the Federal Circuit's rule that no degree of government "involvement or control" over a contract between a government contractor and a third party can create an implied contract between the government and the third party.

OPINIONS BELOW

The Federal Circuit's Judgment upholding the Court of Federal Claims Order and Opinion was entered November 3, 2022 (App.1a). The Court of Federal Claims Order and Opinion dismissing Mr. Calapristi's complaint under RCFC 12(b)(6) was entered September 28, 2021 (App.5a). These opinions were not designated for publication.

JURISDICTION

The Court of Appeals for the Federal Circuit entered judgment on November 3, 2022 (App.1a-2a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1491(1)

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

STATEMENT OF THE CASE

1. Proceedings below.

On July 25, 2016, Peter Turping, a recently retired employee of a government contractor on the Department of Energy's Hanford Nuclear reservation, filed a class action lawsuit in the United States Court of Federal Claims alleging that the United States government created an implied contract with Turping. On September 22, 2017 the trial court granted the government's motion to dismiss under RCFC 12(b)(6). Turping appealed. While Turping's appeal was pending, Frank Calapristi, the petitioner in this matter, filed another class action suit also alleging the government had formed an implied contract with Calapristi and other similarly situated individuals. On January 9, 2019, the Federal Circuit ruled against Turping in a precedential opinion (App.108a). Turping sought an en

banc hearing, but was denied. Subsequent to, and in light of, the Federal Circuit's opinion in *Turping*, Calapristi then amended his complaint (hereafter "Complaint" or "Calapristi's Complaint") (App.21a-107a) to better address the Federal Circuit's opinion in *Turping*, and to better position the Complaint for argument to the Federal Circuit and then to this Court that *Turping* should be overruled.

On September 28, 2021 the Court of Federal Claims granted the government's motion to dismiss under RCFC 12(b)(6) (App.5a). Calapristi appealed and asked the Federal Circuit to overturn *Turping*. On November 3, 2022 the Federal Circuit declined Calapristi's invitation, and instead entered Judgement denying Calapristi's appeal without opinion (App.1a). Calapristi now seeks a writ of certiorari.

2. The Federal Circuit's Rule.

The Court of Federal Claims' ruling cited the Federal Circuit's opinion in *Turping* as its basis for dismissing Calapristi's Complaint (App.18a). The trial court recited:

> [a]s the Federal Circuit made clear in *Turping*, the degree of government involvement or control over a government project does not indicate an implied-in-fact contract enforceable against the government. 913 F.2d at 1066-67.

(App.18a)

In *Turping*, the Federal Circuit also recited the same rule for dismissing Turping's complaint (App.117a). The Federal Circuit recited:

> Our case law has made clear that the "degree of [government] involvement with a project

> does not create privity [between the government and a subcontractor] so as to allow suit against the government." *Cienega Gardens*, 194 F.3d at 1245; *see also id.* at 1244-45 ("That the Federal Government has intimate control over a project, including prior approval of plans and costs, does not establish liability here for claims by a contractor [whose contract is only with a third party].") (quoting *Marshall N. Dana Const., Inc. v. United States*, 229 Ct. Cl. 862, 863 (1982)). "Nor does this degree of involvement indicate an implied-in-fact contract enforceable against the United States." *Dana Const.*, 229 Ct. Cl. at 863

(App.117a).

Calapristi contends that the Federal Circuit's ruling (hereafter "the Federal Circuit's Rule") is factually, logically, and legally flawed and should be overruled by the Court, particularly in light of the precedents of the Court as they apply to the facts set forth in Calapristi's Complaint.

3. Factual Background.

Calapristi's Complaint alleges that the Department of Energy (DOE) put in place a pension plan titled the "Hanford Multi-Employer Pension Plan" ("MEPP") governing multiple contractors at the Hanford site in 1987 (App.32a). All members of the Class were participants in the MEPP (App.22a). The MEPP contains a clause (Article 29) specifically promising the Class that when the DOE changed contractors at the Hanford site in a "Termination for Transfer," their retirement benefits at their normal retirement date would include

credit for all of the years they worked at the Hanford Reservation (App.34a). The Complaint alleges that when the government effected a "Termination for Transfer" in 1996, the government repudiated that obligation (App.41a), and when the Class members began retiring in 2014, the government then breached that obligation (App.49a).

