No. 25-428

In the Supreme Court of the United States

PERCIPIENT.AI,

Petitioner,

v.

UNITED STATES, CACI, INC.-FEDERAL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Brief for Palantir Technologies Inc.; Eight Partners VC, LLC; and Joe Lonsdale as Amici Curiae in Support of Petitioner

Zachary A. Austin
Samantha L. Clark
Jason W. Moy
PALANTIR TECHNOLOGIES INC.
1025 Thomas Jefferson St. NW, Ste. 600
Washington, DC 20007
(703) 270-3135
zaustin@palantir.com

Jeffrey M. Harris
Counsel of Record
J. Michael Connolly
James F. Hasson
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
jeff@consovoymccarthy.com

Counsel for Palantir Technologies Inc.

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(*Additional Counsel on Inside Cover*)

Ian Shannon
EIGHT PARTNERS VC, LLC
501 2nd St., Ste. 300
San Francisco, CA 94107

Counsel for Eight Partners VC, LLC and Joe Lonsdale

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INTEREST OF AMICI CURIAE*

Palantir Technologies Inc. is a leading U.S. commercial software company founded in 2003 to create the world's best data analysis software. Palantir's first customers were American intelligence agencies and warfighters. Today, Palantir also provides its cutting-edge commercial decision-making software to Fortune 500 companies, non-profits like hospitals, and public institutions.

As a frequent provider of commercial software to both the United States Government and businesses who hold direct (or "prime") contracts with the Government, Palantir has a significant interest in the Court's resolution of the question presented: whether a subcontractor who alleges that an agency's violation of the Federal Acquisition Streamlining Act of 1994 ("FASA") prevented it from bidding on a subcontract is an "interested party" under 28 U.S.C. §1491(b)(1).

Palantir was the plaintiff in the seminal case interpreting FASA's scope and effect, and it continues to believe that properly applying and enforcing FASA is crucial to the future of government procurement and to America's national security. *See Palantir USG, Inc. v. United States*, 904 F.3d 980 (Fed. Cir. 2018). As an American company unwaveringly committed to the

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* Per Rule 37.2, counsel for Palantir notified all parties' counsel of its intent to file this amicus brief more than 10 days before the due date. Per Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than amicus or its counsel made a monetary contribution to its preparation or submission.

defense of this nation, Palantir also has an interest in ensuring that American warfighters always have the necessary tools to dominate their adversaries.

Palantir is joined by members of the venture capital community prepared to stand up for the next generation of commercial innovators interested in providing cutting-edge solutions to the government. The venture capital industry has a strong interest in the outcome of this case because the Federal Circuit's decision affects the promising companies in which they invest. Joe Lonsdale is the founder and managing partner of Eight Partners VC, LLC ("8VC"), which builds and invests in the world's most ambitious companies.

SUMMARY OF ARGUMENT

A sharply divided en banc Federal Circuit just decided its first bid protest case in more than forty years—and it was grievously wrong. Pet.Br.37. As the 4-judge dissent recognized, "[t]his is a straight-forward statutory-interpretation case with significant impact on the government contracting community." App.45. The decision below severely undermines FASA, Congress's signature defense procurement reform. If allowed to stand, it will deprive the national security community of critical tools necessary to counter adversaries; stifle innovation in the defense technology sector; and result in delays and cost overruns in defense programs.

FASA guarantees offerors of commercial products "an opportunity to compete in *any procurement*." *Id.*

§§3453(a)(3), (b) (emphasis added). It does so by requiring federal agencies and prime contractors alike to do "market research" and determine whether commercial products meet their needs before reinventing the wheel. *See, e.g.*, 10 U.S.C. §3453(c)(5).[1] FASA demands that agencies acquire eligible commercial products, including "components of items supplied to [an] agency" under a prime or subcontract, "to the maximum extent practicable." *Id.* §3453(b)(2).

To ensure agency compliance with procurement laws like FASA, §1491(b)(1) authorizes "action[s] by an interested party objecting to … any alleged violation of statute or regulation in connection with a procurement." It follows that if an agency violates FASA by failing to ensure prime contractors consider commercial items when awarding subcontracts, then a spurned subcontractor can sue to force the agency to follow the law.

Yet the Federal Circuit found that subcontractors that provide commercial products are not "interested parties" under §1491(b)(1), even when an agency violates the rights FASA guarantees them, because they could not bid on the original prime contract. App.16-18.

