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 *AMICI CURIAE* MEMBERS OF CONGRESS IN SUPPORT OF PETITIONERS

JAMES M. BURNHAM
Counsel of Record
BRADLEY P. HUMPHREYS
DEREK S. LYONS
KING STREET LEGAL, PLLC
800 Connecticut Avenue NW
Suite 300
Washington, D.C. 20006
(602) 501-5469
james@kingstlegal.com

Counsel for Amici Curiae

November 7, 2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICI CURIAE*[*]

Representative Stephanie Bice represents Oklahoma's 5th congressional district. Representative Jake Ellzey represents Texas's 6th congressional district. Representative Nick LaLota represents New York's 1st congressional district. Representative Rich McCormick represents Georgia's 7th congressional district. All four are either members of the House Armed Services Committee, veterans, or appropriators and are concerned that proper interpretation of the Administrative Dispute Resolution Act of 1996 is necessary to effectuate congressional intent and to ensure that Congress's procurement reforms, like those in 10 U.S.C. § 3453, are broadly enforceable in the Court of Federal Claims.

---

[*] Under this Court's Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record received timely notice of the intent to file this brief as required by Rule 37.2.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a question of substantial importance to Congress's oversight of federal procurement law: whether the broad waiver of sovereign immunity in 28 U.S.C. § 1491(b)(1) allows judicial review of statutory violations that occur "in connection with a procurement" by entities other than actual or prospective bidders on a prime contract. The answer is yes. Congress designed § 1491(b)(1) to ensure accountability when federal agencies or their contractors fail to follow vital laws like the unanimously adopted Federal Acquisition Streamlining Act of 1994. The Federal Circuit's en banc decision to the contrary narrows these statutes in a manner Congress never intended.

When Congress enacted the Administrative Dispute Resolution Act of 1996 ("ADRA"), it consolidated jurisdiction over procurement challenges in the Court of Federal Claims but preserved the full range of actions previously reviewable in federal district court under the Administrative Procedure Act. Section 1491(b)(1) accordingly authorizes suits by "interested parties" in three categories: (i) challenges to solicitations, (ii) challenges to awards, and (iii) challenges to "any alleged violation of statute or regulation in connection with a procurement or proposed procurement."

That third category—the one at issue in Percipient.ai's petition—was deliberately "sweeping." *RAMCOR Servs. Grp., Inc. v. United States*, 185 F.3d 1286, 1289 (Fed. Cir. 1999). It ensures that, when Congress imposes substantive procurement obligations, those obligations are fully enforceable not just by actual or prospective bidders on the prime contract, but also by potential subcontractors with a direct economic stake in the outcome.

The facts of this case illustrate why Congress authorized suits by directly affected third parties. In the Federal Acquisition Streamlining Act of 1994 ("FASA")—which became law after a 425-0 vote in the House and a voice vote in the Senate—Congress required federal agencies to acquire commercial products and services (*i.e.*, those that do not require costly independent development) to meet procurement needs "to the greatest extent practicable." 10 U.S.C. § 3453(b); 41 U.S.C. § 3307(c)(1). In many cases, as with Percipient.ai, the purveyors of commercial products are unable to bid on a prime contract but may be able to provide significant cost savings by acting as subcontractors. Such commercial providers are "interested parties" in whether the prime contractor complies with FASA's commercial-item preference, because they are directly injured if the prime contractor ignores its statutory obligations.

The Federal Circuit, however, has devised a way for the federal government and its prime contractors to escape responsibility for ignoring the commercial-item preference. It accomplished this feat by importing the definition of "interested party" from the Competition in Contracting Act ("CICA") into ARDA challenges. The CICA has no applicability to this case. That statute governs the U.S. Government Accountability Office's administrative protest process and applies only to solicitations and awards. And nothing in the ADRA's text or history supports CICA's definition of "interested party" wholesale into the ADRA.

By incorporating CICA's definition, however, the Federal Circuit largely immunized the government and its prime contractors from suit for failure to comply with the commercial-item preference in any procurement in which actual or prospective bidders on the

prime contract do not produce the commercial item in question.

Congress enacted laws like the commercial-item preference to modernize and discipline government purchasing, and it created a broad waiver of sovereign immunity in the ADRA to give its mandates teeth. The Court should grant Percipient.ai's petition to restore the interpretation Congress intended—one that preserves robust judicial review of procurement-law violations and the accountability Congress built into the federal acquisition system.