The Complaint contends that the government is bound by Article 29 because even though the government was not formally a party to the MEPP, the government effectively, deliberately, and openly controlled all aspects of Article 29, including its creation, enforcement, repudiation, and termination (App.31a). The remainder of this section simply recounts the facts demonstrating that control as they are set forth in the Complaint.

The Complaint begins by showing that at the time the government put the MEPP in place, the government had an official policy requiring that the government exercise complete control over Article 29 (App.59a). The policy recites that "The objective is to assure that employee continuity in pension programs funded by DOE contributions is protected in replacement contractor situations . . . " (App.59a). Under the section titled "Responsibilities and Authorities," the policy provides that the government's "Director of Industrial Relations shall" "Approve for contracting officer execution" [of] "pension arrangements at inception and at Contractor replacement" and "changes in plan provisions." (App. 59a). As such, the government explicitly assigned itself the sole authority to create, enforce, repudiate, and terminate contract provisions such as Article 29 (App.59a).

Consistent with this policy and the government's exclusive authority, in anticipation of the contract

changeover in 1987, the government directed Ernest Vodney (and others) to draft the MEPP (App.56a). Through this process, the government controlled the specific language set forth in the MEPP, including Article 29 (App.56a).

In the contractor changeover in 1987, the Department of Energy (DOE) then implemented the MEPP (App.57a). The government required that the incoming contractors and their employees (including Mr. Calapristi and the Class) transfer their pensions from their prior company's pension plans into the MEPP. (App. 32a). Beginning in 1987, participation in the MEPP was thereby required by the government for all of the contractors, and for all of their employees, including Mr. Calapristi and the Class, on the Hanford site (App.32a).

Article 29 of the MEPP promises the workers that when they retire from the Hanford site, they will receive credit for all their years working at the Hanford site in the calculation of their pensions, even if the government replaced his current employer with another contractor (App.34a). Article 29 reads as follows:

> In the case of a Termination for Transfer, an Employee who becomes a Participant hereunder shall be entitled to credit for eligibility under Article 2, Benefit Service under Article 3 and Vesting Service under Article 6 to such a degree as shall be determined by the Plan Administrator in order to assure that the Participant receives a benefit at Normal Retirement Date which is reflective of his Years of Service on the Hanford Reservation. The Plan Administrator's decision shall be adopted by a rule pursuant to Article 11. A termination for transfer means a ter-

> mination from one contractor on the Hanford reservation to another contractor which is determined to be in the best interests of the Government (App.34a).

On the face of it, Article 29 requires the "Plan Administrator" to assure that "the Participant receives a benefit at Normal Retirement Date which is reflective of his Years of Service on the Hanford Reservation." However, consistent with the government's written policy, the government has always exercised actual control over that provision (App.35a). In part, this control is a function of the fact that the government has a non-delegable duty to exercise actual and total control over the terms and conditions of all contracts and subcontracts for all entities and individuals working on the Hanford site (App.35a). The DOE's contracting officers have therefore always maintained the sole and exclusive power and authority to determine which contractors, therefore and which Hanford site employees, will participate in the MEPP, and under what terms, when new contracts are put in place at the Hanford site in a Termination for Transfer (App.35a).

The Complaint contends that the government intentionally and completely usurped the authority from the Plan Administrator set forth in Article 29, because at all times the government (and everyone else) knew that it in the event of a Termination for Transfer the government would have complete and exclusive control over the negotiation and terms of all new prime and subcontracts with new government contractors at the Hanford Reservation, and the terms of those new contracts would determine, entirely, whether Article 29 was honored, repudiated or breached (App.34a-35a).

In 1996, DOE sought bids on a new prime contract for management of the Hanford reservation, called the Project Hanford Management Contract (PHMC), with a transition date of October 1, 1996 (App.37a). Consistent with the promise of Article 29, the government's solicitation for the PHMC contract contained a requirement that the new prime contractor and its subcontractors "shall . . . continue the defined benefit pension plans . . . of the incumbent contractor and integrated subcontractors" (App.38a). This language in DOE's solicitation demonstrated that at the time the government put the PHMC out for bid, the government intended to enforce the requirements of Article 29 of the MEPP (App.38a).

