No. 25-428

IN THE

Supreme Court of the United States

PERCIPIENT.AI, INC.,

Petitioner,

v.

UNITED STATES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF AMICI CURIAE OF FOUNDATION FOR AMERICAN INNOVATION, THE ALLIANCE FOR COMMERCIAL TECHNOLOGY IN GOVERNMENT, SHIELD CAPITAL, SNOWFLAKE INC., AND COMMERCIAL SUPPLIERS IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici are commercial technology suppliers and policy organizations who study federal procurement. Their work directly addresses the commercial-item enforcement gap this case presents. Amici have compiled and submit empirical evidence that quantifies the prevalence and economic impact of noncompliance with commercial-item mandates and demonstrates the importance of this Court's review.

The Foundation for American Innovation is a think tank whose mission is to develop technology, talent, and ideas that support a better, freer, and more abundant future. Its policy team focuses on issues at the intersection of innovation, governance, and national security, including regulatory barriers that prevent cutting-edge technology from serving government needs.

The Alliance for Commercial Technology in Government represents commercial technology companies seeking to supply the Department of Defense. The Alliance advocates for acquisition regulation changes that enable commercial suppliers to compete on commercial terms.

Snowflake, ASTi, Makpar Corporation, Foxtrot Professional Services, Gallatin AI, and NEXA are commercial suppliers facing the barriers this case addresses. Snowflake Inc. is a large, publicly traded (NYSE: SNOW) cloud-based AI and data company. ASTi

1. No counsel for any party authored this brief in whole or in part. No party, counsel, or person other than Amici and their counsel contributed money to fund the preparation and submission of this brief. Timely notice of the intent to file this amicus brief was provided to all parties by October 24 via email.

has supplied commercial-off-the-shelf communications and sound systems to military training for 36 years but faces explicit exclusion from larger DoD deployments despite evidence its solutions could save hundreds of millions of taxpayer dollars. Makpar has delivered federal IT solutions since 2008, earning recognition including Inc. 5000 and federal program awards for cloud engineering, cybersecurity, and data analytics work. Foxtrot provides data platform implementations to federal agencies. Gallatin AI develops AI-native logistics decision-support software for defense customers. NEXA supplies mission-grade mobile devices plus end-to-end device lifecycle and managed services to defense customers. All six compete for government contracts where agencies may impose requirements that violate commercial-item mandates and remove their opportunity to fairly compete.

Shield Capital is a venture capital firm investing across artificial intelligence, autonomy, cybersecurity, and space. SHIELD supports entrepreneurs addressing the convergence of commercial technology and national security.

Amici file this brief because the issues presented affect their ability to serve the national defense and because commercial procurement reform is central to maintaining America's technological advantage.

SUMMARY OF ARGUMENT

This case asks whether 28 U.S.C. § 1491(b)(1)—which authorizes suit by an "interested party" over "any alleged violation of statute or regulation in connection with a procurement or a proposed procurement"—permits

challenges to post-award statutory violations by all parties with a provable harm derived therefrom. The Federal Circuit held that it does not, limiting such standing to actual or prospective bidders, regardless of the fact that the language of the statute itself contains no such limitation. This holding should be overturned.

Reviewing the question is critical because of the widespread noncompliance with Congress's commercial-procurement mandates. This noncompliance occurs chiefly after contract award, when the lower court's holding now bars most standing. Two common failures show the effects of noncompliance: first, agencies under-research the market and default to custom development instead of buying existing commercial items, adding years to procurement cycles; second, agencies reimpose government-unique clauses on purportedly commercial purchases, deterring entry and causing an exodus among defense suppliers. Under the lower court's ruling, these post-award violations have no private enforcement mechanism.

The legal theory is straightforward and rooted in text and structure. Congress used "any" and modified the object with "in connection with a procurement," language that reaches the procurement lifecycle—not just the moment of award. The third prong's separate reference to "a procurement" would be surplusage if suits were limited to bidders contesting a specific award. And Congress chose "interested party," not "bidder" or "offeror," terms it uses elsewhere when it means to confine standing. The familiar limits still apply: Article III's injury, causation, and redressability; the zone-of-interests test; and the requirement to plead a concrete statutory violation, such as inadequate market research or improper clause

imposition. Recognizing prong-three standing preserves those brakes and channels litigation to parties with direct economic injury who can supply record-based proof.

