No. 25-428

IN THE

# Supreme Court of the United States

PERCIPIENT.AI.,

*Petitioner,*

*v.*

UNITED STATES, CACI, INC.-FEDERAL,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## BRIEF OF AMICUS CURIAE POPLICUS INC. D/B/A GOVINI IN SUPPORT OF PETITIONER

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## INTEREST OF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37, Poplicus Inc. d/b/a/ Govini (Govini) respectfully submits this brief of amicus curiae in support of Percipient.ai's petition for writ of certiorari.

Govini is an innovative, market-leading, commercial-item provider supporting the Department of Defense (DoD) and numerous other federal agencies. Govini's mission is to transform the government's outdated and manual defense acquisition process into one that is software-driven, efficient, and a strategic advantage to the country. Govini's flagship product, Ark, is a cutting-edge suite of AI-enabled applications integrating best-in-class commercial and government data spanning the acquisition life cycle: Supply Chain, Science and Technology, Production, Sustainment, Logistics, and Modernization.

Govini is a "nontraditional defense contractor" in accordance with 10 U.S.C. §§ 3014 and 3457 and as defined in Defense Federal Acquisition Regulation Supplement (DFARS) 202.101. As a result, Govini's software offerings may be treated as commercial items and are entitled to the benefits of the Commercial Item Preference Law codified in the Federal Acquisition Streamlining Act (FASA) at 10

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[1] Pursuant to this Court's Rule 37.2, amicus curiae provided timely notice to all parties of its intent to file this brief. Further, pursuant to this Court's Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part. No entity or person, aside from amicus curiae, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

U.S.C. § 3453. The Commercial Item Preference Law directs DoD and other federal agencies to procure commercial products and services, as well as non-developmental items other than commercial products, "to the maximum extent possible."

Congress and DoD have repeatedly emphasized the myriad benefits of the commercial products and services animating FASA's codified preference for them: quicker acquisition times, lower life cycle costs, superior results and system performance, and an expanded pool of suppliers. For that reason, the Commercial Item Preference Law applies not just to acquisitions conducted by federal agencies, but also acquisitions by prime contractors acting on their behalf. In the challenged decision below, however, an *en banc* majority of the Federal Circuit held that in procurements conducted by prime contractors on behalf of their agency customers, potential violations the Commercial Item Preference Law are unreviewable, and the law is unenforceable, via the bid protest process at the U.S. Court of Federal Claims (CFC).

Govini has a substantial interest in ensuring that its commercial software products and services can compete for valuable federal contracts and that it has "interested party" standing to bring legal challenges at the CFC under the Tucker Act, 28 U.S.C. § 1491(b)(1), in situations like the one currently before this Court—where the government violates the Commercial Item Preference Law by allowing holders of existing government contracts to (slowly, expensively) develop new software solutions rather than leveraging existing available commercial products and commercial services. Absent reversal of

the Federal Circuit's *en banc* decision in *Percipient.ai v. United States*, 153 F.4th 1226 (Fed. Cir. 2025), commercial software providers like Govini will be unable to bring such challenges, rendering the congressionally mandated Commercial Item Preference Law unreviewable and unenforceable for procurement actions nested within existing government contracts and administered by prime contractors.

## SUMMARY OF ARGUMENT

Congress passed the Commercial Item Preference Law as part of FASA in recognition of the significant efficiencies and cost savings commercial products and commercial services provide. The Commercial Item Preference Law directs federal agencies to prioritize "to the maximum extent practicable," the acquisition of commercial products and services, and to that end, requires "prime contractors and subcontractors at all levels" conducting procurements on behalf of federal agencies "[to] . . . incorporate commercial services or commercial products" to meet an agency's needs. 10 U.S.C. § 3453 (DoD agencies); 41 U.S.C. § 3307 (civilian agencies). This preference for commercial items follows recognition that "[a]ccess to commercial items and practices brings significant benefit to DoD, including "creation and integration of new technology; greater product availability and reliability; reduced acquisition cycle times; lower life cycle costs; increased competition, and an expanded pool of innovative and non-traditional contractors that seek to do business with DoD." DoD Guidebook for Acquiring Commercial Items (Jan. 2018).

