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

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

Cases do not become moot simply because a defendant issues a press release claiming to have ceased its misconduct. Instead, to deprive federal courts of Article III jurisdiction, a defendant bears the "formidable burden" of showing not only that it has ended the challenged conduct, but also that "it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013) (citation omitted).

Here, the government asserts that the Department of Defense mooted this case by cancelling JEDI, the procurement contract that Oracle has challenged. But in the next breath, the Department states its intent to replace JEDI with another similar cloud-computing contract; to presumptively award the contract to Microsoft and respondent Amazon Web Services as the "only" eligible competitors; and to exclude other bidders based on infected research and requirements drawn directly from the challenged procurement. Far from making it "absolutely clear" that the challenged misconduct will not recur, the Department essentially admits the challenged misconduct *will* continue—and will continue to prejudice Oracle.

Oracle respectfully submits that the government has not met its heavy burden of establishing mootness and that Oracle's certiorari petition should be granted. At minimum, this Court should hold the petition until the Department of Defense establishes that the new procurement does not reproduce the legal defects of the old one. But if the Court agrees with the government that its voluntary change in behavior has mooted this case, then the Court should vacate the decision below and remand in accordance with its ordinary practice.

BACKGROUND

1. Oracle asks this Court to review the judgment of the Federal Circuit, which raises two legal questions relating to the JEDI procurement. First, Oracle argues that the Department of Defense unlawfully structured the contract as a single-source award rather than a multiple-award solicitation. Both courts below agreed with that contention, but nevertheless held that the contract should remain in place under the doctrine of harmless error. The Federal Circuit reasoned that Oracle did not meet the contract's threshold requirements, even though the record did not indicate the agency would retain those same threshold requirements if forced to restructure the contract as a multiple-award solicitation.

Second, Oracle argues that the JEDI procurement was void under this Court's decision in *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), because multiple employees who worked on the procurement had conflicts of interest that violated criminal law. See 18 U.S.C. § 208. The courts below did not dispute either the existence of those conflicts or the employees' violation of criminal law. But they nevertheless deferred to the agency's determination that the conflicts had not sufficiently "tainted" the contract.

Separately, Amazon filed its own bid protest after the JEDI contract was awarded to Microsoft in October 2019. The

Court of Federal Claims enjoined the contract award pending resolution of Amazon's suit. See *Amazon Web Services, Inc.* v. *United States*, 147 Fed. Cl. 146, 150 (2020).

2. On July 6, 2021, the Department of Defense announced it was cancelling JEDI and replacing it with another cloud-computing contract, called the Joint Warfighter Cloud Capability (JWCC). In its official Notice of Contract Opportunity, the Department stated it "anticipated" making "multiple" awards under JWCC. Notice of Contract, *Joint Warfighting Cloud Capability (JWCC)* (July 6, 2021).[1] At the same time, however, the Department expressed a specific view regarding who those multiple awardees would be. Based on the same preexisting "[m]arket research" that infected the JEDI procurement challenged in Oracle's pending petition for certiorari, the Department stated that it "anticipate[d] awarding two [such] contracts—one to Amazon Web Services, Inc. (AWS) and one to Microsoft Corporation (Microsoft)."

Other cloud service providers would *not* qualify, the Department of Defense stated, because only "a limited number of sources are capable of meeting the Department's requirements." *Ibid.* In particular, "only two of those hyperscale [cloud service providers]—AWS and Microsoft—appear to be capable of meeting all of the DoD's requirements at this time." *Ibid.* The Department again reiterated the point in a press release issued the same day:

> The Department intends to seek proposals from a limited number of sources, namely the Microsoft Corporation (Microsoft) and Amazon Web Services (AWS), as available market research indicates that these two vendors are the

[1] https://sam.gov/opp/54ce941a25a14932809b5d83ac52a09a/view.

> only Cloud Service Providers (CSPs) capable of meeting the Department's requirements.

