IN THE
Supreme Court of the United States

GENERAL DYNAMICS CORPORATION,

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 WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the government can maintain its claim against a party when it invokes the state-secrets privilege to completely deny that party a defense to the claim.

2. Whether, contrary to nearly a century of government contracts law, a court can uphold a default termination on factual grounds never relied on by the contracting officer, and can dispense with the requirement that the contracting officer exercise discretion when terminating for default.

3. Whether one panel of a court of appeals can use the law-of-the-case doctrine to overrule another panel's prior decision in the same case as clearly erroneous or manifestly unjust and thereby circumvent the law-of-the-circuit doctrine, which permits only the *en banc* court to overrule a precedential panel decision.

LIST OF PARTIES

Pursuant to Rule 14.1(b) and Rule 29.6, the following list identifies all the parties to the proceeding before the United States Court of Appeals for the Federal Circuit:

General Dynamics Corporation, appellant below, has no parent corporation. No publicly held company owns ten percent or more of the stock of General Dynamics Corporation.

McDonnell Douglas Corporation, appellant below, was a wholly owned subsidiary of The Boeing Company prior to January 1, 2010. On January 1, 2010, McDonnell Douglas Corporation was merged into The Boeing Company, which is now the corporate successor of McDonnell Douglas Corporation. The following publicly held companies own ten percent or more of the outstanding stock of The Boeing Company: State Street Corporation and its subsidiary State Street Bank and Trust Company as the trustee of The Boeing Company Employee Savings Plan Master Trust; Evercore Trust Company, N.A. as the investment manager of The Boeing Company Employee Savings Plan Master Trust.

The United States.

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The opinions of the Federal Circuit (Pet. App. 1a-34a, 178a-211a, 250a-279a) are reported at 182 F.3d 1319, 323 F.3d 1006, and 567 F.3d 1340. The order of the Federal Circuit denying the petition for panel rehearing or rehearing *en banc* (Pet. App. 444a-445a) is unreported. The pertinent opinions of the Court of Federal Claims (Pet. App. 35a-177a, 212a-249a, 280a-443a) are reported at 29 Fed. Cl. 791, 35 Fed. Cl. 358, 37 Fed. Cl. 270, 40 Fed. Cl. 529, 50 Fed. Cl. 311, and 76 Fed. Cl. 385.

JURISDICTION

The Court of Appeals for the Federal Circuit issued its decision on June 2, 2009. On November 24, 2009, the Federal Circuit denied petitioner's timely filed petition for rehearing or rehearing *en banc*. Chief Justice Roberts extended the time for filing a petition for certiorari to April 23, 2010. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATORY PROVISIONS INVOLVED

This case involves the following statutes and regulatory provisions, which are set forth in full in the Appendix to the Petition (Pet. App. 446a-472a): 41 U.S.C. § 605; 48 C.F.R. § 49.402-3; *id.* § 52.249-2; *id.* § 52.249-9.

STATEMENT OF THE CASE

A. Factual Background

General Dynamics Corporation and McDonnell Douglas Corporation (together, the "contractors") were awarded a multi-billion-dollar contract by the Navy to jointly design, develop, and build a state-of-the-art weapon system called the "A-12 Avenger." The A-12 was to be a stealth aircraft that would expand upon technology already in use in other government programs. The ultimate aim of the contract was a fully validated aircraft design; thus, the contract called for a series of increasingly sophisticated aircraft to be built and extensively tested.

The contractors were promised that the government would share its exclusive knowledge regarding stealth technology, and that this would be the foundation for the stealth capabilities in the A-12. Pet. App. 353a-355a & n.6. However, in an about-face, the government ultimately refused to give the relevant information to the contractors. *Id.* 52a & n.9.

Without the promised technology, it became apparent that some of the "A-12 performance specifications were impossible to accomplish within the time and cost projections contemplated by the parties." *Id.* 355a. After extraordinary efforts, the contractors informed the Navy that they would not be able to meet the original weight specification or the original contract schedule, which included a number of interim milestones. *Id.* 385a-387a. The Navy responded by waiving both requirements. It

relaxed the weight specification, accepted the contractors' aircraft design, *id.* 156a-157a, 388a-389a, and extended the schedule for delivery of the first eight aircraft under contract, *id.* 71a. The Navy left the schedule for delivery of the remaining six aircraft undefined, however, and never set a new completion date for the entire contract effort, which included years of ground and flight testing. *Id.* 71a-72a.

In addition, because the contractors had been forced to reinvent the wheel when it came to stealth technology, the costs of performing the contract had far exceeded the amounts obligated by the government. Thus, the contractors also requested financial relief. *Id.* 95a-96a. The government denied that request. Nevertheless, the contractors stated that they remained committed to the A-12 program. *Id.* 148a-149a & n.82.

Despite the Navy's and the contractors' desire to continue the A-12 development effort, political support at higher levels in the Pentagon was waning. With the Cold War over, the Pentagon reviewed its spending priorities, and the A-12 program fell victim to that review. *Id.* 389a-391a. Thus, although the Navy's contracting officer strongly supported the A-12 program and did not believe the contractors were unwilling or unable to complete the contract, and although the contractors had not missed *any* of the interim deadlines set forth in the Navy's revised schedule, Secretary of Defense Cheney ordered the termination of the program. *Id.* 395a-398a. That order reflected amorphous "concerns" about contract cost and schedule, but came without any

"consideration of the contract's circumstances." *Id.* 387a, 391a-397a, 414a.

The Navy was scheduled to obligate an additional $553 million in funds to the contract the very next day. *Id.* 399a. To avoid this obligation, the contracting officer precipitously terminated the contract for default. A default termination must be based on some contractor wrongdoing, and is a "drastic sanction," *J.D. Hedin Constr. Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969), pursuant to which the contractor is denied any payment for costs that have not yet been reimbursed and may be required to return payments it has received for work that the government has not yet officially "accepted." 48 C.F.R. § 52.249-9. A default termination also can result in the contractor being debarred from public contracting, *id.* § 9.406-2(b)(1), or prejudiced in the award of new contracts, *id.* § 15.304(c)(3). The other way for the government to terminate a contract is a "termination for convenience," which allows the government to act without fear of incurring any damages for breach. The government must reimburse the contractor for certain costs reasonably incurred, but otherwise is entitled simply to walk away. *Id.* § 52.249-2.