By giving entrenched contracting officers and prime contractors "a roadmap for circumventing the

[1] FASA also created a similar scheme for non-defense government procurements, which are equally impacted by the decision below. *See, e.g.*, 41 U.S.C. §3307.

law," Pet.Br.23, the decision below will deprive military and intelligence agencies of cutting-edge technologies at the worst possible time. A RAND Corporation report commissioned in response to the Ukraine war found that U.S. forces need "improvements in remote sensing, automation, and data integration" to prevail against a peer adversary like China. Mark Hvizda, et al., *Dispersed, Disguised, and Degradable: The Implications of the Fighting in Ukraine for Future U.S.-Involved Conflicts* 36, RAND Corp. (2025), bit.ly/4o4wl7K. Advanced software companies like Percipient provide such capabilities. But the Federal Circuit's new rule will degrade incentives for such companies to design defense-specific innovations or compete to offer them to the government.

That is exactly the opposite of what Congress intended, as purchasing commercial items "can eliminate the need for research and development, minimize acquisition leadtime, and reduce the need for detailed design specifications or expensive product testing." *Palantir*, 904 F.3d at 983.

The Federal Circuit's decision is also wrong on the merits. The majority failed to give effect to the plain meaning of "interested party" under §1491(b)(1); prioritized unrelated legislative history over straightforward statutory interpretation; and disregarded the purpose and history of the statute.

The majority did not even mention the text of §1491 for the first *14 pages* of its opinion—and once it did, it subordinated that text to the legislative history

of separate laws that were enacted for different purposes. In the process, the majority reached a conclusion that is not only at odds with the text of the statute but also inconsistent with its purpose and structure. And the majority ignored this Court's decision in *Truck Insurance Exchange. v. Kaiser Gypsum Co., Inc.*, where the Court interpreted the nearly identical phrase "party in interest" to mean "entities that are potentially concerned with or affected by" a challenged action. 602 U.S. 268, 278 (2024).

The Federal Circuit's 7-4 en banc decision is both profoundly important and profoundly mistaken, and this Court should grant certiorari to correct it.

ARGUMENT

I. The Federal Circuit's decision undermines bipartisan defense reforms and poses serious risks to national security.

FASA is critical to America's national security. It requires federal agencies to purchase commercial products (rather than bespoke or custom-designed products) "to the maximum extent practicable." 10 U.S.C. §3453(b)(1). FASA passed 425-0 in the House and by voice vote in the Senate, reflecting a bipartisan and unanimous determination that market pressures drive innovation. *See Palantir*, 904 F.3d at 983.

"FASA achieves its preference for commercial items" by requiring agencies to conduct market research and determine whether available commercial products will meet their needs before developing new ones. *Id.* at 984. Because Congress wanted to deliver the best products to Government agencies as quickly

as possible, it specified that FASA's market-research and commercial-preference requirements apply throughout the procurement process—to contracting and subcontracting decisions alike. *See* 10 U.S.C. §§3453(b)(2), (c)(5).

The decision below severely undermines FASA by dramatically limiting the universe of "interested parties" who can file bid protests in the Court of Federal Claims when the government violates the statute. App.16-18. Bid protests are the linchpin of FASA enforcement because they are the most common mechanism for ensuring that agencies follow the statute. By unraveling the enforcement framework Congress provided, the Federal Circuit's decision will deprive warfighters of next-generation commercial products; throttle innovation in the defense sector; and foster delays and wasteful spending. It may be technical, but it will undoubtedly cost this country taxpayer dollars and American lives.

A. The decision below undercuts FASA by preventing interested parties from challenging violations of the law.

Before 1994, the government relied almost exclusively on "cost-plus" contracts, which were as dysfunctional then as they are now. *See* President's Blue Ribbon Comm'n on Def. Mgmt., *Final Report to the President* 44-48 (1986), bit.ly/3LheP1r. Under the cost-plus model, the Government reimburses the prime contractor for all its costs—including employee salaries—throughout the project and guarantees a certain level of profit or return even if the project goes over-time or overbudget. *See* 48 C.F.R. §31.205-6(a).

Nontraditional defense contractors like Palantir are defined by their refusal to bid on certain cost-plus contracts. *See* 10 U.S.C. §3014. Instead, Palantir sells goods and services to the government at a firm fixed price as it would in a typical commercial transaction. Because many government contracts require a traditional contractor (that is, one that bills by the hour instead of by-project) to serve as the prime, Palantir has often served as a subcontractor. *Cf.* 41 U.S.C. §1502; 48 C.F.R. §252.242-7006.

