No. 18-1394

In The
Supreme Court of the United States

WATERFRONT MARINE CONSTRUCTION, INC., *et al.*,

Petitioners,

v.

HEARD CONSTRUCTION, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 28 U.S.C. § 1491 pre-empts all state common law actions for tortious interference with a contract expectancy involving a government contract.

CORPORATE DISCLOSURE STATEMENT

Respondent Heard Construction, Inc. certifies that no publicly traded company owns more than 10% of its stock.

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STATEMENT OF THE CASE

On August 24, 2012, the Department of the Navy ("Navy") requested bids for a civil engineering and construction project in Norfolk, Virginia, with a contract value of about $4.5 million ("Contract"). On September 25, 2012, Respondent Heard Construction, Inc. ("Heard"), a "HUBZone" small business, submitted a bid for the Contract. As a HUBZone business, Heard enjoyed a 10% pricing preference if the low bidder was a "large" business under federal procurement standards. 48 C.F.R. § 19.1307.

On September 25, 2012, Petitioner Waterfront Marine Construction, Inc. ("Waterfront") also submitted a bid for the Contract, claiming that it qualified as a "small business" under the applicable size standard. Pet. App. 48. However, on the same day that Waterfront submitted its bid for the Contract, it was acquired by an entity associated with a "large" company called "Joseph B. Fay Company" ("Fay"). Pet. App. 50-52. The acquisition established Waterfront as "other than" a small business. Pet. App. 66-67.

On September 25, 2012, Navy personnel opened and read aloud all bids; Waterfront thereupon became aware that Heard was a competing bidder for the Contract. On that date, Waterfront knew the requirements of the U.S. Small Business Administration ("SBA") HUBZone program. Pet. App. 48. Three days later, on September 28, 2012, the Navy sent an email to Waterfront containing an "Abstract of Offers" listing all bidders and identifying

Waterfront as a "small business" and Heard as a "HUBZone." Pet. App. 49.

Waterfront's bid was lower than Heard's, and the Navy awarded the Contract to Waterfront. Yet, if Waterfront had not misrepresented itself as a "small business," a 10% pricing preference would have been applied against Waterfront, which, as the trial court later determined, would have resulted in Heard receiving the Contract. Pet. App. 5-6.

On October 2, 2012, Heard filed a size protest with the Navy in accordance with 13 C.F.R. § 121.1001(a)(iv)(7). Pet. App. 50. SBA sent a formal request to Waterfront inquiring of its size. Waterfront responded to SBA's inquiry claiming that Heard's protest was meritless and that Waterfront and Fay were unaffiliated; SBA later determined these representations to be false. Pet. App. 52.

Based upon Waterfront's misrepresentations, SBA initially determined that Waterfront was "small" at the time of the bid. Pet. App. 51. Thereafter, Heard appealed SBA's determination to the SBA Office of Hearings and Appeals ("OHA"). OHA's inquiry revealed that Waterfront concealed the same-day merger; it remanded the matter back to the local SBA office for further review. Pet. App. 51.

After remand, the local SBA office determined that Waterfront had misrepresented itself as a "small" business. Pet. App. 52. By this time, however,

Waterfront had completed nearly all of the Contract's work.[1]

Heard filed suit against Petitioners in the Circuit Court of the City of Chesapeake, Virginia ("trial court") for tortious interference with a contract expectancy, seeking damages of $2,000,000.00 plus $350,000.00 in punitive damages. At trial, Calvin Jenkins ("Jenkins") qualified as Heard's expert as to "SBA programs and government contracts."[2] Jenkins testified that but for Waterfront misrepresenting itself as a small business, Heard would have received the Contract award. Pet. App. 17.

Jenkins testified that but for Waterfront's misrepresentations, the 10% HUBZone price benefit would have resulted in Heard as the low bidder and thus receiving the award. When asked how he could give such a definitive answer, Jenkins explained that the Navy contracting officer did not have discretion in light of applicable federal procurement standards and would have had no choice but to award the Contract to Heard if Waterfront had not misrepresented its size.[3]

After the close of evidence, the jury ultimately awarded Heard $887,158.00 in damages. Pet. App. 5-6. Heard concurs in the accuracy of Petitioners' representation of the facts as to the subsequent procedural history both in the trial court and in the Virginia Supreme Court. Pet. 6-7.

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[1] Heard's protest was filed on October 2, 2012, and SBA's final size determination was issued on May 23, 2014.
[2] Trial Tr. vol. 1, 234-35.
[3] Trial Tr. vol. 2, 308, 359-60, 364.