Over the past 30 years, Congress has repeatedly enhanced the Commercial Item Preference Law through specific provisions in annual National Defense Authorization Acts (NDAA). *See* NDAA FY 2009 § 803 (mandating commercial software preference "at all stages of the acquisition process"); NDAA FY 2016 § 855 (expanding scope of commercial market research required before using noncommercial items); NDAA FY 2017 § 876 (requiring higher-level approvals validating that "no commercial services are suitable").

Nonetheless, federal agencies and, relevant here, contractors acting on their behalf, do not always adhere to the Commercial Item Preference requirements. (Percipient's challenge here arises from a procurement administered on behalf of the National Geospatial-Intelligence Agency's (NGA) by CACI, Inc.-Federal (CACI)—the prime contractor on an NGA contract—for which Percipient alleges CACI failed to comply with the Commercial Item Preference Law.) When they bypass the commercial marketplace, federal agencies effectively prevent commercial providers from competing for the work. *See* Executive Order 14271, "Ensuring Commercial, Cost-Effective Solutions in Federal Contracts" (Apr. 15, 2025) (noting agencies have "evaded statutory preferences and abused the Federal contracting framework by procuring custom products and services where a suitable or superior commercial solution would have fulfilled the Government's needs . . . resulting in avoidable waste and costly delays to the detriment of American taxpayers."); Executive Order 14271 Fact Sheet (Apr. 15, 2025) (noting "the Federal government could have saved an estimated $345 billion over the last 25 years if it had abided by FASA

and purchased more commercial off-the-shelf IT solutions, rather than building systems from scratch.").

One important check on such noncompliance is the bid protest process at the CFC. Pursuant to the Tucker Act, 28 U.S.C. § 1491(b)(1), "interested parties" may challenge government procurements at the CFC by objecting to, among other things, "any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." This includes violations of the Commercial Item Preference Law. In this way, government contractors such as Percipient and Govini act as "private attorney generals" to ensure that the government follows the law and is held accountable for contracting decisions both before the Court system and federal taxpayers.

The Federal Circuit's *en banc* decision in *Percipient.ai* undermines this critical protection. It holds that where a prime contractor conducts a procurement on behalf of a federal agency, although the Commercial Item Preference Law still applies, no party other than the prime contractor itself has standing to bring a bid protest challenging noncompliance with the law. In so holding, the *en banc* Federal Circuit has stripped commercial-item providers of the ability to ensure the application of a law intended to promote the acquisition of commercial items.

Percipient raised this exact concern below; the *en banc* Federal Circuit addressed it only in passing, suggesting the Commercial Item Preference Law might still be enforced "by prime contractors or joint bids with other subcontractors." *Id.* at 1243. But that

suggestion takes the Commercial Item Preference Law and applies it exactly backwards. The purpose of the preference is to leverage the capabilities of existing commercial-item providers—something the government should be doing now more than ever as cutting-edge technology such as Govini's advances at a rate the government could not possibly replicate—not to force those providers to squeeze themselves into a lumbering, outdated acquisition model by teaming for offerings they never intended to provide.

Nothing in FASA, the Tucker Act, or any of the other authorities the *en banc* Federal Circuit invoked suggests the Commercial Item Preference Law was to be constrained in such a fashion. Accordingly, this Court should grant Percipient's petition for certiorari and hold that commercial providers can enforce the Commercial Item Preference Law via CFC bid protests for procurements administered by prime contractors on behalf of the government.