Such subcontracting is possible because traditional contractors who are awarded cost-plus contracts rarely design or build the products by themselves. *See* 48 C.F.R. §44-201-1. Instead, primes parcel out many of their obligations to various subcontractors and integrate the components at the end. *See id.* §44-201-1(b).

Because traditional prime contractors do not bear their own expenses and are guaranteed a set rate of return on cost-plus contracts, they often have no meaningful incentive to complete work under budget or ahead of schedule. In fact, their incentives are often *precisely the opposite*: they get paid more the longer a project takes. The Executive Branch thus concluded that cost-plus contracts "cost too much, take too long to develop, and, by the time they are fielded, incorporate obsolete technology." President's Blue Ribbon Comm'n on Def. Mgmt, *supra*, at 44.

Congress took notice. An advisory panel established by Congress warned that reliance on cost-plus contracting was driving commercial "subcontractors

and suppliers of system components" out of the defense industry because it incentivized contractors to reinvent the wheel each time instead of purchasing existing commercial products. Acquisition Law Advisory Panel, *Streamlining Defense Acquisition Laws* I-5 (Jan. 1993). The panel's report contained model legislation that formed the basis for FASA. *See id.* at 1-16.

In 1994, Congress passed FASA to implement "sweeping reforms to the Federal Procurement System." 140 Cong. Rec. H37 (daily ed. Sept. 20, 1994) (Statement of Rep. John Conyers). The Act "represent[ed] the coordinated efforts of the majority and minority" to "apply some common-sense approaches" to "reduce the inefficiencies of the system," and "provide more competitiveness in our Government procurement." 140 Cong. Rec. H37 (daily ed. Sept. 20, 1994) (Statement of Rep. William Clinger).

FASA requires the Government to "acquire commercial services [and] commercial products … to the maximum extent practicable" before retaining a prime contractor to develop a custom-built product. 10 U.S.C. §3453(b)(1). The statute governs every stage of the procurement process and applies equally to prime contracts and subcontracts. *See* §3453(b)(2).

- It directs agencies to "ensure" that "prime contractors and subcontractors at all levels under the agency" prioritize commercial options, even for "components of items supplied to the agency" by the prime contractor. *Id.*

- It orders agencies to take appropriate steps "to ensure that any prime contractor" who receives a non-commercial contract worth more than $5 million conducts "market research as may be necessary" to satisfy the commercial preference mandate in §3453(b)(2) when issuing subcontracts. *Id.* §3453(c)(5).
- Finally, FASA guarantees "offerors of commercial services [and] commercial products" the right "to compete *in any procurement* to fill [an agency's] requirements." *Id.* §3453(a)(3) (emphasis added). The continuing legal obligations FASA imposes on agencies and primes—and the corresponding rights it vests in commercial companies—give teeth to the law's goals of maximizing quality and competition across the entire procurement process.

FASA marked a major congressional shift in federal contracting law, but it has faced sustained bureaucratic resistance. It is a truism in the government-contracting industry that contracting officers "lack adequate incentive or ability to police contractors' development decisions, whether from inertia, industry capture, lack of expertise or exposure to private sector innovation, or some combination of the foregoing." Pet.Br.34.

Congress cannot monitor every suboptimal agency decision. Thus, commercial offerors are often forced to challenge contracting officers' noncompliance through bid protests submitted at the agency level; lodged with the Government Accountability Office; or brought via federal lawsuits. *E.g.*, *Palantir*, 904 F.3d at 983.

One of the principal mechanisms for enforcing FASA is by filing a bid protest in the Court of Federal Claims under §1491(b)(1), which permits "interested parties" to challenge an agency's failure to comply with the statute's commercial-preference requirements. In the FASA context, Percipient and other companies who provide commercial products that meet the government's needs are plainly "interested parties" at both the prime-contract and subcontract stages. Section 1491(b)(1) is designed to ensure a remedy when an agency's illegal activity prevents such companies from bidding on the prime contract or being considered for subcontractor roles for which they have a legal right to compete.

But the Federal Circuit held that a party who alleges that an agency violated FASA by excluding it from consideration for a subcontract is not an "interested party"—and therefore cannot vindicate its rights under §1491—unless it was "an actual or prospective bidder" on the prime contract for which it was ineligible or from which it was excluded. App.12.

In so holding, the majority effectively erased the parts of FASA that apply only *after* a prime contract has been awarded, such as the requirement that prime contractors conduct market research to identify available commercial alternatives. *See* 10 U.S.C. §§3453(b)(2), (c)(5). The majority's decision prevents the precise companies FASA was designed to protect from vindicating the rights the law affords them.

