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

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REPLY BRIEF FOR THE PETITIONER

Amazon Web Services, Inc.'s brief in opposition underscores the need for this Court to grant certiorari to protect fundamental separation-of-powers principles. Amazon does not dispute that this Court should review the first question presented; nor does it deny that the second question presented is timely, important, and recurring. Instead, Amazon argues (at 1) that this case is a poor vehicle because the conflicts of interest at issue in the second QP are "highly fact-bound" and "not outcome-determinative." Three points are worth emphasizing in response.

1. Oracle's petition does not ask this Court to decide any fact-bound issue. Rather, in evaluating Oracle's conflict-of-interest challenge, the Federal Circuit made two serious *legal* errors.

First, rather than follow this Court's holding in *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), that a criminal conflict of interest "alone" renders a government contract unenforceable, *id.* at 525, the Federal Circuit instead imposed an additional materiality test. See Pet. 27-28. Second, the Federal Circuit compounded the error by deferring to *the agency's own* materiality determination, rather than deciding the issue itself. See Pet. 29-31. Both of those

errors are mistakes of law, not fact. Correcting them would thus provide great "value in other cases," AWS Opp. 7, especially because these errors are central to the Federal Circuit's approach in *every* procurement case involving a conflict of interest. See, *e.g.*, *Long Island Sav. Bank, FSB* v. *United States*, 503 F.3d 1234, 1250 (Fed. Cir. 2007); *Godley* v. *United States*, 5 F.3d 1473, 1476 (Fed. Cir. 1993). Notably, Amazon does not defend either aspect of the Federal Circuit's approach.

Indeed, the supposed "intensely fact-bound" nature of the Federal Circuit's materiality inquiry, AWS Opp. 7, is a reason to grant review, not deny it. Oracle's point is that such an inquiry is entirely unnecessary—and inappropriate—under *Mississippi Valley*. And even if this Court were to hold (per Oracle's alternative argument) that the lower courts should have conducted a materiality inquiry themselves, rather than deferring to a conflicted agency, articulating that governing legal principle would complete this Court's role: The Court would presumably remand the case rather than conduct the inquiry in the first instance. See *Brownback* v. *King*, 141 S. Ct. 740, 747 n.4 (2021) ("[W]e are a court of review, not of first view.") (citation omitted).

If anything, this case is remarkable in how cleanly it presents the relevant legal questions. Conflict-of-interest cases will generally be thorny vehicles because they involve fights over the threshold issue of *whether* the conflict-of-interest statute was violated at all. But here, no one disputes that at least one Department of Defense employee, Deap Ubhi, violated 18 U.S.C. § 208. (It would be hard to argue otherwise, given that the Department itself listed Ubhi as having been "personally and substantially involved" in the procurement, C.A. App. 104,862, which is the test for a Section 208 violation.) And, unlike many other government contracting cases, the

contract at issue here is not at risk of being fully performed before this Court weighs in, see AWS Opp. 2 n.* (noting Amazon's own active bid protest), and neither the government nor Amazon has suggested that their ongoing (but unrelated) litigation over the JEDI Cloud contract presents any obstacle to this Court's review.

2. The question presented is also outcome-determinative. Amazon does not dispute that if *Mississippi Valley* prohibits enforcement of a conflicted contract, the disposition of this case would change—indeed, such a holding would require reversal of the judgment below. Instead, Amazon merely argues that if this Court *rejects* Oracle's argument under *Mississippi Valley*, then it would not matter whether primary responsibility for conducting the materiality inquiry rested with the lower courts or with the conflicted agency. But that is plainly wrong as well. See Pet. 31-33.