## ARGUMENT

### I. CONGRESS' OBJECTIVE IN ENACTING THE COMMERCIAL ITEM PREFERENCE LAW WAS TO ENSURE INCREASED COMMERCIAL PURCHASING AT BOTH THE GOVERNMENT AND PRIME CONTRACTOR LEVELS

In overhauling the federal procurement system through passage of FASA, Congress was clear: federal agencies must "to the maximum extent practicable" prioritize procurement of commercially available products and services over costly developmental non-commercial ones to meet agency needs. 10 U.S.C.

§ 3453 (DoD agencies); 41 U.S.C. § 3307 (civilian agencies).

Congress' desire to prioritize commercial acquisitions was animated by its findings that "[c]ommercial technology advancements are outpacing DoD sponsored efforts in the same sectors that are key underlying technologies for military superiority" because "[t]he current development and production of DoD systems takes too long" and that "[t]he purchase of proven products such as commercial and non-developmental items can eliminate the need for research and development, minimize acquisition lead time, and reduce the need for detailed design specifications or expensive product testing." S. Rep. No. 103-259 at 5-7 (1994); *see also* S. Rep. No. 101-62 at 2 (1989) (noting that "[f]or almost twenty years, study after study has endorsed the use of commercial products and [non-developmental items] and urged DOD to increase its use of such products.").

Congress placed the onus on "heads of an agency" to implement the Commercial Item Preference Law through, among other actions: (1) acquiring commercial products and services, (2) requiring prime contractors and subcontractors "at all levels under the agency contracts" to utilize commercial products and services, (3) modifying agency requirements to ensure that commercial products and services can meet those needs, (4) encouraging offerors to supply commercial products and services, and (5) otherwise maximizing acquisition of commercial products and services. 10 U.S.C. § 3453(b).

The Commercial Item Preference Law further requires agency heads to conduct market research regarding the availability of commercial providers before awarding contracts for developmental and non-commercially available items. 10 U.S.C. § 3453(c). And for DoD contracts, agency heads must "***ensure that any prime contractor of a contract (or task order or delivery order) in an amount in excess of $5,000,000 for the procurement of products other than commercial products or services other than commercial services engages in such market research . . . before making purchases for or on behalf of the Department of Defense***." 10 U.S.C. § 3453(c)(5) (emphasis supplied). In other words, Congress mandated that DoD agencies must both enforce the Commercial Item Preference Law at the government purchasing level ***and*** downstream at the prime contractor purchasing level.

## II. CONGRESS AND THE EXECUTIVE BRANCH HAVE REPEATEDLY ENHANCED THE COMMERCIAL ITEM PREFERENCE LAW

Since its enactment, Congress and the Executive Branch have repeatedly strengthened protections for the Commercial Item Preference Law to ensure that commercial procurements become the preferred method for DoD agencies to meet their needs.

In 2008, Congress mandated the "Commercial Software Reuse Preference" provision as part of the 2009 NDAA, requiring "that contracting officers identify and evaluate, ***at all stages of the acquisition process*** (including concept refinement, concept decision, and technology development), opportunities for the use of commercial computer

software and other non-developmental software." NDAA FY 2009 § 803 (emphasis supplied).

In 2015, Congress prohibited agencies from "enter[ing] into a contract in excess of the simplified acquisition threshold for information technology products or services that are not commercial items ***unless the head of the agency determines in writing that no commercial items are suitable to meet the agency's needs*** . . . ." NDAA FY 2016 § 855 (emphasis supplied).

In 2016, Congress prohibited agencies from "enter[ing] into a contract" exceeding $10 million for certain types of non-commercial services "unless the service acquisition executive of the military department concerned, the head of the Defense Agency concerned, the commander of the combatant command concerned, or the Under Secretary of Defense for Acquisition, Technology, and Logistics (as applicable) ***determines in writing that no commercial services are suitable to meet the agency's needs***." NDAA FY 2017 § 876 (emphasis supplied).