To justify terminating the A-12 contract for default rather than for convenience, the contracting officer and Navy counsel were forced to cobble together a termination memorandum in very short order. Pet. App. 399a-403a. Because the termination came early in the life of this multi-year contract, the stated basis for the termination was a projected failure to "[p]rosecute the work" so as to

make adequate progress (as opposed to a failure to meet a deadline that had already passed), 48 C.F.R. § 52.249-9(a)(1)(ii) – but the contracting officer did not perform any analysis at all of the contractors' progress or performance. Pet. App. 410a-411a. Instead, he simply "cribbed" a prior termination memorandum from a completely unrelated program. *Id.* 411a. Thus, the "termination memorandum for the A-12 reflect[ed] an analysis conducted for the P-7 program, not the merits [of the contractors'] performance on the A-12." *Id.* 100a.

As a result, the memo contained a number of glaring mistakes and omissions. Most significantly, the contracting officer terminated the contractors for failure to make progress toward the completion of the contract, yet left blank the completion date. *Id.* 142a. That was not surprising, since at the time there was no completion date for the contract. *Id.* 14a.

Following the default termination, the Navy sent the contractors a letter demanding the return of approximately $1.35 billion in progress payments, plus interest.

B. Procedural History

Pursuant to the Contract Disputes Act, the contractors challenged the default termination in the Court of Federal Claims. In this action, the government bore the burden of proof to justify its decision to terminate for default, which constitutes a government claim. The *only* consequence to the government of a failure to meet this burden is a

conversion of the default termination to a termination for convenience.

1. After a trial, the Court of Federal Claims first ruled for the contractors. It found in no uncertain terms that "the A-12 contract was not terminated because of contractor default. The contract was terminated because the Office of the Secretary of Defense withdrew support and funding from the A-12." *Id.* 383a.

In support of this conclusion, the trial court found that the government's contracting officer "did not review any A-12 contract documents in preparation for the termination. He did not consult with technical personnel.... He did not review documents related to schedule or specifications." *Id.* 401a-402a. The court concluded that "[t]he entire termination procedure was *pro forma* at best" and that "the reasons [for termination] were not contractor performance or default." *Id.* 412a-413a. The court thus converted the default to a termination for convenience. It found that the contractors were entitled to $1.2 billion in unreimbursed costs reasonably incurred in their performance, plus interest. *Id.* 341a-342a.

The government appealed to the Federal Circuit, which reversed and remanded. The court of appeals held that a potentially valid default termination requires only some "nexus" between the government's termination for default and the contractor's performance, *id.* 269a, and concluded that "because the termination for default was predicated on contract-related issues, it was within

the discretion of the government," *id.* 251a.[1] The Federal Circuit left it for the trial court to decide, however, whether the default termination was actually justified in light of the contractors' performance.

2. After another trial, the court upheld the termination for default on the sole basis that the contractors were not projected to meet the deadline for one early milestone in the multi-year, multi-billion-dollar contract. That milestone was the date for "first flight" of the first A-12 test aircraft. *Id.* 212a, 248a-249a. The court did not look to any date beyond that milestone, or assess how long it would have taken the contractors to perform the entirety of the contract effort.

Separately, the trial court held that it would not entertain the contractors' defense that their delay was entirely excusable due to the government's failure to share its superior knowledge regarding stealth technology. *Id.* 246a. The government had unilaterally invoked the state-secrets privilege – which applies if "there is a reasonable danger" of exposure of "military matters which, in the interest of national security, should not be divulged," *United States v. Reynolds*, 345 U.S. 1, 10 (1953) – to bar the litigation of issues relating to that technology. Once the government asserted that privilege, the trial court ruled that the contractors' "superior knowledge

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[1] In the wake of this decision, General Dynamics filed a petition for certiorari. The government argued that the petition was premature because the decision was interlocutory, and this Court denied the petition. *See McDonnell Douglas Corp. v. United States*, 120 S. Ct. 1831 (2000).

defense could not be tried because the resulting threat to national security would not permit it." Pet. App. 243a-244a.

The contractors appealed, and the Federal Circuit affirmed in part and reversed in part. The Federal Circuit affirmed the trial court's ruling regarding the superior-knowledge defense. It found that the requirements for invoking the state-secrets privilege were satisfied, and rejected the contractors' argument that the government could not pursue a default claim while stripping the contractors of a defense to that claim. *Id.* 202a-210a.

As to the default termination, however, the Circuit reversed and remanded. The court explained that the contractors could not properly be defaulted for a projected failure to meet a single interim milestone. Rather, the court held, the governing standard was set forth in *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759 (Fed. Cir. 1987): the trial court had to determine "the actual performance that the contract requires and the amount of time remaining for that performance," and then decide whether there was a "reasonable belief on the part of the contracting officer that there was no reasonable likelihood that the contractor could perform the entire contract effort within the time remaining for performance." Pet. App. 191a, 195a. As the court of appeals stated, "[u]nless the contracting officer had determined the entire effort required under the contract and the time left to complete the contract, it would be difficult, if not impossible, for him to resolve" this question. *Id.* 195a.

3. On remand, the trial court recognized that the contracting officer had never made the determination required by the Circuit, and could not have done so. As the court stated, the "contracting officer did not know [at the time of termination] when contract completion might occur," *id.* 39a, and "did not conduct a *Lisbon* analysis prior to termination," *id.* 176a n.92. Thus, "[t]he A-12 termination memorandum did not reflect any contracting officer analysis of the time when the A-12 contractors were likely to complete the remaining contract effort." *Id.* 101a n.42. Nor could it have done so, since at that time there was no date in place for completion of the entire effort. *Id.* 73a.

