No. 06-817

In the Supreme Court of the United States

APPLIED COMPANIES, PETITIONER

v.

PRESTON M. GEREN,
ACTING SECRETARY OF THE ARMY

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, in the absence of a cross-appeal, the court of appeals may affirm a judgment of the Armed Services Board of Contract Appeals on a ground that was rejected by the Board.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-13a) is reported at 456 F.3d 1380. The opinion of the Armed Services Board of Contract Appeals (Board) (Pet. App. 15a-84a) is reported at 04-2 B.C.A. (CCH) ¶ 32,786. The opinion of the Board denying petitioner's motion for reconsideration (Pet. App. 85a-111a) is reported at 05-2 B.C.A. (CCH) ¶ 32,986.

JURISDICTION

The judgment of the court of appeals (Pet. App. 14a) was entered on July 14, 2006. A petition for rehearing was denied on September 12, 2006 (Pet. App. 1a). The petition for a writ of certiorari was filed on December 8, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1985, petitioner entered into a contract to supply air conditioners (specifically, 36,000 BTU/hr horizontal air conditioners) to the Army Troop Support Command (Army). Pet. App. 6a. The contract included a standard clause encouraging petitioner to submit a value engineering change proposal (VECP), that is, a proposal to change the manner of performing the contract in a way that would save the government money. The contract provided that petitioner would share in certain savings achieved in the event that its VECP were approved by the Army and petitioner performed in accordance with the approved VECP. *Ibid.*

Specifically, the contract stated that petitioner would be eligible for a share of VECP savings achieved on all relevant contracts issued by the same contracting group during a certain period of time. Those savings were defined as "savings resulting from the application of a VECP to contracts * * * for essentially the same unit." 48 C.F.R. 52.248-1(b) (1984).

Savings were to be calculated in different ways depending upon the type of contract involved. The standard clause included a detailed formula for calculating the savings per unit achieved in the course of the performance of the contract for which the VECP was submitted (the instant contract). 48 C.F.R. 52.248-1(b), (g) and (h) (1984). Savings achieved on other contracts for essentially the same unit that existed when the VECP was approved (concurrent contracts) were measured by actual price reductions to those contracts resulting from the application of the VECP. 48 C.F.R. 52.248-1(b)(2) (1984).

Finally, savings achieved on other contracts for essentially the same unit that came into existence after the VECP was approved (future savings) could be calculated by two alternative methods. The parties could apply a formula specified by regulation, or they could estimate the future savings at the time the VECP was approved and agree to a lump sum settlement, which would not be subject to later adjustment even if it proved inaccurate. 48 C.F.R. 52.248-1(b)(3), (g)(1) and (h)(3) (1984).

2. In 1989, petitioner suggested that certain air-conditioner parts could be replaced with lower-cost commercially available parts. Pet. App. 25a. That suggestion was formalized in a VECP, and petitioner and the Army then entered into a bilateral modification to the contract, known as modification P9. In modification P9, the contracting officer conditionally approved the VECP, subject to submission of cost data and successful completion of various tests. *Id.* at 26a-27a, 49a. The specific unit identified in modification P9 was the 36,000 BTU/hr horizontal model air conditioner supplied under the instant contract. *Id.* at 25a.

Modification P9 memorialized specific agreements concerning savings and stated that savings from concurrent contracts were "not applicable." Pet. App. 28a. It further provided that projected future units were "zero" and that "[i]t is mutually understood and agreed that there will be no future contract sharing provisions." *Id.* at 10a, 29a. It also specified that the instant contract savings would be determined and agreed in accordance with the "Lump Sum Settlement Method." *Id.* at 29a.

In its VECP, petitioner had stated that a new and different VECP would be submitted for a different kind of air conditioner: the 36,000 BTU/hr vertical model. Pet. App. 25a. Subsequently, petitioner submitted the

VECP for that unit (*id.* at 33a-34a), and the VECP was approved. *Id.* at 15a-16a.

