No. _____

In the
Supreme Court of the United States

PRECISION PINE & TIMBER, INC.,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for 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

In this case, the trial court applied the well-established standard in the Federal Circuit and, in 2001, ruled at summary judgment that because the United States Forest Service ("FS") had acted unreasonably both in imposing and prolonging a suspension of Precision Pine & Timber, Inc.'s ("Precision") operations on 11 timber sale contracts, the FS had breached its implied contractual duties to cooperate and not to hinder Precision's performance. Following lengthy discovery proceedings and a six week trial on damages, judgment was entered in favor of Precision. The government appealed and, in a 2010 ruling, a panel of the Federal Circuit disregarded binding Circuit precedent and created a new standard of proof for a breach of the implied duties, *i.e.*, one adopted from a misapplication of the sovereign acts doctrine. The Federal Circuit now requires contractors to establish a breach of the implied contractual duties to cooperate and not to hinder by demonstrating that the government acted with subjective intent to deprive the contractor of benefits to which it was entitled under the contract. The questions presented are:

1. Whether the Federal Circuit erred by creating a defense to breach of the implied contractual duties under the sovereign acts doctrine that is at odds with the two-part test established by this Court in *United States v. Winstar Corp.*, 518 U.S. 839 (1996) (plurality), that has been adopted as the test for application of the doctrine by the Federal Circuit?

2. Whether the Federal Circuit erred by failing to apply its own, binding, objective reasonableness

standard for determining whether the government had breached its implied contractual duties and instead adopted a new legal standard requiring a contractor to prove that the government had a subjective intent to breach its implied contractual duties?

3. If questions 1 and 2 are answered in the negative, whether the Federal Circuit erred when it reversed the trial court's finding of a breach of contract at summary judgment under the reasonableness standard, but did not remand the case to the trial court to allow the contractor an opportunity to establish facts necessary to prove its breach claim under the newly announced, subjective intent standard?

LIST OF PARTIES AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

There are no parties to the proceedings other than those listed in the caption.

Pursuant to Supreme Court Rule 29.6, Petitioner Precision Pine & Timber, Inc., makes the following disclosures:

There are no parent corporations or any publicly held companies owning 10% or more of Petitioner's stock.

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The United States Court of Federal Claims' opinion is reported at 50 Fed. Cl. 35 (2001) and reproduced at Petitioner's Appendix ("Pet.App.") 36a-135a. The United States Court of Appeals for the Federal Circuit's opinion is reported at 596 F.3d 817 (Fed. Cir. 2010) and reproduced at Pet.App.1a-35a.

JURISDICTION

The Federal Circuit entered judgment on February 19, 2010 (Pet.App.152a-153a) and denied Precision Pine & Timber, Inc.'s ("Precision") combined petition for rehearing and rehearing *en banc* on June 10, 2010. Pet.App.136a-137a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appendix reproduces the following relevant constitutional amendment, statutes and regulations: U.S. Const. amend. V, Endangered Species Act 16 U.S.C. § 1536(a)(2), 16 U.S.C. § 1536(b), National Forest Management Act, 16 U.S.C. § 1604(f)(5), 16 U.S.C. § 1604(i) and 50 C.F.R. § 402.14(e)(1995).

STATEMENT OF THE CASE

It had been settled law for decades in the Federal Circuit that a federal contractor could establish that the government breached its implied contractual duties by demonstrating that the government's action(s) in causing and/or prolonging a contract suspension were objectively unreasonable. Indeed, in

recent years, the Federal Circuit had reaffirmed the applicability of the reasonableness standard in a case addressing government suspensions under a contractual provision that is substantively indistinguishable from the contractual provision at issue here. However, rather than applying the objective, reasonableness standard that *both* parties had argued governed this appeal, a Federal Circuit panel ignored binding Circuit precedent and announced a new standard which required the contractor to prove that the government had *subjectively intended to harm* the contractor in suspending the contractor's operations.[1] In creating its new standard, the panel relied almost exclusively on cases that addressed the sovereign acts defense and *sua sponte* applied aspects of that defense that do not apply to this case. Worse still, the panel applied the defense in a way that is at odds with the two-part test set forth in *United States v. Winstar Corp.*, 518 U.S. 839 (1996) (plurality) that has been adopted by the Federal Circuit.[2] In doing so, the Federal Circuit

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[1] Original jurisdiction over government contracts claims arising under the Contract Disputes Act, 41 U.S.C. § 601, *et seq.*, is lodged with the Court of Federal Claims and the Boards of Contract Appeals, *id.* at §§ 609,607, and appeals from these tribunals are solely to the Federal Circuit. 28 U.S.C. § 1295. For this reason, a split in circuit authority is unlikely to develop. Where the Federal Circuit has been given essentially exclusive jurisdiction over an area of the law that is of special importance to the entire Nation (such as the law of government contracts), a grant of *certiorari* is particularly warranted. *See Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 89 (1993).

[2] Seven justices concurred in the opinion, affirming the Federal Circuit's ruling in *Winstar Corp. v. United States*, 64 F.3d 1531 (Fed. Cir. 1995)(*en banc*). The Federal Circuit has treated the

provided the government with an unprecedented and wholly unwarranted defense to breach of contract claims that threatens to allow the government to escape liability for a host of actions that are unreasonable, if not, in fact, contrary to law.

Moreover, even if this Court were to find no error in the Federal Circuit's creation of a new legal defense to a breach of the implied duty to cooperate, the Federal Circuit's refusal to remand the case so that Precision could have an opportunity to prove a breach of its contracts even in the face of this new defense violates both plaintiff's right to due process and the law of this Court. Review by this Court is warranted.

