ORIGINAL

No. 22-1110

In The

Supreme Court of the United States

JUSTIN PAUL DREILING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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May 10, 2023

QUESTIONS PRESENTED

28 U.S.C. § 1491(a)(1) states, "The 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."

This Court has repeatedly held the text of the foregoing statute is limited to only monetary demands against the government.

The Questions Presented Are:

1. Shall the Court of Federal Claims have jurisdiction to render judgment upon any claim against the United States founded upon any regulation of an executive department?

2. Whether the Court should overrule *United States v. Jones*, 131 U.S. 1 (1889), or clarify the holding in *Jones* and recognize the plain language of 28 U.S.C. § 1491(a)(1) confers equitable jurisdiction upon the Court of Federal Claims.

PARTIES TO THE PROCEEDING

The parties to this proceeding are listed on the front cover.

CORPORATE DISCLOSURE STATEMENT

Petitioner does not have a parent or publicly held company owning 10% or more of a corporation's stock.

LIST OF PROCEEDINGS BELOW

Court of Appeals for the Federal Circuit:

Dreiling v. United States, No. 2022-2292 (Fed. Cir. Mar. 16, 2023)

Court of Federal Claims:

Dreiling v. United States, No. 1:22-cv-00223-SSS (Fed. Cl. Sep. 12, 2022)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Justin Paul Dreiling respectfully asks the Court to put to rest the jurisdictional jurisprudence of the Court of Federal Claims and to earnestly grant the petition for a writ of certiorari to overrule the judgment of the Court of Appeals for the Federal Circuit and to reverse and remand his case back to the Court of Federal Claims as it is the proper court to adjudicate his equitable controversy against the United States.

OPINIONS BELOW

The decision under review in this petition is the Court of Appeals for the Federal Circuit's Opinion, which was entered on Mar. 16, 2023, affirming the Court of Federal Claims' Opinion and Order. App. 1.

An initial request for hearing *en banc* was denied by the Court of Appeals for the Federal Circuit on Dec. 19, 2022. App. 5.

The Opinion and Order dismissing the petitioner's case for lack of jurisdiction was entered on Sep. 12, 2022 by the Court of Federal Claims. App. 7.

These opinions were not designated for publication.

JURISDICTION

The opinion of the Court of Appeals for the Federal Circuit, from which this appeal is taken, was entered on Mar. 16, 2023. App. 1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1491(a)(1)

> The 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. [].

STATEMENT OF THE CASE

A. Statutory Precedent

"The Court of Federal Claims' jurisdiction under the Tucker Act is limited to cases involving a money-mandating statute or agency regulation. *See* 28 U.S.C. § 1491(a)(1); *United States v. King*, 395 U.S. 1, 2-3 (1969); *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (en banc)." App. 3.

"The Supreme Court has repeatedly held the Court of Federal Claims' jurisdiction is limited to monetary claims against the government. *See, e.g.*, *Jones*, 131 U.S. at 19; *King*, 395 U.S. at 2-3; *United States v. Testan*, 424 U.S. 392, 400-02 (1976); *United States v. Mitchell*, 463 U.S. 206, 216-17 (1983)." App. 3-4.

B. Proceedings Below

The petitioner, Justin Paul Dreiling, a Staff Sergeant in the United States Army, brought suit in the Court of Federal Claims based upon a claim against the United States founded upon a regulation of an executive department. Namely, that the U.S. Food and Drug Administration (FDA) was in violation of their own regulation which was causing irreparable harm to his career in the U.S. Army.

The petitioner requested equitable relief in the form of an injunctive remand, directing the FDA (or Secretary or Director thereof) to comply with their own regulation. However, the regulation the claim was founded upon was not *money-mandating* (emphasis added), and the Court of Federal Claims dismissed the petitioner's complaint for lack of jurisdiction citing Supreme Court precedent spanning "nearly a century and a half." App. 8. *See United States v. Jones*, 131 U.S. 1 (1889).

The petitioner appealed to the Court of Appeals for the Federal Circuit, arguing Congress had always conferred equitable jurisdiction to the Court of Federal Claims since passage of the Tucker Act in 1887; argued

the Supreme Court precedent cited by the Court of Federal Claims was misguided and not applicable to the plaintiff's complaint; argued the Administrative Procedure Act (APA), under 5 U.S.C. § 706(1), is available to the trial court as an avenue of relief; and ultimately argued that the plaintiff had done nothing but follow the plain language of the law – an undisputed fact. Error must be in precedent.

The Federal Circuit was unmoved as "[t]he Supreme Court's interpretation is binding," and affirmed the trial court's judgment without reference to the plain language of the law and multiple arguments made by the petitioner. App. 3-4. The Federal Circuit erred in its standard of review. The petitioner hereby appeals to the Supreme Court.

SUMMARY OF ARGUMENT

It may very well be an unpropitious attempt for the petitioner to bring the foregoing questions to this Court.[1] Nevertheless, it must be brought. The Constitution, the law, and justice demand such.

