No. ________

IN THE

Supreme Court of the United States

ASG SOLUTIONS CORP., DBA AMERICAN SYSTEMS GROUP,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the landmark decision *Schlesinger v. United States*, 390 F.2d 702 (Ct. Cl. 1968), the termination for default ("T4D") of a federal contract is void if the contracting officer abdicates their independent administrative discretion. This core principle was codified in the Federal Acquisition Regulation (FAR) 49.402-3(f) factors adopted in 1984, which mandate that a contracting officer "shall" consider seven performance-related business factors prior to T4D. In a series of decisions culminating in *Dep't of Transp. v. Eagle Peak Rock & Paving, Inc.,* 69 F.4th 1367 (Fed. Cir. 2023), however, the Federal Circuit has eradicated *Schlesinger* and the role of the FAR factors, establishing that a contracting officer's failure to exercise independent judgment is legally irrelevant and T4D is proper as an automatic consequence of a contractor's technical breach.

The questions presented are:

1. Whether the government must prove that a contracting officer exercised independent, contemporaneous discretion prior to T4D, or whether a T4D remains valid when the evidentiary record contains zero evidence that the contracting officer exercised any independent business discretion, so long as an underlying breach occurred.

2. Whether the government may satisfy its burden to prove the contemporaneous exercise of administrative discretion by relying solely on an unauthenticated memorandum that appears fraudulent on its face and is admitted "not for the truth of its contents."

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Federal Circuit were Petitioner ASG Solutions Corp. DBA American Systems Group and Respondent the United States of America, acting by and through the Department of Navy.

Pursuant to Supreme Court Rule 29.6, Petitioner states that it has no parent corporation and that no publicly held company owns 10 percent or more of its stock.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

ASG Solutions Corp., dba American Systems Group v. United States, No. 2024-1755, United States Court of Appeals for the Federal Circuit, judgment entered December 15, 2025, combined petition for panel rehearing and rehearing en banc denied March 3, 2026.

ASG Solutions Corp., dba American Systems Group v. United States, No. 23-1029, United States Court of Federal Claims, judgment entered March 29, 2024.

ASG Solutions Corp., dba American Systems Group v. United States, No. 24-1966 C, United States Court of Federal Claims, judgment entered May 6, 2026.

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OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Federal Circuit (App. 1a-8a) is available at 2025 U.S. App. LEXIS 32663. The order of the Federal Circuit denying the combined petition for panel rehearing and rehearing en banc (App. 63a-64a) is unreported. The opinion of the United States Court of Federal Claims granting summary judgment to the United States (App. 9a-62a) is reported at 170 Fed. Cl. 485.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 2025 (App. 1a-8a). A combined petition for panel rehearing and rehearing en banc was denied March 3, 2026. App. 63a-64a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves the Federal Acquisition Regulations provision governing the contracting officer's exercise of discretion prior to terminating a government contract for default. Title 48, Code of Federal Regulations, § 49.402-3(f) provides in pertinent part:

> (f) The contracting officer **shall consider** the following factors in determining whether to terminate a contract for default:

(1) The terms of the contract and applicable laws and regulations.

(2) The specific failure of the contractor and the excuses for the failure.

(3) The availability of the supplies or services from other sources.

(4) The urgency of the need for the supplies or services and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contractor.

(5) The degree of essentiality of the contractor in the Government acquisition program and the effect of a termination for default upon the contractor's capability as a supplier under other contracts.

(6) The effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments.

(7) Any other pertinent facts and circumstances.

48 C.F.R. § 49.402-3(f) (2023) (emphasis added).

Title 48, Code of Federal Regulations, § 52.249-8 provides in pertinent part:

> Default (Fixed-Price Supply and Service) (Apr 1984)
>
> (a) (1) The Government **may**, subject to paragraphs (c) and (d) of this clause, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to-
>
>> (i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;
>>
>> (ii) Make progress, so as to endanger performance of this contract (but see paragraph (a)(2) of this clause); or
>>
>> (iii) Perform any of the other provisions of this contract (but see paragraph (a)(2) of this clause).

48 C.F.R. § 52.249-8(a) (2023) (emphasis added).

STATEMENT OF THE CASE

This case arises from the Department of the Navy's ("Navy") termination for default ("T4D") of a non-personal service firm-fixed price task order contract issued to ASG Solutions Corp., dba American Systems Group ("ASG"). Appx2958-2992[1]. Before

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[1] Citations to "Appx" refer to the joint appendix filed in the United States Court of Appeals for the Federal Circuit.

executing a T4D the Government must exercise independent discretion. That discretion is typically evidenced by the consideration of the mandatory factors enumerated in FAR 49.402-3(f). Here, the courts below sustained the drastic sanction of T4D finding that (1) because the contractor failed to perform the contract there is no abuse of discretion; and (2) the evidence of considering the FAR factors is satisfied by an unauthenticated, memorandum ("Memorandum") that appears fraudulent on its face that was produced and referenced for the first time just 5 days prior to summary judgment. (App. 61a (CFC Opinion); App. 79a-112a (Memorandum); Appx4654 (Navy Reply).