BACKGROUND

Between June 24, 1991 and July 20, 1995, the United States Forest Service ("FS") publicly offered and awarded to Precision 14 timber sale contracts located on National Forests in Arizona. Pet.App.41a n.1. Section 7(a)(2) of the Endangered Special Act ("ESA"), 16 U.S.C. §§ 1531 et seq., provides that each federal agency shall, in consultation with the United States Fish and Wildlife Service ("FWS"), insure that

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plurality opinion in *Winstar* "as setting forth the core principles underlying the sovereign acts doctrine." *Conner Bros. Constr. Co., Inc. v. Geren*, 550 F.3d 1368, 1374 (Fed. Cir. 2008) (applying two-part *Winstar* test), *citing Carabetta Enters., Inc. v. United States,* 482 F.3d 1360, 1365 (Fed. Cir. 2007) (same), and has applied the two-part test established by the plurality opinion in *Winstar* "as the current understanding of the sovereign acts doctrine in the Federal Circuit." *Stockton E. Water Dist. v. United States*, 583 F.3d 1344, 1366 (Fed. Cir. 2009), rehear'g *en banc* filed November 20, 2009 pending.

their actions are not likely to jeopardize the continued existence or adversely modify the critical habitat of a listed species. 16 U.S.C. § 1536(a)(2). Pet.App.138a. This requirement notwithstanding, upon the listing of the Mexican spotted owl ("MSO") in March 1993, the FS Region 3 refused to submit its existing Land and Resource Management Plans ("LRMP")[3] for consultation with FWS. Indeed, it refused to do so until a federal district court ordered it to consult in August 1995. Pet.App.47a-59a, 121a-124a. At that time, the district court also directed Region 3 to suspend all timber harvesting authorized by those LRMPs until the required consultations were completed. Pet.App.63a. As a result, on August 25, 1995, the Region suspended the 14 timber sale contracts held by Precision, 10 of which had been awarded after the listing of the MSO in March 1993. Pet.App.41a n.1.

Furthermore, even though consultation under the ESA was to have been completed within 135 days, as a result of the FS's "misbehavior" (*see* Pet.App.22a), it took 467 days to complete consultation, during which time Precision's contracts remained suspended. Pet.App.126a.

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[3] "Activities, including timber sales, in National Forests are governed by the LRMP for each forest." Pet.App.471, *citing* National Forest Management Act (16 U.S.C. § 472(a); §§ 1600 *et seq.* ("NFMA")) at 16 U.S.C. § 1604(f)(5). Pet.App.142a. "Each timber sale offered by the Forest Service must be 'consistent' with the LRMP for the National Forest on which it is located." *Id.*, *citing* 16 U.S.C. § 1604(i). Pet.App.143a. Thus, until the FS had a valid LRMP in place by completing consultation, it could not proceed with timber sale contracts.

Shortly before the MSO was listed in 1993, environmentalists had sued the FS regarding its failure to submit LRMPs in Oregon for consultation following the listing of another species under the ESA. *See Pac. Rivers Council v. Roberston*, 854 F. Supp. 713, 723 (D. Or. 1993). The Oregon district court, following the Ninth Circuit's controlling decision in *Lane County Audubon Soc'y v. Jamison*, 958 F.2d 290, 294 (9th Cir. 1992), ruled that LRMPs were agency actions for which the FS was obliged to consult whenever a new species was listed. *Id.* This ruling confirmed that, upon the listing of the MSO, Region 3 was required by the ESA to have submitted all of its LRMPs to FWS for consultation. Pet.App.53a.[4]

On December 10, 1993, environmentalists in Arizona advised the Region that, based on *Lane County* and the district court's ruling in *Pacific Rivers*, they planned to bring suit regarding Region 3's failure to submit its LRMPs for forests located in Arizona for consultation following the listing of the MSO. Pet.App.53a-54a. Rather than submit its Arizona LRMPs for consultation, the FS appealed the ruling in

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[4] At summary judgment, Precision contended that the ESA itself required the FS to submit its LRMPs to FWS for consultation upon the listing of the MSO. Pet.App.119a. Alternatively, Precision argued that the FS's duty to consult became manifest when, on March 4, 1992, *Lane County Audubon Soc'y v. Lujan*, 958 F.2d 290, 295 (9th Cir. 1992), held that the FS's sister agency, the Bureau of Land Management ("BLM"), was required to submit aspects of its timber management plans for consultation upon the listing of a new species under the ESA. *Id.* The ruling in *Lane County* came more than one year before the MSO was listed and was the law in the states comprising the Ninth Circuit, including the state of Arizona where all of the timber sales at issue are located. *See id.*

Pacific Rivers to the Ninth Circuit. Pet.App.54a. However, on July 7, 1994, the Ninth Circuit affirmed that LRMPs must be submitted for consultation upon the listing of a new species under the ESA. *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1054-56 (9th Cir. 1994).[5]

In reaction to *Pacific Rivers* and *Lane County*, other Regions of the FS submitted their LRMPs for consultation. Pet.App.57a. However, FS Region 3 continued to resist doing so. Pet.App.58a-59a. As a result, on August 8, 1994, environmentalists filed suit against FS Region 3. *See Silver v. Babbitt* ("*Silver*"), 924 F. Supp. 976 (D. Ariz. 1995). In the face of this lawsuit, Region 3 still refused to submit its LRMPs for consultation and continued to award timber sale contracts under the authority of those LRMPs. Pet.App.59a-60a. These actions were taken contrary to Department of Justice ("DOJ") advice that the Ninth Circuit's ruling in *Pacific Rivers* governed and therefore that the FS was required to engage in consultation on its LRMPs. *Id.* Indeed, DOJ thought so little of the FS's position in *Silver* that it advised the FS that its continued failure to follow the law and engage in consultation was so at odds with applicable law that continuing to defend the FS could expose DOJ attorneys to sanctions under Federal Rules of Civil Procedure 11. Pet.App.59a-60a.

Faced with Region 3's unwavering refusal to comply with the ESA, on August 24, 1995, the Arizona District Court in *Silver* ordered the Region to engage

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[5] Seven of the 14 sales at issue were awarded to Precision after the Ninth Circuit's decision in *Pacific Rivers*. Pet.App.41a n.1.

in consultation and directed the agency to suspend all timber harvesting that had been authorized pursuant to those LRMPs until consultation was complete. Pet.App.62a-63a.

Despite knowing that timber sale contracts awarded under the LRMPs could not proceed until the consultation was complete and that this delay was having devastating effects on contractors in Region 3, specifically including Precision, the FS repeatedly attempted to thwart the consultation process, which caused further delay. Pet.App.63a-65a, 67a-77a.[6]

As a result, in 1997, Precision submitted certified claims pursuant to the Contract Disputes Act, 41 U.S.C. § 605, alleging breach of the 14 contracts and detailing millions of dollars of damages that it had sustained during the 16-month suspension. Pet.App.77a. In response, the contracting officers awarded Precision a total of $18,242.72, which they believed were owed under the terms of the contract and denied Precision's claims for breach of contract damages. *See* Pet.App.78a.

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[6] Consultation on the LRMPs took 467 days because, among other things, the FS delayed commencing formal consultations, attempted to evade the orders of the district court about the scope of consultation (for which it was threatened with contempt) and tried to unilaterally declare the injunction to be over, even though it had not completed consultation as ordered by the district court. Pet.App.126a. As the district court found, the FS was the "culprit" in a process that had taken far too long and was paralyzing the local timber industry. *See* Pet.App.74a-75a.