[1] The Honorable Justice Kagan in 2016 was asked about what types of petitions the Court chooses to grant. In response on how to narrow it down, Justice Kagan stated, "A lot of [the petitions] are not all that serious . . . A very high percentage of them are non-lawyered . . . You sometimes see a genuine issue in those petitions, but not frequently. But we do take everybody seriously and every petition seriously . . . For the most part though, what [petitions] get to us are petitions which raise what we call circuit splits . . . I would say over 75% of our cases are taken because

SSG Dreiling has done nothing but follow the plain language of the law in formulating his complaint in the Court of Federal Claims. A fact that is undisputed. The only basis for the petitioner's complaint to be before this Court is due to Supreme Court precedent; precedent that has become spurious and clear in error.

The issue presented to this Court is seemingly simple. The first question presented is *verbatim* to the text of the statute in question (emphasis added).

> Shall the Court of Federal Claims have jurisdiction to render judgement upon any claim against the United States founded upon any regulation?

See 28 U.S.C. § 1491(a)(1).

Unfortunately, this question is so intertwined with the fabric of our judicial court's jurisdictional jurisprudence, that no court dares follow the law for fear of the ramifications and the uncertainties of the judgment.

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they involve what we call a division of authority among the circuits. Then the other 25% are cases which raise such important issues that we think we ought to be the court that decides them . . . Or [cases] where people feel this is an important issue and we got it wrong before and we ought to correct ourselves and nobody else will do that because they're all too scared of us." Quoted text from C-Span video at time 28:21, "Justice Elena Kagan on Supreme Court and Constitutional Law." C-SPAN, 31 Aug. 2016, https://www.c-span.org/video/?414445-1/justice-elena-kagan-supreme-court-constitutional-law. This case is "non-lawyered" and falls within the 25% of cases Justice Kagan referred to.

The question hinders on the judicial branch's expectation that the public believes unquestionably that the law does not mean what it says, but what the Supreme Court says it means; that Supreme Court precedent is above the plain language of the law. It is akin to the courts expecting the public to believe that 2+2=5. Flagrantly untrue, but if the lie can be held for a century or more – no one will dare overturn or question it. A fallacy it becomes. 2+2=5 becomes the law of the land.

Just as 2+2=5 is not a fallacy, so too should be the interpretation of 28 U.S.C. § 1491(a)(1). This statute does not confer jurisdiction upon only monetary demands, but upon *any claim* founded upon the text of the statute itself (emphasis added). It is such a grievous error it must be corrected.

However, the error has been so engrained in our judicial system, that any such ruling overturning the precedent will potentially upset the entire balance of the judicial system. No judge dares to overturn such a precedent.[2] A fallacy it has been made encroaching jurisprudential dogma. Is this reason enough to look the other way? For Supreme Court precedent to be above the plain language of the law? For the Court to not grant the petition for writ of certiorari?

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[2] "If a precedent is so deeply embedded that its overruling would cause chaos, no Justice will want to subject the precedent to scrutiny." Amy Coney Barret, *Originalism and Stare Decisis*, 92 Notre Dame L. Rev. 1921 (2017).

The petitioner prays that the Court does not believe such; that the Court recognizes the plain language of the law is absolute and must be followed. That the second question presented must be addressed to remedy the first. That the Honorable Justices grant the petition for writ of certiorari to fix such a grievous error: the Court of Federal Claims has equitable jurisdiction under § 1491(a)(1); Supreme Court precedent does not usurp the plain language of the law.

REASONS FOR GRANTING THE PETITION

I. The People are Entitled to Redress Against the Federal Government for Their Grievances.

One of the most fundamental rights available to the people of the United States is the ability "to petition the Government for a redress of grievances." U.S. Const., amend. I. There must be an avenue – a branch of government – for the people to exercise this inalienable right, but what branch of government is best suited to redress grievances where the federal government itself is alleged to be in violation of their own regulations?

The Constitution, under the separation of powers, provides three separate but equal branches of the government. "The doctrine of separation of powers is concerned with the allocation of official power among the three coequal branches of our Government. The Framers "built into the tripartite Federal Government . . . a

self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." (Citation Omitted)." *Clinton v. Jones*, 520 U.S. 681, 699 (1997).

Congress could surely be the avenue for the people to petition redress upon the federal government, but Congress' primary job is to legislate, not to investigate and ascertain facts upon every claim against the federal government. U.S. Const., Art. I, § 1.

The President could be a valid avenue. U.S. Const., Art. II, § 3. However, the claim inherently involves allegations that the President's subordinates are failing to faithfully execute their duties. The President – as a member of the executive branch – may very well presume the allegations as false and not provide any relief, much less omit any wrong doing. A conflict of interest would arise.

The judicial branch, to the contrary, is especially suited to adjudge such petitions. Perhaps Congress legislated such *judicial power* to an inferior court or tribunal? (emphasis added).

The Constitution extends judicial power "to controversies[3] to which the United States shall be a Party" U.S. Const., Art. III, § 2, cl. 1 – such as an alleged claim against the United States founded upon a regulation of an executive department – and also provides

[3] *Controversy*. "It differs from "case," which includes all suits, criminal as well as civil; whereas "controversy" is a civil and not a criminal proceeding." *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 431, 432 (1793). Black's Law Dictionary 271 (1st ed. 1891).