The Executive Branch has recently emphasized the importance of a commercial-item focused acquisition strategy. On March 6, 2025, the DoD Secretary issued a memorandum titled "Directing Modern Software Acquisition to Maximize Lethality," mandating that DoD "immediately shift to a construct designed to keep pace with commercial technology advancements, leverage the entire commercial ecosystem for defense systems, rapidly deliver scaled digital capabilities, and evolve our systems faster than adversaries can adapt on the battlefield." To

that end, DoD has directed that all department components must use commercial software openings "as the default solicitation and award approaches for acquiring" software development components and weapon systems.

In the same vein, on April 9, 2025, President Trump issued Executive Order 14265, "Modernizing Defense Acquisitions and Spurring Innovation in the Defense Industrial Base," calling for immediate reforms to expedite DoD's acquisition processes, including for DoD to develop a plan to incorporate "to the maximum extent possible . . . a ***first preference for commercial solutions*** . . . in all pending Department of Defense contracting actions[.]" EO 14265 § 3 (emphasis supplied).

And on April 15, 2025, President Trump issued Executive Order 14271, "Ensuring Commercial, Cost-Effective Solutions in Federal Contracts," which called for enhanced oversight over non-commercial procurements across the entire federal government. EO 14271 requires contracting officers to obtain approval from designated senior procurement executives before purchasing any non-commercial products or services and calls for a review of all open procurements for non-commercial items to ensure compliance with FASA requirements, including whether adequate market research was conducted. EO 14271 §§ 4-5.

## III. THE FEDERAL CIRCUIT'S *EN BANC* DECISION MAKES PRIVATE PARTY ENFORCEMENT OF THE COMMERCIAL ITEM PREFERENCE LAW IMPOSSIBLE IN PROCUREMENTS CONDUCTED BY PRIME CONTRACTORS ON DOD'S BEHALF

Notwithstanding Congress' clear intent and the significant benefits available via the use of commercial items, agencies have not procured them "to the maximum extent practicable." *See* Executive Order 14271, "Ensuring Commercial, Cost-Effective Solutions in Federal Contracts" (Apr. 15, 2025) (noting agencies have "evaded statutory preferences and abused the Federal contracting framework by procuring custom products and services where a suitable or superior commercial solution would have fulfilled the Government's needs"); Executive Order 14271 Fact Sheet (Apr. 15, 2025) (noting "the Federal government could have saved an estimated $345 billion over the last 25 years if it had abided by FASA and purchased more commercial off-the-shelf IT solutions, rather than building systems from scratch."). One of the most important tools to ensure DoD agencies' compliance with the Commercial Item Preference Law is bid protests at the CFC.

The Tucker Act, codified at 28 U.S.C. § 1491(b)(1), authorizes "interested paries"—entities with a direct economic interest in a particular government procurement—to challenge agency procurement decisionmaking. Companies can "object[] to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract," and, as relevant here, "any alleged violation of statute or regulation in connection

with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1).

The bid protest process provides a critical check on the federal procurement system. It authorizes potential providers of goods and services to serve as "private attorney generals" thus "keeping the system under perpetual scrutiny, ferreting out mistakes, and bringing to light bad government practices that impact their chances of receiving contract awards." *AECOM Mgmt. Servs., Inc. v. United States*, 147 Fed. Cl. 285, 287 (2020); *see Scanwell Lab'ys, Inc. v. Shaffer*, 424 F.2d 859, 864 (D.C. Cir. 1970) (noting bid protest litigants acting as "private attorney generals" serve "public interest" by ensuring "agencies follow the regulations which control government contracting"). This "perpetual scrutiny" extends to the government's application of the Commercial Item Preference Law. *See Palantir USG, Inc. v. United States*, 904 F.3d 980 (Fed. Cir. 2018), *aff'g*, 129 Fed. Cl. 218 (2016).

