No. 2017-1465

# United States Court of Appeals for the Federal Circuit

PALANTIR USG, INC.,
*Plaintiff-Appellee,*

v.

UNITED STATES,
*Defendant-Appellant.*

APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS
IN CASE NO. 1:16-CV-00784C-MBH, JUDGE MARIAN BLANK HORN

## BRIEF OF *AMICUS CURIAE* TECHNET IN SUPPORT OF PLAINTIFF-APPELLEE

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June 28, 2017

## CERTIFICATE OF INTEREST

Counsel for *Amicus Curiae* Technology Network ("TechNet") certify the following:

1. The full name of every party represented by the undersigned counsel in this case is: Technology Network, also known as TechNet.

2. The name of the real parties in interest represented by the undersigned counsel is: Technology Network, also known as TechNet.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or *amicus curiae* represented by the undersigned counsel are: None.

4. The names of all law firms and the partners and associates that have appeared for the party in the lower tribunal or are expected to appear for the party in this Court and who are not already listed on the docket for the current case are: None.

June 28, 2017

*/s/ Gideon A. Schor*
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## INTEREST OF *AMICUS CURIAE*[1]

Technology Network ("TechNet") is an association of chief executive officers and senior executives of leading technology companies from across the nation. TechNet's objective is to promote the growth of the technology industry and to advance America's global leadership in innovation. TechNet's diverse membership includes dynamic startups and the most iconic companies on the planet, and represents more than 2.5 million employees in the fields of information technology, e-commerce, the sharing and gig economies, advanced energy, biotechnology, venture capital, and finance.[2]

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[1] A motion for leave to file this brief is being filed herewith. None of the parties to this case or their counsel authored this brief in whole or in part. None of the parties to this case or their counsel contributed money that was intended to fund preparing or submitting this brief. No one other than *amicus curiae* and its undersigned counsel contributed money that was intended to fund preparing or submitting this brief.

[2] TechNet's member companies include: Accenture, Airbnb, Akin Gump Strauss Hauer & Feld, Amazon, American Standard Development Company, Amyris, Apple, Arch Venture Partners, AT&T, Austin Tech Alliance, Bloom Energy, Booster Fuels, Box, CA Technologies, Charge Point, Cisco, ClearStreet, Comcast, Craigslist, Dewey Square Group, Direct Energy, DoorDash, DXC Technology, eBay, ecoATM, eHealth, Elevate, EnerNOC, F5 Networks, Facebook, FWD.us, General Motors, Gilead Sciences, Google, Green Charge Networks, Hewlett Packard Enterprise, HP Inc., Instacart, Intuit, Kleiner Perkins Caufield & Byers, LoanGifting.com, Lyft, Madrona Venture Group, Microsoft, MIND Research Institute, Motor Vehicle Software Corporation, Nasdaq, National Instruments, Oracle, Palantir Technologies, Inc., PayPal, Perkins Coie, Philips Lighting, Point Inside, Postmates, Recurrent Energy, Rubicon Project, Silicon Valley Bank, Silver Spring Networks, SolarCity, Sunrun, SV Angel, TechNexus, Thumbtack, Turo, Uber, Upwork, Verizon, Visa, WGBH, Wilson Sonsini Goodrich & Rosati, and Yahoo! No one affiliated with Palantir Technologies, Inc. or its subsidiary Palantir

This appeal involves a 1994 law – the Federal Acquisition Streamlining Act ("FASA") – which requires that federal agencies, to the maximum extent practicable, procure commercially available technology to meet their needs. This preference for commercial items was enacted into law in order to prevent federal agencies from developing their own unproven technology systems from scratch when the technology they seek to use already exists in the marketplace. In a word, the law's intent is to prevent the federal government from reinventing the wheel when it comes to procuring products and services. The judgment challenged on this appeal properly determined that the government, in violation of FASA, structured its research and solicitation requirements to exclude commercially available items – including the software of Appellee Palantir USG, Inc. ("Palantir"). *See* Appellee's Red Brief ("RB") at 21-24; *see also id.* at 35-36, 43. Contrary to FASA, the government chose solicitation requirements that could be satisfied only by the government's own developmental technology. *See* RB at 14, 18-19, 34, 43, 61. The decision below should therefore be affirmed.