ARGUMENT

I. Congress Intended § 1491(b)(1) To Provide a Meaningful Check on Procurement Law Violations.

The Court should grant Percipient.ai's petition because the Federal Circuit en banc majority narrowed the scope of federal jurisdiction conferred in 28 U.S.C. § 1491(b)(1) beyond what Congress intended, as reflected in the text and history of the statute.

When Congress enacted the Administrative Dispute Resolution Act of 1996 ("ADRA"), amending the Tucker Act, it did not write on a blank slate. Before the ADRA's passage, the Court of Federal Claims had jurisdiction over pre-award protests, and federal district courts had jurisdiction over post-award disputes. *Am. Fed'n of Gov't Emps., AFL-CIO v. United States*, 258 F.3d 1294, 1302 (Fed. Cir. 2001). As to the latter, disappointed contractors and other aggrieved parties could seek judicial review of procurement decisions under the Administrative Procedure Act. *Scanwell Lab'ys, Inc. v. Shaffer*, 424 F.2d 859, 869 (D.C. Cir. 1970); *see, e.g.*, *Contractors Eng'rs, Inc. v. U.S. Dep't of Veterans Affs.*, 947 F.2d 1298, 1300–1301 (5th Cir.

1992); *Amdahl Corp. v. Baldridge*, 617 F. Supp. 501, 504–506 (D.D.C. 1985). The APA's broad waiver of sovereign immunity gave federal district courts authority to review any agency action "not in accordance with law," provided the plaintiff's alleged injuries are "arguably within the zone of interests" protected by the procurement statute at issue. *See Amdahl*, 617 F. Supp. at 504–506.

Congress passed the ADRA to consolidate jurisdiction over procurement claims in the Court of Federal Claims, after a sunset period of five years during which the district courts exercised concurrent jurisdiction. Pub. L. No. 104-302, § 12, 110 Stat. 3870, 3874–3876. In doing so, Congress sought to unify and preserve the system of broad judicial review—not to narrow it. *See Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071, 1080–1081 (Fed. Cir. 2001). As explained in the legislation's Conference Report, "[i]t was the intention of [ADRA's] Managers to give the Court of Federal Claims exclusive jurisdiction over *the full range of procurement protest cases* previously subject to review in the federal district courts and the Court of Federal Claims." H.R. Conf. Rep. 104-841, at 10 (1996) (emphasis added); *see also* 142 Cong. Rec. S11849, at 10 (daily ed. Sept. 30, 1996) (statement of Sen. Levin).

In conferring the Court of Federal Claims with exclusive jurisdiction to hear procurement-related claims, § 1491(b)(1) therefore waived sovereign immunity for actions brought by an "interested party" in three distinct prongs:

i. A solicitation by a Federal agency for bids or proposals for a proposed contract;

ii. A proposal or actual contract award; and

iii. Any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.

28 U.S.C. § 1491(b)(1). The first two prongs track the jurisdiction long exercised by the Court of Federal Claims. The statute's third prong preserves the broader jurisdiction previously exercised by federal district courts and, as long acknowledged by the Federal Circuit, is "very sweeping." *RAMCOR Servs. Grp., Inc. v. United States*, 185 F.3d 1286, 1289 (Fed. Cir. 1999). The third prong "does not require an objection to the actual procurement, but only [an objection] to the 'violation of a statute or regulation in connection with a procurement or a proposed procurement.'" *Id.*; *see also id.* ("As long as a statute has a connection to a procurement proposal, an alleged violation suffices to supply jurisdiction."). In other words, by pairing the open-ended phrase "any alleged violation" with the expansive modifier "in connection with," Congress made apparent that the Court of Federal Claims has jurisdiction not only to resolve classic bid protests but also to police violations of procurement-related statutes whose enforcement otherwise would depend on agency self-policing.

The breadth of that third category—waiving sovereign immunity outside of the context of solicitation and awards for any violation of law—was deliberate, allowing for challenges that had long been permitted in federal district court through APA review. *Emery Worldwide Airlines*, 264 F.3d at 1080. Indeed, Congress explicitly incorporated the APA's standard of review into suits authorized by the ADRA, demonstrating its intent to maintain causes of action outside the context of solicitation and acceptance of an award. 28 U.S.C. § 1491(b)(4); *Impresa Construzioni Geom.*

Domenico Garufi v. United States, 238 F.3d 1324, 1331–1333 (Fed. Cir. 2001).