But the Federal Circuit's *en banc* decision below shuts the door completely on the ability of those "private attorney generals" to enforce the Commercial Item Preference Law in procurements conducted by prime contractors on DoD's behalf, despite FASA expressly identifying such procurements as subject to the preference. 10 U.S.C. § 3453(c)(5) (requiring agency heads to "ensure that any prime contractor of a contract (or task order or delivery order) in an amount in excess of $5,000,000 for the procurement of products other than commercial products or services . . . engages in such market research . . . before making purchases for or on behalf of the Department of Defense."). This is inarguable—Percipient's petition

for certiorari explains in great detail (1) the SAFFIRE procurement that is the subject of the underlying bid protest here; (2) the failure of either NGA (the agency overseeing the SAFFIRE program) or CACI (the SAFFIRE prime contract holder) to conduct adequate market research for AI technology to interpret visual data—technology which Percipient already provides via an established commercial solution; and (3) the Federal Circuit's *en banc* holding that Percipient was not an "interested party" to challenge that failure.[2]

Of course, no party could be ***more interested*** than Percipient in NGA's and CACI's failure to consider the capability of Percipient's solution to meet the downstream procurement needs of the SAFFIRE program. The result of the *en banc* majority's ruling is clear: the government may escape scrutiny of Commercial Item Preference Law violations by nesting subsequent discrete procurements within larger overarching contracts for which a commercial-item provider could not bid and then delegating commerciality decisionmaking to the prime contractor administering the larger contract. Under those circumstances, the *en banc* majority's decision renders the Commercial Item Preference Law unreviewable and unenforceable.

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[2] While amicus here focuses on the practical implications for private companies' inability to enforce Commercial Item Preference Law violations in the wake of the Federal Circuit's *en banc* decision, amicus agrees with all of Percipient's arguments as to how and why the Federal Circuit's *en banc* majority erred in holding Percipient was not an "interested party" under the Tucker Act to challenge CACI's noncompliance, and joins those arguments in their entirety.

The *en banc* Federal Circuit hand-waves away this conclusion in passing, declaring "there are other mechanisms for enforcing the statute . . . such as protests by prime contractors or joint bids with other subcontractors so that one would be the prime contractor . . . ." *Percipient.ai*, 153 F.4th at 1243.

This makes no sense. As noted above, the Commercial Item Preference Law requires a prime contractor to engage in market research as to the availability of commercial items "before making purchases for or on behalf of the Department of Defense." 10 U.S.C. § 3453(c)(5). The only prime contractor involved in the failure to comply with the Commercial Item Preference Law in the administration of the SAFFIRE program is CACI. Self-evidently, CACI is not going to protest its own violation of the requirement. The *en banc* majority's decision offers no explanation for what other "prime contractor" could enforce the Commercial Item Preference Law under these circumstances.

Moreover, as Percipient's case demonstrates, commercial providers often cannot submit an offer as a prime contractor when agencies bundle multiple requirements, resulting in a single solicitation that a commercial provider cannot perform in its entirety. To conclude that the statute can only be enforced by commercial providers acting as prime contractors is contrary to the practical way agencies solicit their requirements.

And with regard to the contention that commercial providers should be required to devise joint bids to qualify as an interested party, such an argument turns the Commercial Item Preference Law on its

head. The law requires the ***government*** to leverage commercial providers and the benefits of the innovation, cost, and efficiencies available in the commercial marketplace, not the other way around. It is not the duty of commercial providers to seek out arrangements through which they can submit a joint bid beyond the capabilities that each company can perform individually simply to establish standing to enforce the Commercial Item Preference Law where no one else will.

In sum, Congress enacted the Commercial Item Preference Law to ensure the government utilizes the commercial marketplace "to the maximum extent practicable." And commercial providers have an important role to play through Tucker Act bid protest litigation to ensure that the government complies with these requirements. But the *en banc* majority's decision means that where a prime contractor engages in purchasing decisions for the federal government, the Commercial Item Preference Law is unreviewable and unenforceable in CFC protest litigation, a conclusion in direct tension with the plain language of FASA, and one that begs for this Court's review.

## CONCLUSION

For these reasons, the petition should be granted.

Respectfully submitted,

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