REASONS FOR DENYING THE PETITION

Petitioners have not presented any compelling reason to grant certiorari. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari will be granted only for compelling reasons."). In fact, Petitioners' stated reasons for review in this case do not fall within any of the three categories outlined in this Court's Rules that typify its traditional reasons for granting certiorari. *See Id*. There is no conflict between the United States courts of appeals on the question presented in this case. The trial court's decision in no way conflicts with the decision of another state court of last resort or of a United States court of appeals. Most importantly, the trial court's adjudication was in accordance with relevant decisions of this Court, thereby precluding the presence of "an important question of federal law that has not been, but should be settled by this Court." *See* Sup. Ct. R. 10(c).

I. The Trial Court Had Jurisdiction Over the State Common Law Claim of Tortious Interference with a Business Expectancy.

It is an axiom of our judicial system of dual sovereignty—one that hardly needs repeating—that state courts have general jurisdiction over state common law causes of action. Petitioners do not dispute this general principle; rather, they attempt to obfuscate the nature of what was litigated in the proceedings below. In so doing, Waterfront incorrectly contends that 28 U.S.C. § 1491 ("Tucker Act") pre-empts all state common law actions when such actions remotely involve the interpretation of federal procurement regulations to establish an

element of a common law tort action. Waterfront's claim finds no basis in the text of either the Tucker Act or any applicable federal regulation and runs contrary to settled jurisprudence of this Court and lower courts.

A. The United States Federal Court of Claims Had No Jurisdiction Over This Suit.

Petitioners start off on the wrong foot in their initial framing of the issues when they claim that the state tort action pursued by Heard required the trial court to determine whom the awardee of the Contract "should be" in violation of the Tucker Act, which confers the authority to award such relief exclusively to the United States Court of Federal Claims. Pet. 3, 7. This framing creates a self-serving fiction, as the trial court did no such thing. In fact, the trial court agreed that it "[did] not have the power to order an award of the [C]ontract," and Heard never sought a judgment mandating that Heard be the awardee of the Contract. Pet. App. 15, 54-60. Rather, Heard sought and won compensatory and punitive damages proximately caused by Petitioners' repeated, intentional acts of deceit in dealing with the Navy that tortiously deprived Heard of its contract expectancy. Pet. App. 11-12, 18-19.

Not only do Petitioners obscure the nature of the relief sought and awarded in the trial court, they also demonstrate an unfounded reliance on the Tucker Act as a basis for the purported exclusive jurisdiction of the United States Court of Federal Claims over this suit. The Tucker Act confers

jurisdiction with the Court of Federal Claims for certain claims that may be asserted against the United States Government when the Government has waived its right to sovereign immunity. The relevant portion of the statute states:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim *against the United States* founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1) (emphasis added).

Petitioners' reliance on the Tucker Act bespeaks an extraordinary misunderstanding of this litigation's subject matter. Heard pursued no claim against the United States; Heard's claim was against Waterfront. As the trial court correctly held and the Supreme Court of Virginia undoubtedly recognized in denying Petitioners' petition for appeal, Petitioners' status as a private party alone is cause to deny review for any argument based on the Tucker Act. Moreover, this Court addressed the Tucker Act's inapplicability nearly 80 years ago in a case involving an action against the United States for breach of contract in which a private party was also a defendant:

> We think it plain that the present suit could not have been maintained in the Court of Claims because that court is *without jurisdiction of any suit brought against private parties* . . . [a]djudication of that issue is not within the jurisdiction of the Court of Claims, whose authority, as we have seen, is narrowly restricted to the adjudication of suits brought against *the Government alone*.

United States v. Sherwood, 312 U.S. 584, 588-89 (1941) (emphasis added); *see also Cycenas v. United States*, 120 Fed. Cl. 485, 497 (Fed. Cl. 2015) ("All claims filed in the United States Court of Federal Claims must be filed against the United States as the defendant.").

Petitioners cite *Distributed Solutions, Inc. v. United States*, 539 F.3d 1340 (Fed. Cir. 2008) in support of the contention that the trial court was divested of its jurisdiction over this suit. Pet. 7. However, in quoting that case, Petitioners omit a key portion of the sentence from the relevant passage; the full quote states that "§ 1491(b) confers exclusive jurisdiction upon the Court of Federal Claims over *bid protests against the government*." *Id.* at 1344 (emphasis added).[4] Had Heard filed a bid protest

[4] The full quote from *Distributed Solutions* demonstrates that subsection (a)(1) of the Tucker Act limits the Federal Court of Claims' jurisdiction under subsection (b)(1) to hear certain claims against the United States alone. Petitioners' omission of any reference to subsection (a)(1) illuminates its erroneous assertion that the Federal Court of Claims had jurisdiction over suits against private parties.

against the United States instead of the state common law tort action against Petitioners, Petitioners would be correct in asserting that the trial court lacked subject matter jurisdiction over the bid protest. However, Heard did not file a bid protest against the United States, but rather an action for tortious interference with a contract expectancy. The Federal Court of Claims would not have had jurisdiction over any claim in which Petitioners were defendants.