PROCEEDINGS BELOW

Precision timely appealed the contracting officers' denials of its breach of contract claims to the Court of Federal Claims ("COFC") as provided for in the Contract Disputes Act, 41 U.S.C. § 609(a). Upon cross-motions for summary judgment, on July 30, 2001, the COFC found that, although the FS had contractual authority to suspend a contract in certain circumstances, here, the suspension was caused by FS fault and was, therefore, unreasonable; and the duration of the suspension was unreasonably prolonged by actions of the FS, both of which breached the government's implied contractual duty not to hinder performance for 11 of the 14 contracts. Pet.App.125a-130a.

Following a six week trial on damages and extensive post-trial briefing, on May 2, 2008, the trial court entered judgment in Precision's favor in the amount $3,343,712. *Precision Pine & Timber, Inc. v. United States*, 81 Fed. Cl. 733 (2008). The government appealed the case on several grounds, including challenging the trial court's ruling on liability on the basis that the government was entitled to a presumption of "good faith" in the performance of its duties that must be applied before a breach of the government's implied duties may be found. In response, Precision argued that the government, when acting in its contractual capacity, was not entitled to any presumption of good faith and that the FS's suspension had been unreasonable and a breach of the government's implied contractual obligations under Federal Circuit precedent. *See* Pet.App.11. The Federal Circuit adopted neither party's position. Instead, on February 19, 2010, it reversed the COFC's

2001 liability ruling and, without discussing the reasonableness standard, ruled *sua sponte* for the government as a matter of law because the FS's actions which caused and prolonged the suspension were not "specifically targeted" at Precision's contracts and did not "reappropriate any benefit guaranteed by the contracts." Pet.App.23a.[7]

Precision timely filed a combined petition for panel rehearing and rehearing *en banc* and the Federal Circuit requested that the government respond to the petition. *See* Pet.App.150a. On June 10, 2010, the Federal Circuit denied Precision's petition. Pet.App.136a.

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[7] The Federal Circuit also reversed the COFC's ruling finding that the government had breached a warranty contained in the contracts. Pet.App.19a. Although Precision disagrees with that ruling, it does not seek review of that ruling by this Court.

REASONS FOR GRANTING THE WRIT

I. The Federal Circuit Erred By Creating A Government Defense Adopted From The Sovereign Acts Doctrine That Is At Odds With This Court's Plurality Decision In *Winstar* And Conflicts With Circuit Precedent[8]

A. Precision's Allegations That The FS Breached Its Implied Contractual Duties By Unreasonably Causing And Prolonging Suspensions Of Precision's Contracts Did Not Implicate The Sovereign Acts Defense

Precision alleged that both by causing the suspension through its unreasonable failure to submit its LRMPs for consultation as required by the ESA and then by prolonging the suspension by its unreasonable actions during consultation, the FS breached its implied contractual duties to cooperate and not to hinder Precision's performance. It is well-established in the Federal Circuit that:

> Every contract, as an aspect of the duty of good faith and fair dealing, imposes an implied obligation "that neither party will do anything that will hinder or delay the other party in performance of the contract." *Luria Bros. v. United States*, 177 Ct. Cl. 676, 369 F.2d 701, 708 (1966); *see Malone v. United States*, 849

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[8] Professor Nash described the ruling as creating a new, "mini-sovereign acts" defense. *See* Ralph C. Nash, Jr., "Postscript: Breach of the Duty of Good Faith and Fair Dealing," 24 Nash & Cibinic Report, No. 5 at 67.

F.2d 1441, 1445, *modified* 857 F.2d 787 (Fed.Cir.1988); *Restatement (Second) of Contracts* § 205 cmt. d (1979).

Essex Electro Eng'rs., Inc. v. Danzig, 224 F.3d 1283, 1291 (Fed. Cir. 2000).[9] When the government is a contracting party, these implied duties apply just as they would with a private party. *Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320, 1330 (Fed. Cir. 2003). The implied duties to cooperate and not to hinder are as binding on the parties as if they were expressly written into the contracts. *Kehm Corp. v. United States*, 93 F. Supp. 620, 624 (Ct. Cl. 1950). A claim that the government breached the implied covenant of good faith does not require a showing of bad faith. *Tecom, Inc. v. United States*, 66 Fed. Cl. 736, 770 (2005) ("[I]t is clear, particularly when the specific aspects of the duties to cooperate and not to hinder are at issue, that proof of fraud, or quasi-criminal wrongdoing, or even bad intent are not required"). The implied duties do require, however, that the government refrain from hindering the contractor's performance, and that it do whatever is necessary to enable the contractor to perform. *Lewis-Nicholson, Inc. v. United States*, 550 F.2d 26, 32 (Ct. Cl. 1977) (citation omitted).

In assessing whether a party to a government contract has violated its implied contractual duties, the Federal Circuit has consistently applied a reasonableness standard. *E.g.*, *Essex Electro. Eng'rs.*,

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[9] The Federal Circuit has adopted the opinions of its predecessor, the Court of Claims, as binding law in the Circuit. *South Corp. v. United States*, 690 F.2d 1368, 1370-71 (Fed. Cir. 1982) (*en banc*).

224 F.3d at 1291 (A party must refrain from doing "anything that will hinder or delay the other party in performance of the contract," or that will destroy the "reasonable expectations of the parties in the special circumstances in which they contracted") (citation omitted); *C. Sanchez & Son, Inc. v. United States*, 6 F.3d 1539, 1542 (Fed. Cir. 1993) ("government must avoid actions that unreasonably cause delay or hindrance to contract performance") (citation omitted); *O'Neill v. United States*, 231 Ct. Cl. 823, 826 (1982) (applying reasonableness standard to review the actions of the contracting agency which failed to comply with its statutory duties). In fact, in an earlier opinion addressing whether the FS had breached its implied contractual obligations when suspending a timber sale contract pursuant to contract clause C[T]6.01, as it did here, the Federal Circuit specifically ruled that the court must determine whether the suspension was reasonable. *Scott Timber Co. v. United States*, 333 F.3d 1358, 1609 (Fed. Cir. 2003).[10]

B. The Federal Circuit Erred By Misapplying Cases Addressing The Sovereign Acts Defense

In failing to apply the Federal Circuit's objective, reasonableness standard and, instead, adopting a new, subjective "specifically targeted" standard, the panel relied principally upon *Centex Corp. v. United States*, 395 F.3d 1283 (Fed. Cir. 2005), and *First Nationwide*

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[10] The contract clause at issue in *Scott* was C6.01 (*see* Pet.App.145a), however, the relevant language of C6.01 is identical to the language in clause CT6.01 (Pet.App.147a) of Precision Pine's contracts. *Precision Pine & Timber, Inc. v. United States*, 63 Fed. Cl. 122, 136 n.8 (2004). The clause will be referred to as C[T]6.01 in this Petition.