Fluor Daniel Hanford, Inc. (FDH), the eventual prime contractor awardee under the PHMC, submitted a bid to DOE that enticed the government to repudiate those obligations to Mr. Calapristi and the other Hanford site employees who are the Class (App.39a). As set forth in FDH's bid, the majority of the Hanford workforce would continue to participate in the MEPP, but some portion of the workforce would work for new entities, which FDH called "Enterprise Companies," that would be sub-contractors to FDH (App.39a). The new Enterprise Companies (one of which would ultimately employ Mr. Calapristi) would not participate in the MEPP – *i.e.*, the Enterprise Companies would not be "sponsoring employers" as that term is defined in the MEPP (hereafter "Employers") (App.39a).

The government did not have to accept the terms of FDH's bid (App.40a). However, on August 6, 1996, the government announced that the prime contract for the management of the Hanford site was to be terminated and transferred by the United States

Department of Energy from the incumbent contractors Westinghouse Hanford Company (WHC) and its subcontractors to the successor contractor Fluor Daniel Hanford, Inc. (FDH) and its team of integrated subcontractors with a transition date of October 1, 1996 (hereafter the "1996 changeover") (App.40a). Under the terms of the government's new contracts, for the vast majority of the Hanford workforce affected by the 1996 changeover, the government would honor Article 29 of the MEPP (App.40a). However, for the employees of "Enterprise Companies," under the terms of the new contracts the government would repudiate the government's obligations under Article 29 of the MEPP (App.40a).

As part of the transition, on September 30, 1996, the government entered into a "Transfer Agreement" with the out-going contractor, WHC, and the incoming contractor, FDH, which transferred the responsibility for administering the MEPP to FDH (App.78a). The Transfer Agreement specified which of the subcontractors would be "Employers" under the MEPP (App. 81a). The Enterprise Companies were not included as "Employers" in the Transfer Agreement (App.81a). Importantly, the Plan Administrator, who was purportedly responsible for securing the benefits under Article 29 promised to Mr. Calapristi and the Class, was not a party to the Transfer Agreement (App.41a, 86a-87a). By failing to designate the Enterprise Companies as "Employers" in the MEPP in the Transfer Agreement, and usurping and repudiating the Plan Administrator's obligation to continue the accrual of years of service in the pension calculation, the government repudiated the government's obligation to the employees of the

Enterprise Companies set forth in Article 29 of the MEPP (App.41a).

In the days immediately following the 1996 changeover, when it became apparent that their Enterprise Company employers were not named as "Employers" in the MEPP, certain Enterprise Company employees then sought to begin withdrawing their pension benefits from the MEPP, as was their right under the terms of the MEPP and under ERISA 29 U.S.C. § 1001 et seq. (App.41a). The government then refused to allow these employees to begin drawing their pensions because the MEPP had insufficient resources to pay these pension benefits and the MEPP would not remain adequately funded under ERISA if these employees were permitted to withdraw their pensions, which would result in the government being forced to make additional contributions to the MEPP (App.41a).

On October 10, 1996, ten days after the 1996 changeover, the government, realizing that it could not afford to have the Enterprise Company employees withdraw their pension benefits from the MEPP and keep the MEPP adequately funded under the requirements of ERISA, announced that the Enterprise Company employees who continued to work at the Hanford site would be forced to remain in the MEPP (App.42a). On October 11, 1996 the Department of Energy issued a press release describing how the government (and not the Plan Administrator) would amend the MEPP and the terms under which the Enterprise Employees would remain in the MEPP (App.42a, 89a). In this press release, the government explicitly repudiated the promises set forth at Article 29 of the MEPP to the employees of the Enterprise Companies (App.42a).

On January 15, 1997, the government then amended the MEPP in the manner set forth in the October 11, 1996 press release (hereafter the "January 15, 1997 Amendment") (App.42a). The January 15, 1997 Amendment recited that the Enterprise Company employees would remain Participants in the MEPP (App.42a). Upon retirement the MEPP would calculate Enterprise Company employees pension benefits using the highest five year salary during their employment at the Hanford site (hereafter the "high five benefit"), but that calculation would not include the number of years they worked for Enterprise Company (App.42a). By its own terms, the January 15, 1997 Amendment was made retroactive to September 30, 1996 (App.42a).