Even if Petitioners intended to suggest that Heard *should have* filed a post-award bid protest exclusively against the Navy and foregone any claims against Petitioners, such a suggestion would also be misguided based on the nature of bid protests and the facts of this case. Generally speaking, post-award bid protests are designed to challenge the impropriety of *government actors* (such as the Navy) in reviewing the bids for a given contract and in awarding the winner of the contract. *See generally Orion Tech., Inc. v. United States*, 704 F.3d 1344 (Fed. Cir. 2013); *Banknote Corp. of Am., Inc. v. United States*, 365 F.3d 1345 (Fed. Cir. 2004); *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365 (Fed. Cir. 1999); *Navarro Research & Eng'g, Inc. v. United States*, 94 Fed. Cl. 224 (Fed. Cl. 2010).

If Heard, at the time of the award, possessed sufficient information to contend that the Navy improperly reviewed Heard's bid for the Contract or had failed to abide by applicable federal procurement statutes or regulations in awarding the Contract to Waterfront, then Heard would have been obligated to file a post-award bid protest in the Federal Court of Claims. For example, if Waterfront had properly

represented itself as a large business in filing its bid for the Contract, and the Navy failed to apply the appropriate 10% small business pricing preference to Heard's bid in awarding the Contract to Waterfront, then Heard's appropriate course of action would have been a bid protest that ultimately could have led to a claim against the Navy in the Federal Court of Claims, not a state common law action against Petitioners. However, since the commencement of the size protest in 2012, Heard has never alleged any wrongdoing on the part of the Navy. Rather, its sole grievances have been against the tortious misconduct of the Petitioners.

Even if Heard had filed a bid protest in the Court of Federal Claims, that court would not have been able to provide adequate relief to Heard given the timeline of events in this case. Further, that court was without jurisdiction to adjudicate the central controversy surrounding Petitioners' conduct in any event. To the former point, by the time SBA concluded through Heard's size protest that Waterfront lied repeatedly in representing itself as a "small business" when making its bid to the Navy, Waterfront had already completed nearly all of the Contract work. *Cf. Searles v. United States*, 88 Fed. Cl. 801, 804 n.2 (Fed. Cl. 2009) (stating that a bid protest filed three years after a contract was awarded would not have been timely). On the latter point, the Federal Court of Claims was without jurisdiction to adjudicate any claims challenging Waterfront's size, which is the only federal controversy to result from the bidding process as relevant to this case. *See* 13 C.F.R. § 121.1002 (providing that SBA "makes all formal size determinations"); *see also Int'l Mgmt. Servs. v. United*

States, 80 Fed Cl. 1, 7 (Fed. Cl. 2007) (stating that the Federal Court of Claims "lacks any authority to entertain a size protest" in rejecting plaintiff's challenge to a competing bidder's size during a formal bid protest).[5] Had Heard challenged Waterfront's size in a bid protest in the Federal Court of Claims, that court would likely have remanded the case to SBA for a determination on Waterfront's size, in what would have amounted to an unnecessary delay of the inevitable. *See Diversified Maint. Sys. v. United States*, 74 Fed. Cl. 122, 128 (Fed. Cl. 2006) (remanding a bid protest to the Administrator of SBA for a determination of a bidder's HUBZone size qualifications).

In short, there was no practical or legal basis by which Heard could have filed a bid protest. The only remedy available to Heard was the state common law action it chose to pursue. Implicit in Petitioners' arguments is the assertion that Petitioners were effectively immune from liability for their tortious conduct against Heard. For obvious policy reasons, that sort of contention has also been expressly disfavored by this Court and should be rejected here too. *See United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 663-64 (1954) (expressing disapprobation with granting tortfeasors "immunity from liability for their tortious conduct" by "cut[ting] off" an injured party's access to state remedies where Congress has not pre-empted state action).

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[5] Petitioners cannot credibly claim that the Tucker Act precluded Heard from filing a size protest in this case.

