No. 09-1302

In The
Supreme Court of the United States

THE BOEING COMPANY,

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Our petition demonstrated that this Court should review and reverse the judgment below, perhaps summarily. Nothing in the Government's opposition casts doubt on that conclusion.

1. Earlier in this case, Contractors asserted an affirmative claim for damages against the Government, but the trial court, according to the Government, correctly dismissed it "because the state-secrets privilege prevented the government, as the defendant, from effectively responding to that claim." Opp. 17-18; *see* Pet. 28-29. But now, when the shoe is on the Government's other foot, the Government argues that the dismissal, for precisely the same reason, of its *own* claim against Contractors, which could result in a multi-billion dollar forfeiture, would be an "extreme result." Opp. 17. The Government says that it alone is entitled both to assert a claim against its contractors, and also to ensure its own victory by disarming them of a defense that would defeat the claim, simply by invoking the state secrets privilege to withhold information necessary to prove that the defense has merit and the claim does not. The Government asserts this view of its power, and of our laws, without hint of embarrassment; to the contrary, it claims that *Contractors* seek an "extreme result" in resisting its confiscatory position. The Founders understood that governments were capable of such overreaching, and so they gave us a Due Process Clause and an independent judiciary.

a. The Government argues first that "where matters can be fairly litigated without resort to secret information, a suit may continue." Opp. 17. True enough. But contrary to the Government's suggestion, entertaining only those arguments Contractors sought to present "*that would not have risked the disclosure of secret information*," Opp. 16-17 (emphasis added), patently does not satisfy the due process guarantee that defendants be afforded "an opportunity to present *every* available defense," *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (emphasis added); Pet. 32. When threatened disclosure of a state secret bars presentation of a *prima facie* valid defense, the claim may not proceed.

The Government counters that *Lindsey* does "not speak to the application of evidentiary privileges generally or the state-secrets privilege in particular." Opp. 16. Rather, it contends, "evidentiary privileges may limit both plaintiffs' and defendants' access to material and may thereby affect a party's ability to prove its case." Opp. 16. But this is not a routine case in which a defense was weakened by the inadmissibility of a piece of privileged evidence; this is a case in which the same party – the Government – was permitted both to assert a claim *and* to invoke the state secrets privilege to foreclose a defense already found *prima facie* valid based on nonprivileged evidence. Pet. 12. Unsurprisingly, courts have not allowed litigants such a patently unfair advantage when invoking other privileges. Pet. 33 n.8; Chamber of Commerce Br. 13-14. Nor have other circuits allowed

litigants to use the state secrets privilege to corrupt the judicial process in this manner. The Federal Circuit's contrary holding thus conflicts with core principles of due process recognized in *Lindsey v. Normet*, 405 U.S. 56 (1972), and in decisions from the Second, Fourth, Fifth, Sixth, Ninth, and D.C. Circuits. Pet. 33-34.

The Government also contends that a rule requiring "[a]utomatic invalidation of the default termination" would be "susceptible to manipulation" by contractors that "raise a superior-knowledge claim simply to induce the government to invoke the state-secrets privilege." Opp. 18. The Government attacks a strawman, for courts can and do limit the rule's application to situations, like that here, in which the foreclosed defense is *prima facie* valid, Pet. 33-34. Moreover, private contractors are entitled to the presumption that they act in good faith no less than the Government. And any risk of manipulation by private litigants is far outweighed by the risk of manipulation that inheres in the Government's largely unfettered discretion to assert the state secrets privilege, which, despite certain "procedural and substantive restrictions" on its assertion, Opp. 18, is absolute and practically unreviewable. *United States v. Reynolds*, 345 U.S. 1, 10-11 (1953); *El-Masri v. United States*, 479 F.3d 296, 305-06 (4th Cir. 2007).

b. The Government argues, alternatively, that this rule would not apply here anyway because Contractors "are plaintiffs rather than defendants." Opp. 13-15, 17. True, Contractors are nominally the

plaintiffs here, but it is the Government that asserts the default termination claim at issue – it is the "moving party." *Reynolds*, 345 U.S. at 12. And Contractors' *prima facie* valid defense has been blocked by the Government's assertion of the state secrets privilege. The happenstance of which party files the lawsuit cannot defeat the fundamental due process principle that if the Government can force the opposing party to lay down its shield, then the Government must lay down its sword.