Bank v. United States, 431 F.3d 1342 (Fed. Cir. 2005), cases which it deemed to be "prototypical examples" of situations in which implied contractual duties were violated. Pet.App.22a-23a. Both *Centex* and *First Nationwide* involved retroactive legislation (the "Guarini amendment") which repealed certain tax deductions that the contractors obtained under their contracts. In those cases, the government argued that, because Congress' enactment of such legislation was a sovereign act, breach of contract liability was precluded. *See First Nationwide*, 431 F.3d at 1351; *Centex*, 395 F.3d at 1307-08. In both cases, the Federal Circuit properly determined that the sovereign acts defense *did not apply* because the Guarini amendment was not "generally applicable legislation . . . but was specifically targeted at appropriating the benefits of a government contract." *First Nationwide*, 431 F.3d at 1351, *citing Centex*, 395 F.3d at 1308.[11] Although enactment of legislation (or taking any other action) that is specifically targeted at contractual benefits certainly renders the sovereign acts defense inapplicable to a claim that the government breached its implied contractual duties, there is no case law which *requires* what the Federal Circuit held for the first time here, *i.e.*, that specific targeting and reappropriation of benefits must be proven by a contractor to establish that the

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[11] The result in both cases is consistent with the observation that "where the contracting agency breaches an implied obligation, generally the [sovereign acts] doctrine will not afford protection." Ronald G. Morgan, IDENTIFYING PROTECTED GOVERNMENT ACTS UNDER THE SOVEREIGN ACTS DOCTRINE: A Question of Acts And Actors, 22 Pub. Cont. L.J. 223, 258 n.173 (1993).

government breached its implied duties.[12] As has long been recognized by this Court, the reason for this is that "when the United States 'comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there.'" *Winstar*, 518 U.S. at 895 n.39, *quoting Cooke v. United States,* 91 U.S. 389, 398 (1875).[13]

C. The Federal Circuit's Ruling Violates Both Prongs Of The Two-Part Test For Application Of The Sovereign Acts Defense In *Winstar*

The sovereign acts defense is designed to balance "the government's need for freedom to legislate [or otherwise perform governmental functions] with its obligation to honor its contracts. . . ." *Winstar*, 518

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[12] The government did not even raise the sovereign acts defense on appeal. Rather, both parties cited *Centex* for its general statement of the law with respect to the implied duties; however, neither party argued that *Centex* required "targeted" government actions before a breach of the implied duties could be found. Neither party cited *First Nationwide*.

[13] The underlying purpose for such parallel treatment is to serve "the Government's own long-run interest as a reliable contracting partner in the myriad workaday transactions of its agencies." *Winstar*, 518 U.S. at 883. The Federal Circuit's ruling undermines the government's interests by raising the possibility that the government will be relieved of liability for commercially unreasonable conduct, thereby forcing contractors to increase their bid prices to factor in this contingency *in every contract*. Under the reasonableness standard, the government, like other contractors, was only held liable for breach of its implied contractual duties in those relatively rare situations where its actions did not meet commercially reasonable expectations. *See* Nash, 24 Nash & Cibinic Rep., No. 5 at 67-68.

U.S. at 895. The defense provides that "'the United States when sued as a contractor cannot be held liable for an obstruction to the performance of [a] particular contract resulting from its public and general acts as a sovereign.'" *Id.* at 890 (*quoting Horowitz v. United States,* 267 U.S. 458, 461 (1925)). Accordingly, the sovereign acts defense exempts the "[g]overnment as contractor from the traditional blanket rule that a contracting party may not obtain discharge if its own act rendered performance impossible." *Winstar*, 518 U.S. at 904. However, as this Court has found, even if the sovereign acts defense applies, *i.e.*, the act in question is public and general and not "specifically targeted" at the contractor, "it does not follow that discharge will always be available, for the common-law doctrine of impossibility imposes additional requirements before a party may avoid liability for breach." *Id*; *see also Carabetta*, 482 F.3d at 1365 (holding that such "additional requirements" include that government performance be objectively impossible or impracticable, *citing*, *inter alia*, RESTATEMENT (SECOND) OF CONTRACTS).

As recognized by the Federal Circuit in this regard, *Winstar* adopted a two-part test for application of the sovereign acts defense: (1) Were the government's actions genuinely public and general in nature, *i.e.*, not "specifically targeted" at the contract in question, but only incidentally fell upon the contract?; *and* (2) Even if the actions were not "specifically targeted," but, rather, were public and general in nature, does the government *also* meet the common-law test for

impossibility of performance? *Carabetta*, 482 F.3d at 1365, *citing Winstar*, 518 U.S. at 895.[14]

i. The FS's Suspension Did Not Satisfy The First Prong Of The *Winstar* Test Because It Was The Result Of The Agency's Failure To Meet Its Legal Obligations

Regardless of whether the FS's actions were "specifically targeted" at Precision, the sovereign acts defense (even in the truncated form adopted by the panel) could still never have relieved the FS of breach liability here because the FS's actions that resulted in its breach of contract were not performed in its sovereign capacity. That is, neither the FS's stubborn refusal to enter into consultation nor its subsequent failure to comply with the 135-day period within which to complete consultation comported with the ESA. In this regard, as this Court has found, quite unsurprisingly, the sovereign acts defense only applies to public and general actions that are "otherwise legal." *Winstar*, 518 U.S. at 898, *citing O'Neill*, 231 Ct. Cl. at 826.[15]

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[14] The Federal Circuit has adopted the plurality opinion in *Winstar*, including the two-part test "as the current understanding of the sovereign acts doctrine in the Federal Circuit." *See supra* note 2.

[15] Stated otherwise, for the sovereign acts defense to apply, the government's performance must be made impracticable *without its fault. . . .*" *Winstar*, 518 U.S. at 904, *citing* RESTATEMENT (SECOND) OF CONTRACTS § 261 (emphasis added). The FS's actions in this case can be described in many ways; however, "without fault" is not one of them.