According to the plain language of the statute, Congress intended § 1491(b)(1) to allow federal-court review of any potential statutory or regulatory violation related to procurement brought by a party "interested" in the outcome. It is incorrect to conclude, as the Federal Circuit did in this case, that an "interested party" across all three prongs can only be a bidder or prospective bidder on a prime contract.

Context matters when interpreting statutory language. *See Tyler v. Cain*, 553 U.S. 656, 662 (2001). Thus, who will be an "interested party" as Congress used that phrase in § 1491(b)(1) varies according to the claim asserted. For prong one, which allows for the challenges to "solicitations," the "interested party" is a person or entity that is a potential bidder for the solicitation. For prong two, which authorizes challenges to potential or actual contract awards, an "interested party" is a person or entity who has submitted a bid on the contract.

Similarly, for prong three, the proper understanding of an "interested party" is a person or entity with a direct economic stake in the alleged violation of a statute or regulation in connection with the procurement. As this case illustrates, there are circumstances in which third parties have significant direct economic interests in a bidder's compliance with federal procurement law, because failure to do so may preclude them from participating as subcontractors. Such parties are "interested" in the outcome, just as actual or prospective bidders are interested in claims under prong one and prong two of § 1491(b)(1). That commonsense reading of "interested party" gives import to all three prongs of § 1491(b)(1) and is consistent with the

purpose of the ADRA, discussed above, to give the Court of Federal Claims jurisdiction over cases that could have been pursued in the district courts under the prior statutory regime.

By contrast, the Federal Circuit's importation of the definition of "interested parties" from the Competition in Contracting Act ("CICA") to restrict who may assert a claim under § 1491(b)(1)'s third prong is contrary to the ADRA's purpose and would unnaturally cabin Congress's waiver of sovereign immunity beyond what the text can support. Congress, of course, did not incorporate the definition of "interested party" from the CICA into the ADRA, even though it easily could have. If all three prongs of § 1491(b)(1) were limited to bidders and prospective bidders, as the majority concluded, the third prong, despite its intentionally broad language, would add little substance. In short, if the Federal Circuit were correct, Congress would simply have stopped after authorizing actions related to a solicitation or contract in the first two prongs. But it did not.

Instead, Congress inserted a third, freestanding category—confirming that the provision was meant to reach other forms of unlawful procurement conduct, including failures to comply with statutory duties that arise before or after the bidding process itself. The Federal Circuit erred by reading "interested party" so narrowly that only actual and prospective bidders may sue, significantly curtailing the broad, prophylactic waiver of sovereign immunity in § 1491(b)(1)'s third prong. *See Validata Chemical Servs. v. U.S. Dep't of Energy*, 169 F. Supp. 3d 69, 82 (D.D.C. 2016) ("If [the third prong of § 1491(b)(1)] were read to apply only to disappointed bidders, it is difficult to imagine what work the 'in connection with' clause would perform

beyond the first two prongs of ADRA's "objecting to" test, which already permit challenges by those 'objecting to' federal contract solicitations or awards."); *see also United States v. Menasche*, 348 U.S. 528, 539 (1955) ("The cardinal principle of statutory construction is to save and not to destroy."); *Inhabitants of Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) ("It is the duty of the court to give effect, if possible, to every clause and word of a statute . . . .").

There is no indication that Congress intended for the CICA's bidder-based definition of "interested party" to inform the meaning of that phrase in § 1491(b)(1). The CICA provides administrative remedies in the U.S. Government Accountability Office's protest process, which deals exclusively with disputes over solicitations and awards. 31 U.S.C. §§ 3551(1), 3552(a). Thus, while the claims available under the CICA mirror the first two prongs of § 1491(b)(1), there is no analogue in the CICA to § 1491(b)(1)'s third prong, because the GAO lacks any similar authority to adjudicate a challenge to "any alleged violation of statute or regulation in connection with a procurement or proposed procurement." The broader language in § 1491(b)(1)'s third prong reaches agency conduct before, during, or after a solicitation, and encompasses violations of substantive procurement law that go beyond the contract award, such as the commercial-item preference in 10 U.S.C. § 3453 at issue in Percipient.ai's petition. Because the CICA does not contemplate such claims, its definition cannot sensibly control the meaning of "interested party" for the entirety of § 1491(b)(1). As the panel decision observed, "the third prong of § 1491(b)(1) goes beyond the situations considered in the CICA, and thus the CICA definition of 'interested party' is not fairly borrowed to apply to everything that comes under the third prong."