Congress the sole authority to create courts inferior to the Supreme Court. U.S. Const., Art. III, § 1, U.S. Const., Art. I, § 8, cl. 9. Congress is more than authorized to delegate such authority and judicial power to a judicial court. *See Muskrat v. United States*, 219 U.S. 346, 356-358 (1911).

But the United States is sovereign and immune from suit, save its consent to be sued. *United States v. Sherwood*, 312 U.S. 584, 586 (1941). If Congress did create a court inferior to the Supreme Court with judicial power to hear controversies against the United States (where the United States is the defendant), the court must have been authorized by Congress to waive the sovereign immunity of the United States.

It just so happens that is exactly what Congress did through the passage of the Tucker Act in 1887. *See* 18 Cong. Rec. 622 (1887) (remarks of Rep. TUCKER):

> "The object of the [Tucker Act] is this: It extends the jurisdiction of the Court of Claims beyond the mere contract obligations of the government to obligations of all kinds, as well those that could be asserted in a court of law as those which could be asserted in a court of equity or in admiralty."

See also 18 Cong. Rec. 2679 (1887) (remarks of Rep. TOWNSHEND):

> "My objection is not on account of what is omitted from the [Tucker Act], but on account of what is embraced in it. It revolutionizes the policy of the Government from its foundation

> to this day. The Government has never permitted itself to be made defendant in any district or circuit court in this country. If this bill should pass it will make the Government a defendant in nearly all cases where a private citizen could, under similar circumstances, if a party."

Congress did not have the time to faithfully look into every alleged controversy against the United States. *See* 18 Cong. Rec. 2680 (1887) (remarks of Rep. BAYNE):

> "The fact is that [the Tucker Act] is going to relieve the Congress of the embarrassment of receiving claim after claim and give the people of the United States what every civilized nation of the world has already done – the right to go into the courts to seek redress against the Government for their grievances. That is all there is of it."

See also H.R. Rep. No. 1077, 49th Cong., at 4-5 (Mar. 17, 1886):

> "Besides, these claims should be asserted before a judicial, not a legislative, tribunal. It is not fit that Congress should be a court to try causes, and the time it occupies in doing so is taken from its legitimate work of legislating for the great interests of a growing people. In the division of labor proposed greater efficiency and justice will be secured, and from the separation of the legislative and judicial functions there will come a better discharge of both by the Departments to which the Constitution has confided them."

To alleviate the demands for claim after claim, Congress delegated such judicial power to the then Court of Claims and provided the people a judicial tribunal to redress their grievances against the federal government as if it was otherwise suable. "If you can not trust the business to the courts where can you trust it?" 18 Cong. Rec. 2679 (1887) (remarks of Rep. BANNEY).

However, the Supreme Court ignored such a broad delegation of judicial power and limited the court's judicial power to only claims involving a monetary demand against the United States. *United States v. Jones*, 131 U.S. 1 (1889). It squarely contradicted the intent of the Tucker Act.

Section 5 of the Tucker Act (petition for settlement of claims) states:

> "Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claims is based, the money or any other thing claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law."

Tucker Act, ch. 359, March 3, 1887, 24 Stat. 505.

The Tucker Act specifically allowed the people to petition the Court of Claims for "money or *any other thing claimed.*" *See Jones v. United States*, 35 F. 561, 565 (9th Cir. 1888) ("But section 5 of the act shows affirmatively that the right of action or suit given by it is not confined to money claims or demands, but includes 'any other thing claimed.'").

Congress *never* limited the jurisdiction to only monetary demands or money-mandating regulations (emphasis added). They unequivocally legislated judicial power to *render judgment* upon:

> "*all claims*[4] founded upon the Constitution of the United States, or any law of Congress, except for pensions, or upon *any regulation* of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, *equity*, or admiralty[5] if the United States were suable."

Tucker Act, ch. 359, March 3, 1887, 24 Stat. 505 (emphasis for clarity).

This grievous error in *Jones* is unfounded and must be corrected; the second question presented *infra*.

The petitioner, SSG Dreiling, has done nothing but follow the plain language of the law, 28 U.S.C. § 1491(a); the law that provides subject-matter jurisdiction to the Court of Federal Claims. The government and lower courts never disputed such a fact. Only through jurisdictional stare decisis was the complaint

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[4] ""A claim," in a just juridical sense, is a demand of some matter as of right, made by one person upon another to do or to forbear to do some act or thing, as a matter of duty." *Prigg v. Pennsylvania*, 41 U.S. 539, 541 (1842).

[5] The Court of Federal Claims no longer has admiralty jurisdiction. *See* Suits in Admiralty Act.

justifiably dismissed, however the justification itself contradicts case law. *See Hyde v. Stone*, 61 U.S. 170, 175 (1857). ("[T]he courts of the United States are bound to proceed to judgment, and to afford redress to suitors before them, in every case to which their jurisdiction extends.").

