No. 2015-5146

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

DAVID FRANKEL,
Plaintiff-Appellee

v.

UNITED STATES,
Defendant-Appellant.

On Appeal from the United States Court of Federal Claims
No. 13-546C, Hon. Thomas C. Wheeler

BRIEF OF THE UNITED STATES

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STATEMENT OF RELATED CASES

Pursuant to Rule 47.5, counsel for the United States states that he is unaware of any other appeal in or from this action that was previously before this court or any other appellate court under the same or similar title. Counsel for the United States is also unaware of any case pending in this or any other court that will directly affect or be affected by this Court's decision in this appeal.

STATEMENT OF THE ISSUES

1. Whether the trial court correctly entered summary judgment in favor of the FTC on Frankel's contract claim because Frankel agreed to be bound by the judges' decision and released the FTC from any liability arising from his participation in the contest, and Frankel failed to show fraud, gross mistake, or bad faith that would release him from those promises.

2. Whether the Court of Federal Claims correctly held that it lacked jurisdiction over Frankel's attempt to have the FTC's Robocall Challenge rescored because the contest was not a procurement.

JURISDICTION

This is an appeal from a final judgment of the United States Court of Federal Claims entered July 31, 2015. The court below had jurisdiction under 28 U.S.C. § 1491 to hear Frankel's breach-of-contract claim, but as explained in section II, *infra*, it lacked jurisdiction over his claim for injunctive relief under 28 U.S.C. § 1491(b)(1). The appeal was timely noted on August 31, 2015. A25. This Court has jurisdiction under 28 U.S.C. § 1925(a)(3).

STATEMENT OF THE CASE

This is an appeal from a decision of the trial court granting summary judgment in favor of the Government.

Appellant David Frankel entered the FTC's Robocall Challenge contest and lost. The three contest judges each evaluated his entry, but none of them found that it would work. That decision was in line with the contest's rules. Nevertheless, Frankel now asks that the Court award him the entire prize amount for an alleged breach of contract or, alternatively, that it order the entire contest to be re-run.

Frankel's claim for damages founders on contest rules that the judges' decisions would be final and that the FTC would be released from any claims arising from the contest. Frankel agreed to these rules as a condition of entry. Yet Frankel asserts that he is not bound by his agreements, knowing well that the law is clear that he must prove "fraud, irregularity, or gross mistake" in the contest to succeed on that claim. In fact, Frankel can show nothing of the sort. The contest was conducted by the rules and Frankel lost. His only reasonable expectation on entering the contest was that his application would be considered by the judges, which it was. Frankel is disappointed with the outcome, but he has provided no reason to overlook the clear contest rules that bar the relief he seeks.

Frankel's demand to run the contest again, as if it were an office supply procurement, also fails because the contest was not a procurement and the requested relief is beyond the jurisdiction of the lower court.

STATEMENT OF FACTS

One of the FTC's most important jobs is protecting consumers from unlawful business practices. In pursuit of this mission, the agency has for several years sought to stop the use of automatically dialed sales calls that deliver prerecorded messages, also known as "robocalls." Robocalls are almost always illegal. In its law-enforcement capacity, the agency has brought more than 100 lawsuits against over 600 companies and individuals responsible for billions of illegal robocalls and violations of the Do Not Call List. *See* FTC, *Robocalls*, http://bit.ly/ftc-robocalls. Enforcement alone is not enough, however, because internet-based telephone technology has made robocalling easier and enforcement more difficult. As a result, the FTC has opened a second front in the fight against robocalls: initiatives to develop technology to fight the robocall problem. *Id.* This case involves one such initiative, a contest known as the FTC Robocall Challenge.

The Robocall Challenge was the first in a series of contests held by the FTC to encourage innovators to develop technological tools to combat robocalls. *See id.* The agency announced the Robocall Challenge in late 2012 as part of a summit it held on the robocall problem. *See* FTC, Robocalls All The Rage: An FTC

Summit, http://1.usa.gov/1WbutpU. As announced by David Vladek, then-head of the agency's Bureau of Consumer Protection:

> We are calling on you, college students, doctoral candidates, Ph.D.'s, all of the above to go out and to try to design a new system that will block illegal robocalls but let permissible robocalls through.
>
> What do we want? We want a robocall blocking system that is practical and that works. We want one that is easy to deploy, easy to use. One that is practical and we can deploy quickly. We want one that will not place burdens on consumers. So technology is our goal. New technology is our goal.

Transcript, FTC, Robocalls All The Rage at 246 (Oct. 18, 2012), http://1.usa.gov/1PiWdHl ("Summit Tr."). To "tap into the genius and technological expertise among the public," the agency offered a $50,000 prize for the best solution proposed by an individual or small company. *Id.* at 246, 248.

The agency enlisted three experts in the technology community to serve as judges for the competition: Dr. Henning Schulzrinne, the Chief Technology Officer of the FCC and former Chairman of the Computer Science Department at Columbia University; Dr. Steven Bellovin, then-Chief Technology Officer of the FTC and Professor of Computer Science at Columbia University; and Kara Swisher, a respected technology journalist. A59.

Two entries tied as the best overall solution and split the $50,000 prize. *Id.*; A88. One winning entry proposed to analyze and block robocalls using software to determine if the caller ID is authentic, which could be implemented as a mobile

telephone application (app), an electronic device in a user's home, or a feature of a provider's telephone service. *See* A62; A145. The other winner, "Nomorobo," is a cloud-based solution that uses "simultaneous ringing," a service available through phone carriers that allows incoming calls to ring on two telephone lines. A63. *Nomorobo* proposed to detect illegal robocalls, answer them, and hang up before they reach the consumer. *See* A62-63, A140-A142. (Foss offers his solution at http://www.nomorobo.com (last visited Feb. 2, 2016), where he claims to have stopped more than 65 million robocalls.)

Frankel's entry, titled "It's My Number," proposed a trace-back mechanism under which (1) telephone carriers would track billions of calls placed on or routed through their networks and make that data available; (2) the data would be matched to calls reported by consumers as robocalls in complaints to the FTC; (3) the matched call would be traced back to the original carrier through every telephone carrier that handled the call, including international carriers (all of which would have to participate in the program); (4) the original carrier would be asked to identify the robocaller; and (5) the FTC would then pursue enforcement measures or the robocaller's carrier would be pressured to cut-off its service. *See* A160-A174. Although Frankel's entry was deemed facially eligible and was reviewed by the expert judges, it was eliminated from consideration when the judges collectively determined that solutions employing various forms of "filtering" and

"blocking" were more likely to work than other approaches, which were judged "infeasible on technical or economic grounds." A528. Frankel's entry employed call tracing rather than filtering. As one judge testified, "Trace-back is something that, without significant enhancements, I did not think was going to work." A256 (Bellovin Depo. at 32:11-13).