B. The decision below will deprive the military and intelligence agencies of cutting-edge technologies.

Without enforcement by "interested parties," contracting officers will likely revert to the wasteful cost-plus approaches of decades past. That means cutting commercial technology companies out of acquisitions. *See* Pet.34.

Most of the companies who sell state-of-the-art commercial software solutions are nontraditional disruptors who do not operate under the cost-plus model (and often bid on subcontracts as a result). Under the Federal Circuit's decision, those innovators are now at the mercy of legacy prime contractors with entrenched interests. They will have no recourse if established incumbents ignore FASA by excluding commercial products from consideration for subcontracts—or engage in self-dealing by awarding themselves subcontracts to duplicate products already available in the market.

This case is a perfect example. CACI simply awarded the subcontract to itself. *E.g.*, App.53-54. Neither CACI nor the Government has claimed at any point in this litigation that the procurement challenged by Percipient was FASA-compliant. They simply argue that Percipient lacks standing to challenge it.

All this means that the national security community will lose access to groundbreaking capabilities. The legacy prime contractors who operate on a cost-plus basis are not incentivized to match the cutting-

edge technologies developed and refined by commercial companies and stress-tested by the market. As a result, America's warfighters will be left with inferior products.

Although war does not usually evoke images of computer engineers, software is a crucial tool for achieving asymmetric advantages in the modern battlespace. America's "competitive advantage, today and tomorrow, is reliant on strategic insight, proactive innovation, and effective technology integration enabled through software capabilities." U.S. Dep't of Defense, *Software Modernization Strategy* ii (Feb. 1, 2022), bit.ly/4nrlALD. With the rise of artificial intelligence and autonomous vehicles, the military assesses that its software capabilities—or lack thereof—will "be the differentiator in the continued defense of our nation." *Id.* at 10.

"The war in Ukraine has demonstrated how a combination of improvements in remote sensing, automation, and data integration can enable military forces to better detect, locate, and track their adversaries," giving "an advantage to whichever side can most quickly collect information and disseminate it to shooters on the battlefield." Hvizda, et al., *supra*, at 36. Small drones with explosive payloads and first-person viewer optics livestream their feeds to mobile phones and tablets. There, software programs fuse the data from various drone into a single platform and identify targets for attack. *See id.* at 15-18. "Constant adaptation [is] required" as each side's tactics continually evolve. *Id.* at 17.

Based on its observations of the conflict, the U.S. Army has now set a goal of "[enabling] AI-driven command and control at Theater, Corps and Division headquarters by 2027." Memorandum from Sec'y of Def. to Senior Pentagon Leadership, *Army Transformation and Acquisition Reform* (April 30, 2025), bit.ly/3L6H17i. Time is of the essence.

Congress recognized that commercial software developers supply relevant and tested technologies at a speed that cost-plus contracting cannot match. That is why it added software-specific requirements to FASA in 2008 for the military. The 2008 FASA amendment requires Pentagon contracting officers to "identify and evaluate" any "opportunities for the use of commercial computer software and other non-developmental software" at "all stages of the acquisition process." Pub. L. 110-417, §803(a), 122 Stat. 4356, 4519 (2008). That mandate has since been extended by regulation to all other federal agencies. *See* 48 C.F.R. §212.212(1).

If our military is to win future wars, software products must get "to the warfighter at the speed of relevance." Warren Katz, *The 'Cost Plus' Boondoggle That Hobbles U.S. Defense*, Breaking Defense (Oct. 10, 2024), perma.cc/3JKN-6XRH. Yet under the current pace of advancement in software and artificial intelligence, products developed by prime contractors under the cost-plus model are already obsolete by the time they arrive in the hands of their end users. *See, e.g.*, Ashley Roque, *Frustrations Over Army's Robotic Combat Vehicle Autonomy, Acquisition Approach*, Breaking Defense, (July 22, 2024) perma.cc/3PUU-UBEK (General stating that new autonomous vehicles

are not "as autonomous or as capable as we want"). Palantir, by contrast, pushes an average of 90,000 software upgrades per week to its customers, many of whom are federal agencies.

C. The decision below will strangle innovation in the defense technology industry at a critical juncture.

Without the threat of FASA challenges lurking in the background, many contracting officers will take the easy way out by defaulting to cost-plus contracting with the legacy prime contractors. *See* Pet.Br.21; *Palantir*, 904 F.3d at 986-88.