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USG, Inc. is a member of TechNet's Executive Council, *see* http://technet.org/ membership /executive-council, or staff, *see* http://technet. org/our-story/technet-staff. In accordance with standard practice, TechNet's Vice President for Federal Policy, Government Relations & Communications proposed the filing of this *amicus* brief to TechNet's Federal Public Policy Committee, which includes all TechNet member companies; no member company objected.

TechNet believes that this case could have implications extending far beyond the interests of any single company and could jeopardize TechNet's goal of modernizing information technology systems throughout the federal government. If the Court rules in the government's favor here, the decision would empower federal agencies to bypass the use of commercially available technologies in favor of developing their own unproven and more costly systems. That result, in turn, would be directly contrary to Congress's intent in enacting FASA.

TechNet has a strong interest in the outcome of this appeal. In TechNet's view, the government should take advantage of commercially available technology that provides superior capabilities and cost savings. A reversal of the judgment below will incentivize the government to continue pursuing unjustified, wasteful, and counterproductive programs to develop technologies from scratch, when more reliable and cost-efficient alternatives are already commercially available.

## INTRODUCTION

The law at issue here – FASA – wisely mandates steps to end a bureaucratic culture of waste and delay. But the officials who administer FASA did not enforce its mandates.

In fact, the opposite occurred. Where Congress mandated a preference for the acquisition of commercially available software, the Army preferred to continue developing its own software from scratch – an effort that has cost billions, created years of delay, and resulted in an ineffective product. Where Congress provided that procurement requirements not exclude commercial items from competition for defense contracts, requirements were imposed that no commercial item could satisfy. Where Congress obligated agencies to research the availability of commercial alternatives, the Army's procurement officials researched ways to facilitate development and systematically excluded commercial items.

In short, the Army did not comply with the mandates expressly enacted by Congress in FASA. Palantir accordingly sued to challenge that noncompliance. Fortunately for the nation's defense and the interests of taxpayers, the court below enjoined the Army from proceeding with the contract solicitation absent compliance with FASA.

To be clear, TechNet's arguments in this brief do not turn on the good faith or integrity of the Army or its procurement officials. Rather, TechNet challenges

the predisposition – long criticized by Congress and blue-ribbon commissions – to favor development over commercial acquisition. That predisposition led, over many years, to the exclusion of innovative technology companies from the government procurement process.

FASA was enacted to reverse that predisposition – *i.e.*, to mandate a preference for buying, rather than making, the items to be procured. FASA was thus meant to ensure that technology companies could fully share their cutting-edge products with government and the military. The instant case is this Court's first opportunity to ensure that procurement officials are meaningfully adhering to FASA's mandates.

Accordingly, the judgment below should be affirmed.

## SUMMARY OF ARGUMENT

Technology companies cannot genuinely compete on a level playing field for government contracts unless agency officials comply with FASA's mandates.

Before FASA, numerous government-sponsored reports noted and criticized procurement officials' predisposition to favor developmental items over commercial items. That predisposition excluded innovative technology companies from competition for government contracts. *See infra* Point A.

Congress's intent in enacting FASA was to reject the developmental approach and to mandate a preference for acquisition of commercially available

items. When FASA's mandates are enforced, technology companies are included in the competition for government contracts. That inclusion lowers the government's costs and saves taxpayer dollars, while giving the government immediate access to the most advanced technologies available in the marketplace. *See infra* Point B.

Congress remains concerned about the government's over-reliance on the developmental approach. Recent congressional inquiries show the failure of the developmental approach. They also show the continuing predisposition of procurement officials to favor developmental items. By affirming the judgment below, this Court can underscore the importance of FASA's procurement reforms and encourage fuller adherence to FASA's mandates. *See infra* Point C.

## ARGUMENT

## TECHNOLOGY COMPANIES CANNOT COMPETE FOR GOVERNMENT CONTRACTS UNLESS PROCUREMENT OFFICIALS COMPLY WITH FASA'S MANDATES

Compliance with FASA's mandates is essential if innovative technology companies are to compete for and obtain government contracts. Several of these mandates are at issue in this case.