A. The Contractor and the Award

ASG is a small business that for more than two decades and across more than 125 task orders valued in excess of $100 million, has performed federal contracts without a single termination, cure notice, or sub-satisfactory CPARS rating. Appx79. On September 28, 2022, the Navy awarded ASG the Task Order to provide advisory assistance services to NAVFAC Southeast at Naval Air Station Jacksonville. Appx2958.

B. The Disputes Over Interpretation of the Task Order

Disputes arose immediately following award. Appx4621-4622. Navy told ASG that it must supply 20 professionals that matched Attachment 2 to the Task Order. Appx4610-4611. Appx4621-4622. Navy asserted the right to unilaterally reject resumes. Appx3688. Navy refused to provide any indication of the work to actually be performed and refused to issue work tasks under the performance work statement ("PWS") to ASG. Appx4624. ASG disputed Navy's interpretations of the Contract. Appx4621-4624. Nevertheless, ASG at all times during the term of the Contract in good faith attempted to comply with Navy's interpretations and demands. Appx4612-4617. In fact, ASG performed every task it was assigned during the 186 days prior to T4D. Appx4625.

C. Termination for Default and the Absence of Contemporaneous Exercise of Discretion

On April 4, 2023, Navy issued T4D. App.65a-78a. Following T4D, ASG filed the Complaint on July 3, 2023. Appx78-114. ASG's complaint alleged that the Navy had terminated ASG in bad faith and failed to exercise the discretion evidenced by consideration of the FAR 49.402-3(f) factors. Appx99-109. Navy filed its Answer September 29, 2023. Appx419-452. The Answer does not include an allegation that Navy exercised discretion prior to T4D. *Id.*

On December 22, 2023, ASG filed its motion for summary judgment ("ASG MSJ"). Appx453-503.The ASG MSJ reiterated and developed the argument that the Agency had not pleaded the exercise of the discretion typically evidenced by the mandatory FAR 49.402-3(f) factors, and therefore the T4D must be converted to termination for convenience ("T4C"). Appx500-501.

On February 12, 2024, Navy filed its cross-motion for MSJ (Appx2893-2950) and its reply brief on March 7, 2024. Appx4654. However, the supporting declarations of the contracting officer did not describe any conduct amounting to an exercise of discretion by the Navy prior to T4D, nor did they identify, attach, reference, or authenticate a contemporaneous document reflecting conduct amounting to an exercise of discretion or consideration of the FAR 49.402-3(f) factors. Appx4564-4570; Appx4749-4751.

On February 26, 2024, ASG filed its Response. Appx4571-4607. ASG emphasized the position of ASG that the Navy had admittedly abdicated its duty to exercise discretion prior to T4D. Appx4578; Appx4600-4602.

D. The Unauthenticated Memorandum

On March 7, 2024, Navy filed its Reply. Appx4654-4679. This Reply was supported by an unauthenticated Memorandum titled "Request to Terminate for Default" (App. 79a-112a) bearing a typed date of March 17, 2023 and a digital signature block that *did not* contain a date-stamp, as follows:

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/ / / / /

/ / / / /

Prepared by:

ISELIN.CORY.S.1100847996 Digitally signed by ISELIN.CORY.S.1100847996

Cory Iselin
CONTRACTING OFFICER/CONTRACT SPECIALIST

3/17/23
DATE

I have reviewed the above for form and legality:

GONZALEZ.JAVIER.E.1258530140 Digitally signed by GONZALEZ.JAVIER.E.1258530140 Date: 2023.03.21 09:27:15 -04'00'

Javier Gonzalez
COUNSEL

3/21/23
DATE

Termination Contracting Officer or Level III Contracting Officer approval:

Renee M Comfort

Renee Comfort
Terminating Contracting Officer

4/4/2023
DATE

App. 111a-112a. This Memorandum was not accompanied by any transmittal email. App. 79a-112a. It bore no page numbers, no Navy standard subject identification code, and no originator's code, contrary to the Department of the Navy's Correspondence Manual SECNAV M-5216.5. App. 79a-112a (Memorandum); Dep't of Navy, SECNAV M-5216.5, *Department of the Navy Correspondence Manual*, ch. 7 (2015), https://www.secnav.navy.mil/doni/SECNAV%20Manuals1/5216.5%20%20CH-1.pdf. The digital signature lacks the date-and-time stamp present on every other digitally signed Navy document in the record. The memorandum referenced an incorrect contract number. *See* App. 79a. The signature page is a standalone page detached from the body of the document. App. 111a-112a.