Department of Defense, *Future of the Joint Enterprise Defense Infrastructure Cloud Contract* (July 6, 2021).[2]

Despite publicly stating its expectation that only Amazon and Microsoft would satisfy the requirements for JWCC, the Department of Defense did not reveal what those requirements would be. Instead, the Department released "a high level summation," promising "[a]dditional details" when it formally seeks proposals in October 2021. Department of Defense, *Required Capabilities* (July 6, 2021).[3]

The next day, a Defense Department spokesperson admitted that the agency had adopted JWCC as a stopgap. JWCC will not itself resolve the Department's cloud-computing needs, but only serve as "a bridge to our longer term approach." C. Todd Lopez, DOD News, *DOD Aims for New Enterprise-Wide Cloud by 2022* (July 7, 2021).[4] Unlike JWCC, he explained, that "next step" will entail a "full and open, competitively awarded multi-vendor contract." *Ibid.* He said the Department "hopes" to initiate that process "by early 2025." *Ibid.*

Just two days after the Department of Defense announced JEDI's nominal cancellation, Amazon, Microsoft, and the government informed the Court of Federal Claims that they had collectively agreed to dismiss Amazon's bid protest.

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[2] www.defense.gov/Newsroom/Releases/Release/Article/2682992/future-of-the-joint-enterprise-defense-infrastructure-cloud-contract.

[3] https://sam.gov/api/prod/opps/v3/opportunities/resources/files/22b16a96b6434e518a897adfa5c01e9f/download?&status=archived&token=.

[4] www.defense.gov/Explore/News/Article/Article/2684754/dod-aims-for-new-enterprise-wide-cloud-by-2022.

DISCUSSION

The government has failed to bear its burden of showing that either question presented by this case has become moot (much less both of them). Oracle's petition for a writ of certiorari should accordingly be granted. At minimum, the government's mootness argument is premature: This Court should hold Oracle's petition until the Department of Defense screens bidders under the JWCC solicitation—or at least clarifies its parameters, which the Department anticipates doing in October 2021—to establish that JWCC does not simply reproduce JEDI's legal infirmities under a new name. Finally and in any event, if the Court concludes that the case has indeed become moot as a result of the government's unilateral actions, then the Court should vacate the decision below in accordance with its ordinary practice.

1. In its supplemental brief, the government argues (at 5-8) that the Federal Circuit's judgment became moot when the Defense Department cancelled JEDI in favor of JWCC. But the government has failed to demonstrate that the questions presented by this case no longer implicate a live controversy.

a. "The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox* v. *Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012). Instead, the party claiming mootness "bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Already*, 568 U.S. at 91 (citation omitted). Here, the government's showing—based largely on press releases issued by the offending agency—falls far short of that necessary clarity.

The first question presented concerns the Federal Circuit's "harmless error" rule, under which JEDI's unlawful

single-source award was insulated from judicial review based on screening requirements "that only two offerors, [Amazon] and Microsoft, could satisfy." App. 19a. The Department of Defense has announced that JWCC, unlike JEDI, could involve "multiple" awards. But the Department has already indicated that it "anticipates awarding two [such] contracts—one to Amazon Web Services, Inc. (AWS) and one to Microsoft Corporation (Microsoft)." *Ibid.* The Department of Defense's own statements accordingly indicate strongly that JWCC is *not* likely to involve the open competition for a multiple-source award that Congress mandated, see 10 U.S.C. § 2304a, and that Oracle has sought all along. Instead, the Department has taken the highly unusual step of declaring (at least presumptively) that JWCC will involve a "multiple"-award competition only in the sense that the Department has pre-selected two particular cloud providers as the winners.

Worse still, the Department has indicated its expectation that other cloud service providers will be excluded based on security "requirements" like the ones used to exclude Oracle from consideration for JEDI, and later used by the Federal Circuit to insulate the challenged procurement from judicial review. Notice of Contract Opportunity, *supra*. The Department has thus stated its belief that Amazon and Microsoft are the "only two" cloud service providers that are "capable of meeting" JWCC's requirements—even though it has yet to announce what those requirements are. *Ibid.* Far from making "absolutely clear" that Oracle will be allowed to compete for JWCC free from JEDI's improper limitations, *Already*, 568 U.S. at 91 (citation omitted), the Department has suggested that Oracle will continue to be fenced out from consideration based on the same "requirements" underlying the Federal Circuit's harmless-error ruling. App. 12a.