A. The Official Rules

The contest officially opened when the FTC published the official rules of the Robocall Challenge in the Federal Register. 77 Fed. Reg. 64802 (Oct. 23, 2012); A43. Among other terms, the rules provided a schedule for the contest, described its eligibility requirements, instructed contestants how to enter, and prescribed the required entry format. A43-A45. With regard to the judging, section 9 of the rules provided:

> All Submissions will be judged by an expert panel of impartial judges . . . . Such Submissions may initially be screened by a qualified internal panel selected by the Sponsor, at its sole discretion.

A46. Section 10 described three criteria by which the entries would be evaluated and assigned a weight to each: (i) Does it work? (50%); (ii) Is it easy to use? (25%); and (iii) Can it be rolled out? (25%). A46. Each of the criteria was explained and illustrated with a list of questions and comments. For example, "Does it work?" included questions like:

- How successful is the proposed solution likely to be in blocking illegal robocalls?;

- How many consumer phones can be protected?; and
- How easy might it be for robocallers to adapt and counter your scheme?

Id.[1] To be considered for the prize, submissions were required to "satisfy each required category," with the prize awarded to the submission earning the highest overall score. A46 (Rules § 10(B)). The rules permitted the prize to be split in the case of a tie. *Id.* (Rules § 10(C)).

As a condition of entry, section 14 of the rules required all entrants to "[c]omply with and be bound by" the other rules, A48 (Rules § 14(A)(i)), including the agreement to abide by the decisions of the judges, which would be "binding and final," *id.*, and to absolve the FTC of any liability arising from the contest, A48-A49 (Rules § 14(a)(ii); *see also* § 17).

The "Entry Conditions and Release" of section 14 required contestants to broadly release (among other things) "any and all claims, expenses, and liabilities . . . arising out of or relating to [the contestant's] participation in the [c]ontest." A48. Section 14(B)(iv) further required contestants to agree that the FTC would have "no liability in connection with . . . technical or human error that may occur in the administration of the Competition." *Id.* And section 17, entitled "Limitations of Liability," provided that by entering, contestants released the FTC

[1] The competition website defined "[b]locking a robocall" as "preventing [the] phone from ringing when a robocall is sent to your number." A51.

against "any and all liability in connection with the Prizes or the Contestant's participation in the Competition." A49.

Frankel testified that he read the rules "many times" when preparing his entry. A350 (Frankel Depo. at 53:17-24); *see also* Br. 13. He understood that by entering the contest he agreed to the conditions of entry and that the decisions of the judges would be final and binding. A350-51, A360 (Frankel Depo. at 57:3-58:8, 63:3-11).

B. The Expert Judging Process

The agency received nearly 800 eligible entries. A59. As permitted under the rules, a panel of FTC staff members then reviewed the timely entries to screen out those that were deficient on their face. A59-A60. The remaining entries (about 270) were passed on to the expert judges, each of whom individually reviewed them all. A60, A73, A528. Along with the entries, the judges received instructions noting that they could collaborate with one another during the evaluation process, and that they did "not have to provide numerical scores for all submissions." A73, A807-A809.

In the ensuing weeks, each of the judges independently reviewed every one of the proposals, including Frankel's. A60, A73, A80 (Schulzrinne: "I went through all the entries"), A198, A262 (Bellovin Depo. at 38:8-15), A500, and A528 (Daffan Depo. at 49:21-22). The judges also discussed the proposals and the

types of proposals that they believed held the most (or the least) promise. A60; A506 (Daffan Depo. 57:1-21). After reviewing all the proposals and participating in these discussions, the judges agreed that the entries proposing to "filter" out illegal robocalls were more likely to work than other types of entries. A60, A528. In an email to the other judges, Dr. Schulzrinne described how he narrowed the field: he started with the "easy ones" to eliminate—either because they did not fit the competition guidelines or because they "wouldn't work." A80; A241 (Schulzrinne Depo. at 147:2-7). Dr. Bellovin agreed that "the very large majority" of the entries fell "into categories that I didn't think were going to work[,]" including Frankel's trace-back proposal. A261 (Bellovin Depo. at 37:11-14); A528; A845 (Bellovin Depo. at 129:9-11 ("I don't think it would actually work.")). Frankel's proposal did not employ filtering and was judged as "infeasible on technical or economic grounds." A528; A256, A845 (Bellovin Depo. at 32:11-13, 129:9-11).

The judges' determinations left "essentially one type of entry" for consideration: proposals that detect robocalls and "filter" them out while letting other calls through. A80. There was substantial variation among this broad category of solutions, however. Dr. Schulzrinne commented that the "more thoughtful" entries employed various features that "would actually help reduce the volume of both illegal and nuisance robocalls." A80.

As a way to select "the best" of the filtering proposals, the judges enlisted the assistance of FTC staff to create a spreadsheet to sort 16 features that the judges thought were important to consider in evaluating the filtering solutions, assigning various weights to certain features based on what they in their technical expertise viewed as more or less important. *See* A79-81.

Using the spreadsheet, the judges determined that six of the filtering solutions seemed to demonstrate clear superiority to the others. A528. The judges nonetheless also reviewed the other solutions to determine if any had merits that were not captured in the spreadsheet. *Id.*; A211-12 (Schulzrinne Depo. 98:10-99:10). Dr. Schulzrinne identified one such solution, the *Nomorobo* proposal, which he believed strongly met the judging criteria laid out in the rules. He specifically utilized rules language advocating the solution to the other judges observing that it functions "without carrier cooperation" and it can adapt to Caller-ID "spoofing"—when the caller ID screen displays a number other than the one that originated the call. A532-A533. In an email to the other judges, Dr. Schulzrinne emphasized the ease of deploying the solution (another rule criteria) because it did not require any hardware attachment to consumer telephones but required only that participants subscribe to the free "simultaneous ringing" feature offered by telephone companies. *Id.* The judges were persuaded to include *Nomorobo* as a finalist.

After further deliberations, the judges determined that the two winning entries best met the criteria in the rules and that they were "equally good." A515 (Daffan 75:8-11); A60; A848 (Schulzrinne Depo. at 112:8-22). The judges each assigned numerical scores to the finalist entries, resulting in a tie. A537. The $50,000 prize was split between the two winners in accordance with the rules. *See* A46 (Rules § 10(C)).

C. Procedural History

Disappointed at the outcome of the contest, Frankel tried to change it. He first filed a protest with the U.S. Government Accountability Office (GAO), arguing, as here, "that the agency failed to evaluate his entry in accordance with the rules established for the contest." *In re David Frankel*, No. B-408319 (G.A.O. June 7, 2013), A835. GAO determined that Frankel "[e]ssentially takes issue with the outcome of the contest and argues that his submitted solution was better than those selected by the agency as winning solutions." A836. The Office dismissed the protest for lack of jurisdiction, finding that the Robocall Challenge did not propose to award a contract for the procurement of property or services, and therefore fell outside its authority under the Competition in Contracting Act, 31 U.S.C. § 3552(a). A837-A838.