Although the consequences of cost-plus contracting "have customarily been measured in both time and money, they also burden technological innovation." Acquisition Law Advisory Panel, *Streamlining Defense Acquisition Laws* I-5 (Jan. 1991). Concerns about innovation were one driver behind FASA's enactment. *See id.* (noting "growing concern among lawmakers and procurement experts who worried about the system's ability to respond to future scientific challenges"). The decision below—that contractors have substantive rights under FASA, but they cannot enforce them—will undermine innovation in the defense sector in two ways.

First, the Federal Circuit's rule will drive leading technology companies out of the industry. Promising start-ups will conclude that the barriers to entry in the defense contracting space are too high, or that the tradeoffs are not worth it. And larger contractors who

have a foot in both the commercial space and the defense industry may opt out from defense work entirely because the opportunities in the private sector vastly outweigh those in the government domain. Such an outcome "will ensure DoD loses the innovation war with China." William Greenwalt, *Congress Must Again Strengthen the Federal Acquisition Streamlining Act*, Am. Enter. Inst. (Nov. 8, 2024), bit.ly/49oMEHT.

Second, the decision will deter the remaining commercial software innovators from investing in new products at any stage of the procurement process. As for the pre-award stage, why develop something that one cannot bring to market? And once procurement officials assign a cost-plus contract to a prime, they have essentially "lock[ed] themselves into purchasing that product only from that contractor, [and] no private company would invest out of their own pocket in a superior product, as there is no way for the [government] to switch" to it. Katz, *supra*.

D. The decision below will increase delays and cost-overruns.

The erosion of FASA enforcement will lead to extended timelines for inferior products at greater expense. Because the government bears all risk under the cost-plus approach, contractors have no incentive to keep costs down. Moreover, a contractor's fixed profit does not increase for completing work under budget, so a cost-plus contractor can increase a project's budget by taking on additional overhead or labor without affecting its profit. *See* 48 C.F.R. §16.306(a)-(b).

Traditional contractors that win cost-plus contracts have no incentive to complete the job ahead of schedule, either. The government reimburses contractors for the costs of their employees' salaries as long as the contract remains open, so finishing before the deadline leads to a large jump in a prime's expenses. *See* 48 C.F.R. §31.205-6(a). And because the contractor bears no financial risk from delays or cost overruns, *see* 48 C.F.R. §16.306, but does bear a *reputational* risk if the completed project cannot be completed or is deemed substandard, the contractor's interest is to double (and triple) down on failure until the project is technically "complete."

For example, in 2011, NASA estimated that it would cost at least $4 billion over a decade to develop a reusable launch rocket for its new Space Launch System. NASA rolled out SLS through a series of cost-plus contracts with traditional prime contractors. Over the next 11 years, SLS achieved only one flight: an uncrewed, single-use test in 2022 completed "after launch delays of nearly 4 years." NASA Inspector General, IG 24-001, *NASA's Transition of the Space Launch System to a Commercial Services Contract* 3 (Oct. 12, 2023). The price tag had ballooned to $23.8 billion. *Id.*

Meanwhile, SpaceX built a better rocket—in less time—for $400 million. *See* Shyam Sankar, *The Defense Reformation*, perma.cc/K5ZM-W32A. A 2023 NASA report blamed the debacle partly on the use of "cost-reimbursable contracts," and recommended a "pivot to other commercial alternatives" to "capitalize on multiple technological innovations, making them

lighter, cheaper, and reusable." NASA IG 24-001, *supra*, at 12 & n.18; *id.* at 24. NASA now contracts with SpaceX.

This example highlights the compounding advantages of commercial innovation: SpaceX's Starship Heavy will be 1% of the cost of the Falcon 9, and its cost-savings will be 1,000 times greater than the progeny of the cost-plus approaches. *See* Sankar, *supra*. SpaceX costs less than $100 million per launch, versus more than $2 billion per launch under the cost-plus programs. *See* NASA IG 24-001, *supra*, at 12.

The pattern repeats itself whenever agencies are allowed to skirt their burdens under FASA. A Senate committee investigating design failures in the Air Force's new Expeditionary Combat Support System ("ECSS") determined that the service ignored mandatory commercial procurement practices, leading to "a waste of $1.1 billion in taxpayer money, a loss of eight years of effort, [and] the same old inadequate logistics system far inferior to the promise of ECSS." Permanent Subcomm. on Investigations, S. Comm. on Homeland Sec. & Governmental Affs., *The Air Force's Expeditionary Combat Support System (ECCS)* 1 (July 7, 2014), perma.cc/JUR8-78AZ.