When the government put in place the January 15, 1997 Amendment, it created a new financial obligation owed by the government directly to the Plaintiffs, the high five benefit (App.43a). The high five benefit required ongoing contributions to the MEPP to account for the fact that the Plaintiffs were continuing to work and get raises at the Hanford site, thereby increasing the amount the MEPP would ultimately be required to pay them at retirement (App.43a). Since the government dictated that the Enterprise Companies were never "Employers" in the MEPP in the Transfer Agreement, the Enterprise Companies had no ability or obligation to fund the Plaintiffs' high five benefit (App.43a). Beginning in 1997 and continuing to this day, the government has made payments into the MEPP to account for the ongoing increases in the Plaintiffs' high five benefit (App.43a).

By making payments into the MEPP on the Plaintiffs' behalf to account for the Plaintiffs' high five benefit, the government has demonstrated that the

government assented to having obligations directly to Mr. Calapristi and the Class by virtue of the MEPP (App.43a). Mr. Calapristi is still a Participant in the MEPP (App.43a) and Article 29 is still a term of the MEPP (App.43a).

At various times during the life of the MEPP, when the Plan Administrator has acted to alter the provisions of the MEPP in a way that would also alter the pension benefits, the government stepped in and unilaterally overruled the Plan Administrator's actions (App.42a-43a, 46a-47a). In a similar manner, when the government wants changes to the MEPP, the government has unilaterally stepped in and has made the required changes (App.42a-43a, 46a-47a).

Naturally, the government's ill-treatment of the Enterprise Employees generated considerable apprehension among the other employees at the Hanford site who were still promised the benefits under Article 29. To assuage those fears, at subsequent contract changeovers, the government issued press releases assuring anxious workers at the Hanford site that, unlike the employees of the Enterprise Companies in the 1996 changeover, they would not lose their pension rights under Article 29 (App.99a, 102a, 105a). Those press releases are attached to Mr. Calapristi's Complaint (App.99a, 102a, 105a).

At various times while Mr. Calapristi was working on the Hanford site with an Enterprise Company, similarly situated individuals also employed by Enterprise Companies, sought to challenge the changes in the MEPP instituted by the government in the 1996 changeover (App.43a-44a). The government would then inform those individuals that they could not challenge the changes until they retired (App.43a-44a).

Beginning on or about October, 2014, various Enterprise Company employees began retiring and notified the Plan Administrator that they wished to begin drawing retirement benefits under the MEPP (App.48a). Those employees claimed that their benefits should include all of their years of service at the Hanford site, as promised in Article 29 (App.48a). The government, acting through the MEPP and the Plan Administrator, responded by paying those Enterprise Company employees retirement pension benefits that did not include their entire term of service at the Hanford Site as required under Article 29 of the MEPP (App.48a). The employees appealed (App.48a). The government, acting through the MEPP and the Plan Administrator, then declined those appeals and ruled that these employees benefits did not include the entire term of their service at the Hanford Site, as required by Article 29 of the MEPP, thereby breaching the agreement (App.48a-49a).

In short, beginning in 1987, the government had a policy that required that the government control each and every meaningful aspect of the MEPP, and in particular Article 29. The government followed that policy and controlled, completely, the creation, enforcement, repudiation, and breach of Article 29. Petitioners contend that based on the forgoing facts, the government should be held liable under the Tucker Act for forming an implied in fact contract and then breaching that contract.

SUMMARY OF ARGUMENT

Calapristi' argument is simple. The Federal Circuit's Rule, that no degree of government "involvement or control" over a contract between a government contractor and a third party can create an implied contract between the government and the third party, is contrary to this Court's controlling authority, the Congressional intent set forth in the Tucker Act, and the widely shared published views of academics and practitioners. It should be overruled. This case presents an excellent set of facts to overrule the Federal Circuit's Rule, because this case shows how the government controlled, completely, the creation, implementation, administration, repudiation, and ultimately the breach, of a contract provision; Article 29 of the MEPP. The present case thus presents the Court with a bare application of the Federal Circuit's Rule, with no ancillary issues that would complicate the Court's analysis.