Frankel then sued in the Court of Federal Claims, alleging that the FTC "failed to conduct the Challenge according to its own published Rules," and asking

"that the Agency be ordered to re-score the Challenge" and "compensate the correctly-identified Contestant(s)." A27-A28. The court dismissed the complaint in part, holding that Frankel could not pursue injunctive relief—his "bid protest" attempt to have the contest rescored—because the contest "was not a 'procurement' within the meaning of 28 U.S.C. § 1491(b)(1)." A9, A12. The court permitted Frankel to proceed on a breach-of-contract claim, holding that "a contract was formed between the FTC and each of the competitors when the competitors accepted the offer embodied in the competition by submitting entries." A9, A11.

After discovery,[2] the parties filed cross motions for summary judgment. A693-A705; A707-A731. Frankel argued that the FTC breached the contract embodied in the contest rules by failing to give his entry a numerical score and misapplying the judging criteria. A702-A705. The Government argued that Frankel's claim was precluded by his agreement to abide by the finality of the judges' decisions and to release the FTC from any liability arising from the contest. A721-A730.

The court denied Frankel's motion and granted summary judgment to the Government, A1-A7, holding that "Frankel agreed to be bound by the decisions of

[2] Mr. Frankel deposed each expert judge, a director and an assistant director in the FTC's Bureau of Consumer Protection (which manages the Do Not Call List), and the primary advising attorney on the contest.

the judges, and understood that the FTC would not be subject to liability for issues arising from his participation in the contest." A6. "Without any evidence of fraud or bad faith required to sustain a claim for material breach, Mr. Frankel has failed to meet his burden of proof." *Id.* The court noted that allowing Frankel to proceed without such evidence would "negate the explicit terms of the contract" and "open the door for every other participant to challenge the decisions of judges in future contests." *Id.*

SUMMARY OF THE ARGUMENT

Like any contest entrusted to the subjective determinations of neutral experts – for example, the "Best in Show" prize awarded by the Westminster Kennel Club – an entry in the Robocall Challenge could win only if the judges found it to be superior to the others. Frankel's entry did not win, though he believes it should have. His appeal fails to establish any basis to overturn that result. His attempt to force the FTC to re-do the contest also fails—the FTC, like the Westminster Kennel Club, did not "procure" anything by holding a contest.

Frankel's breach-of-contract claim fails for four reasons, any one of which is enough to defeat the claim by itself.

First, Frankel concedes that he can challenge the judges' decision after agreeing it would be final only by showing fraud, intentional or gross mistake, irregularity, or lack of good faith. Br. 30. Yet he admitted below that he failed to

find any evidence of such misconduct. A784. He argues that a mere "allegation" of a rule violation meets his burden, but no case law supports him. Indeed, his interpretation would render the contract provision meaningless. Frankel likewise fails to show that he developed any facts to establish an "irregularity" in the judging sufficient to overcome the finality of the judges' decision.

Second, Frankel agreed when he entered to release the FTC from liability for any claim arising from his participation in the contest and he admitted below that this is such a claim. His appeal does not address these admissions or challenge their applicability. The arguments he does make misconstrue the law, the rules, or both, and in any case do not negate the clear waiver of his claim against the FTC.

Third, Frankel fails to show that the FTC broke any of the contest rules. He argues for the first time on appeal that the FTC changed the rules midstream, which the Court need not consider because it has been waived. Regardless, it fails for lack of any evidence. Frankel complains that his entry did not receive a numerical score, but the rules did not require one. Frankel's solution was eliminated because the judges thought it did not work, which counted for 50% of the contest, so a score was not necessary.

Fourth, Frankel argues that the judges improperly applied the contest's definition of "blocking" a robocall and did not score entries higher if they proposed to work on multiple types of telephones. As an initial matter, Frankel's view of the

"blocking" definition is implausible. But even if the definition were disqualifying it would disqualify Frankel's solution, not the winners'. Frankel is likewise incorrect that the judges should have scored every entry that proposed to work on both mobile and landline phones higher than any entry that worked only on one type of phone. The rules did not require that.

Finally, none of Frankel's alleged breaches was material. None of them goes to the essence of his contract—that his entry would be judged (it was) and that the entries selected by the judges would receive the prize (they did). For the same reason, Frankel cannot claim the $50,000 prize as contract damages because like the contestants in the Westminster Dog Show, he was never promised that he would win "Best in Show." That decision was for the judges to make.

As to Frankel's argument that he should be entitled to injunctive relief, Frankel fails to show that the Robocall Challenge was a Government procurement subject to the trial court's jurisdiction. Whether a Government contract is a procurement depends on the "principal purpose" of the contract. Here, the principal purpose was to stimulate innovation to create technology in the fight against Robocalls to benefit the public – not a contract for goods and services to provide a direct benefit to the Government.

STANDARD OF REVIEW

1. The Court reviews the Court of Federal Claims' grant of summary judgment *de novo*. Contract interpretation is a question of law, which the Court likewise reviews *de novo*. *St. Christopher Assocs., L.P. v. United States*, 511 F.3d 1376, 1380 (Fed. Cir. 2008).

2. The Court reviews the Court of Federal Claims' grant of a motion to dismiss for lack of jurisdiction *de novo*. *Bay View, Inc. v. United States*, 278 F.3d 1259, 1263 (Fed. Cir. 2001).

ARGUMENT

I. THE COURT OF FEDERAL CLAIMS PROPERLY ENTERED SUMMARY JUDGMENT FOR THE FTC ON FRANKEL'S CONTRACT CLAIM.

When he entered the FTC's Robocall Challenge, Frankel agreed to be bound by the rules of the contest "and the decisions of . . . the [c]ompetition judges." A48. He agreed that the judges' "decisions are binding and final." *Id.* Unless Frankel can show bad faith or other serious misconduct on the part of the judges, he cannot renege on his agreement.

Independently, Frankel agreed to release the FTC from "any and all liability in connection with the Prizes or [his] participation in the Competition." A48. These clear terms likewise foreclose Frankel's claim that he is entitled to damages from the FTC.

While Frankel touts the purported virtues of his proposed solution (that the expert judges rejected), the FTC conducted the contest according to the rules and Frankel lost. Frankel's claims require misreading the rules and rely on purported breaches of requirements that the rules do not contain. And even if Frankel had made out a plausible claim that the contest administration varied from the rules, the rules never promised him that he would win the $50,000 prize so he cannot recover the prize as damages.