The trial court acknowledged that the contractors would therefore prevail if "the clauses 'entire contract effort' and 'contract completion date'" in the Circuit's mandate "mean exactly what they appear to mean." *Id.* 176a n.92; *see also id.* 39a ("[I]f the date we must look to in measuring the contractors' progress can occur no earlier than after completion of plaintiffs' contract requirements, we would vacate the termination for default."). But the trial court refused to undertake the analysis mandated by the Federal Circuit, and instead simply found that if the "Government can point to reasons in retrospect why plaintiffs were not making the progress that some officials hoped and perhaps expected[,] [s]o long as those reasons form a rational basis for a reviewing court to uphold defendant's decision to terminate, the court must do so." *Id.* 176a. The court upheld the termination for default on that basis.

The contractors again appealed, and this time the Federal Circuit affirmed. The Circuit agreed with the contractors that at the time of termination there was no contract completion date in place, and thus no way to assess whether the contractors were making adequate progress toward completion of the whole contract. *Id.* 13a-14a. But the court of appeals changed the legal standard, concocting what it described as an "ad hoc, factual" test to measure the contractors' progress. *Id.* 20a-21a. The court then held that the government had carried its burden because the "contractors' performance history," including their failure to meet early deadlines under the *original* schedule that the government had waived and reset, "shows that the contracting officer was reasonably justified in feeling insecure about the contractors' rate of progress," *id.* 27a. Despite acknowledging the absence of a completion date, the court repeatedly referred to the concept of "timely completion" when explaining how this "ad hoc" test was to be applied. *Id.* 15a, 21a-22a, 28a.

The panel expressly acknowledged that the new test differed from the one that the prior panel had mandated. *Id.* 27a n.4. But the court stated that it "believe[d] that this is warranted as under the law of the case doctrine, 'it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice.'" *Id.* The court provided no explanation of why the prior opinion had been clearly erroneous, or why converting the default termination into a

termination for convenience would work a manifest injustice.

The court also gave the contractors no opportunity to show that they could prevail under the new standard. Instead, the Federal Circuit affirmed on factual grounds different from (and contrary to) those relied upon by either the contracting officer or the trial court, stating only that "the facts in the record are sufficient for the court, in a de novo review, to sustain the default termination." *Id.* 32a.

On December 29, 2009, the government sent the contractors a letter demanding payment of $1,352,459,644 plus statutory interest from 1991, for a total (as of the filing of this petition) of nearly $2.9 billion.

REASONS FOR GRANTING THE PETITION

This case comes to this Court after nearly twenty years of litigation over whether the government was justified in imposing the drastic sanction of a default termination when it chose to cancel the A-12 program. In the first phase of the case, when memories were fresh, the trial court heard the evidence and concluded that the claimed reasons for the default termination, pursuant to which the government seeks billions of dollars from the contractors, were entirely pretextual. That finding has never been disturbed. But the Federal Circuit has since issued three different decisions, each struggling to find a legal basis for upholding a politically motivated default. In so doing, the court of appeals has generated several rulings that raise

issues of enormous importance warranting this Court's review.

First, the Federal Circuit grossly misapplied the state-secrets doctrine. The court held that the government could pursue its claim for default termination against the contractors while at the same time using the state-secrets privilege to entirely deprive them of one of their principal defenses: that they were unfairly disadvantaged by the government's refusal to share its stealth technology. In so holding, the court disregarded the clear teachings of this Court's state-secrets jurisprudence, basic principles of due process, and numerous contrary rulings from other circuits.

Second, ignoring applicable regulations and many decades of precedent, the court of appeals held that the default could be upheld even if the contracting officer *never actually weighed the issue* and exercised discretion, and even if the factual basis *was never even articulated* at the time of termination. The court thus adopted an approach that would never be tolerated for a moment in any other area of administrative law. Moreover, the court of appeals applied an ad hoc balancing test that makes it nearly impossible for contractors to combat unjustified default terminations. These troubling rulings came from the court charged with handling almost all litigation over government contracts, and thus will have national impact. For that reason, and because the rulings may ultimately force potential government contractors to refuse to undertake research-and-development contracts like the A-12

contract, the rulings strongly merit this Court's attention.

Finally, in reversing course to invent its new ad hoc balancing test, the Federal Circuit panel did not even bother to call for *en banc* review of the prior panel decision in this case setting a dramatically different legal standard. It invoked the law-of-the-case doctrine, holding that a panel has the power to overrule a prior panel decision by labeling it clearly erroneous or manifestly unjust. That approach has been flatly rejected by several other circuits, which have recognized that law-of-the-case doctrine does not provide an exception to the rule that only the *en banc* court can overrule a prior panel decision. The Federal Circuit's approach is also inconsistent with the sound administration of a court composed of multiple judges who hear cases in panels. In this case, it serves to dramatize the lengths to which the court was willing to go to uphold a default that was long ago found pretextual – and that now forms the basis of a government demand for a multi-billion-dollar forfeiture from two of the Nation's most important defense contractors.

I. The Federal Circuit's Decision Conflicts With This Court's Precedent and Decisions in Other Circuits on the Consequences of Successful Assertion of the State-Secrets Privilege.

The contractors had what both courts below recognized as a strong defense to the government's claim that the A-12 contract was properly terminated for default: that the government had "superior knowledge" of the stealth technology required to

develop the A-12 but refused to share it with the contractors, leading to the very delay that was the basis for the alleged failure to make adequate progress. As the trial court explained, the contractors "made a persuasive showing that they could prove" the superior-knowledge defense without resort to any secret information. Pet. App. 245a; *see also id.* 270a-272a; *Helene Curtis Indus., Inc. v. United States*, 312 F.2d 774, 777-79 (Ct. Cl. 1963). Nevertheless, based on the government's assertion that it could not counter the defense without resort to state secrets, the trial court barred the contractors from pressing their argument, and the Federal Circuit affirmed, ultimately upholding the government's claim. Pet. App. 245a-246a, 353a-381a, 202a-210a.