That begs the questions: Does Congress not understand the law it legislates? Are the people not entitled to go into the courts to seek redress against the Government for their grievances in the Court Congress has provided? Or does Supreme Court precedent usurp the plain language of the law? Usurp the clear intent of Congress?

Surely not. "It is always appropriate to assume that our elected representatives, like other citizens, know the law." *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979). And "[t]he people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020). Furthermore, "only the words on the page constitute the law adopted by Congress and approved by the President." *Id.* at 1738.

SSG Dreiling respectfully requests this Court grant his petition for writ of certiorari to finally allow the people the right to go into the courts to seek redress against the Government for their grievances in the Court which Congress provided nearly a century and a half ago, without their claims being unjustly dismissed for lack of jurisdiction. There is no jurisdictional or

statutory requirement for monetary demands in the Court of Federal Claims.

II. The Supreme Court Erred in its Opinion in *U.S. v. Jones*, 131 U.S. 1 (1889) and Subsequent Interpretation of *Jones* Has Become Spurious.

Throughout the proceedings below, the lower courts cited numerous Supreme Court precedents for justifying their jurisdictional conclusions.

Upon review of these precedents, they could all be traced back to *United States v. Jones*, 131 U.S. 1 (1889). Understandably so, as this was the first Supreme Court case after the passage of the Tucker Act in 1887. The case before the Supreme Court in *Jones* inherently involved "jurisdiction in equity to compel the issue and delivery of a patent for public land" *United States v. Jones*, 131 U.S. 1 (1889).

In the Ninth Circuit, the appellate court affirmed such equitable jurisdiction upon claims under the Tucker Act:

> "Considering, for these reasons, that the act conferring jurisdiction on this court to hear and determine 'all claims * * * founded on any contract * * * with the government of the United States', is a highly remedial and beneficent one in its general purpose and scope, I proceed to consider whether it includes such a 'claim' or cause of suit against

> the United States as the petitioner is shown to have."

Jones v. United States, 35 F. 561, 564 (9th Cir. 1888).

> "On behalf of the defendant it is insisted that the word 'claim,' as used in this act, means a money demand and no other, – a claim on which a judgment or decree can be given for money, or damages payable in money."

Id. at 564-65.

> "It may be admitted that the term is more often used in this sense than any other, simply because the great majority of claims which arise out of the intercourse and business of the country are in fact pecuniary ones. But the general and natural sense of the term is not thus limited."

Id. at 565.

> "As was said by the supreme court in *Prigg v. Pennsylvania*, [a claim] includes a demand made of right by one person on another to do some act as a matter of duty. And that is this case exactly."

Id. at 565.

> "In my judgment, any person who has a claim against the United States founded on a contract with the government thereof, on which an action at law or a suit in equity or admiralty might be maintained against a private person, is within the purview of the

> statute, and may proceed thereunder for the relief to which he is entitled . . . "

Id. at 565.

After the government lost the case in the Ninth Circuit, they appealed to the Supreme Court. Instead of arguing the term 'claim' only involved monetary demands and no other, they instead extended their argument to relief. The term 'claim' could only mean monetary demands as Congress never provided express language for specific equitable relief; Congress surely could not make an error as gross as conveyance of public lands as an available remedy without providing express language for such. *See United States v. Jones*, 131 U.S. 1, 3 (1889):

> "Whoever undertakes to exclude this claim from the class defined by the act must start with an assumption as broad as the following, namely: That the proposition that a court should be permitted to hear and determine a claim against the United States for equitable relief, such as the execution of a conveyance of lands, is of such an extraordinary character, and so doubtful in point of expediency, that Congress must be presumed not to have authorized such action by any general language, however clearly that language may embrace it, and that the authority can be held to have been given only when conferred by express language specifically describing such relief. It is respectfully submitted that such an assumption would be an error too gross for any indulgence."

The Supreme Court took note of this ostensible argument, and looked into past Acts on the types of 'claims' available for suit in the Court of Claims and came to a strikingly erroneous conclusion.

> "'Claims" redressable "in a court of law, equity, or admiralty," may be claims for money only, or they may be claims for property or specific relief, according as the context of the statute may require or allow. The claims referred to in the original statute of 1855, as described in the first section thereof, above quoted, might have included claims for other things besides money; but various provisions of that act and of the act of March 3, 1863, were inconsistent with the enforcement of any claims under the law except claims for money."

United States v. Jones, 131 U.S. 1, 17 (1889).

> "In the case of *United States v. Alire*, 6 Wall. 573, Mr. Justice Nelson speaking for the court, said: "It will be seen by reference to the two acts of Congress on this subject that the only judgments which the Court of Claims is authorized to render against the government, or over which the Supreme Court has any jurisdiction on appeal, or for the payment of which by the Secretary of the Treasury any provision is made, are judgments for money found due from the government to the petitioner. And although it is true that the subject matter over which jurisdiction is conferred, both in the act of 1855 and of 1863, would admit of a much more extended cognizance of cases, yet it is quite clear that the limited

> power given to render a judgment necessarily restrains the general terms and confines the subject matter to cases in which the petitioner sets up a moneyed demand as due from the government."

Id. at 17.