Certiorari is warranted. The en banc court split 7–4 on a recurring topic central to federal procurement performance. The Federal Circuit's exclusive jurisdiction prevents percolation; in the absence of review, it is the last word. The issue carries existential consequences for commercial defense contractors and presents a clean legal question of statutory interpretation that this Court can resolve within established standing doctrines. The Court should grant the petition.

ARGUMENT

I. FORTY YEARS OF CONGRESSIONAL REFORM HAVE FAILED DUE TO A SYSTEMIC ENFORCEMENT GAP THAT THREATENS NATIONAL SECURITY

The Federal Circuit's ruling in *Percipient.ai, Inc. v. United States* caps off decades of court and agency decisions undermining Congress's attempts to bring commercial vendors into federal procurement. No. 23-1970, 2025 U.S. App. LEXIS 22128 (Fed. Cir. Aug. 28, 2025) (en banc). For forty years, Congress has commanded agencies to buy commercial products. For forty years, agencies have evaded that command. The consequences have been dire: tens of billions of dollars in waste, thousands of exited suppliers, and an almost twelve-year major project acquisition timeline. Now, the Federal Circuit's opinion is set to make enforcing these commands nearly impossible by nontextually limiting prong three standing to those least likely to challenge violations.

A. Congress Envisioned a Procurement Revolution That Would Harness Commercial Innovation for National Defense

Congress launched its first effort at commercial-procurement reform in 1984. The impetus was clear: government acquisition had become a spectacle of waste, particularly at the Department of Defense (DoD). A Navy hammer cost $436; an Air Force plastic cap, $1100; and a single diode—available elsewhere for four cents—$110.[2] The 1982 Grace Commission calculated that DoD procurement savings over only 3 years could be $7.33 billion.[3] In response to the commission, in July 1984, Congress passed the Competition in Contracting Act (CICA), with a stated goal of ensuring that government contracts were awarded "using full and open competition." Pub. L. No. 98-369, Div. B, Title VII, §§ 2701–2753, 98 Stat. 1175 (1984).

Despite the passage of CICA, waste continued to pile up. So, in 1994, Congress passed the most ambitious procurement reform in modern history, the Federal Acquisition Streamlining Act. FASA had a simple premise: the government would buy from the same companies that serve commercial markets, using the same streamlined practices that make those markets

2. John E. Jackson, The $436 Hammer: A Laughing Matter?, Proceedings (U.S. Naval Inst.) (Dec. 1985), https://www.usni.org/magazines/proceedings/1985/december/436-hammer-laughing-matter. U.S. Naval Institute.

3. *Grace Commission Recommendations: Hearing Before the S. Comm. on Finance*, 98th Cong., S. Hrg. No. 98-744, at 46 (1984), https://www.finance.senate.gov/imo/media/doc/HRG98-744.pdf.

efficient. No longer would commercial companies need to maintain separate production lines, quality systems, or accounting structures to serve federal buyers. To achieve this goal, Congress created a parallel acquisition pathway—Federal Acquisition Regulation Part 12—that exempted commercial purchases from over thirty unique government requirements.[4]

FASA included a detailed statutory scheme for ensuring adherence. It created mandatory commercial-item preferences codified at 10 U.S.C. § 3453 (formerly 10 U.S.C. § 2377), which used the word "shall" ten times. See *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016) (rejecting the VA's "may" construction and holding that Congress's use of "shall" in 38 U.S.C. § 8127(d) imposes a mandatory, non-discretionary duty). It also requires agencies to: (1) conduct market research *before* developing requirements (§ 3453(c)); (2) define requirements to permit commercial solutions (§ 3453(a)); (3) acquire commercial items "to the maximum extent practicable" (§ 3453(b)); (4) "require" prime contractors to incorporate commercial components (§ 3453(b)(2)); and (5) "ensure" primes conduct market research for contracts exceeding $5 million (§ 3453(c)(5)).