This Court's reliance upon *O'Neill* exposes a fundamental error in the Federal Circuit's decision. In *O'Neill*, the contracting agency asserted that because its underlying actions "affected all persons . . ., not just the plaintiffs," the sovereign acts defense exempted it from liability "even though such actions may have been contrary to statute." 231 Ct. Cl. at 825. The Court of Claims disagreed and held that, to avoid liability under the sovereign acts defense, "[i]t is critical that the governing acts themselves be legal." *Id.* at 826 (citations omitted). As such, the court not only denied the government's motion for summary judgment but remanded the case to the trial court to answer the following question: "[a]ssuming that there is at least some delay not excused by the sovereign act doctrine," *i.e.*, delay caused by action(s) contrary to the agency's statutory obligations, "whether such delay under the circumstances was unreasonable." *Id.* *O'Neill* notwithstanding, the Federal Circuit erred here by allowing actions which were contrary to the government's statutory duties to constitute the basis for exempting the government from breach liability.[16]

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[16] If action taken by an agency in direct contravention of its statutory obligations can prevent its contractual performance and exempt it from liability for doing so, then the principle that the government is bound by the same rules as private parties when it steps out of its role as sovereign and enters the commercial realm becomes a farce and the saying from previous centuries that the "sovereign can do no wrong" becomes the rule.

ii. The Federal Circuit Also Erred Because The Sovereign Acts Defense Does Not Apply Where The Event That Prevents Performance Was Anticipated By The Parties To The Contract

As noted, even under the sovereign acts defense, in order for the government to obtain discharge from liability, the sovereign action must be "an event the non-occurrence of which was a basic assumption on which the contract was made. . . ." *Winstar*, 518 U.S. at 904, *quoting* RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981). In other words, did the parties anticipate such an act of the sovereign when they entered the contract? Courts considering this precise issue have determined that the parties to standard FS timber sale contracts both foresaw and included standard contract clauses C[T]6.25 (Pet.App.148a-149a) and C[T]6.01 (Pet.App.145a-147a) in recognition of the possibility that the government would need to take actions *required* by the ESA that could affect contract performance. *E.g., Scott Timber Co. v. United States,* 40 Fed. Cl. 492, 508 (1998), *rev'd on other grounds,* 333 F.3d 1358 (Fed. Cir. 2003).[17] That is, clause C[T]6.25 (Pet.App.148a-149a) allows the FS to modify timber sale contracts (something which did not occur here) to add protections for species listed under the ESA, while clause C[T]6.01 (Pet.App.145a-147a) allows the FS to suspend operations to prevent environmental degradation or resource damage. Because contract

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[17] The contracts at issue in *Scott* contained clause C6.25 (*see* Pet.App.148a), while the contracts at issue here contained CT6.25 (R3). Pet.App.149a. The clauses are identical for purposes of this case and will be referred to as C[T]6.25.

clauses C[T]6.25 and C[T]6.01 anticipate that the FS might have to take actions needed *to comply* with its obligations under the ESA that could interfere with contract performance, the non-occurrence of a listing of a new species under the ESA was not an event that was a basic assumption of the contracts.[18] For this reason, the second prong of the *Winstar* test, *i.e.*, the impossibility defense, cannot be established here. *Id.*, *citing Winstar*, 518 U.S. at 906. On this basis alone, the Federal Circuit erred by providing the government with a defense drawn from the sovereign acts doctrine.[19] Accordingly, and as the trial court correctly held, the fact that the FS both caused and prolonged the suspension of Precision's operations precludes the successful invocation of the sovereign acts defense (even in the form utilized by the panel) and constituted a breach for which the government remains liable.

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[18] In its 2001 ruling that was neither challenged by the government nor addressed by the Federal Circuit, the trial court found that the sovereign acts defense did not apply because the government "cannot satisfy the common-law doctrine of impossibility; namely, that it cannot show that the non-occurrence of the suspension of the contracts were a basic assumption of the parties." (Citation omitted). Pet.App.130a-134a.

[19] Had the FS acted *properly* at the time of the listing of the MSO to meet its obligations under the ESA, these clauses may have provided it with authority to modify or suspend the contracts and the Federal Circuit's ruling in favor of the government may have had some validity. Here, however, the delay was the direct result of the FS's *failure to comply* with its obligations under the ESA, something which, of course, was not expressly provided for under the contracts. Nor, as discussed in the preceding section, is the FS's failure to comply with the law something that has ever been deemed to be a sovereign act.

II. The Federal Circuit Also Erred By Adopting A New Standard For Assessing The Government's Breach Of Its Implied Contractual Duties That Conflicts With Binding Circuit Precedent

A. Binding Precedent Required That The Reasonableness Standard Be Used To Assess The FS's Actions In Suspending Timber Contracts Under Clause C[T]6.01

Wholly apart from the fact that the Federal Circuit panel applied the sovereign acts defense in ways that are at odds with this Court's ruling in *Winstar*, the Federal Circuit panel also erred by creating a standard for proving a breach of the implied duty to cooperate that is in direct conflict with binding Federal Circuit precedent.[20] That is, the panel held that, because the

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[20] In the Federal Circuit, "prior decisions of a panel of the court are binding precedent on subsequent panels unless and until overturned *in banc*. Where there is direct conflict, the precedential decision is the first." *McMellon v. United States*, 387 F.3d 329, 333 (Fed. Cir. 2004) (citations omitted); *see* Fed. Cir. R. 35(a)(1). As the former Chief Judge emeritus of the Federal Circuit has observed, however:

> The first decision on a legal issue (not the last) is the binding precedent of our court. This procedure prevents intracircuit splits theoretically but not in reality. Because our precedent can be overturned only in banc, which is difficult logistically, a later panel that disagrees with an earlier panel's analysis as applied to its case may skirt around the issue with unhelpful generalities.

Helen Wilson Nies, DISSENTS AT THE FEDERAL CIRCUIT AND SUPREME COURT REVIEW, Am. U. L. Rev. 1519, 1519-20 (Aug. 1996). Here, the panel did not even attempt to skirt around the

contract authorized the FS to suspend contract performance in certain circumstances, for the contractor to establish a breach of the implied duties it was required to show that the FS's underlying actions were "specifically targeted" at it and "reappropriated benefits" it had expected under the contract. Pet.App.23a. The panel's ruling applying a "specifically targeted" standard is in direct conflict with binding precedent of the Circuit in *Scott Timber Co. v. United States*, 333 F.3d 1358 (Fed. Cir. 2003), where the Federal Circuit held that all a contractor need do to prove a breach of the implied duties was to demonstrate that the FS failed to act reasonably in exercising the same suspension authority at issue here.