> "The sections of the act of 1863 referred to in this opinion are still in force, not being repealed by the act of 1887, which only repeals "all laws and parts of laws inconsistent" therewith."

Id. at 17-18.

> "These sections are still the law on the subjects to which they relate, being necessary to the completion of the system, and not being supplied by any other enactments. Indeed, they are expressly retained. The fourth section of the act of 1887 declares that "the jurisdiction of the respective courts of the United States proceeding under this act, including the right of exception and appeal, shall be governed by the law now in force, in so far as the same is applicable and not inconsistent with the provisions of this act."

Id. at 18.

> "It seems, therefore, that in the point of providing only for money decrees and money judgments, the law is unchanged, merely being so extended as to include claims for money arising out of equitable and maritime as well as legal demands. We do not think that it was

> the intention of Congress to go farther than this. Had it been, some provision would have been made for carrying into execution decrees for specific performance, or for delivering the possession of property recovered in kind. The general scope and purport of the act is against any farther extension than that here indicated."

Id. at 18.

> "Of course, our province is construction only; the policy of the law is the prerogative of the legislative department. But notwithstanding the glowing terms in which able jurists have spoken of the progress of civilization and enlightened government as exhibited in subjecting government itself, equally with individuals, to the jurisdiction of its own courts, we should have been somewhat surprised to find that the administration of vast public interests, like that of the public lands, which belongs so appropriately to the political department, had been cast upon the courts – which it surely would have been, if such a wide door had been opened for suing the government to obtain patents and establish land claims, as the counsel for the appellees in these cases seems to imagine. We are satisfied that the door has not yet been thrown open thus wide."

Id. at 19.

The Supreme Court dismissed the plain language of the law and the clear intent of Congress – it took the law into its own hands.

Congress in fact did throw the door "open thus wide" to *all claims* against the United States if the United States was otherwise suable (emphasis added). It was specifically brought up in debate, and Congress passed the Act anyway. 18 Cong. Rec. 2678-2680 (1887):

> Mr. TUCKER: "[T]his bill as it originally passed the House, on 13th of January last, had been very carefully prepared by a sub-committee of the Judiciary Committee, and was unanimously reported to the House by that committee. It is designed so to extend the jurisdiction of the judiciary of the United States to more claims than are now within the jurisdiction of the Court of Claims under the Court of Claims act. And the purpose was to extend it to all claims in law, or equity, or admiralty, upon contracts express or implied, for damages liquidated or unliquidated, in every case in which, if the United States were suable as a party, suits could be brought in either one of these courts."
>
> Mr. TUCKER: "Now let me go on. That was the language of the original act as it went to the Senate. The Senate doubted whether there should be full power given in case of tort against the United States and so they qualified it that a claim for pension and action of tort against the United States should not be

within the provisions of the bill. The conferees on the part of the House, after full discussion, agreed to these two modifications of the original bill, and they are incorporated in the substitute we propose."

Mr. GILFILLAN: "Mr. Speaker, I have had occasion to give some attention to the present provisions of our statutes governing the Court of Claims as well as the decisions of the courts thereunder. Whatever may be the proper construction of the bill – and there seems to be a great deal of controversy among members participating in this discussion as to what it means – this fact is manifest, that its provisions embrace matters of too much importance and are fraught with too much danger to the government, and its possible consequences are of too important and serious a character to permit us to properly and carefully consider and dispose of the bill at this late day in the session. I hope, therefore, the House will vote to reject this report."

Mr. HOLMAN: "This measure being now formulated for the first time, I submit that its consideration should go over until Congress, at some future time, may have better opportunity for understanding the provisions of the proposed measure. I appeal to the House not to permit a bill of this importance to go through without opportunity for proper consideration. The measure has not been, up to this time, the subject of deliberation and debate which it demands more than any other

class of legislation that ever came into this Hall."

Mr. TUCKER: "The gentleman says there is a great difference of opinion as to the meaning and effect of the bill, but I desire to say that the difference of opinion to which he refers is not between members of the Committee on the Judiciary."

Mr. BAYNE: "Mr. Speaker, I think this bill ought to pass. It is criticized by the gentleman from West Virginia [Mr. GIBSON] because it does not take in particular claims. It is criticized by the gentleman from Illinois [Mr. SPRINGER] because it takes in all the claims against the Government. The fact is that it is going to relieve the Congress of the embarrassment of receiving claim after claim and give the people of the United States what every civilized nation of the world has already done – the right to go into the courts to seek redress against the Government for their grievances. That is all there is of it, and the bill ought to pass.

The bill passed with yeas 187, nays 55, not voting 77; 18 Congressional Record, 49th Congress, 2nd Session (Mar. 3, 1886).

Congress, as debated, was well aware that ALL claims against the government, except for those precluded by the statutes of limitations, pensions, and tort claims, were authorized for final judgment in the Court of Claims. There was, and still is, no requirement for monetary demands for jurisdiction.