B. The Tucker Act Does Not Pre-empt a State Common Law Action for Tortious Interference of Contact Expectancy.

Heard concurs in Petitioners' statement that this Court has not specifically addressed the question of whether the Tucker Act pre-empts all state common law claims that remotely involve the interpretation of federal procurement statutes or regulations to establish an element of such claims. Nevertheless, this Court's settled jurisprudence on federal pre-emption of state law and lower courts' holdings on substantially similar issues provide ample basis for denying certiorari on Petitioners' implicit pre-emption arguments.

Petitioners do not, and indeed cannot, identify any Tucker Act language that affirmatively pre-empts state common law actions. In the absence of discernable congressional intent to pre-empt state action—in fact, especially in the absence of congressional intent—this Court and the United States courts of appeals have shown strong disfavor against finding pre-emption. *See Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law."); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) ("Pre-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'") (quoting *Florida Lime &*

Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963)); *Los Alamos School Bd. v. Wugalter*, 447 F.2d 709, 714 (10th Cir. 1977) ("It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intent to do so.").

Furthermore, lower courts have also consistently declined to find pre-emption of state action in cases that involved other federal procurement statutes and regulations that did not affirmatively pre-empt state law. To Respondent's knowledge, each United States court of appeals addressing questions whether other statutes relevant to federal procurement regulation—for example, the Small Business Act—pre-empt state common law actions, has declined to find pre-emption. *See*, *e.g.*, *Integrity Mgmt. Int'l, Inc. v. Tombs & Sons, Inc.*, 836 F.2d 485, 489, 494-95 (10th Cir. 1987); *Tectonics, Inc. of Florida v. Castle Constr. Co.*, 753 F.2d 957, 964 (11th Cir. 1985); *Iconco v. Jensen Constr. Co.*, 622 F.2d 1291, 1298-99 (8th Cir. 1980). Petitioners identify no contrary authority.

Nothing in the Tucker Act or in any relevant federal procurement statute or regulation prevented the trial court from receiving interpretive expert testimony respecting federal procurement regulations in adjudicating the state tort action. And, as lower courts have correctly pointed out, "[i]f a state can (and in some instances must) enforce federal law in its courts, it is certainly free to look to the provisions of a federal statute for guidance *in applying its longstanding common-law remedies*." *Iconco*, 622 F.2d at 1296 (emphasis added). Accordingly, granting

certiorari on Petitioners' misapprehended Tucker Act contentions "would be to ignore the teaching of this Court's decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exist." *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 446 (1960).

In sum, there is no compelling reason for this Court to grant certiorari on the first question presented by Petitioners.

II. The Second Question Presented by Petitioners is Also Not Worthy of Certiorari.

Petitioners' second proposed reason for this Court granting certiorari is similarly without merit. Rather than present any important question of federal law that this Court has a compelling reason to resolve, Petitioners' second argument amounts to a grievance with the sufficiency of the evidence upon which the jury based its verdict, and it effectively refutes the underpinnings of its first argument.

In repeating its flawed assertion that the trial court improperly made "a discretionary federal contract award determination," Pet. 11, Petitioners again misconstrue what transpired in the proceedings below. The trial court did not award a federal contract to Heard. It did not change the decision of the Navy's contracting officer in awarding the Contract to Waterfront. It did not undo the work completed by Waterfront. Rather, it simply looked to federal procurement statutes and regulations for "guidance in applying its longstanding common law remed[y]"

and the jury determined that Heard was entitled to pecuniary damages for Petitioners' tortious conduct. *See Iconco*, 622 F.2d at 1296.

In the absence of any authority that directly supports Petitioners' principal assertions for granting certiorari, Petitioners appear to rely heavily on unpublished *dicta* from a federal district court order to support their claim that the trial court improperly "step[ped] in the shoes of a federal agency contracting officer" and made "a discretionary determination on the proper award of a federal contract." Pet. 12, 13, 15. In *GTSI Corp. v. Wildflower Int'l, Inc.*, 2009 U.S. Dist. LEXIS 61537 (E.D. Va. July 17, 2009), the court denied plaintiff GTSI's motion to dismiss defendant Wildflower's counterclaims, all of which were based on state common law causes of action. In its motion, GTSI first argued that the district court was without jurisdiction to adjudicate causes of action that in any way related "to the federal bidding and contract procurement process" and that only "the Federal Court of Claims, the GAO, the SBA, and the relevant procuring agency . . . ha[d] jurisdiction." *Id.* at *11. Secondly, GTSI argued that because Wildflower purportedly sought "damages for GTSI's alleged violations of federal business size and business affiliation rules," Wildflower was therefore obligated to pursue all claims relevant to GTSI's size with SBA. *Id.* at *13.