REASONS FOR GRANTING THE PETITION

I. THIS ISSUE IS OF GREAT LEGAL AND NATIONAL SIGNIFICANCE.

The Federal Circuit's Rule uproots one of the most fundamental principles of the law of contracts, and the cornerstone "rule of law" upon which America's capitalist society is built. When a first party makes a promise, supported by consideration, and a second party relies on that promise to their detriment, the second party is entitled to compensation if the promise is later breached by the conduct of the first party. The Federal Circuit's Rule violates that simple rule because it provides a glaring loophole through which the government can create a promise, interfere with that promise, and instigate a breach, all without consequence.

According to the General Accountability Office, (GAO), the United States government procures about $650 billion dollars in goods and services on an annual basis.[1] The vast majority of that money is ultimately paid to the employees and subcontractors of government contractors. Under the Tucker Act, 28 U.S.C. § 1491(1), the Federal Circuit and the Court of Claims hold exclusive jurisdiction over all disputes related to those contracts.

All of that economic activity is thereby subject to the Federal Circuit's Rule. The government is thereby

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[1] U.S. Government Accountability Office, *Government Wide Contracting FY 2021*, https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2021-interactive-dashboardAccessed January 25, 2023

free to interfere with, repudiate, abrogate, and breach provisions within any and all of the agreements between the government's contractors and their employees and subcontractors in any manner the government chooses, without any possibility that the government will ever be accountable for its interference. Unless and until this Court intervenes and reverses the Federal Circuit's Rule, the government will remain immune from any consequences for such interference. That is the status quo.

The sheer magnitude of the government's contracting activity, and the shadow of the Federal Circuit's Rule cast over all of that activity, ensures that this case is worthy of the Court's attention. There is simply too much of the taxpayer's money at stake for the Court to allow the status quo to continue.

The Petitioner also cannot help but note the irony of the Federal Circuit's Rule, which is ultimately an interpretation of the Tucker Act. The Congress explicitly waived sovereign immunity for the government to be subject to implied contracts. The Federal Circuit's Rule accomplishes the exact opposite; creating unlimited immunity for the government's interference in the subcontracts and employment contracts of its contractors.

II. EXCEPT FOR THIS COURT, THE FEDERAL CIRCUIT HAS NO BRAKES.

By vesting exclusive jurisdiction over the Tucker Act to the Court of Claims and the Federal Circuit, Congress insured that no other court will ever hear a case asserting claims against the government under the Tucker Act. As such, there is no possibility that any Federal Circuit Courts or State Supreme Courts will

have the opportunity to render an opinion interpreting the Tucker Act conflicting with the Federal Circuit's Rule. As a result of the Federal Circuit's exclusive jurisdiction over Tucker Act claims, if the Federal Circuit has "made a mistake," review and reversal by this Court is the only possible corrective action.

III. THE LOWER COURTS HAVE ERRED IN THE OPINIONS BELOW.

It is also plain that the Federal Circuit has "made a mistake." At a minimum, the Federal Circuit's Rule is counter to this Court's holdings in *Baltimore & Ohio R.R. Co. v. United States*, 261 U.S. 592 (1923), *Lynch v. United States*, 292 U.S. 571 (1934), and *United States v. Winstar Corp.*, 518 U.S. 838 (1996). The Federal Circuit's Rule also finds no supporting analogous authority in any other jurisdiction. The Federal Circuit's Rule also plainly provides the government unique treatment in its contracting activities, a practice which has been roundly criticized both by this Court and a host of legal scholars and commentators.