Both the instant case and *Scott* involved lengthy suspensions imposed by the FS under C[T]6.01, a clause that authorized the FS to suspend contract performance in certain circumstances. Pet.App.93a-96a; 333 F.3d at 1368-70.[21] The prolonged suspensions at issue in *Scott* were imposed to permit the FS to consult with the FWS when the Marbled Murrelet (a seabird that nests in coastal trees) was newly listed under to the ESA. 333 F.3d at 1361. In contrast, here, the suspensions resulted from the FS's refusal to

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issue, but simply failed to address the binding precedent cited by both parties.

[21] Precision does not dispute that the FS had authority under clause C[T]6.01 to suspend contract operations in certain circumstances; however, those circumstances cannot arise where the FS's unreasonable actions, including actions contrary to the agency's statutory obligations, cause and then prolong the suspension.

engage in required consultation until a federal district court ordered it to do so nearly 2½ years after the MSO had been listed.[22] Pet.App.49a-63a. Thereafter, the suspensions were also prolonged by FS "misbehavior" during the consultation process. Pet.App.22a, 63a-77a.

Scott held that, even where the FS properly initiated consultation in response to the new listing of a species under the ESA (something that the FS improperly refused to do here), in order to ascertain whether resulting suspensions imposed under C[T]6.01 constituted a breach of contract, "*the court must determine whether the suspensions were reasonable.*" 333 F.3d at 1368 (emphasis added). The court specifically identified factors to be examined which included: whether the contracting agency had violated any statutory obligations under the ESA, whether the agency had taken all appropriate actions prior to awarding the contracts, and the wisdom of the agency's making award where it had not first met its obligations under the law. *Id.* at 1369.[23]

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[22] Between the April 15, 1993 listing of the MSO and the August 24, 1995 district court order, the FS awarded 10 contracts to Precision. Pet.App.41a n.1.

[23] As the trial court correctly recognized, that the government owed no statutory duties under the ESA directly to Precision does not mean that the manner in which the government met, or failed to meet, its ESA obligations did not affect other legal responsibilities that arise from the contracts. Pet.App.85a. Unlike the situation in *Agredano v. United States*, 595 F.3d 1278 (Fed. Cir. 2010), cited by the panel (Pet.App.24a) and other cases such as *D & N Bank v. United States*, 331 F.3d 1374, 1378-79 (Fed. Cir. 2003), cited by the Federal Circuit in *Agredano*, Precision does not seek to *create* any contract rights based on the

It is undisputed in the instant case that the FS's continuing refusal to comply with its consultation obligations under the ESA was completely at odds with the law. Pet.App.85a n.1. Moreover, even the Federal Circuit panel recognized "[t]here is evidence that the [FS] failed to cooperate" during consultation in 1995-1996 by taking actions in violation of a court order. Pet.App.24a. Nevertheless, the panel determined that the FS did not breach its implied duties because, although the FS's misbehavior "during consultation" "violated its obligations under the ESA to the FWS," it was not "specifically targeted" at Precision and did not "reappropriate" to the government any benefit guaranteed by the contracts. Pet.App.23a. In doing so, the panel, without acknowledgement, imposed a new standard for proving a breach of contract that was neither raised nor advocated by either party.[24]

In its ruling, the panel failed to apply, or even discuss, the binding Circuit precedent represented by *Scott*. Instead, the panel concluded that because the

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existence of a statutory or regulatory duty, nor does it seek to equate a violation of such duties with a breach of contract *per se*. Rather, the implied duties at issue are inherent in every contract. Pet.App.3a n.1. As *Scott* correctly recognized, a court should examine the FS's compliance with its statutory duties under the ESA only as part of an analysis of the overall commercial reasonableness of the agency's conduct in order to determine if the FS breached its implied *contractual* duties to cooperate with, and not hinder, its contractor. 333 F.3d at 1369.

[24] In fact, the Federal Circuit went so far as to state that something akin to the "old bait-and-switch" or "double crossing" was necessary before liability for simple breach of implied contractual duties could be established against the government. Pet.App.22a, 23a.

FS's duties under the ESA were not owed directly to Precision, the "incidental effect" which resulted from the FS's non-compliance with them did not violate any implied duties under the contracts. Pet.App.24a-25a. Again, this holding cannot be squared with *Scott*, in which the Federal Circuit held that a factor to be considered in the reasonableness analysis is whether the FS complied with it statutory duties. Moreover, the inquiry upon which this case turns is not whether the FS violated the ESA. In 1995, the District Court in *Silver v. Babbitt* determined that it did. Pet.App.85a n.25. The question here is whether the agency's failure to consult as required by the ESA, the resulting suspension, and further delay caused by the agency's "misconduct" during consultation were commercially reasonable under the circumstances. *See id.*

B. The Panel's Decision Failed To Follow Both Common Law And Federal Circuit Precedent That Require The Use Of The Objective, Reasonableness Standard In Determining Whether The Government Breached Its Implied Contractual Duties

For decades, the law in the Federal Circuit and its predecessor court has been that the implied duty of good faith and fair dealing imposes an obligation on each party to do everything that the contract presupposes should be done by it to accomplish the contract's purpose. *See, e.g., Scott*, 333 F.3d 1358 (Fed. Cir. 2003); *see also Stockton*, 583 F.3d at 1365, *citing* 30 Richard A. Lord, WILLISTON ON CONTRACTS § 77.10 (4th ed. 1999). As other cases have held, a party must refrain from doing "anything that will hinder or delay the other party in performance of the contract," or that

will destroy the "reasonable expectations of the parties in the special circumstances in which they contracted." *Essex Electro. Eng'rs. v. Danzig*, 224 F.3d 1283, 1291 (Fed. Cir. 2000) (citation omitted). *Accord C. Sanchez*, 6 F.3d at 1542 ("government must avoid actions that unreasonably cause delay or hindrance to contract performance"); *O'Neill*, 231 Ct. Cl. at 826 (applying reasonableness standard to review the actions of the contracting agency that impeded its contract performance and refusing to exempt the agency from liability for incidental, and presumably unintended, consequences where its actions underlying the breach failed to comply with its statutory duties).

The Federal Circuit's case law also conforms to the common law which recognizes that a party to a contract violates its duty of good faith and fair dealing (of which the duties to cooperate and not to hinder are a part) when that party acts unreasonably, or interferes with, or fails to cooperate in the other party's performance. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. (d); 2 E. Allan Farnsworth, FARNSWORTH ON CONTRACTS § 8.6 (2nd ed. 1998). Breach of the implied duties can result from "evasion of the spirit of the bargain," "inaction," "slacking off," or "a lack of diligence." RESTATEMENT § 205 cmt. (d). *See* Pet.App.21a (*citing* RESTATEMENT § 205 with approval). *See also* John Cibinic, Jr. & Ralph C. Nash, Jr., ADMINISTRATION OF GOVERNMENT CONTRACTS § 302 (4th ed. 2006) ("Failure to cooperate will be found when the government's conduct during contract performance is unreasonable"). Contrary to the panel's apparent conclusion (*see* Pet.App.24a), no evidence of a specific purpose to harm the contractor or any wrongful motive is required.