The Supreme Court erred in its precedential opinion in *Jones*. It merely presumed Congress' *supposed gross* mistake, and used the reasonings of *Alire* and Section 4 of the Tucker Act to justify their conclusion. As the Honorable Justice Miller and Justice Field stated in their dissent:

> "I find myself unable to concur with the majority of the court in the construction given by it, in the opinion just read, to the provisions of the act of March 3, 1887. This act was evidently intended to confer a new and important jurisdiction upon the Court of Claims, and a concurrent jurisdiction to a limited extent, in the same class of cases, upon the Circuit and District Courts of the United States. I can see no other possible object in that part of the statute which confers this new jurisdiction by the use of language which for the first time in the history of that court authorizes it to take cognizance of claims where the party would be entitled to redress, against the United States either in a court of law, equity or admiralty, if the United States were suable, than to make them suable in such cases. To hold that the distinct grant of power here provided for is controlled by the fact that this court has under former statutes decided that it did not then exist, is simply to nullify this new grant of power.
>
> The manifest purpose of this new act was to confer power which the Court of Claims did not previously have, and to authorize it to take jurisdiction of a class of cases of which it

> had not cognizance before. To say that under such circumstances the new statute is to be crippled and rendered ineffectual in the only new feature which it has, in regard to the jurisdiction of that court, is in my mind a refusal to obey the law as made by Congress in the matter in which its power is undisputed.
>
> It is clear to me that Congress intended by this act to enlarge very materially the right of suit against the United States, to facilitate this right by allowing suits to be brought in the Circuit and District Courts where the parties resided, and that it also designed to enlarge the remedy in the Court of Claims to meet all such cases in law, equity, and admiralty, against the United States, as would be cognizable in such courts against individuals."

United States v. Jones, 131 U.S. 1, 20 (1889) (Miller and Field dissenting).

Unfortunately, even worse than this grievous error in *Jones*, the precedent has long since become spurious. No longer is the precedent "the limited power given to render a judgment necessarily restrains the general terms." *Id.* at 17. Instead, the precedent has morphed into, "[t]he Supreme Court has repeatedly held the Court of Federal Claims' jurisdiction is limited to monetary claims against the government." App. 3.

Congress has since authorized specific, limited equitable relief to the Court of Federal Claims through the Remand Act of 1972, currently codified under 28 U.S.C. § 1491(a)(2). Pub. L. 92-415, Aug. 29, 1972, 86

Stat. 652. Or through the Administrative Procedure Act (APA), 5 U.S.C. § 706(1). All that needs to be done is to follow the plain language of the law. The Court of Appeals for the Federal Circuit however ignored such arguments made by the petitioner and made no reference to such arguments in their opinion – *see infra*.

"Subject-matter jurisdiction is "the courts' statutory or constitutional power to adjudicate the case" *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998). And ""[a] claim," in a just juridical sense, is a demand of some matter as of right, made by one person upon another to do or to forbear to do some act or thing, as a matter of duty." *Prigg v. Pennsylvania*, 41 U.S. 539, 541 (1842).

SSG Dreiling fulfilled all requirements for subject-matter jurisdiction in the Court of Federal Claims. If his equitable claim was to be tried to the same standard as in *Jones* today, it would undoubtedly succeed.

He demanded as of his right, information publicly available to him in which the FDA, as a matter of duty, was supposed to provide. The claim falls well within the plain language § 1491(a)(1) and the specific relief requested is well within the plain language of § 1491(a)(2). Furthermore, directing the FDA to abide by their own regulation is not providing a benefit solely to the petitioner, but to the public as a whole, and it *costs the taxpayers nothing* (emphasis added). It is a far cry from conveyance of public lands. What harm can be done by directing an executive department to abide by its own regulations? Are the people not entitled to

such? Is the judicial branch not a check-and-balance upon the executive?

The only real argument that can be made in maintaining the lower court's judgment is congressional acquiescence. "Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively." *Flood v. Kuhn*, 407 U.S. 258, 283-84 (1972). And if Congress disapproves, they are surely "free to change it." *Mansell v. Mansell*, 490 U.S. 581, 594 (1989).

However, even this argument is fruitless. "Congressional silence is meaningless. Does it signal acquiescence in a judicial interpretation or an unwillingness to expend political capital to fix the error? Amy C. Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 Geo. Wash. L. Rev. 317, 335 (2004-2005).

Unfortunately, Congress did change the precedent, and the courts have so hence forth failed to acknowledge it.

> "[O]nly the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the

> law they have counted on to settle their rights and obligations."

Bostock v. Clayton County, 140 S. Ct. 1731, 1738 (2020).

It further begs the questions: Is Supreme Court precedent coupled with congressional acquiescence the law of the land? Or the plain language of the law? Does statutory supplementation by the Remand Act of 1972 override past Supreme Court precedent? Or are statutory overrides meaningless? The petitioner respectfully requests the Court to grant his petition and set the record straight.

III. The Court of Appeals for the Federal Circuit Erred in its Standard of Review.

The Court of Appeals for the Federal Circuit reviewed the petitioner's appeal using the standard of review: "We review decisions to dismiss a complaint for lack of subject matter jurisdiction de novo. (Citation Omitted)." App. 3.[6] Reviewing the appeal based upon this Standard of Review undoubtedly lead to the same conclusion as the trial court, as stare decisis is inherent in any such subject-matter *de novo* review.