After completing various tests, petitioner proposed a lump-sum settlement of instant savings. Pet. App. 9a. Thereafter, the Army issued modification P15, a contract modification stating the amount of instant savings as a lump-sum amount equal to that proposed by petitioner. *Ibid.*

3. In 1995, petitioner submitted a claim to the Army for additional savings under the VECPs. Pet. App. 45a-46a. Petitioner asserted that more than $81 million in savings had been achieved on other contracts, covering 23 different models of air conditioners, as a result of its two VECPs: the VECP for the 36,000 BTU/hr horizontal model, and the VECP for the 36,000 BTU/hr vertical model. *Id.* at 61a. Petitioner sought half the alleged savings on these contracts, and it allocated its entitlement equally between its two VECPs. In other words, petitioner sought $20,250,000 for savings allegedly achieved on other contracts as a result of the VECP for the horizontal model at issue in this case. *Id.* at 45a-46a.

4. The Board awarded petitioner $1,000,947.36, plus interest, for future savings achieved on other contracts. Pet. App. 71a. The Board rejected the Army's argument that modification P9 foreclosed any entitlement to future contract savings. *Id.* at 10a-11a, 48a-55a. Instead, it held that modification P9 was ambiguous and that petitioner had a right to future savings related to the same units procured by other contracts during the sharing period. *Id.* at 48a.

Nonetheless, the Board refused to award petitioner savings related to 21 other models of air conditioners, because it concluded that those models were not "essentially the same unit" (Pet. App. 61a) as the 36,000

BTU/hr horizontal model for purposes of damage calculations, because they had different parts, assembly methods, and associated costs. See *id.* at 35a, 61a-62a, 81a, 84a. Rather, the Board awarded petitioner savings in connection with only one model of air conditioner besides the 36,000 BTU/hr horizontal model specifically identified in the VECP; that model was an updated version of the 36,000 BTU/hr horizontal air conditioner. *Id.* at 65a-66a.

5. Petitioner appealed the Board's decision to the United States Court of Appeals for the Federal Circuit. Pet. App. 5a-14a. The Army did not cross-appeal, and it did not challenge the $1 million award to petitioner for savings in connection with the contract for an updated 36,000 BTU/hr horizontal model. *Id.* at 70a-71a.

The court of appeals affirmed. Pet. App. 5a-14a. First, the court held that none of the 21 models was essentially the same "unit" as the unit designated in the VECP, and, therefore, none of the 21 models was covered by the VECP. The court observed that "[t]he language of the VECP is unambiguous. It names only the contract for the Applied AC, and indeed specifies only the Applied AC's unique drawing set." *Id.* at 9a. For that reason, "the Board correctly concluded that [petitioner] was not entitled to share in future savings on air conditioner models not covered by [petitioner's] contract with the Army." *Id.* at 5a.

Second, the court of appeals held that modification P9 was "unambiguous" and meant that petitioner could not recover any savings in connection with future contracts. Pet. App. 10a. "Of particular note, [modification P9] also provided that there would be 'zero' future units scheduled for delivery during the sharing period and stated: 'It is mutually understood and agreed that there

will be no future contract sharing provisions.'" *Ibid.* Accordingly, the court held that petitioner "is not entitled to share in future savings." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioner asserts (Pet. 6-8) that it was improper for the Army to support the Board's judgment by relying on contract modification P9. In petitioner's view, the Army's argument, if asserted in support of a cross-appeal, would have invalidated the Board's award of approximately $1 million to petitioner. For that reason, petitioner contends, the Army was foreclosed from raising that argument because it did not cross-appeal.

Even if petitioner's theory were correct, the judgment of the court of appeals would still stand on the independent ground that none of the 21 other air conditioner models was essentially the same as the unit designated in petitioner's VECP. Pet. App. 8a. That determination—which petitioner does not challenge here—afforded a sufficient basis for affirming the Board's judgment and denying any additional monetary recovery to petitioner. This case is therefore a poor vehicle for considering petitioner's arguments about the scope of the issues that may be considered by a court of appeals in the absence of a cross-appeal.

2. In any event, petitioner errs in arguing that the court of appeals lacked the ability to affirm the Board's judgment on a ground that had been rejected by the Board. To be sure, an appellee who fails to file a cross-appeal may not seek to change the judgment of the trial court in the appellee's favor. As this Court has long

held, however, as long as the appellee does not seek to change the judgment of the trial court, the appellee is free to support that judgment with any arguments fairly presented in the trial record—even if the trial court rejected those arguments:

> It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary * * * . But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.