Noting that it "did not file any claim or seek any affirmative relief in the CFC," the Government maintains that it is "similarly situated to a private defendant sued for breach of contract," as if default termination were merely "an affirmative defense[ ]." Opp. 13-15. Not so. Default termination is an affirmative claim by the Government that the *contractor* breached *its* contractual duties to the Government, which could entitle the Government to money damages – here, potentially billions of dollars. *See* App. 46a, 91a, 104a; FAR §52.249-9(a)(1); Pet. 31. Indeed, as the Government acknowledges, it is well-established that default termination is a government claim. Opp. 14; Pet. 9. Thus, as even the court below recognized repeatedly, it is Contractors who must "assert . . . affirmative defense[s]" to the Government's default termination claim, App. 30a, and it was their superior-knowledge "defense" that was foreclosed by the Government's assertion of its state secrets privilege, Pet. 11-14; App. 42a, 63a-64a, 70a.

Indeed, Contractors are captioned "plaintiffs" only because the FAR and the Contract Disputes Act allow the Government to decide unilaterally to terminate a contract for default and force the contractor to challenge that decision by timely filing suit in the CFC (or before a board of contract appeals). FAR §52.249-9; 41 U.S.C. §605(a)-(b); Pet. 9. Because of this procedural framework, the Government can never be captioned "plaintiff" in a lawsuit concerning the validity of a default termination, but this procedural rule should not be determinative here. The safeguards of due process would be meaningless if the Government could nullify a contractor's due process rights simply by granting itself such procedural advantages.

Reynolds recognized 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," 345 U.S. at 12; Pet. 31-32. The Government resists application of this fundamental insight because "[t]his case . . . is a civil rather than a criminal proceeding." Opp. 13-14. In both civil and criminal proceedings, however, the state secrets privilege creates the risk that the Government will use the privilege to distort the fact-finding process to its advantage, and due process guarantees civil defendants, no less than criminal defendants, the opportunity to present every available defense. Pet. 32-33; *Lindsey*, 405 U.S. at 66. Accordingly, every circuit to have addressed the issue, other than the Federal

Circuit, has made clear that a *civil* claim should be dismissed if the state secrets privilege forecloses a valid defense thereto. Pet. 33-34.

In any event, default termination threatens Government contractors with draconian, quasi-criminal penalties. The Government is not "simply seek[ing] to recoup . . . monies that it had advanced to [Contractors] as progress payments for aircraft that it never received." Opp. 14. By terminating for default, the Government potentially entitles itself "to the repayment of advance and progress payments" for work that was performed but not yet "accept[ed]." FAR §§49.402-2(a), 52.249-9(f); Pet. 35-36. Here, the Government has claimed that the default termination entitles it not only to recoup $1.35 billion in such payments to Contractors, Pet. 8-9, but also to retain the benefit of another $1.2 billion of Contractors' own unreimbursed money, which Contractors could not recover if the default termination is upheld. Contractors were acting at the Government's "encourage[ment]" to continue work under the contract despite the delays inevitably associated with a complex research and development contract. Pet. 7-10; App. 217a, 218a n.73, 227a. Results like this have naturally prompted courts to repeatedly characterize default termination as "a drastic sanction," *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987), and "a species of forfeiture," *Decker & Co. v. West*, 76 F.3d 1573, 1580 (Fed. Cir. 1996). Pet. 20, 32 n.7, 35-36.