A. The Federal Circuit's Rule Contradicts Binding Precedent.

In *Baltimore & Ohio R.R. Co.*, this Court held that an implied-in-fact contract is one "founded upon a meeting of the minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." The government put in place a written pension plan that specifically promised that Mr. Calapristi and the Class that a Termination for Transfer would not end the benefit of their years of service at the Hanford site when they retired. While the government did not

sign the pension plan containing that promise, the government did both create and mandate the use of the agreement that contained the promise. The government also knew that the government, and the government alone, would ultimately decide if that promise were kept. As such, the only rational alternative to the existence of a tacit understanding that the government would be bound by that promise is that the government believed it was not bound, and was thus free to defraud Mr. Calapristi and the Class. That is the logical result of the Federal Circuit's ruling in this matter. The Federal Circuit's Rule is a license for the government to make and break contracts similar to the MEPP, and to thereby defraud the employees and subcontractors who do work for the government in the same manner that that Mr. Calapristi and the Class were denied their benefits.

B. The Federal Circuit's Rule Has No Support in Any Other Jurisdiction.

In *Lynch* this Court held that when the United States enters into contractual relations its rights and duties therein are governed generally by the law applicable to contracts between private individuals. The Federal Circuit's Rule finds no counter-part in the law applicable to contracts between private individuals. It is a rule entirely made up by the Federal Circuit for the sole and exclusive benefit of the federal government. The Federal Circuit's Rule thus provides the exact outcome prohibited by *Lynch*.

While no other court has jurisdiction over claims under the Tucker Act, other courts do have jurisdiction over analogous claims. The Federal Circuit has never cited another court to support the Federal Circuit's

Rule, because the Federal Circuit's Rule is counter to all of those decisions. Examples of such contrary rulings include in *Paschall's, Inc. v. Dozier*, 219 Tenn. 45, 57, 407 S.W.2d 150, 155 (1966) where the Supreme Court of Tennessee held that where a materialman or subcontractor furnishes labor or materials which benefit the property of a person with whom there is no privity of contract, an action on quantum meruit may lie against the landowner to recover the reasonable value of the labor and materials so furnished. Rulings from the federal courts are similar. For example, in an unpublished opinion, *Martin Energy Services, LLC v. M/V Bravante IX*, No. 17-10899 (11th Cir. May 10, 2018) the 11th Circuit held that under Florida law, a subcontractor can recover in quantum meruit from the owner, even though the subcontractor had a contract with the general contractor, if the owner had received a benefit from the subcontractor's work and the owner had not paid for that work under the owner's own contract with the general.

C. As Recognized by This Court and Numerous Legal Scholars, the Federal Circuit's Rule Imposes Substantial Costs on the Federal Government.

Employees and subcontractors who work for government prime contractors are rational actors. They recognize that regardless of what their agreements may say, because of the Federal Circuit's Rule, the government is free to change the terms of those agreements at any time. This Court has previously recognized the consequences of allowing the government immunity for violating normal contracting rules. Rational actors charge more, or decline to do work altogether, in the face of that uncertainty.

In *Winstar*, this Court recognized that there are real costs imposed on the government when the government is not held to the same standards as normal commercial entities in contracting. This Court held that a lower court seeking to protect the government from its own actions "undermin[ed] the Government's credibility at the bargaining table and increas[ed] the cost of its engagements." This Court then quoted Judge Brandies, stating "[p]unctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors." *Lynch v. United States*, 292 U. S., at 580.

There is a well established body of academic literature making the same point. For example, in "Let the Government Contract: The Sovereign has the Right, and Good Reason, to Shed its Sovereignty when it Contracts" Stuart Nibley, Jade Tolman, AMERICAN BAR ASSOCIATION'S PUBLIC LAW JOURNAL, Vol. 42, No. 1, Fall 2012, the authors argue persuasively that there is a "Core Tenant" that this Court's jurisprudence requires the government to be held to its contractual obligations as any other commercial entity even when acting in its sovereign capacity, and Federal Circuit decisions rely "exclusively and erroneously on an analysis of subjective bad faith and animus on the part of government employees, even when the government acts under consideration are taken solely in the contractual arena." The cost to the government for its failure to maintain normal contracting expectations is not merely hypothetical. Indeed, it is demonstrated by the facts in this case.

After the government had repudiated its pension obligations to the Appellants in 1996, there were about 8,000 Hanford employees who were still accruing years

of service in the MEPP. Those workers took note of the government's actions in the 1996 Termination for Transfer. Understandably, the next time that the government would change prime contractors at the Hanford site, there was considerable apprehension among these workers. Having witnessed first-hand the government's callous treatment of the Appellants in the 1996 Termination for Transfer, the remaining Hanford workers made rational decisions anticipating the possibility of receiving similar treatment during subsequent Terminations for Transfer.