Percipient.ai v. United States, 104 F.4th 839, 855–856 (Fed. Cir. 2024) (panel decision).

Moreover, Congress enacted ADRA in 1996, just two years after the Federal Acquisition Streamlining Act of 1994, which created, among other requirements, the commercial-item preference at issue in Percipient's petition. *See* Pub. L. No. 103-355, §§ 8001, 8104, 8203, 108 Stat. 1587, 3390–3391, 3394–3396. It is implausible that the very next Congress intended to incorporate, *sub silentio*, the definition of "interested parties" from the CICA, when doing so would severely restrict the scope of the recently created obligations in the Federal Acquisition Streamlining Act.

Limiting "interested party" to bidders across all three of § 1491(b)(1)'s prongs, however, would do exactly that—foreclosing review by a whole class of clearly interested potential subcontractors whenever an agency or its prime contractor ignored a statutory duty outside the narrow confines of a competition. The ADRA's text and history instead confirm that Congress meant to preserve the APA-style waiver of sovereign immunity, not to replace it with the CICA's more onerous standing requirements, even where the substantive obligations on the agency and the prime contractor extend beyond the context of solicitations and awards.

The correct approach, consistent with the plain language of the statute and Congress's intent, is to read the phrase "interested party" in § 1491(b)(1) in context to ensure that those directly and concretely injured by procurement-law violations have a forum to vindicate Congress's mandates. For the first two prongs of § 1491(b)(1), that means interpreting "interested party" as actual or prospective bidders on a prime contract, because those prongs are limited to objections to

solicitations and contract award decisions—*i.e.*, the same types of actions covered by the CICA. But for the third prong of § 1491(b)(1), which authorizes claims not covered by the CICA, "the parallelism between the CICA and the ADRA breaks down." *Percipient.ai v. United States*, 153 F.4th 1226, 1247 (Fed. Cir. 2025) (en banc) (dissent); *see Validata Chemical Servs.*, 169 F. Supp. 3d at 81. For such claims—to allow for the full range of claims authorized by Congress—"interested party" must have a different meaning that includes litigants who have a direct economic interests that would be affected by the alleged "violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1). To read "interested party" otherwise would be contrary to Congress's decision to make such statutory violations independently and broadly reviewable.

II. A Narrow Reading of "Interested Party" Undermines Congressional Policy and Oversight.

Congress has imposed a variety of concrete, ongoing obligations—like the commercial-item preference in 10 U.S.C. § 3453—designed to discipline how the Executive Branch procures goods and services with public funds. Section 1491(b)(1)'s third prong exists to ensure that, when agencies or their prime contractors ignore statutory mandates in connection with procurement, those directly harmed can obtain relief. The majority's interpretation § 1491(b)(1)—which would limit judicial review claims brought by formal offerors, regardless of the type of violation alleged—would hollow out those statutes and undermine the judicial oversight Congress built into the procurement system, leaving agencies and contractors to police themselves. The Court should reject that outcome.

A. Congress established the commercial-item preference to modernize government purchasing.

For three decades, Congress has insisted that agencies rely on commercial products and services "to the maximum extent practicable," and that they conduct real market research—and require their prime contractors to do the same—before defaulting to bespoke development. 10 U.S.C. § 3453(a)–(c). Congress coupled that requirement with implementation machinery: it directed agencies to revise acquisition policies and procedures to enable commercial solutions, to state needs in functional terms, to ensure prime contractors incorporate commercial products and services where feasible, to perform and apply market research before drafting specifications or issuing large orders, and to train the acquisition workforce accordingly. *Id.* § 3453(b), (c) & (e). Those requirements reflect a deliberate policy choice to move away from government-unique development that is slow, costly, and brittle, and toward effective, rapidly evolving commercial technology.