In particular, 10 U.S.C. § 2377 is intended to require that agency officials, to the maximum extent practicable, purchase commercial items to meet agency needs. Section 2377 accomplishes that goal in at least two ways. *First*, it mandates

agency officials to conduct market research concerning the availability of commercial items. *See* 10 U.S.C. § 2377(c)(1). This requirement prevents agency officials from using ignorance of commercial options to justify pursuit of a developmental approach. *Second*, it mandates agency officials to use that market research to determine whether commercial items can meet the agency's requirements, with or without modification of either the commercial items or the agency's requirements. *See* 10 U.S.C. § 2377(c)(2). The modification determination ensures, among other things, that contract requirements are not improperly structured or interpreted to favor a developmental approach and thus to define the commercial option out of existence. Palantir's brief on appeal demonstrates that Army officials in this case violated at least these two FASA mandates, 10 U.S.C. § 2377(c)(1) and (2). *See* RB at 29-63.

As explained below, FASA's mandates are not recently imposed technicalities. Rather, they stem from long-standing critiques of procurement officials' predisposition to favor development over commercial acquisition – a predisposition that excludes innovative technology companies from the procurement process. When enforced, FASA's mandates are central to reforming the procurement process and thus to ensuring that technology companies can share cutting-edge products with government and the military.

## A. Before FASA, Procurement Officials' Predisposition to Favor Development Was Long Criticized for Excluding Innovative Technology Companies from the Procurement Process

Years before FASA's enactment, numerous studies and reports showed that commercial items – especially in the field of advanced technology – were being systematically excluded from competition for contract awards.

Agencies were structuring contract requirements to favor developmental items and were giving insufficient consideration to commercial options. But commercial items tend to be the most innovative and cost-effective products, because the rigors of free-market competition, as well as ongoing testing and updating, ensure that only the most innovative and cost-effective products survive and flourish. Thus, that structuring of contract requirements and the insufficient consideration of commercial items resulted in the exclusion of the most innovative and efficient products from the procurement competition.

### 1. Packard Commission

In 1985, President Ronald Reagan appointed a blue-ribbon commission on defense procurement chaired by David Packard, who had co-founded Hewlett-Packard and served as deputy secretary of defense.[3] The Packard Commission, as

[3] The Commission was appointed in Executive Order 12526, dated July 15, 1985 ("EO12526"). The appointment was prompted in part by then-recent scandals concerning the military's purchase of ordinary commercial items that were vastly overpriced, including a $435 hammer, a $600 toilet seat, and a $7,000 coffee maker. A primary goal of the Commission was thus to "[r]eview the adequacy of

it came to be known, observed that defense procurement officials were predisposed to structure contract specifications in favor of development and against commercial acquisition. Packard Report at 23-24. The Commission concluded that that predisposition must be reversed: "Rather than relying on excessively rigid military specifications, DoD [*i.e.*, Department of Defense] should make greater use of" commercially available items. *Id.* at 23. Moreover, defense officials "should develop new or custom-made items only when it has been established that those readily available are clearly inadequate to meet military requirements." *Id.*

The Commission's rationale for recommending that procurement be biased in *favor* of commercial items was that free-market competition had already done the work of deciding which product features are the most innovative and cost-effective. *Id.* Such competition had also done the work of deciding which product features add insufficient value to justify their expense. *Id.* Thus, procurement officials must take advantage of that work. *Id.* In particular, defense procurement officials should "make maximum use of commercial products and devices in their programs" because "the defense acquisition system is unlikely to manufacture

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the defense acquisition process[.]" EO12526 at 1. The Packard Commission's report was published as *A Formula for Action: A Report to the President on Defense Acquisition by the President's Blue Ribbon Commission on Defense Management* (April 1986) ("Packard Report") (attached to *Hearing Before the Subcommittee on Defense Acquisition Policy of the Committee on Armed Services*, 99th Cong., 2d Sess. (1986) (statement of David Packard, Chairman, President's Blue Ribbon Commission on Defense Management)).

products as cheaply as the commercial marketplace." *Id.* The Commission explained that "DoD cannot duplicate the economies of scale possible in products serving a mass market, nor the power of the free market system to select and perpetuate the most innovative and efficient producers." *Id.*

Presciently, the Commission warned that the *culture* of military procurement – *i.e.*, the mindset of procurement officials – needed to change. The Commission first identified the critical juncture in the procurement process: the "make-or-buy decision," in which the Pentagon decides whether to spend time and money developing the item from scratch, or instead to buy a commercially available item. *Id.* at 21-22. The Report then recommended a "presumption" in favor of "buying" over "making." *Id.* at 24. But the Report noted that a presumption in favor of buying "would *invert* present procedures." *Id.* (emphasis added). That inversion of long-standing practice, the Report admonished, would "necessitate[] a new spirit and a willingness to change among acquisition professionals." *Id.* at 35.