Petitioner is in no position to challenge the government's assertion of the state-secrets privilege in the first instance, or even the lower courts' determination that the superior-knowledge issue could not be litigated without risking disclosure of secret information. At issue here, rather, are the *consequences* of the government's assertion of the privilege.

In allowing this case to proceed, the Federal Circuit upheld a result that is, under this Court's precedents, "unconscionable." *Reynolds*, 345 U.S. at 12; *see also Roviaro v. United States*, 353 U.S. 53, 60-61 (1957); *Jencks v. United States*, 353 U.S. 657, 671 (1957). As a general matter, it is well established that a court should not exercise its power to uphold a claim where the state-secrets privilege deprives a party of a potentially valid defense to that

claim. Moreover, as this Court has explained, it is particularly pernicious to permit the government to prosecute its *own* claim while using the state-secrets privilege to ensure that the claim is not defeated, since "the Government which prosecutes an accused also has the duty to see that justice is done." *Reynolds*, 345 U.S. at 12. The Federal Circuit's ruling cannot be reconciled with these elemental principles of justice, and conflicts with the decisions of this Court and of other circuits.

1. This Court's decision in *United States v. Reynolds*, 345 U.S. 1 (1953), established the specific principle that the government cannot use the state-secrets privilege to eliminate an obstacle to its own claim for relief. In *Reynolds*, the Court stated that it would be "unconscionable" for the government to "prosecute[ ] an accused" while at the same time using the privilege to "deprive the accused" of a defense. *Id.* at 12. The Court also explained that this principle has no application where "the Government is not the moving party." *Id.* But where the government *is* the moving party, a court will not permit the government to ensure its own victory – and its opponent's punishment – through the government's exercise of its virtually unreviewable discretion to identify and protect state secrets. Thus, the government must choose between invoking the privilege and pursuing its claim.[2] *See id.*; *see also*

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[2] The government is not put to such a choice where, as in *Reynolds* itself, the assertion of the privilege deprives a *claimant* of evidence to aid in its affirmative case. In such circumstances, a court has no obvious way to remedy any

Jencks, 353 U.S. at 670 (even though "the protection of vital national interests may militate against public disclosure of documents in the Government's possession," the government may not pursue a prosecution if it withholds such documents); *Roviaro*, 353 U.S. at 60-61 (addressing informer's privilege and holding that the government cannot continue to prosecute its claim while withholding information that is "relevant and helpful to the defense" or "essential to a fair determination of a cause").

This case exhibited exactly the kind of government conduct that *Reynolds* condemned. Here, the government is indeed the "moving party," 345 U.S. at 12 – and, contrary to the Federal Circuit's belief, Pet. App. 208a-209a, that is indisputably so even though the contractors are nominally the plaintiffs. The claim that the contractors defaulted on the A-12 contract is without question a "government claim." *Malone v. United States*, 849 F.2d 1441, 1443 (Fed. Cir. 1988). Once the contractors initiated suit, the government bore the burden of proof to establish the existence of default and to justify a default termination. *See, e.g.*, Pet. App. 196a-197a; *Lisbon*, 828 F.2d at 763-64. And the government seeks to recover an enormous sum from the contractors as a result of the court's ruling upholding the default termination. *See supra* p. 11. Thus, while the contractors appear as "plaintiffs" in the caption, that is simply a result of the way the government itself has chosen to structure the proceedings, *see, e.g.*, *Seaboard*

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resulting unfairness, and the claimant must proceed as best it can with the evidence that remains.

Lumber Co. v. United States, 903 F.2d 1560, 1562-63 & n.4 (Fed. Cir. 1990), and the contractors' case here is in every meaningful sense an effort to oppose a claim by the government.

By invoking the state-secrets privilege, the government has not simply taken some evidence out of this case; rather, it has entirely prevented the contractors from raising a critical defense. *See, e.g.*, 2009 Oral Arg. 1:12:44 - 1:13:02 (Chief Judge Michel: "[I]t looks to me as if had the Air Force [stealth] technology been handed over at the start of this contract to the two companies, ... they would have met the dates, and the Navy would have got the plane it needed and wanted"), *available at* http://oralarguments.cafc.uscourts.gov/mp3/2007-5111Pt1.mp3. The Federal Circuit nevertheless refused to bar the government from continuing to pursue the matter. In so ruling, the court permitted the very unfairness that the *Reynolds* Court prohibited. *See* 345 U.S. at 12; *see also Roviaro*, 353 U.S. at 60-61 (discussing "fundamental requirements of fairness").

That violation was particularly "unconscionable" because default termination – although technically a civil sanction – is a "species of forfeiture" with consequences sufficiently grave that it is not far removed from criminal prosecution. *DeVito v. United States*, 413 F.2d 1147, 1153 (Ct. Cl. 1969). Default termination jeopardizes a contractor's ability to obtain future government contracts. *See, e.g.*, *Bannum, Inc. v. United States*, 91 Fed. Cl. 160, 171 (2009). It also results in the contractor's forfeiture of amounts that it would otherwise be entitled to

receive for work underway. In this case, the sanction against the contractors could total billions of dollars, and the contractors will also be deprived of billions of dollars that they would have received had the government terminated for convenience. These realities confirm that default termination is a "drastic" and "severe" penalty, *J.D. Hedin*, 408 F.2d at 431; *see also Schlesinger v. United States*, 390 F.2d 702, 709 (Ct. Cl. 1968) – one that puts the contractor in the position of an "accused," *Reynolds*, 345 U.S. at 12.

Accordingly, this case falls squarely within the rule that a court will not put its stamp of approval on a claim where the state-secrets privilege vitiates a defense to that claim – and, more specifically, that "it is unconscionable to allow [the government] to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." *Id.* The Federal Circuit's decision is thus not only deeply unfair, but wholly inconsistent with *Reynolds* and with other precedent of this Court, including the many decisions establishing that in both civil and criminal cases "[d]ue process requires that there be an opportunity to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quoting *American Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932)); *see also Roviaro*, 353 U.S. at 60-61; *Jencks*, 353 U.S. at 671.[3]

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[3] *See also, e.g., United States v. Andolschek*, 142 F.2d 503, 506 (2d Cir. 1944) (Hand, J.), *cited in Roviaro*, 353 U.S. at 61, *Jencks*, 353 U.S. at 671, and *Reynolds*, 345 U.S. at 12 n.27.