2. The Government contends that Contractors were not entitled to a remand to make their case under *MDC 14*'s newly minted ad hoc standard for default terminations. But its own admissions belie that contention. The Government admits that *MDC 12* not only "reaffirmed the *Lisbon* standard" for evaluating the default termination of the A-12 contract, but also specifically "directed the CFC on remand to determine 'the contract completion date' and the 'time remaining for performance'" to answer *Lisbon*'s controlling inquiry: whether "'there was no reasonable likelihood that the contractor could perform the entire contract effort within the time remaining for contract performance.'" Opp. 22-23. Indeed, *MDC 12* emphasized the obvious: that absent a completion date for the entire contract effort, "it would be difficult, if not impossible," to sustain a default termination under *Lisbon*. App 56a. The Government also admits that the A-12 contract had no completion date at termination, but that *MDC 14* nonetheless upheld the default termination under a new, ad hoc "totality of the circumstances" standard announced and applied for the first time in *MDC 14* itself. Opp. 10-11.

a. The Government defends this patent violation of procedural due process by arguing that *MDC 14*'s new, ad hoc test is not "significantly different" from the *Lisbon* standard *MDC 12* mandated, but rather is merely a "refinement" reflecting a "difference in emphasis between the 2009 and 2003 opinions." Opp. 22-24. This attempted reconciliation does

not survive even a casual comparison of the two tests. *MDC 12* unequivocally and repeatedly emphasized that *Lisbon* required determination of the time remaining to complete the contract, while *MDC 14* acknowledged that "because the modified A-12 contract does not contain a fixed completion date, a *Lisbon* analysis cannot be strictly applied." App. 31a. Nor does it survive the *MDC 14* court's candid acknowledgement that its "analysis may appear different from the one [*MDC 12*] previously instructed the trial court to perform, specifically, to determine the contract completion date." App. 30a n.4. Indeed, the *MDC 14* court sought to justify its "depart[ure] from [its] prior holding" on the theory that *MDC 12* was "clearly erroneous." *Id.*

b. The Government claims that remand was unnecessary because the Contractors "were apprised well before [*MDC 14*] of the relevance of the type of evidence . . . invoked" in that decision; *MDC 12*, according to the Government, required "consider[ation of] substantially the same factors" as *MDC 14*, "including 'the contractor's failure to meet progress milestones,' 'problems with subcontractors and suppliers,' its 'financial situation,' and its 'performance history.'" Opp. 24, 26-27.

MDC 12, however, looked to these circumstantial factors solely to determine the likelihood of completion of "the entire contract effort *within the time remaining for contract performance*." App. 52a (emphasis added). *MDC 14* eliminated *MDC 12*'s requirement to determine "the contract completion

date" as a prerequisite to sustaining the default termination, and thus detached the factual analysis contemplated by *MDC 12* from the very question it was intended to answer. App. 17a, 31a, 57a; *see* Pet. 12-13, 15-16.

Under *MDC 12*, the Government's failure to reestablish a completion date before termination was dispositive, so Contractors had no reason to address on remand the circumstantial factors, nor did they even have a point of reference from which to assess those factors' significance. Further, *MDC 14* unexpectedly placed on Contractors the burden of showing they "could have completed the contract on any date" and "excusable delay" – issues that Contractors could have proved but were not required to address under *MDC 12* unless the Government proved a valid completion date. Pet. 16, 18, 35; App. 30a-31a.

Far from a mere "difference in emphasis," Opp. 24, *MDC 14*'s ad hoc approach diverged fundamentally from *MDC 12*'s straightforward *Lisbon* test, and imposed a critical new burden on Contractors. Indeed, *MDC 14*'s approach is materially indistinguishable from the approach urged by the Government but expressly rejected in *MDC 12*. *See* Pet. 12-13, 17.

In short, *MDC 12* gave Contractors no reason to anticipate, and surely no actual notice of, *MDC 14*'s new, ad hoc approach. Rather, *MDC 12* specifically instructed the trial court to "determine[ ] the performance required by the contract and the contract completion date," App. 57a, and Contractors tailored

their arguments and evidence in accordance with that mandate.

c. Finally, the Government argues that remand is not merited here because the "extensive factual record" supports *MDC 14* and provides "no reason to believe" that Contractors would obtain a different result on remand. Opp. 27. But Contractors have shown in detail how *MDC 14,* in applying its newly minted test to that extensive record *de novo* and without guidance from the parties, overlooked many of the trial court's factual findings and other record evidence that fatally undermine *MDC 14*'s conclusions and make clear that Contractors in fact would have met any reasonable completion schedule. Pet. 24-27.