2. Section 800 Panel

In 1991, an additional report confirmed that government procurement practices were excluding technology companies from competition for government contracts. Section 800 of the National Defense Authorization Act for Fiscal Year 1991 appointed a panel of experts to streamline and codify acquisition laws

("Section 800 Panel"). Among the Section 800 Panel's recommendations was a "comprehensive overhaul of the federal procurement laws that would . . . [i]mprove government access to *commercial technologies*[.]" S. Rep. No. 103-258, at 3 (1994) (emphasis added).

3. National Performance Review

In 1993, the Vice President's National Performance Review observed that government procurement practice "impedes government's access to state-of-the-art commercial technology[.]" *See From Red Tape to Results: Creating a Government that Works Better & Costs Less – Report of the National Performance Review* (Sept. 1993) ("NPR Report") at 28. The NPR Report explained that highly centralized procurement is a problem particularly for the acquisition of information technology, including software: "Today, with most computer equipment commercially available in highly competitive markets, the advantages of centralized purchasing have faded and the disadvantages have grown." NPR Report at 29. Indeed, the NPR Report stated, the federal government takes almost four times longer than the private sector to acquire major IT systems. *Id.*

More generally, the NPR Report echoed the Packard Report in recommending that federal procurement avoid rigid specifications and "[r]ely more on the commercial marketplace" (NPR Report at 30): "The government can save enormous amounts of money by buying more commercial products instead of

requiring products to be designed to government-unique specifications." *Id*.

## B. FASA's History and Structure Show That the Developmental Approach Was Expressly Rejected by Congress in FASA

### 1. Senate Bill and Report

In 1994, following these reports and studies, the Senate passed a bill, S. 1587, that, with minor amendments in conference, became FASA. The Senate Report on the bill made several key observations. *See* S. Rep. No. 103-258 (1994) ("Senate Report"). Above all, the bill "would encourage the use of commercial items." *Id.* at 5. Acquisition of commercial items "can eliminate the need for research and development, minimize acquisition leadtime, and reduce the need for detailed design specifications or expensive product testing." *Id.* (citations and internal quotation marks omitted). More concretely, the section that ultimately became 10 U.S.C. § 2377 would "create a preference for the acquisition of commercial items[.]" Senate Report at 35 (addressing Section 8002).

The Senate Report elaborated on the problem created by government contract specifications. Even apart from squelching competition, such specifications inherently require custom-building and unnecessary development, whose costs cannot be recouped through economies of scale: "[T]he government frequently sets standards for its purchases that make them more costly, but not substantially more useful, than other products available through normal commercial channels. Extra development costs and foregone economies of scale

increase the cost of products produced uniquely for the government." *Id.* at 14 (quoting Congressional Budget Office report). By contrast, reliance on "commercially available products would lower costs." *Id.* (same).

2. House Bill and Report

The companion House bill, H.R. 2238, implemented a similar "preference" for acquisition of commercial items. *See* H.R. Rep. No. 103-545 (1994) ("House Report") at 1-2. The House Report on the bill explained: "In this era of fiscal restraint, the Federal Government must stop 're-inventing the wheel' and learn to depend on the wide array of products and services sold to the general public on a routine basis." House Report at 21-22.

In particular, the House Report noted that expanding procurement of commercial items will increase the government's access to advanced technology: "Cost savings, shortened delivery time and *improved access to privately-developed advanced technology* have been cited as the expected benefits from expanded procurement of commercial items." House Report at 25 (emphasis added). That expansion – to be accomplished by the statutory "preference" for commercial items – "will facilitate the Government's ability to timely purchase the latest state-of-the-art technology." *Id.* at 26.

3. House Conference Report

The differences between the Senate and House bills were resolved in

conference and were discussed in House Conference Report No. 103-712 (Aug. 21, 1994). The House Conference Report noted that both the Senate and House bills created a "preference for the acquisition of commercial items[.]" House Conference Report at 233.

4. FASA's Structure

FASA's structure underscores Congress's concern that procurement officials' predisposition in favor of developmental items might prevent those officials from adhering to FASA.

FASA created 10 U.S.C. § 2377. Consistent with the Senate, House, and House Conference Reports, the first subsection of 10 U.S.C. § 2377 is entitled "Preference" and states: "The head of an agency shall ensure that, to the maximum extent practicable": contract requirements "are defined so that commercial items . . . may be procured to fulfill such requirements"; and "offerors of commercial items" receive "an opportunity to compete in any procurement[.]" 10 U.S.C. § 2377(a).