Simply put, "[c]ost-plus contracting makes the nation dumber, slower, and poorer." Sankar, *supra*. Congress knew this and passed FASA to stop it. But by disarming FASA's carefully considered enforcement mechanisms, the decision below throws open the floodgates to flagrant violations of the law.

II. The Federal Circuit's decision is grievously wrong.

A statute must be interpreted according to its "ordinary, contemporary, common meaning." *Sandifer v. United States Steel Corp.*, 571 U.S. 220, 227 (2014). Yet the majority interpreted §1491(b)(1) not based on the statute's text, but on what it believed to be the general intent of the whole field of bid protest law. *But see* 10 U.S.C. §§3453(a)(3), (b).

Rather than beginning with the ordinary meaning of "interested party," the majority conducted an in-depth survey of the history of bid protest legislation to divine *the spirit* of the term, which it then applied to Percipient's claim. *But cf. Wisconsin Cent. Ltd v. United States*, 585 U.S. 274, 282 (2018) ("It is not our function 'to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have' intended."); App.6-12; *supra* at 6-10.

That was a legal error—one that led the majority to announce a rule for bid-protest standing that bears no connection to the text, structure, and purpose of the statute that created it.

A. The Federal Circuit failed to give effect to the plain text of §1491.

Section 1491(b)(1) states that the Court of Federal Claims "shall have jurisdiction" over "an action by an interested party objecting 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

or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. §1491(b)(1).

Breaking that down, §1491(b)(1) states that the Court of Federal Claims "shall have jurisdiction" over three types of "action[s]":

- First, the court has jurisdiction over actions challenging an agency's solicitation for bids on a contract.
- Second, the court has jurisdiction over actions challenging an award or proposed award of a contract.
- Third, the court has jurisdiction over actions raising "any alleged violation of statute or regulation in connection with a procurement or proposed procurement." *Id.*

Each of these three types of challenges may be brought by an "interested party." *Id.* Section 1491 does not define that term; thus, it must be interpreted "according to its 'ordinary, contemporary, common meaning.'" *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 455 (2022).

Applying Federal Circuit precedent, the dissent below correctly recognized that the term "interested party" means an entity "with a direct economic interest that would be affected by" the specific action challenged under §1491. App.37-38 (cleaned up). This interpretation of "interested party" is consistent with this Court's previous interpretation of "party in inter-

est." *See Truck Ins. Exch.*, 602 U.S. at 278 (citing Webster's 2d edition and concluding "[t]he plain meaning of the phrase thus refers to entities that are potentially concerned with or affected by a proceeding").

Thus, as even the Government concedes, *see* App.39, the standard for "an interested party" under §1491(b)(1) is informed by the nature of the government action the party challenges:

First, if a "solicitation by a Federal agency for bids or proposals for a proposed contract" employs an improper evaluation scheme, then an "interested party" is a contractor whose bid will be subjected to the unfair criteria laid out in the solicitation. §1491(b)(1). That is because its direct economic interest was affected by the improper *solicitation*. *Cf. Savantage Fin. Servs., Inc. v. United States*, 595 F.3d 1282, 1286 (Fed. Cir. 2010).

Second, if an agency announces "a proposed award or the award of a contract" to a bidder who was not entitled to it under the solicitation, then an "interested party" is a contractor who properly bid on the contract but was passed over for the ineligible awardee. §1491(b)(1). Its direct economic interest was affected by the improper *award*. *Cf. Centech Grp., Inc. v. United States*, 554 F.3d 1029, 1037 (Fed. Cir. 2009).

Third—and as relevant here—if an agency is in "violation of statute or regulation in connection with a procurement," then an "interested party" is a contractor whose direct economic interest was affected by the legal or regulatory *violation*. §1491(b)(1); *see* App.42.

Percipient plainly satisfies that standard. Its commercial product satisfied the needs of the subcontract—yet the Government violated FASA by failing to ensure that CACI considered Percipient's product after the agency became aware of it. *See* 10 U.S.C. §§3453(b)(2), (c). Percipient is thus an "interested party" under a straightforward application of the text of §1491(b)(1).

The majority reasoned that "Congress was not writing on a blank slate when it enacted 1491(b)(1), but against the backdrop of decades of government contract law." App.19 (cleaned up). Because Congress defined "interested party" in the Competition in Contracting Act ("CICA"), the majority believed, the term must have the same meaning in §1491. App.19 (quoting *George v. McDonough*, 596 U.S. 740, 746 (2022)).