2. The Federal Circuit's decision also directly conflicts with decisions of the Fourth, Sixth, and D.C. Circuits, which have recognized the overarching principle that a claim cannot proceed where the state-secrets privilege deprives a party of a potentially valid defense. *See Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004); *Molerio v. FBI*, 749 F.2d 815, 825 (D.C. Cir. 1984) (Scalia, J.); *El-Masri v. United States*, 479 F.3d 296, 309-10 (4th Cir. 2007); *see also Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991) (acknowledging this rule without applying it); *In re United States*, 872 F.2d 472, 476-77 (D.C. Cir. 1989) (same); *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) (same).[4]

For instance, in *Tenenbaum*, the Sixth Circuit affirmed the dismissal of a suit against the United States and various federal employees alleging a biased criminal investigation because "the state secrets doctrine ... deprives [d]efendants of a valid defense to the [plaintiffs'] claims." 372 F.3d at 777. The court concluded that where the defendants could not "defend their conduct ... without revealing the privileged information," the suit could not go forward. *Id.*

Likewise, in *Moliero*, the D.C. Circuit held that a plaintiff alleging that the FBI violated his First Amendment rights in failing to hire him could not

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[4] Consistent with this principle, other circuits have also held that the government may not use the state-secrets privilege to deprive a criminal defendant of a defense. *See, e.g., United States v. Aref*, 533 F.3d 72, 79 (2d Cir. 2008); *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1261 (9th Cir. 1998).

pursue his claim where the invocation of the state-secrets privilege barred the government from asserting a defense. 749 F.2d at 825 (Scalia, J.). The court concluded that in the absence of the secret information that would have allowed the government to defeat the claim, the case simply could not proceed: although there may have been "enough circumstantial evidence to permit a jury" to rule in favor of the claimant, that result would have been a "mockery of justice." *Id.*; *see also In re Sealed Case*, 494 F.3d 139, 148-51 (D.C. Cir. 2007).

Similarly, in *El-Masri*, the Fourth Circuit dismissed a complaint against United States officials and various corporate defendants seeking damages for alleged violations of the Due Process Clause and the Alien Tort Statute. The court held that any of the "main avenues of defense available in this matter" would impermissibly require disclosure of state secrets. 479 F.3d at 309. The court concluded that the alleged wrongdoers therefore "could not properly defend themselves," and it ended the case against them. *Id.*

To be sure, some of the claims dismissed in these cases were filed against the government, and the government therefore deprived *itself* of a defense when it chose to invoke the state-secrets privilege. But the cases do not suggest that the outcome should be different when the government is asserting a claim and a private party is defending against it. Indeed, given that the state-secrets privilege can be asserted solely by the government, *see Reynolds*, 345 U.S. at 7, the unfairness of allowing a claim to proceed where the privilege hampers a defense is

only heightened when the government is the party seeking to enforce some penalty. Not surprisingly, then, courts have often recited the applicable rule in a manner that does not distinguish between claims against the government and claims by the government. *See Zuckerbraun*, 935 F.2d at 547; *Kasza*, 133 F.3d at 1166.

3. Even apart from the serious conflicts described above, the state-secrets issue presented here is one of exceptional importance. The result permitted by the Federal Circuit is that two of the Nation's most important defense contractors are called on to forfeit billions of dollars, despite having a valid defense to the government's charges of default. Such a "mockery of justice" should not be allowed to stand. *Moliero*, 749 F.2d at 825.

In addition, the Federal Circuit has established a rule that will be binding in nearly every government contracts case, since (with very few exceptions) no other circuit has jurisdiction over such matters. *See* 28 U.S.C. § 1295(a)(3), (10); *id.* § 1491(a)(1)-(2); *id.* § 1346(a)(2). That rule creates a dangerous precedent in a field where contractors frequently work with and develop classified technology. Under the Federal Circuit's decision, the government may affirmatively proceed against a contractor, obtaining a large financial recovery, even while invoking the state-secrets privilege to eliminate the contractor's defense. The temptations of that option for the government, and the resulting disincentives for private contractors to enter into certain contracts that are necessary to the country's welfare, are intolerable. *See United States v. Winstar Corp.*, 518

U.S. 839, 913 (1996) (Breyer, J., concurring) (government may be unable "to obtain needed goods and services" if parties are "unwilling to undertake the risk of government contracting").

The nature of the state-secrets privilege increases the potential for abuse. The basis for the government's invocation of the privilege is often immune from even *in camera* review, *see, e.g.*, *Reynolds*, 345 U.S. at 10, and history shows that the government has sometimes asserted the privilege without justification, as in *Reynolds* itself. *See, e.g.*, Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 Admin. L. Rev. 131, 168 (2006).[5]

Cases do exist in which vital state secrets necessitate keeping certain information confidential. But the costs of that confidentiality should not be borne by individual contractors subject to a massive forfeiture. This Court should confirm that when the government, acting as the "moving party," asserts the state-secrets privilege to bar its opponent's defense, it can protect its secrets only at the expense of its claim.

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[5] The government's recent guidelines for invoking the privilege do not erase the potential for abuse, since the government retains virtually unreviewable control over the matter. *See* Office of the Attorney General, *Policies and Procedures Governing Invocation of the State Secrets Privilege* (Sept. 23, 2009), *available at* http://www.justice.gov/opa/documents/state-secret-privileges.pdf.

II. The Federal Circuit's Unprecedented Decision to Permit Default Termination Without a Contracting Officer Assessment of Performance, and on a Rationale Not Articulated at the Time of Termination, Will Have Broad Application and Is of Crucial Importance.