While subsection (a) of 10 U.S.C. § 2377 mandates that the agency's *contract requirements* include commercial items in the procurement competition, subsection (b) mandates that *procurement officials themselves* be similarly inclusive: "The head of an agency shall ensure that *procurement officials* in that agency, to the maximum extent practicable": "acquire commercial items";

"modify requirements" as appropriate "to ensure that the requirements can be met by commercial items"; "state specifications" to "enable and encourage" bidders "to supply commercial items"; revise agency practices "to reduce any impediments" to "the acquisition of commercial items"; and train personnel "in the acquisition of commercial items." 10 U.S.C. § 2377(b) (emphasis added).

FASA's mandates, when enforced, reverse the anti-commercial predisposition of agencies and procurement officials. Competition for government contracts is thereby expanded to include innovative technology companies. That expansion in turn drastically lowers the government's costs and gives the government immediate access to the most advanced technologies available in the marketplace.

### C. Congressional Inquiries Concerning DCGS-A1 Show Both the Failure of the Developmental Approach and the Continuing Predisposition of Procurement Officials to Disfavor Commercial Items

Since FASA's enactment, Congress has remained concerned about the government's over-reliance on the developmental approach. As shown by recent congressional inquiries, issues raised as far back as the Packard Report were *still* of concern to Congress as late as 2013-2015. Those inquiries demonstrated that the developmental approach was costing billions yet producing no effective product, while Palantir's software was relatively inexpensive, immediately available, and highly rated by fighters in the field. *See* RB at 8-12. Yet in the face of that

evidence, Army officials urged Congress to devote more time and money to the developmental approach, without offering concrete assurances that any effective product would result.

Thus, this case enables the Court to underscore the importance of the procurement reforms enacted by Congress in FASA, particularly the preference for acquisition of commercial items.

1. 2012 Senate Committee Report

In 2012, the Senate Committee on Armed Services noted that the developmental approach represented by the first increment of the Distributed Common Ground System-Army,[4] *see* RB at 2, 8-9, 63, was failing. The Committee further noted that, for at least two years, Army units in Afghanistan had already been urgently requesting use of commercially available alternatives, including Palantir's software.

The Committee issued a report on the National Defense Authorization Act for Fiscal Year 2013. The report observed that, in mid-2010, the Deputy Chief of Staff for Intelligence for U.S. forces in Afghanistan urgently requested "the rapid fielding to all echelons in Afghanistan of a commercially available analyst toolkit, which he had evaluated, that he believed would dramatically improve intelligence

[4] As used herein, "DCGS" refers to the Distributed Common Ground System, "DCGS-A" refers to the Army's DCGS, and "DCGS-A1" refers to the first increment of DCGS-A.

analysis in theater." S. Rep. No. 112-173, at 162 (2012). Instead of using that commercial toolkit, the Army insisted that its own development program would soon provide DCGS-A with capabilities comparable to those of the commercial toolkit and on the same timetable. *Id.* This decision was "controvers[ia]l" within the Department of Defense. *Id.* But the Army was given an opportunity to prove that its internal development program could deliver as the Army promised. *Id.*

In the following two years, the Marine Corps and some Army units began deploying commercial products. *Id.* While the feedback on the commercial products has been "very positive," the Committee noted, the Army's internal development program "appears to continue to lag behind promised performance." *Id.* Indeed, "despite years of development and considerable expense," Army officials testified in 2011 that the DCGS-A analyst tools are used in Afghanistan by only 115 analysts. *Id.* The Committee concluded by doubting the ability of the Army's development program to deliver on its promise: "The committee lacks confidence that the three groups" in charge of the development program for DCGS-A "are going to deliver a fully capable, end-to-end system to support the warfighter on an acceptable schedule and cost." *Id.* at 163.