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[6] For reasons unknown, the appellate court failed to address a number of disputes between the plaintiff and the government/ trial court related to the subject-matter of his complaint – disputes related to the authority of the court to enforce the requested relief. These disputes upon relief would inevitably need to be resolved in the Court of Federal Claims upon reversal and remand due to appellate silence.

The Honorable Chief Judge Moore stated, "The Supreme Court has repeatedly held the Court of Federal Claims' jurisdiction is limited to monetary claims against the government." App. 3.

The petitioner was well aware that this precedent had become spurious. *See* Amy C. Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 Geo. Wash. L. Rev. 317, 341 (2004-2005). ("The premise that an initial judicial interpretation of statutory language becomes an actual part of the statute itself is particularly strained in the court of appeals context . . . ")

Instead, the petitioner requested the standard of review: "This Court decides "questions of statutory interpretation de novo."" *DWA Holdings LLC v. United States*, 889 F.3d 1361, 1367 (Fed. Cir. 2018).

Reviewing the petitioner's appeal upon interpreting § 1491(a) *de novo* would have undoubtedly provided a more judicious, correct conclusion. If the current jurisdictional precedent was a proper interpretation, the Federal Circuit would have inevitably come to the same conclusion through the *de novo* statutory review. However, if some error was made in past interpretations – at least in terms of the particulars of the specific case before the court – a different conclusion could potentially result. This would serve justice far more judiciously than strict adherence to stare decisis. "Abandoning statutory stare decisis in the courts of appeals is a step in that direction." Amy C. Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 Geo. Wash. L. Rev. 317, 319 (2004-2005).

Upon the *de novo* review, the Federal Circuit would of likely started in accordance with their own precedent:

> "When interpreting a statute, we start with the language of the statute itself. (Citation omitted). We search for Congress's intent using both the text and structure of the statute. (Citation omitted). In reviewing the statute's text, we give the words "their 'ordinary, contemporary, common meaning,' absent an indication Congress intended them to bear some different import." (Citations omitted); [ ]. If the statute is clear and unambiguous, then the plain meaning of the statute is generally conclusive, and we give effect to the unambiguously expressed intent of Congress. (Citation omitted). When the statutory language is ambiguous, legislative history can be useful in determining Congressional intent. (Citation omitted)."

Indian Harbor Ins. Co. v. United States, 704 F.3d 949, 954 (Fed. Cir. 2013).

Or they could have followed Supreme Court precedent:

> "We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."

CPSC v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

In any canon of construction or method of interpretation, it would have been improbable for the appellate court to reach the same conclusion as the current jurisdictional precedent for § 1491(a)(1). Error inevitably would have been found.

> " "It is "a cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (Citation Omitted) (internal quotation marks omitted)."

TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001).

> "Just as Congress' choice of words is presumed to be deliberate, so too are its structural choices."

Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 353 (2013).

The structural choice of § 1491(a)(1) could not be clearer then how it was structured between 1948 to 1954. *See* 28 U.S.C., 1952 ed., § 1491(3):

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:
>
> (3) Founded upon any regulation of an executive department;

The House Committee on the Judiciary in 1954 stated this text structure was "Comparative text" to that which was codified in 28 U.S.C., 1958 ed., § 1491,

Structure that is the same as § 1491(a)(1) today and presented to this Court through the first question. H.R. Rep. No. 1981, 83rd Cong., at 37-38 (1954).

Even reviewing the legislative history of the Tucker Act does not lead to a Congressional intent of only monetary demands. This was squarely put to rest in a House debate in 1887. 18 Cong. Rec. 622 (1887):

> Mr. TUCKER: "The object of the bill is this: It extends the jurisdiction of the Court of Claims beyond the mere contract obligations of the government to obligations of all kinds, as well those that could be asserted in a court of law as those which could be asserted in a court of equity or in admiralty."
>
> Mr. REED: "Is the bill sufficiently broad to cover all claims against the United States? Does it give the right to sue the United States in all cases?"
>
> Mr. TUCKER: "Not in all cases."
>
> Mr. REED: "I mean in all cases where there is a claim of right in law or equity, technically so called."
>
> Mr. TUCKER: "Yes; equity and admiralty. The only cases not provided for are suits upon the use of a patent right by the government and suits in reference to captured and abandoned property which are now barred by the statutes of limitations. This bill extends jurisdiction of the Court of Claims to all cases which arise, not only *ex contractu* but *ex*

> *delicto*, and to cases in admiralty, so that it will take the whole mass of these claims away from Congress."

The only cases not within the plain language of the Tucker Act were claims that were past the six-year statute of limitations – that's it. The Senate later amended the bill to exclude pensions and tort damages. 18 Cong. Rec. 2175 (1887). There is, and never was, a requirement for monetary claims or money-mandating regulations for jurisdiction in the Court of Federal Claims emplaced by Congress.

The Federal Circuit further erred in its review of dismissal for subject-matter jurisdiction. When a party moves to dismiss for lack of subject-matter jurisdiction, the court accepts as true all undisputed facts. *Trusted Integration, Inc. v. U.S.*, 659 F.3d 1159, 1163 (Fed. Cir. 2011).