The Federal Circuit held that the government can terminate a contract for default without the contracting officer's performing any evaluation of a contractor's actual performance. Moreover, it held that a court adjudicating the propriety of the default termination need not confine its review to the government's contemporaneous justification for the default termination, but can instead uphold the termination on any ground at all, even if it was never considered or articulated when terminating the contract. These rulings upset nearly a century of settled government contracts law, conflict with basic principles of judicial review of administrative action, and result in a regime in which the government has essentially unbridled authority to subject contractors to a drastic penalty. The rulings not only changed the outcome here, but also put at risk existing and future government contracts, including those for critical military projects. Because the Federal Circuit has exclusive jurisdiction under the Contract Disputes Act, *see* 28 U.S.C. § 1346; *id.* § 1491, there can be no conflict with another circuit on these issues, but the issues are of serious national importance, and this Court's review is urgently necessary. *See, e.g.*, *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (granting certiorari to "determine the appropriateness" of "general rule"

applied by Federal Circuit in area of its exclusive jurisdiction).

1. The Federal Circuit has stripped away vital protections for contractors that are mandated by statute and regulation and are embodied in precedent of the Circuit and its predecessor court stretching back almost a century. Under the Contract Disputes Act, "[a]ll claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer." 41 U.S.C. § 605(a). Further, "[t]he contracting officer shall issue his decisions in writing" and "shall state the reasons for the decision reached." *Id.* Consistent with the Act, the Federal Acquisition Regulations provide that "[w]hen a default termination is being considered, the Government shall decide which type of termination action to take (i.e., default, convenience ...) only after review by contracting and technical personnel ... to ensure the propriety of the proposed action." 48 C.F.R. § 49.402-3(a). The regulations identify specific factors that "[t]he contracting officer shall consider ... in determining whether to terminate a contract for default," including "[t]he specific failure of the contractor and the excuses for the failure," as well as "[t]he terms of the contract and applicable laws." *Id.* § 49.402-3(f).

Thus, until now, the settled rule was that a default termination cannot be sustained unless the government chose that drastic sanction by exercising informed *discretion* – a choice that necessarily draws upon the contracting officer's expertise with respect to the details of the contractor's performance.

Accordingly, in *Schlesinger v. United States*, 390 F.2d 702 (Ct. Cl. 1968), the Court of Claims (the Federal Circuit's predecessor in government contracts matters) set aside a default termination because "[t]here was no indication of any concern for the contractor or whether a default would be excusable, no consideration of a possible waiver or an extension, no weighing of a convenience termination instead of a default termination." *Id.* at 708-09; *see also Darwin Constr. Co. v. United* States, 811 F.2d 593, 596 (Fed. Cir. 1987) (reaffirming *Schlesinger*); *Hannon Elec. Co. v. United States*, 31 Fed. Cl. 135, 143 (1994) (explaining that "courts will not uphold a default unless the [contracting officer] has carefully examined the contractor's ability to complete the remaining work before the contract completion date"). This requirement dates back to at least 1920. *See Williams Eng'g & Contracting Co. v. United States*, 55 Ct. Cl. 349, 382 (1920).

In conjunction with the requirement of an exercise of discretion, the Federal Circuit and its predecessor court also uniformly confined themselves to review of the factual basis for the default termination that was *actually articulated* by the government at the time of termination. *See* 41 U.S.C. § 605(a). Courts were willing to entertain a reason for default termination not articulated by the contracting officer only when that reason was *legal* rather than factual, and therefore (1) outside of the contracting officer's expertise and (2) beyond the contractor's ability to remedy. *See, e.g., Kelso v. Kirk Bros. Mech. Contractors, Inc.*, 16 F.3d 1173, 1175 (Fed. Cir. 1994) (federal labor standards);

Joseph Morton Co. v. United States, 757 F.2d 1273, 1278 (Fed. Cir. 1985) (fraud); *Pots Unlimited, Ltd. v. United States*, 600 F.2d 790, 793 (Ct. Cl. 1979) (federal regulations and contract provisions); *College Point Boat Corp. v. United States,* 267 U.S. 15, 15-16 (1925) (federal statute).[6]

These now-discarded rules reflected basic principles of administrative law. Where the executive determines the rights of private parties, this Court has always insisted that an agency explain its reasoning, and then has limited judicial review to an examination of the reasons given by the agency in the exercise of its expert authority. *See, e.g.*, *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. ... [T]he court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis."); *Motor Veh. Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). No other approach honors Congress's choice to entrust the decision of certain issues to the executive in the first instance. *See SEC v. Chenery Corp.*, 318 U.S. 80, 88, 94 (1943) (a court "cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency").

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[6] The one exception to this rule is a case that was decided after, and relied upon, the Federal Circuit's decision in the case at hand. *See Empire Energy Mgmt. Sys., Inc. v. Roche*, 362 F.3d 1343, 1357 (Fed. Cir. 2004) (citing Pet. App. 193a-194a).

Here, Congress has entrusted certain decisions to the contracting officer, and required the contracting officer to consider certain issues in rendering his decision. But the Federal Circuit has created a new regime in which the government need not exercise any discretion or assess a contractor's actual performance in deciding on a termination for default, and in which the government can advance any factual basis whatsoever for a court to uphold a termination. Thus, while recognizing that in this case the contracting officer was *ordered* for political reasons to carry out a termination against his will, and acted in such haste that he left a key portion of his termination memo – copied verbatim from a prior memo relating to a different contract – completely blank, the Federal Circuit nevertheless held that because the termination was generally "predicated on contract-related issues, it was within the discretion of the government." Pet. App. 251a; *see also id.* 169a (testimony of contracting officer that he "would not have terminated the contract" had he not been ordered to do so). The court then ruled that it could uphold the default on an "alternative theory" of the facts, even though the government could not "establish that the contracting officer conducted the analysis necessary to sustain a default under [that] alternative theory." *Id.* 29a.