But the so-called "old soil" doctrine applies only when the plain meaning of a statute is unclear—and the statute uses "a term of art" that is "obviously transplanted" from another statute. *McDonough*, 596 U.S. at 746. That doctrine is inapplicable here. For starters, the plain meaning of §1491(b)(1) is clear. *Supra* at 3-4. Moreover, Congress did not "obviously transplant[ ]" CICA's definition of "interested party" into FASA. As the dissent noted, CICA "does not even include the subject matter of interest at issue here," App.37, because CICA and §1491 were enacted against "different regulatory backdrops," *Monsalvo v. Bondi*, 145 S. Ct. 1232, 1245 n.5 (2025). CICA became law in 1984 to provide for administrative challenges to solicitations and awards. It does not contain

§1491(b)(1)'s expansive language authorizing challenges to any "violation of statute or regulation in connection with a procurement." Section 1491, on the other hand, expressly authorizes "interested parties" to challenge legal violations in the procurement process. And it was passed on the heels of FASA, which "is itself a procurement statute." *Cf. Monsalvo*, 145 S. Ct. at 1245 n.5 (the same phrase used in "different statutes passed at different times against different regulatory backdrops may bear different meanings").

Furthermore, Congress defined "interested party" as an actual or prospective bidder in CICA—but did not do so in §1491—which cuts against the majority's conclusion. That is because Congress expressly incorporated CICA into a *separate provision* of §1491 in 2008, when it added section (b)(5): "If an interested party who is a member of the private sector commences an action described in [(b)(1)], … then an interested party described in [CICA] shall be entitled to intervene in that action." If "interested party" in §1491(b)(1) already mirrored CICA's definition, Congress would not have needed to incorporate CICA's definition by reference in §1491(b)(5). It would have simply said "an interested party can intervene in a (b)(1) action brought by another interested party." Section 1491(b)(5) underscores that Congress's earlier omission of CICA in §1491(b)(1) was intentional. *Cf. Wisconsin Cent. Ltd*, 585 U.S. at 279 ("We usually 'presume differences in language like this convey differences in meaning.'").

B. The decision below is incompatible with the structure and purpose of §1491(b)(1).

Under the majority's interpretation, the only parties eligible to challenge "a violation of statute or regulation in connection with a procurement" are the same ones already eligible to bring pre- and post-award challenges. Put differently, the only parties who have standing to bring a challenge under prong 3 are ones who would already have standing under prong 1 or 2. *Supra* at 20-21. That reading "render[s] superfluous" the final clause of §1491(b)(1). *Freytag v. Comm'r*, 501 U.S. 868, 877 (1991); *id.* ("If the cases that special trial judges may hear, but not decide, under subsection (b)(4) are limited to the same kind of cases they could hear and decide under the three preceding subsections, then subsection (b)(4) would be superfluous.").

The majority opinion also failed to "exhaust 'all the textual and structural clues' bearing on th[e] meaning" of an interested party under §1491. *Niz-Chavez v. Garland*, 593 U.S. 155, 160 (2021). Section 1491 expressly adopts the APA standard of review, *see* §1491(b)(4). And its purpose was to make the Court of Federal Claims's jurisdiction coextensive with the bid-protest jurisdiction exercised by district courts (which includes APA claims). Yet despite its extensive focus on legislative history, the majority never grappled with the parallels between §1491(b)(1)'s language authorizing "interested parties" to bring claims for statutory violations and the APA's language authorizing persons "aggrieved" to bring claims for statutory violations. *Compare* §1491(b)(1), *with* 5 U.S.C. §702.

The majority's approach is irreconcilable with the purpose of §1491(b)(1) as amended by the Administrative Disputes Resolution Act. Congress passed the ADRA to give the Court of Federal Claims "the full range of procurement protest cases previously subject to review" only in the federal district courts. App.43; *see* §1491(b)(1). By then, it was settled law that district courts had jurisdiction to entertain bid protests brought under the APA. *See, e.g.*, *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 869 (D.C. Cir. 1970). So it would be anomalous indeed if Congress expressly vested the Court of Federal Claims with jurisdiction coextensive with that of the district courts, *see* §1491(b)(1)—*and* specified the APA as the standard of review, *see* §1491(b)(4)—but excluded APA-style claims for violations of law from the scope of the statute *sub silentio*.

