No. 20-1057

In the Supreme Court of the United States

ORACLE AMERICA, INC.,
PETITIONER,

v.

UNITED STATES AND AMAZON WEB SERVICES, INC.

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

REPLY BRIEF FOR PETITIONER

R. REEVES ANDERSON
ARNOLD & PORTER KAYE SCHOLER LLP
1144 Fifteenth Street
Suite 3100
Denver, CO 80202
(303) 863-1000

ALLON KEDEM
Counsel of Record
CRAIG A. HOLMAN
SALLY L. PEI
SEAN A. MIRSKI
NATHANIEL E. CASTELLANO
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
allon.kedem@arnoldporter.com

TABLE OF AUTHORITIES

In the Supreme Court of the United States

ORACLE AMERICA, INC., PETITIONER,

v.

UNITED STATES AND AMAZON WEB SERVICES, INC.

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

REPLY BRIEF FOR THE PETITIONER

Amazon Web Services, Inc.'s brief in opposition underscores the need for this Court to grant certiorari to protect fundamental separation-of-powers principles. Amazon does not dispute that this Court should review the first question presented; nor does it deny that the second question presented is timely, important, and recurring. Instead, Amazon argues (at 1) that this case is a poor vehicle because the conflicts of interest at issue in the second QP are "highly fact-bound" and "not outcome-determinative." Three points are worth emphasizing in response.

1. Oracle's petition does not ask this Court to decide any fact-bound issue. Rather, in evaluating Oracle's conflict-of-interest challenge, the Federal Circuit made two serious *legal* errors.

First, rather than follow this Court's holding in *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), that a criminal conflict of interest "alone" renders a government contract unenforceable, *id.* at 525, the Federal Circuit instead imposed an additional materiality test. See Pet. 27-28. Second, the Federal Circuit compounded the error by deferring to *the agency's own* materiality determination, rather than deciding the issue itself. See Pet. 29-31. Both of those

errors are mistakes of law, not fact. Correcting them would thus provide great "value in other cases," AWS Opp. 7, especially because these errors are central to the Federal Circuit's approach in *every* procurement case involving a conflict of interest. See, *e.g.*, *Long Island Sav. Bank, FSB* v. *United States*, 503 F.3d 1234, 1250 (Fed. Cir. 2007); *Godley* v. *United States*, 5 F.3d 1473, 1476 (Fed. Cir. 1993). Notably, Amazon does not defend either aspect of the Federal Circuit's approach.

Indeed, the supposed "intensely fact-bound" nature of the Federal Circuit's materiality inquiry, AWS Opp. 7, is a reason to grant review, not deny it. Oracle's point is that such an inquiry is entirely unnecessary—and inappropriate—under *Mississippi Valley*. And even if this Court were to hold (per Oracle's alternative argument) that the lower courts should have conducted a materiality inquiry themselves, rather than deferring to a conflicted agency, articulating that governing legal principle would complete this Court's role: The Court would presumably remand the case rather than conduct the inquiry in the first instance. See *Brownback* v. *King*, 141 S. Ct. 740, 747 n.4 (2021) ("[W]e are a court of review, not of first view.") (citation omitted).

If anything, this case is remarkable in how cleanly it presents the relevant legal questions. Conflict-of-interest cases will generally be thorny vehicles because they involve fights over the threshold issue of *whether* the conflict-of-interest statute was violated at all. But here, no one disputes that at least one Department of Defense employee, Deap Ubhi, violated 18 U.S.C. § 208. (It would be hard to argue otherwise, given that the Department itself listed Ubhi as having been "personally and substantially involved" in the procurement, C.A. App. 104,862, which is the test for a Section 208 violation.) And, unlike many other government contracting cases, the

contract at issue here is not at risk of being fully performed before this Court weighs in, see AWS Opp. 2 n.* (noting Amazon's own active bid protest), and neither the government nor Amazon has suggested that their ongoing (but unrelated) litigation over the JEDI Cloud contract presents any obstacle to this Court's review.

2. The question presented is also outcome-determinative. Amazon does not dispute that if *Mississippi Valley* prohibits enforcement of a conflicted contract, the disposition of this case would change—indeed, such a holding would require reversal of the judgment below. Instead, Amazon merely argues that if this Court *rejects* Oracle's argument under *Mississippi Valley*, then it would not matter whether primary responsibility for conducting the materiality inquiry rested with the lower courts or with the conflicted agency. But that is plainly wrong as well. See Pet. 31-33.

As Oracle explained in its reply to the government (at 11), both courts below applied a deferential standard in evaluating the agency's determination that its own conflict had not tainted the procurement. The Court of Federal Claims agreed that the facts were "certainly sufficient to raise eyebrows," App. 107a, and it found some of the contracting officer's "characterizations" of those facts to be "a bit generous," *id.* at 110a. It nonetheless explained that "the limited question" was "whether any of the actions called out ma[d]e a difference to the outcome," and "in particular, *the even narrower question before the court is whether the* [*contracting officer*]*'s conclusion of no impact is reasonable*," *id.* at 108a (emphasis added). Accord *ibid.* ("We review the [contracting officer]'s determinations for a rational basis"). The court then applied that deferential standard, holding that the contracting officer's

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.