2. As a consequence of this novel and unfair approach, the Federal Circuit has placed billions of dollars in current contracts at risk and created a significant disincentive for contractors to enter into relationships with the government in the future. *See* GAO, *GAO High Risk and Other Major Government*

Challenges: Acquisition Management (government spent $529 billion on private contracts in fiscal year 2008), *available at* http://www.gao.gov/highrisk/challenges/acquisition_management/home_acquisition_management.php; GAO, *Defense Acquisitions: Assessment of Selected Weapons Programs* 10-11 (Mar. 2009) ("Only 28 percent of DOD's major defense acquisition programs currently estimate that they will deliver on time ..., while just under one-half report they will have a delay of 1 year or more in delivery of an initial operational capability.").

The legal requirements that the Federal Circuit has now erased operated as a check on the government's ability to terminate for default – a step that the government already had a great incentive to take, since if the courts overturn a default the sole consequence is conversion to a termination for convenience. *See supra* p. 4. The government can now visit punishment on a contractor without giving notice of what the contractor might actually be doing wrong or what it needs to correct. Indeed, a contractor might correct every problem ever identified by the contracting officer and still suffer a default that is upheld for some *other* reason, dreamed up in the course of litigation. Moreover, that litigation is likely to be protracted and complicated, like the case at hand, since the government can call on its resources to present every imaginable reason for a default, in the hope that one of them will stick.

It is hard to see why any contractor would enter into a difficult or high-stakes contract with the government under these onerous conditions. *See*

Winstar, 518 U.S. at 884 (rejecting rules that "expand[ed] the Government's opportunities for contractual abrogation," but "with the certain result of undermining the Government's credibility at the bargaining table and increasing the cost of its engagements"). Notably, following the Federal Circuit's decision, leading commentators began advising contractors that they should refuse to undertake fixed-price research-and-development contracts like the A-12 contract, a type of contract that the government has increasingly sought to use to develop crucial new technology and to push the envelope in military and other contexts. *E.g.*, Ralph C. Nash, *Fixed-Price Research & Development Contracts: A Risk Too High*, 23 Nash & Cibinic Rep. ¶ 39, at 116 (Aug. 2009). As these commentators have explained, the Circuit's new rules, which make "[d]efault termination ... a viable tactic" when some "higher authority" simply wishes to stop paying, create "too great a risk to take," and so contractors should "adopt the Nancy Reagan solution – *just say no*." *Id.*

3. The problems with the Federal Circuit's approach are well illustrated by the case at hand. The contractors are now subject to a government demand for billions of dollars, and a government refusal to pay billions of dollars for costs the contractors incurred, based on a post-hoc justification. The contractors' past performance, their ability to perform in the future, and their explanations of the government's own fault in creating any performance problems were *never* given due consideration by the contracting officer or

anyone else in the government as part of the hasty decision by the Secretary of Defense to order termination. That is the hallmark of arbitrary and capricious government action. And the Federal Circuit's anemic requirement that the default termination be, in some general way, plausibly "performance-related" is no obstacle to such action, since that requirement can be so readily met in almost every imaginable case.

Moreover, the problems with the government's newly recognized powers are compounded here by the Federal Circuit's decision to significantly weaken the substantive standard for assessing whether the government's after-the-fact rationale is a sufficient one. In 2003, the Federal Circuit correctly held that the government had to prove a "reasonable belief on the part of the contracting officer that there was no reasonable likelihood that the contractor could perform the entire contract effort within the time remaining for performance." Pet. App. 191a. Now, however, the Federal Circuit has greatly loosened this standard, holding that the default can be sustained based on an "ad hoc, factual inquiry" into whether a hypothetical contracting officer could have felt "insecure about the contractors' rate of progress." *Id.* 20a-21a, 27a. This change does away with yet another check on the government's use of its sovereign powers to run roughshod over its counterparties.[7] In conjunction with the other

[7] Petitioner General Dynamics agrees with Petitioner Boeing that the Federal Circuit's decision to change the governing standard in this case is independently worthy of this Court's

changes described above, it gives the government extraordinary latitude to inflict a drastic penalty.

None of this can be reconciled with the basic principle that the government must deal fairly with its contractors and "turn square corners." *Heckler v. Community Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 61 n.13 (1984); *see also S&E Contractors, Inc. v. United States*, 406 U.S. 1, 10 (1972). This Court should hear and decide these fundamental issues of government contracts law, which are of extraordinary national importance.

III. The Federal Circuit's Decision Conflicts With the Decisions of Other Circuits on Whether a Panel Can Overrule a Prior Panel in the Same Case Under the Law-of-the-Case Doctrine.

As discussed above, the Federal Circuit is a court of national importance, with sole appellate jurisdiction over patent cases and almost all government contracts cases and, as a result, a profound impact on a wide and important swath of the Nation's economy. Consistency and stability in the Federal Circuit's law is therefore especially important – and a fair and predictable system for dealing with disagreements between different panels of judges is crucial. But the Federal Circuit has long struggled with these issues, and its most recent decision in this case creates additional inconsistency and instability.

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review, and joins the request for review of that issue. *See* Boeing Pet. (filed Apr. 23, 2010).

In that decision, the Federal Circuit determined that under the law-of-the-case doctrine – which permits alteration of prior rulings under certain circumstances – a panel has the authority to disregard Circuit precedent by overruling a prior panel decision that was issued in the course of the same case. That decision not only was outcome-determinative here, but also undermines the confidence of all Federal Circuit litigants. Moreover, it directly conflicts with the rule in a number of other circuits, which have held that the "law of the circuit" doctrine, a bedrock principle of *stare decisis* under which only an *en banc* court can overrule a panel decision, trumps the law-of-the-case doctrine. This Court, which has the "power to supervise the administration of justice in the federal courts," *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 345 U.S. 247, 260 (1953), should step in to ensure consistency in the Federal Circuit and to resolve this split among the circuits.