The dissent at the panel stage argued that ruling for Percipient would open the floodgates to a new wave of bid protests premised on traditional subcontractor standing theories, *see* App.117, and members of the en banc court expressed similar concerns during oral argument. To the extent those concerns animated the majority's opinion, they likewise misunderstand the structure and purpose of §1491. Percipient's standing under §1491(b)(1) flows not from its position as a subcontractor, but from its unique legal interest under FASA as a provider of demonstrated commercial products that meet the government's needs. Being a subcontractor does not change that or otherwise strip Percipient's interest.

Put differently, the relevant distinction is not (as the majority wrongly believed) whether Percipient was a potential prime or subcontractor—but whether its claim was rooted in FASA or not. *Cf. Acuity-CHS Middle E. LLC v. United States*, 173 Fed. Cl. 788, 800-01 (2024) (rejecting a subcontractor's standing arguments for a non-FASA claim while the *Percipient* panel decision stood). Again, all parties concede that standing under §1491(b)(1) hinges on what type of claim a party brings. App.39.

C. The Federal Circuit improperly prioritized legislative history over the statute's text.

This Court has repeatedly admonished that "the authoritative statement is the statutory text, not the legislative history." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). But rather than interpreting §1491's text, the majority reviewed three decades of "the history of bid protest cases and prior statutes." App.19; *see* App.42-43 ("The majority further errs by prioritizing legislative history of various statutes and ignoring the language of §1491(b)(1)."); *cf. Epic Systems Corp. v. Lewis*, 584 U.S. 497, 523 (2018) (The majority "rests its interpretation on legislative history. But legislative history is not the law.").

The majority did not even mention the relevant text until page 14 of its opinion and did not analyze its meaning until page 18. Even then, the majority lingered on the text only long enough to assert that it aligned with the majority's reading of the legislative history. Preoccupied with the legislative history of the

broader field of bid protest statutes, the majority advanced an inflexible interpretation of §1491(b)(1) that no party requested. *See* App.39 ("[E]ven the Government agrees that who qualifies as an interested party depends on the type of objection made under §1491(b)(1).").

In a similar manner, the majority broadly stated that no statute underlying Percipient's claim could provide a basis for subcontractor standing. App.31-32. Instead of cross-checking that assertion against the text of FASA—the law most relevant to the inquiry, which guarantees commercial offerors the opportunity to compete "in any procurement," 10 U.S.C. §§3453(a)(3), (b)—the majority invoked "the history of both CICA and the Brooks Act" for the proposition "that Congress explicitly considered expanding standing to encompass subcontractors and expressly declined to do so." App.34.

That reasoning is flawed multiple times over. If contextual evidence is relevant, it should start with what Congress did or did not consider in FASA. That means looking to FASA and its legislative history first—not indulging a flight of fancy through the majority's cherrypicked laws. In an implicit recognition of this tenuous connection, the majority made no attempt to connect the legislative history of CICA and the (essentially irrelevant) Brooks Act with FASA. *See* App.34. That silence is deafening.

* * *

At bottom, this case is "straight-forward." App.45. FASA requires federal agencies to ensure that commercial products are considered and prioritized at both the prime-contract and subcontract stages. 10 U.S.C. §§3453(b)(2), (c)(5) And it guarantees companies "an opportunity to compete in *any procurement*" where commercial products can fulfill the government's needs. *Id.* §3453(a)(3) (emphasis added). Section 1491, in turn, allows an "interested party" to sue for "*any* alleged violation of statute or regulation in connection with a procurement." 28 U.S.C. §1491(b)(1) (emphasis added).

Companies providing commercial items are plainly "interested parties" under §1491(b)(1) whenever an agency violates the rights FASA guarantees them in any stage of the procurement cycle—including when bidding as a subcontractor. Thus, such subcontractors have standing to object to FASA violations in the Court of Federal Claims, and the Federal Circuit erred significantly by holding otherwise.

CONCLUSION

This Court should grant certiorari.

Zachary A. Austin
Samantha L. Clark
Jason W. Moy
PALANTIR TECHNOLOGIES INC.
1025 Thomas Jefferson St. NW, Ste. 600
Washington, DC 20007
(703) 270-3135
zaustin@palantir.com

Counsel for Palantir Technologies Inc.

Jeffrey M. Harris
Counsel of Record
J. Michael Connolly
James F. Hasson
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
jeff@consovoymccarthy.com

Counsel for Palantir Technologies Inc.

Ian Shannon
EIGHT PARTNERS VC, LLC
501 2nd St., Ste. 300
San Francisco, CA 94107

Counsel for Eight Partners VC, LLC and Joe Lonsdale

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