United States v. *American Ry. Express Co.*, 265 U.S. 425, 435 (1924); accord *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S 473, 479 (1999); *United States* v. *New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977); *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970); see 15A Charles A. Wright et al., *Federal Practice and Procedure* § 3904, at 195-196 (2d ed. 1992) (Wright) (while "a cross-appeal is required to support modification of the judgment, * * * arguments that support the judgment as entered can be made without a cross-appeal").

An appellee may defend the judgment without cross-appealing even if its arguments in support of the judgment might, if taken to their logical conclusion, suggest that the judgment should be altered in some way. As the Seventh Circuit has put it, an appellee "may urge in

defense of the judgment any argument preserved below—even an argument the logical implications of which would call for a different judgment." *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1333 (1992); see 15A Wright § 3904, at 207 ("The abstract incongruity of affirming on grounds that logically dictate reversal should not stand in the way. It is enough that the arguments are properly presented in the district court and the court of appeals."); cf. *United States* v. *Harvey*, 2 F.3d 1318, 1326 (3d Cir. 1993); *United States* v. *Bohn*, 959 F.2d 389, 393-394 (2d Cir. 1992).

In *New York Telephone*, for example, the United States obtained an order requiring a telephone company to permit the installation of a pen register and to lease a telephone line to the United States to facilitate the installation. On appeal, the Second Circuit upheld the portion of the order requiring installation of the pen register, but reversed the portion requiring the company to lease a line to the United States. The United States then filed a petition for a writ of certiorari, but the telephone company did not cross-petition. See 434 U.S. at 161-165. In defending the portion of the judgment denying the lease, the telephone company argued that, by statute, pen registers could only be installed under a wiretap order. See *id*. at 165-166. It was undisputed that this argument, if accepted, would logically have invalidated the portion of the judgment regarding installation of the pen register, which was not challenged by either party. See *id*. at 165 n.7. Nonetheless, this Court held that, because the company was not seeking to attack the judgment, it was proper for it to raise its statutory argument to support the portion of the judgment placed in dispute by the government's petition. See *id*. at 166 n.8.

Thus, in appropriate circumstances, an appellee may present, and an appellate court may accept, arguments supporting the portion of the judgment under review even when a particular argument might be considered inconsistent with other aspects of the judgment that have not been appealed. Here, the Army did not seek to overturn the judgment awarding petitioner over $1 million in future savings. Even though it did not cross-appeal, the Army was permitted to advance any argument supported by the record in defending the judgment against petitioner's arguments that the award should have been higher. For that reason, the court of appeals acted properly in affirming the Board's judgment on the ground that contract modification P9 expressly denied petitioner the right to any future savings.

3. Petitioner suggests (Pet. 7-8) that the decision of the court of appeals is inconsistent with three decisions of this Court. Petitioner is mistaken.

First, petitioner misreads *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S 473 (1999). Petitioner quotes the Court's observation that "orderly functioning of the judicial system" requires "putting opposing parties and appellate courts on notice of the issues to be litigated and encouraging repose of those that are not." Pet. 7 (quoting *El Paso Natural Gas*, 526 U.S. at 481-482). Petitioner apparently reads that language to mean that, in the absence of a cross-appeal, only the arguments raised by the appellant are properly before the court. That proposition finds no support in *El Paso Natural Gas*. To the contrary, *El Paso Natural Gas* reaffirmed the settled rule that an appellee may "urge in support of a decree *any* matter appearing in the record." 526 U.S. at 479 (quoting *American Ry. Express*, 265 U.S. at 435) (emphasis added). At issue in *El Paso Natural Gas* was

the "prohibition on *modifying judgments* in favor of a nonappealing party," 526 U.S. at 480 (emphasis added), because the court of appeals in that case had actually modified the district court's judgment to enlarge the appellee's rights notwithstanding the absence of a cross-appeal, *id.* at 478-480. Here, by contrast, the Army did not ask the court of appeals to modify the judgment below, and the court did not do so. Accordingly, the decision below is entirely consistent with *El Paso Natural Gas*.