A. Frankel Did Not Show Fraud, Gross Mistake, or Bad Faith And Therefore May Not Overturn The Judges' Decisions.

Where contest rules declare judges' decisions to be final, a disappointed entrant may not challenge the decision unless he shows "fraud, intentional or gross mistake, irregularity, or lack of good faith." *E.g.*, *Gillmore v. Proctor & Gamble Co.*, 417 F.2d 615 (6th Cir. 1969); *Giunto v. Florida Coca-Cola Bottling Co.*, 745 So. 2d 1020 (Fla. Ct. App. 1999) (collecting cases) *Younker v. Disabled Am. Veterans Serv. Found.*, 137 F. Supp. 407 (E.D.N.Y. 1954); *Furgiele v. Disabled Am. Veterans Serv. Found.*, 116 F. Supp. 375, 376 (S.D.N.Y. 1952), *aff'd* 207 F.2d 957 (2d Cir. 1953). In the absence of such serious misconduct, a disappointed contest entrant is bound by the contest rule and may not challenge the judges' decision.

Frankel admits that he agreed that the decisions of the judges would be final. Br. 9, 40; A477. He likewise acknowledges that those decisions are incontestable

unless he can provide evidence of "fraud, irregularity, intentional misconduct, gross mistake, or lack of good faith." Br. 30 (quoting *Johnson*, 602 So.2d at 888). The trial court correctly held that Frankel produced no such evidence.

Before the trial court, Frankel flatly admitted that he lacked evidence of bad faith, malicious intent, or fraud.[3] A784; *see also* A477-A478, A423-24 (Frankel 170:10-171:10). He likewise conceded that he found nothing to suggest "that the judges were predisposed one way or on the other" or that they harbored malice against him (or any other contestant). A423-24 (Frankel Depo. at 170:10-171:10). And he admitted that he does not believe the judges were trying to be "unfair" and that they are "professional people" who are "of reasonable integrity generally." A427 (Frankel Depo. at 174:18-20). It has long been a "settled rule in the Courts of the United States" that when a contract delegates to a third person final decisionmaking authority on matters such as quality or value, the decision may be overturned only on evidence that "necessarily impl[ies] bad faith or failure to exercise an honest judgment." *American Pipe & Constr. Co. v. Westchester County*, 292 F. 941, 948 (2d Cir. 1923); *Kihlberg v. United States*, 97 U.S. 398

[3] Frankel attempts to deny this admission and faults the trial court for misconstruing his testimony. Br. 45. But his own surreply to that court stated: "I have uncovered no EVIDENCE on the part of any individual with respect to bad faith, malicious intent or fraud." A784.

(1878). In accordance with the law, Frankel's concessions that the judges acted in good faith foreclose gross mistake or irregularity.

Despite his concession that the contest judges acted in good faith, Frankel contends that he may be excused from his contractual obligations upon a mere "alleg[ation] that the contest sponsor did not abide by the contest rules." Br. 30-31. Alternatively, he asserts that he has shown "irregularity" in the FTC's assessment of the contest entries. Br. 40-46. Neither argument is correct.

Frankel's first argument is simply implausible. It cannot be the case that any allegation of a failure to follow contest rules voids the terms of the contest. Any contestant can allege the breach of a contest rule, and if Frankel were right, no contest finality rule would ever be enforceable and no contest would ever be free of post-hoc challenges. Not surprisingly, Frankel fails to cite a single case that supports his claim.

The cases Frankel does cite merely represent instances where courts declined to dismiss a case *at the pleadings stage* where the complaint alleged fraud or gross mistake. Br. 30-31 (citing *Carlini v. United States Rubber Co.*, 154 N.W.2d 595, 507-508 (Mich. 1967); *Groves v. Carolene Products Co.*, N.E.2d 507, 508, 510 (Ill. App. 1944)). These cases have no application here because Frankel conducted full discovery, and admitted he uncovered no misconduct. In *Carlini*, the court decided that "the mere pleading" of a finality-of-the-judges

provision does not justify dismissing a plaintiff's claim precisely because subsequently developed facts might reveal a "gross mistake." 154 N.W.2d at 507-508. In *Groves*, the court reversed the dismissal of a complaint where the plaintiff alleged "gross error" and "sufficiently charge[d] fraud and misconduct on the part of the judges." 57 N.E.2d at 508, 510.

Frankel's third case, *Holt v. Wilson*, 55 S.W.2d 580 (Tex. 1932), is even farther afield—there were no contest judges and no rule declaring judges' decisions final. The case involved a contest to gather newspaper subscriptions in which the second-place contestant alleged that she would have won but for credit the winner improperly received for subscriptions submitted after a contest deadline. *Id.* at 582. A jury agreed that the submissions were late and the trial court held for the plaintiff. *Id.* On appeal, the contest organizer argued that the rules gave him the "absolute and final" decision on "any question [that might] arise," including the authority to receive entries after the deadline. *Id.* at 584. The court rejected this argument, holding that the term was void because it would "deny contestants access to the courts to establish and enforce their rights." *Id.* Unlike the contestant in *Holt*, Frankel has had access to the courts. Frankel deposed every single judge, a director and assistant director within the FTC, and an advisor attorney for the contest, and found no evidence of bad faith or impropriety.

As the trial court held, Frankel's case fails because he produced no evidence that would render the contest rules inoperative.

Frankel's second argument fares no better. He claims that unspecified "facts developed during discovery" establish "at a minimum, a substantial irregularity in the implementation of the prize competition," which he says "satisfies [his] burden to overcome the parties' agreement that the judges' decision is final." Br. 40. He claims the authority of a "long line of precedent" but fails to substantiate that promise, offering instead a series of cases that are most alike in their inapplicability to this case.

His first two cases did not involve challenges to the decisions of contest judges or provisions specifying the finality of their decisions. Br. 40. In *Krueger v. Elder Manufacturing Co.*, the court *upheld* a contest organizer's determination that the plaintiff-contestant was not eligible because she was an employee of the company. 260 S.W.2d 349 (Mo. App. 1953). *Mooney v. Daily News Co.*, 133 N.W. 573 (Minn. 1911), involved another newspaper subscription contest; like *Holt*, it turned on the timeliness of the contestant's entries—not on the decision of contest judges. The court affirmed the trial court's decision (based on a jury verdict) that the organizer assured the contestant that his entries would be timely and that the rules did not forbid such an agreement. *Id.* at 574. The court noted

that the contestant should have been given credit under the rules regardless of the assurance. *Id.*

Frankel argues that *Krueger* and *Mooney* show that "a breach occurs when the sponsor of the competition fails to comply with the rules."[4] Br. 40. This misses the point. Having agreed that the decisions of the judges would be final and binding, Frankel cannot go back on his word merely by claiming some minor deviation from the rules.[5] He is bound by his agreement unless he can show that the judges' decisions resulted from fraud or other misconduct. This requirement makes sense because the Robocall Challenge depended on the judges' subjective opinion about the quality of the various entries. Cases like *Mooney* and *Holt* did not involve similar subjective judgments or require that entrants agree to the finality of the results; rather, they involved the simple tabulation of credits according to terms agreed to at the outset of the contest. *Holt*, 55 S.W.2d at 584; *Mooney*, 133 N.W. at 574.