On March 12, 2024, oral argument was heard. Appx34-35, Appx59. ASG objected to the Memorandum at oral argument on the grounds of lacking foundation and waiver. Appx36-37. On March 29, 2024, the Court of Federal Claims entered its memorandum opinion denying the ASG MSJ and granting the Navy's cross-motion. App. 9a-62a. Notably, the court relied on the Memorandum to find that "the contracting officer considered the relevant factors before the Navy made the decision to terminate for default." App. 61a n.8. The trial court further held in the alternative that "even without the Navy's analysis of the [FAR 49.402-3(f)] factors, the termination for default would not be an abuse of Navy's discretion because ASG failed to perform the contract." App. 61a. The Federal Circuit affirmed, stating it "agree[d] with the Claims Court's analysis," thereby sustaining the judgment and the lower court's reliance on the unauthenticated Memorandum. App. 2a. ASG's combined petition for panel and en banc rehearing was subsequently denied. App. 63a-64a.

REASONS FOR GRANTING THE PETITION

The decision below sanctions a regime in which the government need not present evidence that it exercised discretion prior to issuing the "drastic sanction" of termination for default. The Federal Circuit's affirmance further erodes the FAR 49.402-3(f) mandatory deliberative safeguards into an optional paperwork formality.

This Court's review is warranted.

I. The Federal Circuit Has Eradicated the Foundational Requirement of Independent Discretion Established in *Schlesinger*

A. The Federal Circuit's Decision Conflicts With Principles Established By This Court That Require Exercise Of Independent Agency Discretion

It has long been the law that a default termination is a drastic sanction that may be sustained only where the contracting officer has, in fact, exercised "fair and reasonable" discretion and acted "in the best interests of the Government." *Darwin Constr. Co. v. United States*, 811 F.2d 593, 596–98 (Fed. Cir. 1987); *Nuclear Research Corp. v. United States*, 814 F.2d 647, 649 (Fed. Cir. 1987). That requirement is not aspirational. The FAR codifies it in mandatory terms: a contracting officer "shall consider" each of the seven factors enumerated at FAR 49.402-3(f) before declaring default—including the contractor's excuses, the availability of alternative sources, the urgency of need, the essentiality of the contractor, and "any other pertinent facts and circumstances." FAR 49.402-3(f). Where that discretion is abdicated, the default termination "will be set aside." *Darwin*, 811 F.2d at 597-98.

The roots of this doctrine trace back to *Schlesinger v. United States*, 390 F.2d 702, 707 (Ct. Cl. 1968), where the Court of Claims emphasized that even when a contractor is in a "technical default" or a "bare default", the government is not automatically forced to terminate the contract. Because the decision to terminate for default is a discretionary act (*see* FAR 52.249-8(a)(1) ["The Government may…terminate this contract…"], the *Schlesinger* court recognized that procurement officials must exercise judgment in terminating an agreement for default and may not act as automatons. *Id.* at 708. Thus, when a contract vests a contracting officer with administrative discretion, the "abdication of responsibility [can never be] sanction[ed]." *Id*. at 709. This ruling is a procurement-law corollary to this Court's foundational administrative law precedents.

As this Court established in *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), and *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29 (1983), agency action cannot be sustained by post-hoc rationalizations, nor can it survive when the agency fails to examine the relevant data and articulate a rational connection between the facts and the choice made. Yet, by holding that a T4D may be sustained even when the record demonstrates a total abdication of the Contracting Officer's independent discretion and an abject failure to consider mandatory regulatory factors, the Federal Circuit has created, without justification, an unwarranted carve-out to *Chenery* and S*tate Far*m. The Supreme Court must grant certiorari to clarify that federal agencies cannot escape the requirement of reasoned, contemporaneous discretion simply because they are acting in a procurement capacity.

Last but not least, fundamental to *Schlesinger* and the importance that *some discretion* be exercised, is the undeniable fact that T4D has harsh consequences and repercussions on the contractor and the government. T4D is a "drastic sanction." *J.D. Hedin Constr. Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969). T4D is a species of forfeiture that is strictly construed. *DeVito v. United States*, 413 F.2d 1147, 1153 (Ct. Cl. 1969). This is the case today as it was in 1969. T4D is the death knell for a federal contractor. This fact compels that discretion be exercised prior to T4D.