As Oracle explained in its reply to the government (at 11), both courts below applied a deferential standard in evaluating the agency's determination that its own conflict had not tainted the procurement. The Court of Federal Claims agreed that the facts were "certainly sufficient to raise eyebrows," App. 107a, and it found some of the contracting officer's "characterizations" of those facts to be "a bit generous," *id.* at 110a. It nonetheless explained that "the limited question" was "whether any of the actions called out ma[d]e a difference to the outcome," and "in particular, *the even narrower question before the court is whether the* [*contracting officer*]*'s conclusion of no impact is reasonable*," *id.* at 108a (emphasis added). Accord *ibid.* ("We review the [contracting officer]'s determinations for a rational basis"). The court then applied that deferential standard, holding that the contracting officer's

conclusions were not "irrational," *id.* at 112a, "unsatisfactory," *id.* at 113a, or "objectionable," *id.* at 114a.[*]

The Federal Circuit's judgment similarly rested on deference. It explained that "[t]he standard for Claims Court review of a contracting officer's decision with regard to a conflict of interest is highly deferential," *id.* at 26a, and that "[a]s the Claims Court explained," the question was only "whether the contracting officer's conclusion of no impact was reasonable," *id.* at 27a. "In light of the deferential standard of review for contracting officers' findings regarding conflicts of interest," *id.* at 35a, the Federal Circuit found "no reversible error in the Claims Court's decision," *id.* at 39a. For both courts, the deferential standard of review was central to the analysis.

In arguing that the standard of review did not matter, Amazon gestures (at 9) at the government's misguided argument that none of the conflicted employees helped develop the minimum security requirements in Gate 1.2. But *no court* has accepted that prejudice argument, see Reply 9-10; and

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[*] Amazon suggests (at 9) that the Government Accountability Office independently "concluded that Mr. Ubhi's involvement was … immaterial." But at the time of the GAO's review, the extent of Ubhi's misconduct was unknown; the GAO evaluated his involvement under the misimpression that Ubhi had stopped working on the JEDI project when Amazon contacted him about purchasing a company he previously had started, rather than long after his employment negotiations had begun. See App. 68a-70a. Following the GAO's determination, the agency received an "unsolicited letter from AWS pointing out that some of the information provided by Mr. Ubhi to the agency was false." *Id.* at 70a. Upon discovering Ubhi's deceptions, the government then asked the Court of Federal Claims for a remand to correct the numerous falsities in the record, and the ensuing investigation revealed substantial evidence of misconduct that the GAO did not have before it. *Id.* at 71a-73a. If anything, the flawed GAO decision shows why agencies should not be afforded deference to police the criminal misconduct of their own members.

indeed, even the government now concedes (at 26) that at least one conflicted employee, Ubhi, *did* have an "impact on the development of those requirements." Amazon attempts to minimize the size of that "impact," but its explanation is unpersuasive: Even though final decisions on the gate requirements were made after "Ubhi had left DoD," AWS Opp. 9, the evidence shows that he influenced early discussions in ways that materially impacted those later decisions. See Pet. 32-33. Amazon seems to think that every agency meeting begins with a clean slate, when in reality momentum, consensus building, and negotiations are key features of the bureaucratic process.

3. Amazon's role in these conflicts of interest further underscores the importance of this Court's review. Amazon notes (at 4-5) that the three Department of Defense employees at issue became conflicted due to their connections to "one of the offerors" for the JEDI Cloud contract: One employee had previously worked at the "offeror," another had accepted employment at the "offeror," and Ubhi had done both. What Amazon omits is that, in each instance, the unnamed "offeror" was none other than Amazon itself.

Amazon's efforts to downplay its involvement are understandable. But as the Court of Federal Claims observed, "the larger impression left is of a constant gravitational pull on agency employees by technology behemoths." App. 107a. That pull is "real," *ibid.*, and it reflects the unfortunate fact that "[p]owerful interests are capable of amassing armies of lobbyists and lawyers to influence (and even capture) politically accountable bureaucracies." *United States* v. *Arthrex, Inc.*, No. 19-1434 (U.S. June 21, 2021), slip op. 10 (Gorsuch, J., concurring in part and dissenting in part) (citation omitted); see *id.* at 10-11 (providing examples of "large technology compan[ies]" that

"rotate" their employees "in and out" of supposedly independent agencies).

This dynamic makes plain the need to protect bedrock separation-of-powers principles. "Any suggestion that the neutrality and independence the framers guaranteed for courts could be replicated within the Executive Branch was never more than wishful thinking." *Id.* at 10. It is time for this Court to banish such wishful thinking, to enforce the statutory conflict-of-interest prohibition as Congress wrote it, and to reaffirm the judiciary's critical role in protecting accountability and integrity in government contracting.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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