In the rest of Frankel's "long line of precedent," the courts *rejected* challenges to contest results, holding the challengers bound by the rules and applying the requirement to show fraud, gross mistake, or irregularity to overcome

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[4] *Krueger* does not demonstrate this truism because there was no deviation from the rules.

[5] As discussed *infra*, section I.C, Frankel does not show even a minor deviation from the rules.

the finality of the judges' decisions. Br. 41-42. For example, in *Furgiele*, the court rejected a claim that contest organizers "acted arbitrarily and in violation of the rules" because like Frankel, the plaintiff failed "to back up this contention." 116 F. Supp. at 376. The court held that the plaintiff (like Frankel) was merely "dissatisfied" with the outcome and failed to establish fraud, gross mistake, irregularity, or lack of good faith. *Id.* *See also Gillmore*, 417 F.2d 615 (no gross mistake or irregularity); *Armato v. N.Y. Daily News, Inc.*, 2006 U.S. Dist. LEXIS 2344 (D. N.J. Jan. 23, 2006) (contestants bound by rules, including number of prizes offered). Frankel attempts to distinguish these cases but fails to identify how he has shown fraud, irregularity, or gross mistake in a way that the plaintiffs in *Furgiele* and *Gillmore* did not.

B. Frankel Has Released The FTC From Liability.

Courts also hold contestants to their agreement to release contest organizers from liability arising from the contest. *E.g.*, *Bunting v. Atl. Refining & Mktg. Corp.*, 1991 U.S. Dist. LEXIS 11543 at *4-5 (E.D. Pa. 1991); *Thomas v. Infinity Broadcasting Corp. of Los Angeles*, 2005 WL 3074138 (Cal. Ct. App. 2005) (unpublished); *Rosner v. Valleycrest Productions, Ltd.*, 2004 WL 1166175 (Cal. Ct. App. 2004) (unpublished). Accordingly, the judgment below should be affirmed for the independent reason that Frankel affirmatively absolved the FTC of any liability in connection with his participation in the contest.

Under section 14(A)(ii) of the contest rules, Frankel agreed to broadly release the FTC from "any and all claims, expenses, and liabilities," including those that "arise out of or related] to" his entry or his "participation in the Competition." A48. He further agreed that the FTC would have no liability in connection with "technical or human error that may occur in the administration of the Competition." *Id.* (Rules § 14(B)(iii)). And in section 17 of the rules, he agreed to release the FTC "from any and all liability in connection with the Prizes or [his] participation in the Competition."

When interpreting a release, this Court "first ascertain[s] whether its language clearly bars the asserted claim." *Dureiko v. United States*, 209 F.3d 1345, 1356 (Fed. Cir. 2000). It does so here. The language could not be clearer, and Frankel admitted without reservation that he "seek[s] to hold the FTC liable for a claim arising from [his] participation in the Contest"—the exact language of the releases in paragraphs 14 and 17 of the rules. A478. He likewise admitted that he sought to hold the FTC liable "in connection with the prizes awarded in the contest," again, the very language of his release in section 17 of the rules. A478. And Frankel admitted that his fault with the judges' decision was based on "technical or human error," a claim he expressly released under section 14(B)(iv) of the rules. A479.

Frankel does not address—let alone deny—these admissions. Instead, he relies on a smattering of flawed arguments misconstruing other parts of the rules.

First, he argues that the rules contained no "complete waiver of damages," because of a purported exclusion for "intentional acts." Br. 51. For this proposition he quotes a fragment of rules section 17, omitting the part that refutes his argument. In full, the clause reads:

> Provided, however, that any liability limitation regarding gross negligence or intentional acts, or events of death or body injury shall not be applicable *in jurisdictions where such limitation is not legal.*

A49 (emphasis added). Even assuming that "intentional acts" described his claim (a big stretch given that Frankel admits the judges acted in good faith), Frankel does not allege (and has never alleged) that the limitation is illegal in any jurisdiction.

Second, Frankel argues (Br. 51) that his claim does not fall within the "specific examples" of liability from which the FTC is released in section 14(B)(iii). The claim fails both on its face and because it ignores other applicable releases that bar Frankel's challenge. As noted above, Frankel admitted his claim was one of "technical or human error," a claim expressly released in section 14(B)(iii). A479. Moreover, section 14(B) specifically says that it does not limit the immediately-preceding release in 14(A), which separately covers Frankel's

claim. *Id.* Frankel offers no plausible interpretation of the rules to escape his multiple releases.[6]

Third, Frankel argues generally that limitations on liability in Federal contest rules should be limited in light of public policy. Br. 47-48, 52-53. But he offers no public policy reason to limit the scope of his release in this case. Policy would clearly favor strict application of releases in the absence of a compelling reason against enforcement. Otherwise, contests that are intended to serve the public interest by generating novel solutions to societal problems would be discouraged by the constant threat of baseless challenges.

Fourth, Frankel posits a conflict between his release and requirements of the America COMPETES Act. Br. 52. The Act requires that participants in Federal prize competitions "waive claims against the Federal Government . . . except in the case of willful misconduct," for injuries "arising from their participation in a competition." Br. 52 (quoting 15 U.S.C. § 3719(i)(1)(B)). Frankel attempts to find light between claims "arising from participating in a competition" and those "arising from an agency's breach of the contract." Br. 51-52. But the two are the same: Frankel's claim may arise from the contract, but the contract arises from his

[6] Frankel also argues (Br 50-51) that the trial court failed to acknowledge "the import of § 18 of the Rules," but he makes no discernable argument that the judgment is incompatible with section 18—his claim was resolved "individually" and "pursuant to Federal law" as that section states. See A49.

participation in the contest. Moreover, Frankel admitted that his claim arose from his participation. A479. Further, though Frankel highlights an exclusion for "willful misconduct," he admitted below that there was no willful misconduct here. *See supra* § I.A.

In short, none of Frankel's arguments overcomes his release of FTC from any liability arising from his participation in the contest.

C. The FTC Did Not Breach Its Contract With Frankel.

Even if Frankel's claim for damages were not barred by the contest rules, he has failed to show that the FTC violated the Robocall Challenge rules.

Frankel alleges that the FTC broke the rules by (i) changing the judging criteria in the midst of the contest; (ii) failing to require that the judges assign a numeric score to his entry; and (iii) permitting the judges to improperly apply the judging criteria. The Court need not consider the first claim because it has been waived; it also lacks a shred of support in the record. The other two alleged breaches depend on a basic misreading of the contest rules.