Although bad faith may be *sufficient* to establish breach of the implied duties, evidence of bad faith is not *necessary* to establish breach of the implied duties. *Tecom, Inc. v. United States*, 66 Fed. Cl. 736, 769-72 (2005) (collecting cases). Precision is not aware of any decision of the Federal Circuit prior to *Precision Pine* which holds that to establish a breach of the implied duties, a federal contractor must prove that the agency acted with bad faith, malice or intent to injure the contractor. The new standard imposed by the panel is a vast departure from accepted common law standards, is contrary to the Circuit's own binding precedent, and cannot stand.

C. Contrary To The Panel's Conclusion, Both The Suspensions And Their Length Were Inconsistent With Precision's Reasonable Expectations And Destroyed Benefits That Precision Reasonably Anticipated

The panel suggested that the FS's "misbehavior" did not deny Precision anything because C[T]6.01 provided for "the listing of a new species and delays associated with reassessing [FS] projects," and "Precision Pine had no reasonable expectation that its contracts would be unaffected by the listing of a new species." Pet.App.25a-26a. Although Precision may have had no reasonable expectation that its contracts would be unaffected if a new species were listed after award, nothing in C[T]6.01 suggests that Precision should have expected that the FS had, prior to award, acted unreasonably by violating its obligations under the ESA and thereby caused a post-award suspension related to a listing that occurred years before award. Contrary to the panel's apparent belief, the cause of the suspensions here was not "the listing of a new

species" after contract award. Pet.App.26a. Rather, it was the FS's *deliberate failure to do what the ESA required, i.e.*, the FS's prolonged refusal to enter into ESA consultation until it was ordered to do so by the district court. Pet.App.125a. This was not something that Precision had any reason to expect could legitimately interfere with its right to perform the contracts. In fact, had the FS promptly begun the required consultation upon the listing of the MSO (when most of the sales had yet to be awarded), the suspension would have been avoided.

The refusal of the FS to submit its LRMPs for consultation (particularly after a July 1994 decision of the Ninth Circuit expressly held that the FS was required to consult)[25] was unreasonable. Moreover, by continuing to award contracts while refusing to do things essential to contract performance, the FS engaged in precisely the kind of conduct that *Scott* held would support a finding of unreasonableness.[26] 333 F.3d at 1369. Additionally, even after the district court's order, the agency engaged in conduct which prolonged the ESA consultation, despite knowing specifically of the devastating impacts that the delay

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[25] *Pac. Rivers*, 30 F.3d 1050. Even after *Pacific Rivers* removed any doubt that the FS was required to consult on its LRMPs, on July 7, 1994, the FS refused to consult but continued to award contracts to Precision. Pet.App.41a n.1.

[26] *See* Pet.App.121a-129a. The trial court stated that because the FS's failure to submit its LRMPs was unreasonable, the government was culpable for the suspension of all 14 contracts but that breach of the duty not to hinder required a finding that the suspension's length was unreasonable, a finding that it made as to 11 of the contracts. Pet.App.125a-130a.

was having on Precision. Pet.App.63a-65a, 67a-76a, 126a-129a. This too was unreasonable and not something that Precision had reason to expect could legitimately interfere with its planned performance.

When an agency, by contract, shifts the risk of certain events to its contractor (as the FS attempted to do in contract clause C[T]6.01), the agency's implied duties require that it not take any action to increase that risk. *W.E. Callahan Constr. Co. v. United States*, 91 Ct. Cl. 538 (1940). In *Callahan*, a contract clause placed "all risk of damage . . . by reason of floods" on a contractor constructing a dam. *Id.* at 617. When the flood waters arrived (something which both parties anticipated), large logs left by agency employees working upstream were washed downstream and extensively damaged the contractor's plant and equipment. In refusing to absolve the agency of liability under the "all risk of damage" clause, the court held:

> [P]laintiffs only assumed the risk of damage by floodwaters and such debris from the jungle above that might be carried down by such floods, and, under the language of the contract, *the defendant impliedly agreed to assume the risk of any additional hazards which it might add to the flood dangers*. We think it is clear that the quoted provision of the contract cannot be construed to place upon plaintiffs the risk of damage directly resulting from additional and unexpected hazards imposed by the defendant, whether or not they were imposed carelessly, accidentally, or otherwise.

Id. at 619-20 (emphasis added); *see also id.* at 620 ("[W]here the Government by a written contract requires the contractor to assume a risk of loss or damage occasioned by the natural consequences of a specified cause, it reciprocally and impliedly assumes an obligation not to interfere in such a way as to increase the hazard of the risk so assumed").

The contractor's assumption of the risk of floods in *Callahan* did not foist on it the further risk that the contracting agency's actions would increase the impact of the floods. Similarly, Precision, by having the risk of a suspension in some circumstances placed on it, did not assume the additional risks that the FS would steadfastly refuse to comply with its ESA obligations to consult and unreasonably *cause* a federal court to enjoin the FS's performance and/or that other unreasonable FS conduct would prolong the resulting suspensions.[27]

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[27] *Callahan* is consistent with the common law precept that "[t]he law will not permit [a party] to take advantage of an obstacle to performance that it had created or that lies within its power to remove." 23 Richard Lord, WILLISTON ON CONTRACTS § 63.26 (4th ed. 2002). *See also Lowenschuss v. Kane*, 520 F.2d 255, 265 (2nd Cir. 1975) (an injunction will not absolve a party from contract breach where its fault contributed to the order); *Fred R. Comb Co. v. United States*, 103 Ct. Cl. 174, 183 (1945) (same). It is also consistent with this Court's precedent rejecting attempts by the government to relieve itself of liability for its own negligence. *United States v. Seckinger*, 397 U.S. 203, 212 (1970) ("if the United States expects to shift the ultimate responsibility for its negligence to its various contractors, the mutual intention of the parties to this effect should appear with clarity from the face of the contract"). Without a clear exculpatory clause, the government does not shield itself from suit. *See Ozark Dam Constructors v. United States*, 127 F. Supp. 187, 190-91 (Ct. Cl.