B. The Federal Circuit's Jurisprudence Has Reduced the FAR to an Unenforceable Suggestion

The Federal Circuit began to shift away from *Schlesinger* in the case of *DCX, Inc. v. Perry,* 79 F.3d 132 (Fed. Cir. 1996). In *DCX*, the contractor claimed the T4D invalid because the government had failed to consider the FAR 49.402-3(f) factors. *Id.* at 135. The court affirmed the government's T4D and commented that the contracting officer's failure to consider one or more of these factors does not require conversion of T4D to termination for convenience. *Id.* at 135. However, notably, in *DCX*, in place of consideration of the FAR factors, was testimony by the contracting officer explaining conduct of the government including periods of forbearing from termination. *Id.* Thus, the record in *DCX* is not devoid of evidence of conduct equating to the exercise of contemporaneous discretion. Based on this fact, *DCX* is arguably consistent with the rule laid out in *Schlesinger*, although it completely gutted the role of FAR 49.402-3(f) by finding that evidence of these factors was not a prerequisite to finding discretion was exercised. *DCX,* 79 F.3d at 135.

The Federal Circuit's decision in *McDonnell Douglas Corp. v. United States*, 182 F.3d 1319 (Fed. Cir. 1999) further narrowed the role of *Schlesinger*. In *McDonnell*, the court parsed the *Schlesinger* decision and erroneously concluded: "In short, *Schlesinger* bars only a termination for default in which there is no considered *nexus* between the default termination and the contractor's performance under the contract." *Id.* at 1326 (italics in original). This conclusion distorts the rationale underlying *Schlesinger* and unduly focuses on the facts of that case and the outcome. As detailed above, the *Schlesinger* court recognized that there is discretion in the decision to terminate and, where there is discretion afforded an agency, that discretion must be exercised. True, the *McDonnell* court pays lip service to this requirement by stating the rule: "The level of discretion that must be exercised by the government before terminating a contract for default is a question of law, which we review *de novo." McDonnel Douglas Corp.*. 182 F.3d at 1325. However, the consideration of the "level of discretion" is completely eliminated by adopting a self-fulfilling rule that the only discretion that need be exercised must be as to whether there is in fact a contractor default that is a breach of the contract.

Thus, *McDonnell* paved the way to destroy any review of discretion by the courts in connection with T4D, which culminated in the Federal Circuit in *Dep't of Transp. v. Eagle Peak Rock & Paving, Inc.,* 69 F.4th 1367 (Fed. Cir. 2023). In *Eagle Peak,* the Court concluded: "as long as 'the termination for default was predicated on contract-related issues,' *i.e.*, 'the government's default termination was not pretextual or unrelated to Contractors' alleged inability to fulfill their obligations under the contract,'…the reasoning of the contracting officer at the time of termination is not the subject of the CDA adjudication…" *Id.* at 1377 (quoting *McDonnell*, 182 F.3d at 1321, 1326). By focusing solely on whether the contracting officer was considering issues as to the materiality of an alleged breach, the court in *Eagle Peak* eliminates any consideration of the performance and business-related factors contemplated by *Schlesinger* and its progeny and codified in FAR 49.402-3(f).

In sum, after *Eagle Peak*, there is no requirement at all for consideration of the drastic impacts of T4D on the contractor or the government. The only "nexus" for consideration involves the materiality of the alleged breach. This effectively eradicates the *Schlesinger* line of decisions, and ignores this Court's direction that where an agency is afforded discretion, that discretion must be exercised.

II. Allowing the Government to "Prove" Discretion via Unauthenticated Memoranda

The government did not plead its exercise of discretion in this case. Appx419-452. It identified no contemporaneous deliberation in its pleadings. *Id.* It filed a cross motion seeking summary judgment that did not allege or provide any evidence of the contemporaneous exercise of discretion. Appx2893-2950. Thus, incredibly, no contracting officer declaration evidencing the consideration of anything beyond the alleged contract interpretation issues in dispute. Appx4564-4570; Appx4749-4751. It is apparent from the record that the government does not consider itself bound to consider anything beyond the alleged breaches of contract at issue.

Only when confronted with the arguments laid out by ASG in its opposition filing did the government change tack ever so slightly. The government filed with its reply brief additional "evidence" including the unauthenticated Memorandum. App. 79a-112a. The dubious origin of this Memorandum is undeniable. The Memorandum is rife with problems, including it was presented without any foundation and fails basic Federal Rules of Evidence Standards (FRE 901, FRE 803(6)). Appx4749-4751. Its most damning characteristic, however, is what appears to be the fraudulent digital signature of the contracting officer which does not include a time and date stamp. App. 111a. The government has not, will not and can not explain how a digital signature may be legitimately generated without a time and date stamp.