The appellate court failed to address the undisputed fact: the plaintiff's complaint was statutorily compliant with the plain language of § 1491(a). This alone should have been reason enough to interpret § 1491(a)(1) *de novo*.

Statutory *de novo* reviews, when requested, must be applied by the Federal Circuit – as they are the *only appellate court* to hear appeals from the Court of Federal Claims (emphasis added); if the Court of Federal Claims strictly follows Supreme Court stare decisis, and the Court of Appeals for the Federal Circuit follows suit – *no 'circuit split' will ever occur and error will go unresolved indefinitely*. Injustice will prevail.

The petitioner respectfully requests the Supreme Court grant the petition for writ of certiorari to ensure judges interpret the plain language of the law first and foremost as faithful servants of the law[7] while utilizing Supreme Court precedent for clarity and guidance. Stare decisis cannot be used as justification to not follow the plain language of the law as written by Congress.

CONCLUSION

The current statutory interpretation of 28 U.S.C. § 1491(a)(1), as provided by this Court, cannot confer jurisdiction upon only monetary claims or money-mandating regulations. No canon of construction or statutory interpretation can deduce the same conclusion as the Supreme Court did in *Jones*. The decision was wrong from the start. And even worse, the original, erroneous precedent set by *Jones*, ostensible but logical as it was, has long since been forgotten and has become spurious.

The courts must presume Congress took great care, time and effort in legislating the law. *See Osborn v. U.S. Bank*, 22 U.S. 738, 866 (1824):

> "Judicial power, as contra-distinguished from the power of the laws, has no existence.

[7] Term "faithful servants of the law" adapted from Harris, Daniel (2020) "Judges as Agents of the Law," Mitchell Hamline Law Journal of Public Policy and Practice: Vol. 41: Iss. 2, Article 1. Available at: https://open.mitchellhamline.edu/policypractice/vol41/iss2/1.

> Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law."

Congress conferred judicial power to the Court of Federal Claims for grievances such as that claimed by the petitioner. Even if Congress never meant to confer equitable jurisdiction such as conveyance of public lands to the Court of Federal Claims, it is unconscionable for the Courts to ignore the law as it has been legislated. The language of the Tucker Act clearly conferred broad equitable jurisdiction; a fallacy 28 U.S.C. § 1491(a)(1) has become.

As this Court wisely stated, "[t]he people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration. (Citations omitted). Of Course, some Members of this Court have consulted legislative history when interpreting *ambiguous* statutory language. (Citation omitted). But that has no bearing here." *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

Jones must either be completely overruled, or affirmed contingent with subsequent clarification of current case law.

The petitioner believes the former is the only proper ruling before the Court. The plain language of the law and the original legislative intent of the Tucker Act undoubtably conferred broad equitable jurisdiction upon the Court of Federal Claims since 1887. However, such a ruling may have an uncertain and disruptive effect on the stability of the judicial system. Albeit, no reason to not make such a ruling. As President Abraham Lincoln wholeheartedly said:

> "Neither let us be slandered from our duty by false accusations against us, nor frightened from it by menaces of destruction to the Government nor of dungeons to ourselves. Let us have faith that right makes might, and in that faith, let us, to the end, dare to do our duty as we understand it."

Abraham Lincoln, Speech at the Cooper Union, New York, NY (Feb. 27, 1860).

Alternatively, and without much issue or ramifications for the courts, the later could be chosen. This Court could recognize Congress has since added limited, specific equitable relief to the Court of Federal Claims through the Remand Act of 1972 or through the APA – relief that is well within the plain language of the law to afford judgment on the petitioner's claim; arguments which the Federal Circuit ignored or acquiesced.

And if this Court believes the error before this Court is too unprecedented to undertake alone as it may very well cause unforeseen ramifications and effects (arguably an error that would benefit from a legislative debate), the Court could grant the petition, send notice to Congress, and if Congress wishes to address the plain language of 28 U.S.C. § 1491(a)(1) through legislation, to stay the petitioner's case until such *reasonable* time the legislation is passed. If Congress does not wish to address the language, or fails/filibusters at such, to rule upon the petitioner's case as faithful servants of the law.

The petitioner is entitled to justice as the law is written, with or without the consent of Congress, as the law has already been legislated and signed by the President; congressional silence is meaningless.

Shall the people be forced into believing the fallacy of 2+2=5? That Supreme Court precedent usurps the plain language of the law?

The petitioner prays the Supreme Court believes not and grants the petition for writ of certiorari to fix the grievous error in *Jones* and its spurious interpretation. Otherwise, the jurisdiction of the Court of Federal Claims will most certainly become jurisprudential dogma. The Court of Federal Claims is the only court with the judicial power to adjudicate his equitable controversy against the United States founded upon a regulation of an executive department.

For the foregoing reasons, the petitioner respectfully requests the Supreme Court to overrule the

judgment of the Court of Appeals for the Federal Circuit, and reverse and remand his case back to the Court of Federal Claims for further proceedings.

Respectfully submitted,

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