2. 2013 Senate Sub-committee Hearing

The Army did little to allay the Senate's doubt. In 2013, the Committee on Armed Services' Subcommittee on Force Readiness held a hearing that focused in

part on DCGS.[5] Senator Claire McCaskill (D-MO) began by noting that, from initial conception, DCGS had already taken 15 years of work and cost billions of dollars. 2013 Hearing at 24. But in 2012, Sen. McCaskill noted, the Army's own research laboratory determined that DCGS was "not operationally effective, not operationally suitable, and not survivable." *Id.* Despite that judgment, DCGS was still approved for full deployment. *Id.* To make matters worse, fighting units in the field were urgently requesting deployment of a commercial system, *but the Army was resisting those requests.*[6] *Id.* at 25. Thus, Sen. McCaskill expressed consternation at the Army's double decision to continue with DCGS despite its problems *and* to resist deployment of the commercial alternative preferred by fighters in theater:

> SENATOR MCCASKILL: . . . I'm disturbed, confused as to how [DCGS] could be deployed at this point. There's 270 million in the budget for 2014 for more money for DCGS. And I – it has been reported, and I have personal awareness from folks, that units have filed urgent needs – the ones who have gotten DCGS have filed urgent needs – these are warfighters – saying, "Please give us this different program that has additional capability," and the Army has resisted that. . . .

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[5] *See Hearing to Receive Testimony on the Current Readiness of U.S. Forces in Review of the Defense Authorization Request for Fiscal Year 2014 and the Future Years Defense Program: Hearings Before the Subcomm. on Readiness and Management Support, Comm. on Armed Services*, 113th Cong., 1st Sess. 24-27 (2013) ("2013 Hearing"), *available at* https://www.armed-services.senate.gov/imo/media/doc/13-25%20-%204-18-13.pdf. Context makes clear that the discussion at the hearing concerned the *Army's* DCGS program, specifically DCGS-A1.

[6] A later exchange at the hearing confirmed that the commercial system referred to was Palantir's software. *See* 2013 Hearing at 25.

> [A]re there other [commercial systems] that can complement, in a way that's less expensive than going back and doing some reconfiguration of DCGS?. . . . [Y]ou are so good at getting the job done, it's very hard sometimes for you guys to say, you know, "Maybe we need to stop here and not go further with this, because maybe we're not going to get it where it needs to be in a cost-effective way." . . . I want to make sure that we're not so wedded to DCGS, that's been very expensive, that we're not complementing with whatever [commercial item] is available[.]

*Id.* at 24-27.

3. 2015 Senate Committee Hearing

Two more years went by, and the picture still had not changed. In 2015, the Senate Armed Services Committee's Subcommittee on Airland held a hearing that focused in part on DCGS-A.[7] The upshot of the hearing: the Army was still sticking by its development program, DCGS-A was still costing money without performing effectively, and soldiers in the field were still clamoring for Palantir's commercially available technologies – which could have been utilized by those soldiers sooner and at lower cost.

Senator Tom Cotton (R-AR) began by observing that the development phase of DCGS-A lasted 10 years and cost billions. 2015 Hearing at 5-6. Yet,

[7] *See Hearing to Receive Testimony on Army Modernization in Review of the Defense Authorization Request for Fiscal Year 2016 and the Future Years Defense Program: Hearing Before the Subcomm. on Airland, Comm. on Armed Services*, 114th Cong., 1st Sess. 5-6, 60-63 (2015) ("2015 Hearing"), *available at* https://www.armed-services.senate.gov/imo/media/doc/15-40%20-%204-14-15.pdf. Again, context makes clear that the term "DCGS" as used at the hearing was shorthand for DCGS-A.

Sen. Cotton noted, "the failures of DCGS-A are well documented." *Id.* at 6. Moreover, the Army's prior promise to fix the problems with DCGS-A – a promise that had bought additional time for the development program – was unfulfilled, as fighting units continued to report that DCGS-A did not meet their needs. *Id.* Sen. Cotton concluded his opening remarks with a critique not just of the details of DCGS-A but of the core problems – the Army's refusal to "leverag[e] existing technologies" and the Army's predisposition to favor development: "They continue to try to build core functions of a DCGS-A system according to customer requirements rather than adopting commercial components that work today." *Id.*

In questioning Lt. Gen. Michael E. Williamson, Military Deputy and Director of the Army Acquisition Corps, Sen. Cotton noted the amount still being spent on DCGS-A, the lack of improvement in DCGS-A, and the war fighters' continuing requests for Palantir's software. *Id.* at 60. Then Sen. Cotton pointedly asked the witness whether the Army would *ever* reach a point where it will stop spending on DCGS-A and start relying on commercial products:

> SENATOR COTTON: . . . . Over the past 5 years, the current version of DCGS has struggled to provide its promised capabilities. It has failed its own tests, the head assessor of the Army's Test and Evaluation Command calling it not operational, not suitable, and not survivable in 2012. Maybe most important, though, it seems to have continued to fail wartime commanders who have continued to file operational needs statements to this day for a commercial alternative that is successfully in use today by the Marine Corps and special

> operations forces. Even with more than 20 units calling for the alternative, because of flaws in the current program of record, taxpayers are continuing to spend hundreds of millions of dollars on the DCGS program, and it does not seem to be getting much better.
>
> *General Williamson, is there a point at which the Army is going to cut its losses and look at alternatives?*
>
> GENERAL WILLIAMSON: . . . . I will absolutely acknowledge that for some formations the DCGS system, as large as it is and the requirements for very well trained personnel to use, has not been optimal. . . .
>
> *I think as we go into the May timeframe where we go through our next set of evaluations, I think you will see a completely different perception of how that tool is provided*.

*Id.* at 60-62 (emphasis added).

Not convinced by such unsupported assurances of future improvement, Sen. Cotton returned to the point at which he started, which was the demonstrable inefficacy of the entire developmental approach, given the demonstrable utility of Palantir:

> SENATOR COTTON:. . . . [T]he National Assessment Group says that Palantir, the commercial system we are talking about, meets all requirements for advanced analytics. It also says that our own Testing Evaluation Command found that 96 percent of soldiers said Palantir was effective in supporting their mission. And the GAO reported that it meets all the needs of the Marine Corps and the special operations forces.
>
> I would just say that in the Cold War, when we were fighting a heavy mechanized war against the Soviet Union, we produced unique capabilities that were not available in the commercial space like tanks. And in the post-Cold War era, as the information technology revolution has taken over, *we have to rethink the wisdom of trying to create these systems in the Federal Government rather than using commercially available . . . systems*.

*Id.* at 63 (emphasis added).

In sum, senators repeatedly expressed skepticism about the developmental approach in general, and in particular about continuing with the developmental approach to DCGS-A. Senators also expressed a clear preference for acquisition of Palantir's software and other commercially available items. Nonetheless, the Army structured the solicitation for the second increment of DCGS-A in a way that excluded commercially available items, including Palantir's software. *See* RB at 14, 18-19, 34, 43, 61. It is hard to imagine more compelling proof of the Army's predisposition to favor developmental items and to exclude commercial items, in violation of FASA.[8] By affirming the judgment below, the Court can emphasize to procurement officials the importance of complying with FASA.

[8] That violation of FASA has not escaped Congress's notice. Congress included in H.R. 1735 – the National Defense Authorization Act for Fiscal Year 2016 – a requirement that, if the Army is going to pursue further development of DCGS-A, the Army must issue guidance to ensure that Army procurement officials comply with 10 U.S.C. § 2377 "regarding market research and commercial items." H.R. 1735, 114th Cong. § 855(a) (2015). That guidance must "provide that the head of an agency may not enter into a contract in excess of the simplified acquisition threshold for information technology products or services that are not commercial items unless the head of the agency determines in writing that no commercial items are suitable to meet the agency's needs as provided in [10 U.S.C. § 2377(c)(2)]." *Id.* § 855(a)(1). In the same bill, Congress restricted the Army's expenditure of funds appropriated for DCGS-A unless the Secretary of the Army submits to Congress a report that (a) identifies "each component of Increment 2 of [DCGS-A] for which commercial software exists that is capable of fulfilling most or all of the system requirements for each such component" and (b) includes an "acquisition plan for Increment 2 of [DCGS-A] that prioritizes the acquisition of commercial software components . . . in time to meet the projected deployment schedule for Increment 2." *Id.* § 222. Analogous provisions appear in the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 113, 220, 130 Stat. 2000, 2027-28, 2055 (2016).

## CONCLUSION

The judgment of the Court of Federal Claims should be affirmed.

Date: June 28, 2017

Respectfully submitted,

*/s/ Gideon A. Schor*
Gideon A. Schor

*Counsel for Amicus Curiae*

## CERTIFICATE OF COMPLIANCE

I certify that the foregoing *amicus* brief complies with the type-volume limitation of Fed. R. App. P. 29 and Fed. Cir. R. 32(a) and contains 5,112 words, excluding the portions of the brief exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b).

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 29 and Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been composed in proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Date: June 28, 2017

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that counsel for the parties have been served with a true and correct copy of the above and foregoing document via the Court's CM/ECF system on June 28, 2017.

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