For example, contrary to the assertions of *MDC 14* and the Government here, *see* Opp. 4, the trial court expressly found that "[t]he contractors' requests to restructure the contract were not declarations of financial inability or unwillingness to perform," App. 225a; that the original contract's delivery schedules and technical specifications, which Contractors refused to meet, were not valid because the Government previously had waived them, *see* App. 266a, 288a; and that the contracting officer was "not particularly concerned" about Contractors' projected failure to meet the partial interim delivery schedule reestablished by the Government, App. 218a n.73. Consequently, remand would not have been futile, for Contractors almost certainly would have prevailed if

given the opportunity to prove their case under *MDC 14*'s new, ad hoc test.

In sum, the Government simply cannot reconcile the Federal Circuit's failure to remand with *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964), and the uniform decisions of numerous circuits, all holding that due process requires remand when an appellate tribunal adopts a new controlling standard, so that a party can make its case under the new rule. *See* Pet. 21-23. Accordingly, the Court should grant review of this case to resolve the circuit conflict created by the decision below. Alternatively, this Court should consider summarily reversing the Federal Circuit's patently wrong decision.

3. The Government contends that *MDC 14*'s ad hoc test is sound because, "[a]lthough a completion date may facilitate the *Lisbon* analysis," the pertinent default-termination clause of the FAR does not require a completion date. Opp. 22. Default termination is permitted if the contractor fails to "[p]rosecute the work so as to endanger performance of th[e] contract." FAR §52.249-9(a)(1)(ii); *see* Opp. 20. But at least when default termination is based solely on concerns about *timely* performance of the contract (as opposed to, say, concerns about work quality or whether the contractor will perform at all), this provision surely must be read to require a completion date against which progress can be objectively measured. As *MDC 12* (like numerous boards of contract appeals) recognized, a court simply cannot "ascertain[ ] whether the contracting officer had a reasonable belief that there

was no reasonable likelihood of timely completion" without "first" determining "the contract completion date." App. 56a-57a; Pet. 12-13, 37 & n.9. Simply put, so long as work under the contract is proceeding in good faith, there can be no "[ ]danger" that "performance of th[e] contract" will be untimely when no completion deadline has been set.

a. Resisting this impeccable logic, the Government points to *Universal Fiberglass Corp. v. United States*, 537 F.2d 393 (1976), which upheld a default termination absent a fixed contract completion date. Opp. 21-22. But there the concern was not that the contractor's performance would be untimely; it was that the contractor would not perform *at all*. Default termination was warranted because the contractor was "making no progress at all," and there was no evidence that progress "would or could ever be resumed." 537 F.2d at 398; Pet. 38. The Government suggests that, in citing *Universal Fiberglass* "approvingly," *MDC 12* somehow implied that default termination can be sustained absent a completion date in cases such as this, where Contractors "were committed to performing the A-12 contract until the date of termination" and were making progress, spending up to $150 million *of their own money* every month on continuing performance. App. 227a. But this reading of *MDC 12* is belied by that decision's own clear, repeated instruction that the trial court *determine the completion date as a prerequisite to assessing the validity of the default termination*, Pet. 12-13, an instruction made in full view of Contractors'

argument that no valid completion date existed at termination, *see* App. 56a.

b. Contrary to the Government's assertion, *see* Opp. 20, the completion-date requirement of *Lisbon* and *MDC 12* does not "serve[ ] only the contractor's interest." Opp. 20 (quotation marks omitted). Rather, it is part of the mutually beneficial balance carefully struck by the FAR between Government and contractor interests. Pet. 35-37; App. 50a-51a. And the contractor's "free[dom] to negotiate completion dates," Opp. 21, is often illusory in practice, as shown by Contractors' futile efforts to negotiate a new schedule here. Pet. 8. In any event, the Government can readily protect itself against adverse consequences from a completion-date requirement – indeed, it alone possesses the extraordinary power to impose *unilaterally* a reasonable completion date anytime before termination. App. 60a.

CONCLUSION

The petition for a writ of certiorari should be granted. As an alternative to plenary review, this Court may wish to consider summarily reversing the judgment below, with instructions to remand the case to the trial court to afford Contractors an opportunity to satisfy the Federal Circuit's new test for reviewing a default termination.

Respectfully submitted,

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