1. The FTC did not change the rules.

For the first time, on appeal, Frankel alleges that the FTC breached the contract contained in the rules of the Robocall Challenge by "chang[ing] the judging criteria of the contest midcourse, without providing any notice." Br. 32. But Frankel did not raise this argument before the trial court, which did not decide

the question. In general, "appellate courts do not consider a party's new theories, lodged first on appeal." *Sage Prods. v. Devon Indus.*, 126 F.3d 1420, 1426 (Fed. Cir. 1997). Here, Frankel did not claim, either in his brief or at oral argument, that the FTC changed the rules of the contest. *See* A703-A705 (Frankel's motion); A760-A762 (reply brief). At oral argument on his summary judgment motion, Frankel expressly declined to rest his argument on grounds other than the alleged failure to numerically score his entry and the alleged misapplication of the judging criteria. A581. When the court gave him the chance to add "anything else you want[] to identify about the breaches," Frankel replied that "those two items suffice." A581-A582.

In any event, there was no rule change. Frankel claims that the judges "decided to apply a 'filtering' requirement in an effort to minimize the number of submissions that had to be judged by the panel." Br. 32. But the evidence and testimony showed that the judges had reviewed all of the entries *before* they determined that "filtering" solutions better met the contest criteria than other

solutions.[7] *See* A500 (Daffan Depo. at 49:21-22); A80 (Schulzrinne: "I went through all the entries"); A198, A528; A262 (Bellovin at 38:8-15). Further, Dr. Schulzrinne's contemporaneous email described how eliminating the "easy ones" (including "lots of 'this wouldn't work' entries") left "one type of entry"—the filtering proposals. A80-81. The judges' actions were in conformity with the rules. The rules make clear that winning proposals must "satisfy each required category." A46 (Rules § 10(B)). When the judges found that a broad number of solutions had failed the most significantly weighted evaluation category, they rightly eliminated them from further consideration.

Frankel does not point to a single document or any testimony to contradict this evidence, nor any suggestion that non-filtering solutions were disqualified under a new rule or that the judging criteria were modified. *See* Br. 19-20, 32-33. The non-filtering entries were eliminated either because they did not fit the competition guidelines or "wouldn't work." A80-A81, A528; *see also* A255-56 (Bellovin Depo. at 31:22-32:22); A241 (Schulzrinne Depo. at 147:2-8). Frankel's

[7] Frankel makes much of a "score" that appears next to his entry on a preliminary working document used by a single judge at very beginning of his review when he had reviewed only a handful of solutions. A590 (Tr. at 13:2-18). After the judges collectively reviewed all submissions, as the rules required, they determined that Frankel's entry did not meet the contest criteria and would not work. A60, A80-81, A241, A256, A261, A528, and A845. The preliminary score does not establish that the judging process violated the rules, that the judges misapplied the judging criteria, or that Frankel should have won the contest.

submission was not plausible because it required the broad cooperation of telephone carriers, domestic and international, gathering mountains of data, all in an effort to track down robocallers one by one and then pursue enforcement. It was removed from consideration by the judges' collective evaluation of the entries because it would not work, not because of any new or changed rule.

2. The rules did not require that every entry receive a numerical score.

Frankel next alleges that the FTC breached the contract by failing to assign a numerical score to his entry, but the rules contain no such requirement. *See generally* A46. Frankel conceded as much in his deposition. A404-06 (Frankel 137:23-139:1). Nevertheless, he insists there must be such a requirement by implication because the rules assign numerical weights (50%, 25%, and 25%) to the three judging criteria. Br. 36-37; *see* A46.

Although the rules state that contest entries will be judged using the contest criteria (they were), it does not follow from the existence of weighted criteria that every entry must be given a numeric score. As we noted above, the rules required that a winning proposal "satisfy each required category[.]" A46 (Rules § 10(B)). The judges in accordance with the rules removed from consideration the solutions that in light of their expertise would not work, Frankel's included. The rules did not require that every solution receive a score, and in fact, suggested that all solutions would not receive one.

Frankel's strained reading of the rules would actually lead to absurd formalities. By way of example, in a building contest where the winner will be determined by building height (50%), width (25%), and number of windows (25%), the judges would not find any need to assign a numeric score before eliminating the townhouse entries and focusing on the skyscrapers. The judges would easily be able to see that the townhouses cannot win based on height alone, but under Frankel's reading, the judges would still be required to formally score solutions that were categorically ineligible to win. The judges did not need numeric scores to eliminate entries they thought would not work – once they were categorically ineligible for a prize, a score was not necessary. A292 (Bellovin Depo. at 75:17-21) ("if something was obviously not going to win, not workable, not deployable or what have you, there was really no point going further. Assigning the number . . . was just going to be a pointless exercise."); A846 (Bellovin Depo. at 172:3-8) ("Again, the big concern that I had was I didn't think it was going to actually work. . . . It doesn't work is 50 percent."). Frankel's position makes no sense and even he concedes it lacks merit. Br. 38-39 ("Without any points in the first category worth fifty percent of the score, [a] submission[] could not win.")

3. The judges properly applied the contest criteria.

Lastly, Frankel alleges that the judges failed to properly apply the contest criteria in two ways: first, that they overlooked that his was the only entry that would "block" illegal robocalls (as "blocking" was defined in the contest FAQ); and second, that the judges failed to score proposals that would work on "all phones" higher than proposals that worked only certain types of phones. Br. 33, 38-39. Neither of these contentions has merit.

The Robocall Challenge website defined "[b]locking a robocall" as "preventing your phone from ringing when a robocall is sent to your number." A51. Frankel contends that the two winning entries should have been disqualified or received a zero in the "Does it work?" category because they would allow one ring or a partial ring before blocking a robocall. Br. 38-39. The obvious flaw in this argument is that the solutions "prevent your phone from ringing" after the first ring or a partial ring, when the phone would otherwise have continued to ring. Moreover, the relevant section of the judging criteria asks "*How successful* is the proposed solution likely to be in blocking illegal robocalls?" as just one of four bullet points provided to illustrate the "Does it work?" category. A46 (emphasis added). "How successful" does not call for a yes-or-no answer. A solution that stops robocalls at the second ring could be less successful than one that allows no rings, but more successful than one that fails to stop them at all, or that stops

legitimate calls more frequently than robocalls. Nothing in the rules suggests that winning solutions must stop the consumer's telephone from ringing even once.

Frankel's argument also throws stones from a glass house: His own proposal relies on complaints about completed Robocalls to populate the databases from which the call originator is eventually to be identified. *See* Br. 14; A160, A164. It would not prevent consumers' phones from ringing when they receive these robocalls. Indeed, Frankel's solution *requires* that consumers receive robocalls—and complain about them. Further, if his solution were successful, it would prevent the originator only from making "*future* illegal calls" but that is not the same as "preventing your phone from ringing *when a robocall is sent to your number*."[8] A160 (Frankel proposal) (emphasis added); A46 (emphasis added). By design, Frankel's solution would not prevent *any* phone from ringing "when a robocall is sent" to it. *See* Br. 14 (arguing that Frankel's proposal would block "potential calls").