In its 2003 panel decision in this case, the court of appeals applied its longstanding precedent and unequivocally ruled that the government could not sustain its default termination claim on a mere showing that the contractors were likely to be behind schedule on an interim contract deadline. Rather, the court held, the government would have to prove that the contracting officer had a reasonable belief that there was no reasonable likelihood of timely completion of the "entire contract effort" – a standard that required a valid deadline for contract completion. Pet. App. 193a, 195a-197a, 211a; *see also id.* 195a-196a (acknowledging that the

contractors contended no such final deadline existed). On remand, the trial court found that the government had disestablished the contract completion date and never set a new one. *Id.* 164a. The 2009 panel agreed. *Id.* 14a. Yet it discarded the 2003 panel's legal standard, shifting to an amorphous "ad hoc, factual inquiry." *Id.* 20a-21a. Amazingly, the new panel all but acknowledged that it had altered the governing standard in service of a particular result, suggesting that a victory by the contractors would be an "injustice," and that the law-of-the-case doctrine therefore authorized a departure from the prior panel ruling, even absent an intervening change in fact or law. *Id.* 27a n.4.

In the Federal Circuit, therefore, if a panel considers an earlier panel decision in the same case to be unjust or erroneous, the later panel can simply set it aside. Other circuits have reached exactly the opposite result. *See United States v. 162.20 Acres of Land*, 733 F.2d 377, 379 (5th Cir. 1984); *United States v. Washington*, 593 F.3d 790, 798 n.9 (9th Cir. 2010); *United States v. Alaw*, 327 F.3d 1217, 1220 (D.C. Cir. 2003); *see also Swipies v. Kofka*, 419 F.3d 709, 714 (8th Cir. 2005); *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289, 1292 (11th Cir. 2005); *Craft v. United States*, 233 F.3d 358, 363, 369 (6th Cir. 2000), *rev'd on other grounds*, 535 U.S. 274 (2002); *Cohen v. Brown University*, 101 F.3d 155, 169 (1st Cir. 1996); *Howard v. Mail-Well Envelope Co.*, 90 F.3d 433, 435 (10th Cir. 1996).

For instance, in *162.20 Acres of Land*, the Fifth Circuit rejected a plea to overturn a prior panel's holding in the same case. The court declared that

"[i]n this circuit ... the law-of-the-case doctrine is supplanted by our firm rule that one panel cannot disregard the precedent set by a prior panel even though it perceives error in the precedent." 733 F.2d at 379.

The Ninth Circuit applies the same rule. In *Washington*, the court explained that it was required to hear an appeal *en banc* because "even if the panel could have revisited [the prior panel's opinion in the same case] under one of the exceptions to law of the case ... it still would have been bound by that published opinion as the law of the circuit." 593 F.3d at 798 n.9 (citing *Old Person v. Brown*, 312 F.3d 1036, 1039 (9th Cir. 2002)).

Had the Federal Circuit taken the same approach, the 2009 panel would have ruled for the contractors. Indeed, the 2009 panel itself recognized that the contractors would have prevailed under the standard the previous panel had mandated. Pet. App. 27a n.4. But the decision of a later panel to overrule the earlier one has allowed the government to claim a right to billions of dollars from the contractors – an extraordinary and improper result.

The injustice was heightened here by procedural unfairness that is a risk in any system in which a later panel may overrule an earlier panel in the same case. Having litigated under the 2003 mandate for years, the contractors had no opportunity to present evidence or argument under the newly announced "ad hoc" test – even though that is a test under which the contractors also could have prevailed. Rather, the Federal Circuit made its own

factual findings under the new test on the basis of the existing record, disregarding contrary evidence and conflicting trial court findings in the course of doing so.[8] The temptation to put an end to long-running litigation in this way – even at the expense of a fair hearing on remand for the losing litigant – is obviously great, especially when the deciding panel knows that any *subsequent* panel would be able to change the governing law in the case yet *again*. Accordingly, under the Federal Circuit's approach, these problems are likely to arise in future cases as well.

But that is far from the only concern raised by the Federal Circuit's departure from the "law of the circuit" rule of *stare decisis* followed by other courts of appeals. That rule serves the important purpose of "establish[ing] the orderly development of federal law" so that it is "at least uniform within a single Circuit." 18B Charles Alan Wright et al., *Federal Practice & Procedure* § 4478.2, at 727 (2d ed. 2002). In contrast, the Federal Circuit's exception "significantly undermine[s]" the "stability of the law" in that court. *United States v. Bordeaux*, 400 F.3d 548, 554 (8th Cir. 2005). Now, losing litigants have every incentive to go over the same ground twice, hoping that the second time they will draw a panel that is more favorable to their position. *Compare Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986) (explaining that *stare decisis* is intended to "permit[]

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[8] Petitioner General Dynamics agrees with Petitioner Boeing that this procedural issue is independently worthy of this Court's review, and joins the request for review of that issue. *See* Boeing Pet. (filed Apr. 23, 2010).

society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals"). And no party – or, for that matter, non-party – can count on the fact that a legal test set forth in a panel decision will stand (absent an intervening legislative enactment or ruling by this Court) unless and until it is considered and altered by the *en banc* court, with the full participation of the members of the original panel. The result is that confidence in the rule of law is undermined, and the Circuit's law thrown into disarray.

The Federal Circuit can ill afford these damaging consequences. Because it is the only circuit that hears patent cases and (with minor exceptions) government contracts cases, consistency among that court's panel decisions is especially important – and, indeed, one of Congress's express purposes in establishing the court was fostering predictability and uniformity in these areas of the law. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25. Yet consistency and predictability are areas in which the Federal Circuit already struggles significantly, as many commentators have recognized. *See, e.g.*, Paul M. Janicke, *On the Causes of Unpredictability of Federal Circuit Decisions in Patent Cases*, 3 Nw. J. Tech. & Intell. Prop. 93, 93 (2005) (stating that the "court has been increasingly criticized for inconsistency"); Matthew F. Weil & William C. Rooklidge, *Stare Un-Decisis: The Sometimes Rough Treatment of Precedent in Federal Circuit Decision-Making*, 80 J. Pat. & Trademark Off. Soc'y 791, 793 (1998).

This Court should not leave in place a rule that exacerbates these problems, places the Federal Circuit at odds with its sister circuits on an important procedural issue, and subjects the contractors to a government demand for a multi-billion-dollar forfeiture.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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