Thus, even putting aside the troubling timing of the Defense Department's decision to cancel JEDI,[5] the government has not met its burden to establish that the procurement of cloud services is now free of unlawful, competition-stifling limitations, or that Oracle will be allowed to compete for JWCC on the level playing field that Congress envisioned. The government cites no case in this Court in which the government's cancellation of a contract was found to have mooted a bid protest under circumstances like these: where the relevant agency immediately announced that it would solicit bids for a new contract to provide the same services, without any guarantee that the basis for the plaintiff's challenge to the original procurement would not recur.

The government has similarly failed to show that no live controversy remains regarding the second question presented. Oracle's argument is that the JEDI procurement was tainted by criminal conflicts of interest that, under this Court's decision in *Mississippi Valley*, require the procurement to be restarted from scratch. See Pet. 25-28. In the alternative, Oracle argues that any inquiry into the effect of those conflicts on the procurement must be performed by courts, not by the conflicted agency. See Pet. 29-31.

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[5] See, *e.g.*, Letter from Sen. Charles E. Grassley, Ranking Member, Committee on the Judiciary, to Lloyd J. Austin III, Secretary of Defense 5 (June 8, 2021) (noting "apparent conflicts of interest regarding the JEDI program" and criticizing "the Department's continued failure to provide forthright answers" to congressional inquiries about them), https://www.grassley.senate.gov/imo/media/doc/grassley_to_defense_dept.jedicontract.pdf; Aaron Gregg, *GOP Lawmakers, Citing Pentagon Emails, Take Aim at Amazon's Pursuit of Cloud-Computing Business*, Wash. Post (July 14, 2021) (noting that "newly surfaced Defense Department emails" had led lawmakers to "call[] for hearings" on JEDI), https://www.washingtonpost.com/business/2021/07/14/jedi-cloud-pentagon-emails-amazon.

In its supplemental brief, the government argues (at 7-8) that the cancellation of JEDI in favor of JWCC means that any conflict of interest associated with the former procurement is no longer relevant to the latter. In other words, the government again purports to judge the taint of its own misconduct. But the government has provided *no* relevant information about JWCC that would allow the Court to conclude that the new procurement will be untainted by the same illegality. Indeed, there are concerning signs that, despite the name change, the Department intends for the JWCC procurement to propagate JEDI's unlawful conflicts and to allow Amazon—one of the Department's declared JWCC contractors—to benefit from the criminal conduct.

In its Notice of Contract Opportunity, the Department of Defense indicated that it intends to solicit proposals from only those service providers that the Department thinks can meet its requirements based on existing (*i.e.*, JEDI-related) "[m]arket research." That is a flashing warning sign: The JEDI employee with the most serious and pervasive conflicts of interest, Deap Ubhi, "was a product manager *focused on market research*." App. 78a (emphasis added). Ubhi used his "market research" to craft parameters used to screen out potential bidders, including the requirement used to exclude Oracle. See App. 69a, 71a; U.S. Opp. at 26. It is therefore especially troubling that the Department has already concluded, on the basis of Ubhi's research, that Amazon—with whom Ubhi was negotiating for employment at the time he helped design the JEDI procurement, and where he still works—will likely win part of the JWCC contract.

If JWCC's requirements are based directly or indirectly on Ubhi's conflicted research, then the Department of Defense will not have remedied JEDI's conflicts of interest; it will have perpetuated them. At this stage, before JWCC's specifications

have even been announced, the government has not carried its burden to demonstrate that the new procurement is "absolutely certain" to be free of such conflicts. See *Ne. Fla. Chapter of Associated Gen. Contractors of Am.* v. *City of Jacksonville*, 508 U.S. 656, 662 (1993) ("This is an *a fortiori* case. There is no mere risk that Jacksonville will repeat its allegedly wrongful conduct; it has already done so.").

b. Even where a case would otherwise be moot, courts may continue to adjudicate controversies that are "capable of repetition, yet evading review." *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969, 1976 (2016) (citation omitted). Such treatment is appropriate "where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Ibid.* (cleaned up). The controversy here satisfies both of those criteria.