Frankel's simplistic argument (Br. 33) that the judges failed to assign higher scores to proposals that purported to work on "all phones" is likewise flawed.

[8] For the purposes of this illustration, the Government refrains from explaining how unlikely it is that Frankel's proposal would bring about this result. Suffice it to say that the judges did not think that would happen. *E.g.*, A845 (Bellovin 129:9-11 ("I do not think it's going to work.")).

Frankel draws this argument from another bullet point provided to illustrate the "Does it work?" evaluation category:

> - How many consumer phones can be protected? What types of phones? Mobile phones? Traditional wired lines? VoIP land lines? Proposals that will work for all phones will be more heavily weighted.

A46. The contest website explained that entries need not work on "both landlines and mobile phones" to be eligible, but advised contestants that a solution that blocks robocalls "on one type of phone will not be scored as highly as a solution for multiple types." A51. Frankel argues that the judges improperly "rewarded submissions they knew would not work for both landline and wireless phones." Br 33.

As with Frankel's other alleged breaches, this argument does not hold water because it takes "more heavily weighted" out of context and makes it controlling of the "Does it work?" category. But "How many consumer phones" was just one illustration in the category. *See* A46. Taken in context, the rules' advice that a proposal for all types of phones would be "more heavily weighted" than one for fewer types of phones assumes that the two proposals would otherwise work equally well.

This flaw in Frankel's breach theory becomes critical in light of how the judging of the contest actually progressed. As described above, Frankel's proposal was eliminated from the competition when the judges collectively determined that

the solutions in the filtering category were more likely to work than the other proposals. As one of the judges explained, there was never a need to "more heavily weight" a proposal based on the types of phones it would work on because "we did not have . . . a filtering proposal that worked uniformly for all phones." A107.

D. None Of The Alleged Breaches Is Material And Frankel Cannot Claim The $50,000 Prize As Damages.

Even if Frankel had shown a breach of the contest rules, he still would not qualify for relief because none of the breaches would be material. Moreover, even if he could prove a material breach, Frankel could not recover the $50,000 prize because his only reasonable expectation from entering the contest was that his entry would be judged and that the prize would be awarded to the entry selected by the judges.

A breach is material if it "relates to a matter of vital importance, or goes to the essence of the contract." *Hometown Fin., Inc. v. United States*, 409 F.3d 1360, 1370 (Fed. Cir. 2005) (quoting *Thomas v. HUD*, 124 F.3d 1439, 1442 (Fed. Cir. 1997)). To determine materiality, this Court considers whether the party alleging breach was "deprived of the benefit which he reasonably expected." *Lary v. United States Postal Serv.*, 472 F.3d 1363, 1367 (Fed. Cir. 2006) (quoting Restatement (Second) of Contracts § 241(a)). In other words, a material breach occurs when one party violates the contract such that the other party can no longer

receive what he was promised; the nonbreaching party can then sue to recover the value of what he was promised. *See* Restatement (Second) of Contracts § 243.

The "essence" of the agreement formed by the rules of the Robocall Challenge and Frankel's entry was that the FTC would conduct a contest and Frankel's entry would be considered for the prize. None of Frankel's alleged breaches impaired that contract or took away what Frankel was promised. As to the alleged change in the rules, Frankel acknowledges (Br. 34-35 & n.34) that the rules reserved the FTC's right, "without liability" to unilaterally "amend the terms and conditions" of the contest. Thus Frankel alleges only the trivial circumstance that the agency failed to publish a notice of the purported rule change. Br. 35. Similarly, Frankel contends that the FTC did not provide a numeric score or apply the judging criteria regarding "blocking" and "all phones" in the way he interprets them. But those allegations involve *how* his entry was judged, not *whether* it was judged. Frankel could not have any reasonable expectation that the criteria would apply in a particular way because he agreed at the outset that the judges' decisions would be binding and final. *See* A46.

Moreover, winning the $50,000 prize was not a benefit that Frankel was promised or could reasonably expect from entering the contest. The rules stated that Frankel's chances of winning would depend on the "number and quality" of all the entries. A46 (Rules § 9(C)). Thus, when deciding to enter, Frankel was

promised only the opportunity to compete by having his entry reviewed by the judges. Frankel does not dispute that he received that benefit.

Finally, "'damages for breach of contract require a showing of causation, which in turn necessitates a 'comparison between the breach and non-breach worlds.'" *Vt. Yankee Nuclear Power Corp. v. Entergy Nuclear Vt. Yankee, LLC*, 683 F.3d 1330, 1349 (Fed. Cir. 2012) (quoting *Yankee Atomic Electric Co. v. United States*, 536 F.3d 1268, 1273 (Fed. Cir. 2008)). Even setting aside all of the other flaws in his appeal, Frankel did not show that he would have won the contest in the non-breach world. A numeric score or a different application of the judging criteria would not have mattered because the judges didn't think Frankel's entry would work. Frankel argues (Br. 37-39) that he would outscore the two winning entries under his atextual interpretation of the "blocking" term, but even that would not establish that he would have won over the nearly 270 other entries. Frankel cannot establish how he would have performed against them without rescoring the contest, which, as shown below, the trial court lacked jurisdiction to order.

II. THE LOWER COURT LACKED JURISDICTION OVER FRANKEL'S "BID PROTEST" CLAIM.

The trial court ruled that the Robocall Challenge is not a Government procurement, and therefore, not subject to its jurisdiction under 28 U.S.C. § 1491(b). A12. Frankel argues that: (1) "the FTC procured the services of individuals" who developed and created potential solutions; and (2) the FTC

"obtained a license to use" submissions and "that license falls 'within the umbrella of a procurement of property.'" Br. 58-59. Not so.

Under 28 U.S.C. § 1491(b) an "interested party" may object to a "solicitation by a Federal agency" for "a procurement or proposed procurement," or to the award of a contract for a procurement. Federal law defines "procurement" as a "process of acquiring property or services." 41 U.S.C. § 111. This Court has similarly held that procurement is "the act of obtaining or acquiring something, in the context of acquiring goods or services." *Res. Conservation Grp., LLC v. United States*, 597 F.3d 1238, 1244 (Fed. Cir. 2010); *see also* 48 C.F.R. § 2.101 ("Acquisition means the acquiring by contract with appropriated funds of supplies or services by and for the use of the Federal Government."). A procurement relationship further requires that "the principal purpose" of the acquisition be "for the direct benefit or use of the United States." 31 U.S.C. § 6303.

This Court recently analyzed the definition of a procurement under section 1491(b). *Hymas v. United States*, 810 F.3d 1312 (2016). In *Hymas*, the United States Fish and Wildlife Service (FWS) awarded cooperative farming agreements, which allowed farmers to raise commercial crops on public lands in exchange for reserving some of their crops to feed migratory birds and wildlife. *Id*. at 1315. FWS considered Hymas for such a relationship, but ultimately selected other

cooperators. *Id*. Hymas thereafter filed a bid protest pursuant to section 1491(b) in the Court of Federal Claims, which issued a decision to retain jurisdiction of the action. *Id*. at 1316. This Court reversed, holding that FWS's actions were not a Government procurement. *Id*. at 1314.