D. The Panel's Unexplained Departure From Prior Federal Circuit Precedent Will Engender Confusion Within The Tribunals Of The Circuit And Has Already Been Criticized By Commentators

Not surprisingly, the Federal Circuit's split in its own authority has already caused confusion in the lower courts. That is, in *Fireman's Fund Ins. Co. v. United States*, 92 Fed. Cl. 598, 675 (2010), the trial court, after discussing the conflict between the Federal Circuit's long-standing reasonableness test and the newly-announced standard in *Precision Pine*, determined that the reasonableness test remained good law in the Circuit and then applied it to find that the government's unreasonable actions had breached its implied duties to the contractor. By contrast, in *Greenhill v. United States*, 92 Fed. Cl. 385, 397 (2010), the trial court applied the *Precision Pine* "subjective intent to harm" standard. Unless rectified by this Court, the current split in authority over which standard applies to a breach of the implied contractual duties will result in further fracturing of the law in this area as the lower courts are left to choose between, and attempt to apply, two competing and irreconcilable standards.

In addition, the panel's ruling in *Precision Pine* has also already set off alarms in the government contracting community. For example, one prominent

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1955); *Kehm Corp. v. United States*, 93 F. Supp. 620, 625 (Ct. Cl. 1950); *George A. Fuller Co. v. United States*, 69 F. Supp. 409, 412 (Ct. Cl. 1947).

government contracts journal has observed that the panel's ruling

> is a problematic decision that establishes a new, more demanding legal standard for breach of the implied duty to cooperate and not hinder--one that departs from prior precedent in the Federal Circuit and lower courts, as well as from the common law of contracts. How this new standard will be applied in future cases is not entirely clear, but *it will likely excuse a variety of objectively unreasonable conduct by one party to a Government contract that adversely impacts the other.*

Feature Comment "Fed. Cir. Resets Standard For Breach of the Duty to Cooperate and Not to Hinder," 52 GOVERNMENT CONTRACTOR ¶ 97, at 6 (Mar. 18, 2010) (emphasis added).

In this same regard, Professor Emeritus Ralph C. Nash, Jr., a pre-eminent authority on government contract law, has stated that the panel in *Precision Pine* "has articulated a standard . . . which flies in the face of almost all prior decisions. The troublesome language in the decision bodes ill for Government contractors." Nash, 24 Nash & Cibinic Rep., No. 5 at 65. As Professor Nash further observed, the rule of reasonableness that had long been applied in the law of government contracts directly benefited the government:

> Contractors selling supplies and services to the Government have traditionally priced such supplies and services on the basis that the law will protect them from unreasonable conduct by

> the Government during the performance of the conduct. This belief has been fostered by decades of decisions by the boards of contract appeals and the courts granting equitable adjustments, price adjustments or damages when the Government does not meet this reasonableness standard. *The Government has been the major beneficiary of this traditional view in the fact that, while it has occasionally been required to pay additional compensation to a contractor, it has obtained lower prices on many, if not most, of its procurements.*

Id. at 68 (emphasis added).

At a minimum, the Federal Circuit has completely confused the law in this area of government contracts (over which it has virtually exclusive jurisdiction) in a way that is likely to do substantial harm to the reasonable commercial expectations of both contractors and the government. Accordingly, this Court should grant *certiorari* to restore consistency to this important area of the law of government contracts which is of national significance.

III. At A Minimum, Because The Federal Circuit Imposed A New Legal Standard, It Erred By Not Remanding This Case To The Trial Court For Further Proceedings Under The New, "Correct" Standard

Regardless of whether the new standard adopted by the panel is correct, there can be no dispute that it is a different standard than the one applied by the trial court in 2001 when summary judgment was decided. Where, as here, a reviewing court determines that a

lower court has applied the wrong legal standard, the case law indicates that the court is obliged to remand to the lower court for consideration in light of the "correct law." *See, e.g., Ricci v. DeStefano*, --- U.S. ---, 129 S.Ct. 2658, 2702-03 (2009) ("When this Court formulates a new legal rule, the ordinary course is to remand and allow the lower courts to apply the rule in the first instance") (citations omitted) (Ginsburg, J dissenting). *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006); *Pelts and Skins, LLC v. Landreneau*, 448 F.3d 743 (5th Cir. 2006); *Tabron v. Lt. Grace*, 6 F.3d 147, 158 (3rd Cir. 1993). "This usual approach allows the lower courts to determine whether further factual development is needed to apply the new rule. It permits the parties to the litigation to present arguments applying the new standard - arguments that they could not have made before as the standard did not exist." Melissa Hart, Procedural Extremism: The Supreme Court's 2008-2009 Labor and Employment Cases, 13 Employee Rts. & Emp. Pol'y J. 253, 257 (2009).

Here, the factual record in the trial court so clearly demonstrated that the government had acted unreasonably in both causing and prolonging the suspension of Precision's contracts that summary judgment was entered in Precision's favor. Pet.App.134a-135a. Neither party argued for the standard ultimately employed by the Federal Circuit because, as Professor Nash has explained, the new standard flies in the face of the Federal Circuit's prior decisions that apply the very standard used by the trial court. Nash, 24 Nash & Cibinic Rep., No. 5 at 65. Accordingly, Precision could not have known, and therefore, had no opportunity to present evidence under the "specifically targeted" standard imposed by

the Federal Circuit *sua sponte* almost a decade after liability was decided by the trial court. Likewise, in granting summary judgment on liability in 2001 based on an objective, reasonableness standard, the trial court understandably never considered applying the subjective "specifically targeted" standard applied by the Federal Circuit for the first time in 2010. Pet.App.23a.

The Federal Circuit did not explain how, on a factual record developed to meet the reasonableness standard, it could determine that Precision would be unable to develop facts sufficient to meet the new "specifically targeted" standard being imposed. In essence, the Federal Circuit created a new legal standard and then, substituting itself for the trier of fact, granted summary judgment for the government on a factual record developed for a different legal standard. This is a radical departure from the accepted and usual course of judicial proceedings and due process requirements of the Fifth Amendment. Pet.App.138a. Indeed, "The core of due process is the right to notice and a meaningful opportunity to be heard," *Lachance v. Erickson*, 522 U.S. 262, 266 (1998), and to "present evidence . . . under the correct legal standards." *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 1049 (6th Cir. 1990). In this regard, at an absolute minimum, the Federal Circuit erred in not remanding the matter to the trial court for further proceedings pursuant to the new, "correct" standard that it created. Thus, even assuming that this Court were to conclude that the standard announced by the panel is the correct one (which it is not), this Court should exercise its supervisory power to give Precision an opportunity to attempt to meet the new, subjective

standard in the first instance by developing a factual record on the issue in the trial court.

CONCLUSION

For the reasons set forth, this petition should be granted.

Respectfully submitted,

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