Second, petitioner relies on *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223 (1975), in which the Court determined that it would consider only the question of remedy for violation of an antitrust consent decree, as presented by the United States in its petition for a writ of certiorari, and would not entertain several arguments advanced by the respondent concerning whether it had correctly been held liable. See *id.* at 226 n.2. The limitation on the issues considered by the Court did not reflect a limitation on the Court's power, however, but was instead "a matter of practice and control of our docket." *Ibid.*; see *ibid.* ("We follow that rule of practice in this case, particularly because the issue of whether there were any violations concerns only a particular order as applied to a discrete set of facts and therefore would not merit this Court's grant of a petition for certiorari."). This Court's rule of practice concerning the discretionary management of its docket provides no support for petitioner's contentions here.[*]

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[*] In *El Paso Natural Gas*, the Court observed that "the prohibition on modifying judgments in favor of a nonappealing party" is a "firmly entrenched rule" and that "not a single one of our holdings has ever recognized an exception to the rule." 526 U.S. at 480. The Court then referenced *ITT Continental Baking* as containing "statements in

Finally, petitioner erroneously cites *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U.S. 185 (1937). In that case, this Court held that, in the absence of a cross-appeal, an appellee could not seek "a modification of the decree itself, the facts being found anew and differently, the law declared anew and differently, and the relief remodeled and adapted to the new law and

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dictum that might be taken to suggest the possibility of an exception to the rule," but reiterated that "[w]e have repeatedly expressed the rule in emphatic terms." *Id.* at 480 n.3. The "rule" at issue in *El Paso Natural Gas*, however, was the prohibition against modifying a judgment to benefit the appellee in the absence of a cross-appeal. When an appellee does not seek to modify the judgment, no such rule forecloses the appellee from defending the judgment on any ground supported by the record, even one that suggests that the judgment might be erroneous in some respects. On the contrary, *El Paso Natural Gas* reaffirms that an appellee may defend the judgment on the basis of "*any* matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court." *Id.* at 479 (quoting *American Ry. Express*, 256 U.S. at 435).

Some of this Court's decisions, which petitioner does not cite, might be taken to suggest that there are restrictions on the ability of a party defending a judgment to attack the reasoning of the lower court. See, *e.g.*, *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 364 (1994); *Strunk* v. *United States*, 412 U.S. 434, 437 (1973); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 381 n.4 (1970). Those cases involved the defense of court-of-appeals judgments in this Court, not the defense of district-court judgments in a court of appeals. They can be explained by "the Court's need to control its docket and to resolve the question that prompted it to grant certiorari," Robert L. Stern et al., *Supreme Court Practice* § 6.35, at 447 (8th ed. 2002), by avoiding issues that might prevent it from resolving that question. See Robert L. Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?*, 87 Harv. L. Rev. 763 (1974); cf. *ITT Continental Baking*, 420 U.S. at 226 n.2. Those considerations are not relevant to proceedings in the lower courts, so whatever additional limitations might be appropriate for respondents in this Court, they should not be imposed on appellees in the courts of appeals.

the new facts." *Id.* at 191. That rule has no application here, because the Army did not challenge the Board's judgment awarding $1 million to petitioner, and the court of appeals left that judgment undisturbed.

4. Petitioner's remaining arguments (Pet. 9-14) have nothing to do with the question presented as set out in the petition (Pet. i) but instead constitute an attack on the Federal Circuit's general approach to commercial contract interpretation. Because they are not fairly encompassed by the question presented, those contentions are not properly before the Court. See *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992).

In any event, petitioner's arguments lack merit, because the court of appeals simply interpreted the contract in this case in accordance with its plain meaning. The canons of interpretation on which petitioner relies have no application where, as here, the contract is unambiguous. See Pet. App. 9a ("The language of the VECP is unambiguous."); *id.* at 10a ("[T]he language of [modification] P9 is unambiguous."). Petitioner has not attempted to show that any other court of appeals would have interpreted this contract differently, nor would that case-specific question merit review in any event.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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