The Memorandum violates Navy policy requirements of the Department of the Navy's Correspondence Manual 5216.5. Dep't of Navy, SECNAV M-5216.5, *Department of the Navy Correspondence Manual*, ch. 7 (2015), https://www.secnav.navy.mil/doni/SECNAV%20Manuals1/5216.5%20%20CH-1.pdf. The Federal Circuit nevertheless held that the memorandum was admissible—"not for the truth of its contents, but only to show that the contracting officer addressed the factors required by FAR 49.402-3(f)." App. 8a n. 3. That reasoning is doubly flawed. The non-hearsay use the Federal Circuit endorsed—offering the document "to show" that the factors were addressed—is precisely a use for the truth of what the memorandum asserts. And, in any event, an unauthenticated document of unknown provenance cannot supply that showing. It cannot demonstrate that the contracting officer engaged in the requisite deliberation any more than it can demonstrate what that deliberation concluded.

Based on what appears on its face to have been a fraudulently prepared post-hoc memorandum, the lower courts allowed the government to terminate without meeting its burden of proving the exercise of independent judgment prior to T4D. The result is that the *Schlesinger* doctrine is reduced to a paperwork exercise that agencies can backfill on the eve of dispositive motions, and without being cross-examined.

III. The Questions Presented are of Exceptional National Importance to the Federal Procurement System

A. T4D Is a "Corporate Death Sentence" Demanding Procedural Safeguards

The Federal Government enters into hundreds of thousands of contracts annually. T4D is the most consequential remedial tool the government wields against its contractors. Under the rule the Federal Circuit has now embraced, the nominal safeguard against retaliatory and arbitrary abuse by the government established by the prior case law and the FAR 49.402-3(f) factors is completely eliminated. Provided the government can later show a breach, it need not give a second thought to the performance and business-related considerations of FAR 49.402-3(f). The ripple effect on federal contracting is significant.

T4D triggers reprocurement liability for the contractor. The contractor's performance history is scarred irretrievably and reported in the Federal Awardee Performance and Integrity Information System. This jeopardizes the contractor's ability to compete for future federal work and for practical purposes, due to the stigma of a T4D past performance record, deprives the government of that contractor's future participation. T4D may be the basis for initiation of debarment as occurred in this case. *See* Notice of Proposed Debarment, C.A. Doc. 11 (judicially noticed by the court of appeals, C.A. Doc. 58). Because the consequences are so severe and so asymmetrical, the law has always insisted that the government make a contemporaneous, deliberate, and documented judgment that default is warranted.

Notably, the *Schlesinger* doctrine protects the taxpayers also, by ensuring contracting officers actually weigh the massive reprocurement costs and project delays before reflexively firing contractors with a default termination.

B. This Court Is the Only Venue Capable of Correcting the Federal Circuit

The Federal Circuit possesses exclusive jurisdiction over appeals from the Court of Federal Claims and the boards of contract appeals. 28 U.S.C. § 1295(a)(3), (10). No other circuit will correct the error. Only this Court's intervention can restore the rule that the government must, in fact and in good faith, exercise the reasoned discretion before invoking the drastic sanction of default.

IV. This Case Is an Ideal Vehicle to Restore the *Schlesinger* Standard

This petition presents a straightforward vehicle to resolve the Federal Circuit's departure from *Schlesinger* because the trial court's dual holdings perfectly encapsulate the lower courts' hostility to the requirement that the government exercise its administrative discretion prior to T4D.

The trial court held in part: "…even without the Navy's analysis…the termination for default would not be an abuse of Navy's discretion because ASG failed to perform." App. 61a. This alternative holding squarely presents the first question for review. It exposes the Federal Circuit's current rule that technical non-performance automatically justifies a T4D, explicitly nullifying the *Schlesinger* requirement that the contracting officer exercise independent judgment.

Simultaneously, the trial court held in part that the discretion was exercised by Navy based solely on a facially defective, unauthenticated, and undated memorandum. App. 60a-61a. This alternative holding squarely presents the second question for review. It demonstrates the twisting of evidentiary standards to rubber-stamp an agency decision.

Because both of the trial court's independent grounds for upholding the T4D are infected by these related legal errors, the Court is presented with a clean opportunity to address both the substantive necessity of discretion under *Schlesinger* and the evidentiary burden required for the government to prove it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 1, 2026