The Court specifically rejected Hymas's argument that the principal purpose of the relationship with FWS was to acquire farming services. *Id*. at 1328. The Court held that the "principal purpose of the relationship" was "'to carry out a public purpose of support of stimulation authorized by law of the United States." *Id*. (citing 31 U.S.C. § 6305(1)); *compare* 31 U.S.C. § 6303 *with* §§ 6304 and 6306 (grants and cooperative agreements must be used when "the principal purpose . . . is to transfer a thing of value to the . . . recipient to carry out a public purpose of support or stimulation . . . instead of . . . for the direct benefit or use of the United States Government[.]"). The Court also disagreed with Hymas' argument that the relationship provided a "direct benefit" to FWS because it helped "advance the agency's overall mission." *Id*. "[A]dvance [of] the agency's overall mission[,]" in the Court's view, was more fairly classified as an "indirect[] benefit[.]" *Id*.

Hymas is consistent with a ruling of this Court's predecessor in *Lucas v. United States*, 25 Cl. Ct. 298 (1992). There, the Court held that "competing in a contest and winning . . . does not constitute [a] procurement" because "[n]o services are called for" in solicitations to compete. *Id*. at 307.

Lucas precludes Frankel's argument that "the FTC procured the services of individuals" when they labored to compete in the Robocall Challenge. Br. at 58. *Lucas* could not have been clearer – a Government contest is not a "call[] for" "services." 25 Cl. Ct. at 307. Contestants can labor as much or as little as they like prior to making their submission – the Government has no interest (or say) in the purported service or the manner in which it is performed precisely because it is not acquiring services.

Frankel responds that *Lucas* should be ignored because it lacks "any analysis" in support of its holding. Br. at 61. But *Lucas* is consistent with *Hymas* and other cases in this Court. A procurement relationship is established only where the "principal purpose" of the arrangement is to "direct[ly] benefit" the United States. *Hymas*, 810 F.3d at 1328. When *Lucas* observed that a call to compete for a prize is not a "call[] for" "services," 25 Cl. Ct. at 307, it was stating that an acquisition of services was not the "principal purpose" of the Government's arrangement.

Frankel next argues that because the Government receives a license to use each submission (which allows the Government to publicize winning solutions without violating intellectual property rights), A45 (§ 7(A) , the contest must have been a procurement. Br. 59. But Frankel entirely ignores the two critical components of analyzing whether a relationship qualifies as a procurement: (1) the

"principal purpose" of the relationship; and (2) whether the Government obtains a "direct benefit" from that relationship. *Hymas*, 810 F.3d at 1327-28.

The principal purpose of the Robocall Challenge, as laid out by Congress, is "to stimulate innovation that has the potential to advance the mission of the respective agency." 15 U.S.C. § 3719. *Hymas* involved nearly identical statutory purpose language – "to carry out a public purpose of support of stimulation" – and there, the Court refused to define the relationship as a procurement. *Hymas*, 810 F.3d at 1327-28. Frankel cannot realistically contend that the FTC's principal goal in holding the challenge was to obtain licenses of solutions. He admits repeatedly that the purpose of the competition was to stimulate innovation in the telecommunications community. Br. at 13-16, and 36; *see Hymas*, 810 F.3d at 1328 ("there is no serious dispute that . . . the *sine qua non* of the" agreements was to benefit the public). Licenses were merely a collateral necessity to carry out the competition.

As to whether the FTC obtains a "direct benefit" from the contest, *Hymas* is again instructive. There, the Court observed that a general advance of the agency's overall mission did not qualify as a "direct benefit" to the Government. *Hymas*, 810 F.3d at 1328. The same is true here. The FTC's Robocall Challenge was meant to benefit the public. The mere fact that the FTC further advanced its missional goals by serving the public is insufficient to meet the "direct benefit"

requirement. Otherwise, almost any activity by any Government agency would satisfy the "direct benefit" inquiry. *See Hymas*, 810 F.3d at 1328 ("True, the CFAs indirectly benefit the Service since the private farmers' activities advance the agency's overall mission, but that is true for nearly all cooperative agreements.").

Moreover, Frankel's attempt to recast the competition as a procurement would contravene Congress' intent. 15 U.S.C. § 3719(p)(2)(B) requires agencies that utilize prize competitions to submit annual reports to Congress, specifying, in part, why a prize competition was used as opposed to a "contract, grant, or cooperative agreement." In so declaring, Congress recognized that prize competitions should not be viewed as procurements. Congress previously promulgated statutes instructing agencies when contracts, grants, and cooperative agreements must be used. 31 U.S.C. §§ 6303, 6304, and 6306. The prize competitions statute was promulgated separately, with language suggesting that prize competitions are not contracts, grants, or cooperative agreements. 15 U.S.C. § 3719(p)(2)(B). Frankel's iteration of the law would eliminate the distinction.

Finally, *Hymas* acknowledged the well-established rule that agencies should be afforded "flexibility" in determining "whether a given transaction or class of transactions is [a] procurement" and that the policy choices that inform the Government's use of certain relationships are best left to "agencies [which] are better equipped to make" such decision than courts. *Hymas*, 810 F.3d at 1329

(citing *Brand X*, 545 U.S. at 980). Here, the FTC in its discretion chose not to award a contract, or issue a grant, or enter into a cooperative agreement. *Cf.* 15 U.S.C. § 3719 (p)(2)(B). Instead, the FTC held a contest and award prizes, as it was permitted to do. Allowing Frankel to second-guess and relabel the Robocall Challenge as a procurement dispute would erode the substantial deference that Congress and the courts have afforded agencies to choose which programs best permit them to achieve their goals. "That principle has particular importance in this case" because to hold otherwise "would severely undermine the Government's ability to [administer prize competitions] under appropriate circumstances, as well as frustrate the [FTC's] attempts to rely on such [events] to accomplish its statutory goals." *Hymas*, 810 F.3d at 1329.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 4th day of March, 2015, a copy of the foregoing "BRIEF OF THE UNITED STATES" was filed electronically. This filing was served electronically to all parties by operation of the Court's electronic filing system.

s/Meen Geu Oh

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I certify that, pursuant to Fed. R. App. Procedure 32(a)(7)(B) and 32(a)(5), (6), this brief complies with the type face, style and volume limitations. In making this certification, I have relied upon the word count function of Microsoft Word 2010 word processing system used to prepare this brief. According to the word count, this brief contains 10,114 words. This brief complies with the type face and style requirements because it has been prepared in Times New Roman, 14 point font.

s/Meen Geu Oh

Dated: March 4, 2016