Absent effective judicial accountability through suits brought by potential subcontractors, these mandates are at risk of being overlooked or ignored. *Percipient.ai*, 104 F.4th at 844–845 (describing how agency's reliance on prime contractor effectively bypassed statutory requirements to assess commercially available computer-vision software). In some circumstances, prospective bidders are in a position to bring suit. *See, e.g.*, *Palantir USG, Inc. v. United States*, 904 F.3d 980, 990–995 (Fed. Cir. 2018) (affirming conclusion that the Army's Distributed Common Ground System procurement violated 10 U.S.C. § 2377 (now § 3453) by refusing to evaluate an existing commercial software

solution). In many cases, however, purveyors of commercial products do not have the capability to bid on the prime contract. Agencies, moreover, frequently fulfill mission needs through large contracts administered by a single prime contractor, while deferring critical "make or buy" choices to that prime. The Federal Circuit's cramped interpretation of "interested party" would leave those downstream contractor decisions immune from judicial review.

In addition, although Congress has required agency officials to use commercially available inputs "to the maximum extent practicable," 10 U.S.C. § 3453, neither the procurement officers nor the prime contractor is sufficiently incentivized to do so scrupulously, particularly in the context of procurements for complex or developmental programs, where cost-type reimbursement is common. *See* 48 C.F.R. § 16.301-2(a)(2). And, incentives aside, even the most diligent contracting professionals and prime contractors could overlook the availability of commercially available products.

Ensuring compliance with post-contract obligations, like § 3453, through judicially available remedies is precisely why Congress included the third prong of § 1491(b)(1), and why Congress did not adopt the narrow definition of "interested party" from the CICA. When the allegation is that the government or the prime contractor ignored § 3453's commercial-item preference and attendant market-research obligations, the entities directly and concretely harmed are the vendors of commercial solutions. Precisely the same entities that the Federal Circuit has barred from the courts. The result is a loophole large enough to swallow Congress's policy: the contractor effectively steps into the government's shoes with respect to conducting market research, despite its clear financial

incentive to develop products from scratch. If the owners of commercially available products cannot challenge those decisions through § 1491(b)(1), Congress's substantive contracting requirements will in many cases be nothing more than words on a page.

Two further consequences follow from the majority's interpretation of "interested party." First, it flips § 3453 on its head. Instead of agencies having to justify departures from commercial solutions, commercial vendors must hope a prime chooses to evaluate them—and have no remedy if they do not. Second, it invites precisely the problems Congress sought to correct—namely, cost-plus development that lags the commercial market, vendor lock-in, and technology that may become obsolete before it is ever deployed.

Put differently, Congress did not design a self-policing regime. It designed one with enforceable duties. Yet, a narrow standing rule encourages agencies and primes to avoid the hard work Congress required—market research, functional specifications, and evaluation of mature commercial offerings—because no one with a direct stake can challenge the omission. Permitting suits by directly affected commercial vendors restores the incentive to comply; agencies and primes must either do the homework the statute requires or explain before the Court of Federal Claims that the "to the maximum extent practicable" standard was satisfied.

B. Judicial Review Reinforces Congress's Role in Procurement Oversight.

Although Congress exercises its oversight functions to maintain accountability in federal agencies, congressional oversight often combines with judicial review to ensure compliance with the law. Congress

legislates procurement policy at a high level—for example, commercial preference, market-research requirements, and training mandates—and expects the Executive Branch to internalize those directives in daily acquisition practice. Without any effective means for Congress to review the thousands of individual government-wide procurement decisions, however, Congress relies on aggrieved parties and the judiciary to supply the backstop to ensure that federal procurement decisions are lawful and remain aligned with legislative policy, as demonstrated by the broad waiver of sovereign immunity provided through the ADRA.

Interpreting "interested party" narrowly undermines that backstop and makes key procurement laws effectively unenforceable, frustrating the reforms Congress sought to advance. Under the government's proposed approach, mandates like § 3453 depend entirely on agency self-policing or the willingness of a prime contractor to insist on compliance against its own financial interests. That is not a realistic model for accountability across the hundreds of billions of dollars in goods and services the U.S. government procures each year. Nor is it what Congress enacted when it paired substantive procurement duties with a broad grant of judicial review over "any alleged violation of statute or regulation in connection with a procurement." 28 U.S.C. § 1491(b)(1). The Court should adopt a context-sensitive understanding of "interested party" that preserves the enforceability of Congress's policy choices.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

JAMES M. BURNHAM
Counsel of Record
BRADLEY P. HUMPHREYS
DEREK S. LYONS
KING STREET LEGAL, PLLC
800 Connecticut Avenue NW
Suite 300
Washington, D.C. 20006
(602) 501-5469
james@kingstlegal.com

Counsel for Amici Curiae

November 7, 2025