To address those obviously valid concerns, the government provided public assurances that the government would not repeat the government's 1996 repudiation. The government did so in the press releases (App. 99a-105a), where the government promised Hanford workers currently accruing years of service in the MEPP that they would continue to accrue years of service in the MEPP with their new employer. The irony, of course, was that these promises by the government were not enforceable because of the Federal Circuit's Rule. Indeed, in both the Federal Circuit and the Court of Federal Claims, the government successfully argued that these exact promises were not enforceable, and the trial court then ruled that these promises were not enforceable. By allowing the government to repudiate and then breach the MEPP's promise to the Appellants, the Federal Circuit didn't merely deny the Appellants' relief. The Federal Circuit's Rule also destroyed the government's credibility in all similar contracting situations going forward, with all of the negative consequences that entails.

IV. THE FEDERAL CIRCUIT'S RULE SETS FORTH A FACTUAL ASSERTION THAT IS FALSE AND A LEGAL CONCLUSION THAT IS FLAWED.

The Federal Circuit's Rule axiomatically asserts that "Our case law has made clear that the "degree of [government] involvement with a project does not create privity [between the government and a subcontractor] so as to allow suit against the government." This begs the question, why not? It is clearly possible for the government to create privity as a factual matter. All the government need do is act in a direct relationship with the affected subcontractor (or employee) outside of the relationship between the government and the contractor. That is exactly what happened in this case.

When the government implemented the "high five" benefit, the government demonstrated that the government knew there was a direct obligation that the government owed to Mr. Calapristi and the Class. Beginning with the 1996 changeover, the government has paid millions of dollars into the MEPP on behalf of Mr. Calapristi and other similarly situated persons to fund their "high five" benefit. The only document obligating the government to pay that money into the MEPP is the MEPP itself.

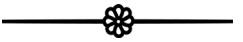
Subsequent to 1996, Mr. Calapristi's Enterprise Company employers were not participants in the MEPP. As set forth in the Transfer Agreement, it was intended by the government that those Enterprise Company employers would have nothing whatsoever to do with the MEPP. Yet the government pays money into the MEPP on Mr. Calapristi's behalf. Why then, does the Federal Circuit insist that the government cannot, as a matter of law, create legal privity with

Mr. Calapristi? The Federal Circuit's Rule ignores, entirely, the fact of this ongoing privity between Mr. Calapristi and the federal government demonstrated by the fact that the federal government continues, to this very day, to fund Mr. Calapristi's benefits under the MEPP. The only support the Federal Circuit offers for the factual and legal conclusions inherent in the Federal Circuit's Rule is circular; because the Federal Circuit says so.

Contrary to the Federal Circuit's Rule, it is also clear that the privity between the government and Mr. Calapristi began with the implementation of the MEPP in 1987. Absent a pre-existing obligation owed by the government to Mr. Calapristi, funding the high five benefit would be an illegal gift of taxpayer money. Executive agencies like the DOE are not free to simply fund the pensions of parties with whom the government has no privity, relationship, or other contractual obligation. The fact that the government put in place and then funded the "high five" benefit in 1996 demonstrates conclusively that the government knew it held a pre-existing obligation to Mr. Calapristi. Contrary to the Federal Circuit's Rule, Article 29 was the only possible basis for that obligation.

Applying this Court's ruling in *Baltimore & Ohio R.R. Co.*, it is clear from the "conduct of the parties" "in the light of the surrounding circumstances" that "although not embodied in an express contract" there existed a "tacit understanding" that the government had a direct obligation to Mr. Calapristi, and that obligation flowed through the MEPP. The Federal Circuit's Rule preempts that analysis. The government simply chose to repudiate the obligation under Article 29 and replace it with the "high five" benefit in 1996.

The Federal Circuit then applied its bogus "rule" that relies on a legal fiction and ignores the facts to excuse the government's conduct after the fact.



CONCLUSION

For the foregoing reasons, this Court should grant this Petition for Writ of Certiorari.

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