In denying GTSI's motion to dismiss on GTSI's first contention, the court noted that because Wildflower's counterclaims were based on "GTSI's allegedly nefarious maneuverings to secure federal contracts and impair Wildflower's ability to do so" and

not a challenge to any "*government* action," that the court was not without jurisdiction to adjudicate Wildflower's counterclaims. *Id.* at *11-15 (emphasis in original).

On GTSI's second contention, the court stated that because Wildflower was not "directly suing GTSI for violating SBA business size status rules" but rather chose to pursue state common law counterclaims, the court was therefore not obligated as a matter of law to grant GTSI's motion to dismiss on that point. *Id.* at *13. The court then proceeded to make the following observation:

> GTSI is right to raise the possibility that litigants may improperly use state causes of action to take a second (or belated first) bite at a federal procurement challenge . . . If it later becomes evident that Wildflower cannot prove its allegations, or that doing so would require this Court to make legal findings reserved exclusively to administrative or other executive agencies – such that this Court lacks all power to make them – then summary judgment may be the proper remedy.

Id. at *13-14.[6]

[6] In support of its denial of GTSI's motion to dismiss, the court went on to point out that several other courts have allowed state common law claims "based on underlying procurement violations" to proceed. *GTSI*, 2009 LEXIS 61537, at *14.

Not only is the above quote from the *GTSI* court a separate observation from the actual ruling on a motion to dismiss, it is also inapposite to what transpired in the present case. Unlike Wildflower, Heard *did* duly file a size protest with SBA, which ultimately determined that Waterfront misrepresented itself as a small business. Furthermore, the trial court did not "make legal findings" that were reserved to SBA officials alone; rather, it *applied* the SBA's legal findings in establishing an element of a state common law action. And, as discussed previously, the trial court did not "step in the shoes" of a federal contracting officer or the Federal Court of Claims and award the contract to Heard.

Moreover, in disputing the validity and substance of the evidence put forward by Heard at trial, Petitioners effectively refute their own arguments raised in support of granting certiorari on their first question presented. On the one hand, Petitioners contend that Heard should have established a contract expectancy by pursuing a successful bid protest in the Court of Federal Claims. Pet. 12. Yet, on the other hand, Petitioners admit that Heard could have established a contract expectancy by calling the Navy's contracting officer as a witness in the state tort action pursued by Heard. Pet. 12.

This admission of multiple methods to establish the contract expectancy constitutes a concession that a bid protest is *not* the exclusive method to establish the expectancy. And, in comparison to a bid protest proceeding where due process would govern the outcome, calling the Navy's

contracting officer to testify as to her opinion on the factual issue of contract expectancy is a purely *ad hoc*, non-official methodology for establishing an element of a tort claim untethered to the Federal Government's procurement laws and regulations. Thus, once Petitioners concede, *as they do*, that a formally litigated bid protest is not the only way to establish Heard's contract expectancy in a state tort action, then Petitioners cannot dictate to this Court or anyone else what is the universe of "other" methods, and by what witnesses, that a contract expectancy can be established in a state tort action.[7]

In reality, Petitioners ask this Court to grant certiorari for the purpose of reviewing the sufficiency of the evidence supporting the jury's fact finding, not to review any dispute over a federal question that this Court has a compelling reason to resolve. Although there are certain contexts in which this Court has set standards for lower appellate courts to apply in conducting sufficiency-of-the-evidence review, *see, e.g.*, *Unitherm Food Sys. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006), Respondents are not aware of any case (that is still good law) in which this Court granted certiorari on whether a jury in a state

[7] Notably, Petitioners cite no authority in support of their claim that there are "only two ways" to prove a contract expectancy. Pet. 12. To the contrary, the applicable standard in Virginia to establish a contract expectancy is whether the plaintiff can show that it was "reasonably certain" to have been awarded a contract but for the tortious interference of another. *See, e.g.*, *Glass v. Glass*, 228 Va. 39, 51, 321 S.E.2d 69, 77 (1984). The jury determined that Heard met this standard, due in part to Jenkins' expert testimony in concert with "ample evidence regarding [Petitioners'] knowledge of [Heard's] expectancy." Pet. App. 17.

common law action "got it right" in weighing the evidence and reaching an ultimate verdict.[8] *See* Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. of App. Prac. & Process 91, 92 (2006) (stating that the Supreme Court is "not a court of error correction," but rather one tasked with "providing a uniform rule of federal law in areas that require one."). To do so now would be a serious departure from this Court's traditional reasons for reviewing lower court decisions.

CONCLUSION

For all of the foregoing reasons, this Court should deny the petition for a writ of certiorari.

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[8] In any event, the Supreme Court of Virginia found no reversible factual or legal errors on this point in denying Petitioners' (then appellants) petition for appeal.