First, this Court has explained that procurement contracts are often "too short to complete judicial review." *Ibid.* The government asserts (at 8-9) that this principle is inapposite here because JEDI was "a long-term procurement … spanning up to a decade" and JWCC "anticipates contracts with performance periods of up to five years." But it is now already more than three years since the Department of Defense issued the JEDI solicitation, App. 60a, and close to another year is likely to elapse before this Court has a chance to hear argument and decide Oracle's petition. If Oracle were forced to start again with a fresh legal challenge to JWCC, that contract would likely be fully or almost fully performed before this Court addresses the questions presented—hampering the Court's ability to grant meaningful relief. Indeed, Oracle's current petition is unusual in how cleanly it provides an opportunity for review: The JEDI contract has been stayed since February

2020. There is no reason to expect the stars to align the same way in the future.

Second, Oracle may reasonably expect to find itself confronting identical controversies. The Defense Department is determining whether other cloud providers (including Oracle) will even be *invited* to compete for JWCC, or whether the Department will instead continue to screen out competitors based on Ubhi's conflicted "market research." In addition, as Oracle observed in its petition (at 20-22), the first question presented recurs with regularity in the Federal Circuit, a point that neither the government nor Amazon has disputed. See Claybrook Amicus Br. 5-7. As a large government contractor, Oracle can thus expect to face these issues again soon—whether with JWCC or another procurement.

2. Although the government bears the "formidable burden" of establishing mootness, *Already*, 568 U.S. at 91 (citation omitted), the Court may decide to wait until the Department of Defense has screened bidders for JWCC—or at least has issued the solicitation identifying its parameters—before acting on Oracle's certiorari petition. The Department has indicated its intention to provide more information in October 2021, and the government's supplemental brief states (at 2) that "the JWCC solicitation … will be conducted afresh in the coming months." Any question regarding whether Oracle's petition has been mooted by the cancellation of JEDI in favor of JWCC can be determined at that point, without prejudicing the government in the meantime.

3. If this Court nevertheless concludes that the government has established mootness, the Court should vacate the judgment below and order the entire case dismissed. This Court's "[o]rdinary practice in disposing of a case that has become moot on appeal is to vacate the judgment with directions to dismiss." *New York State Rifle & Pistol Ass'n,*

Inc. v. *City of New York*, 140 S. Ct. 1525, 1526 (2020) (citation omitted); see *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950). "One clear example where vacatur is in order is when mootness occurs through the unilateral action of the party who prevailed in the lower court." *Azar* v. *Garza*, 138 S. Ct. 1790, 1792 (2018) (cleaned up). It would thus be appropriate to vacate the judgment below under this Court's "established practice." *Ibid.* (citation omitted); see *Relyant Glob., LLC* v. *United States*, No. 20-1526, 2021 WL 831142, at *1 (Fed. Cir. Feb. 1, 2021) (applying doctrine where the government canceled the challenged contract during appeal).

The government argues (at 10-11) that "[v]acatur under *Munsingwear* is appropriate only if, among other things, the petition for a writ of certiorari would have merited this Court's plenary review had it not become moot." The government supports that heightened standard primarily by citing its own briefs; the government does not identify a single decision from this Court (or any other) adopting its heightened standard. And for good reason: Even in the context of a petition for certiorari, "[i]t would certainly be a strange doctrine that would permit a plaintiff to obtain a favorable judgment, take voluntary action that moots the dispute, and then retain the benefit of the judgment." *Garza*, 138 S. Ct. at 1792 (citation omitted).

In any event, this case would qualify for *Munsingwear* vacatur even under the government's proposed standard. The questions presented in this case merit plenary review for the reasons stated in Oracle's prior briefs. The government's supplemental submission offers no additional argument (aside from mootness) that Oracle's petition is unworthy of this Court's review. And indeed, the government has never disputed the importance, recurrence, or timeliness of the relevant issues.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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