The statutory scheme recognized a specific market failure: prime contractors managing large integrated procurements lack incentive to seek commercial components that would displace their own profitable development work. Subsections (b)(2) and (c)(5) thus

4. Federal Acquisition Regulation; Acquisition of Commercial Items, 60 Fed. Reg. 48,231, at 48,246–47 (Sept. 18, 1995), https://www.govinfo.gov/content/pkg/FR-1995-09-18/pdf/95-22778.pdf.

impose *post-award* obligations—agencies must ensure primes research and use commercial alternatives even after contract award. This obligation targets the precise moment when agency oversight weakens and contractor self-interest peaks.

Congress reinforced these mandates repeatedly in national security contexts. The National Defense Authorization Act for Fiscal Year 2009 required defense agencies to "identify and evaluate opportunities for the use of commercial computer software" at "all stages of the acquisition process."[5] Multiple NDAAs further strengthened *§* 3453—adding training (FY2016), pricing market-research (FY2017), terminology and conforming changes (FY2019), clarifications (FY2020), recodification (FY2021), and, most recently, a directive to reward risk-informed decisions maximizing commercial acquisition (FY2025). 10 U.S.C. § 3453; Pub. L. 114-92 § 844(a), 129 Stat. 915 (2015); Pub. L. 114-328 § 871, 130 Stat. 2307 (2016); Pub. L. 115-232 § 836(d)(3), 132 Stat. 1866, 1868 (2018); Pub. L. 116-92 § 818(a), 133 Stat. 1488 (2019); Pub. L. 116-283 § 1821, 134 Stat. 4195 (2021); Pub. L. 118-159 § 834, 138 Stat. 1986 (2024). Additionally, an Executive Order in 2025 mandated removal of regulatory barriers to commercial suppliers.[6] The statutory text, legislative history, and subsequent enactments make clear Congress's intent: commercial items first, development only when commercial solutions are genuinely unavailable.

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5. Defense Acquisition Regulations Sys., Defense Federal Acquisition Regulation Supplement; Limitation on Procurements on Behalf of the Dep't of Def., 74 Fed. Reg. 34,270, at 34,270 (July 15, 2009), https://www.govinfo.gov/content/pkg/FR-2009-07-15/pdf/E9-16668.pdf.

6. Exec. Order No. 14,271, 90 Fed. Reg. 16,433 (Apr. 18, 2025).

B. Agencies Gutted That Vision Through Reinterpretation And Regulatory Accretion

Agencies quickly got to work overriding Congress's intent in order to preserve the status quo. The pattern was consistent. Congress exempted commercial purchases from government-unique requirements, so agencies created parallel procedures to restore those requirements under different names. Congress expanded the scope of what counted as commercial items, so agencies imposed procedural barriers that ensured this expansion would be rarely applied. Today, nominally commercial contracts bear enormous compliance burdens that Congress had explicitly eliminated; and agencies treat statutory commands as suggestions subject to their discretion.

The cost-data exemption illustrates the pattern particularly well. Congress explicitly exempted commercial acquisitions from Truth in Negotiations Act requirements—the "certified cost or pricing data" that forced vendors to maintain government-unique accounting systems. 41 U.S.C. § 3503. The FAR mirrored that command: contracting officers "shall not require certified cost or pricing data" for commercial purchases. 48 C.F.R. § 15.403-1(b)(3).

But agencies built a workaround. The 1997 FAR Part 15 rewrite, led by the agencies themselves, authorized contracting officers to demand "data other than" certified cost or pricing data to establish price reasonableness—cost breakdowns, sales records, internal estimates, etc.[7] The

7. Federal Acquisition Regulation; Part 15 Rewrite—Contracting by Negotiation & Competitive Range Determination,

category was blessed by Congress to ensure procurement at a "fair and reasonable price", but the details were not. 10 U.S.C. § 3705(a). In fact, the information burden the agencies created was functionally identical to the certified cost packages Congress had prohibited. As 48 C.F.R. § 2.101 points out, in some cases the similarity has become more than functional, stating explicitly that "[s]uch data may include the identical types of data as certified cost or pricing data."

The DoD has been particularly effective at stymieing Congressional mandates. For example, Congress broadened the commercial-item definition to include items "of a type" customarily used commercially and items "offered" but not yet sold. 41 U.S.C. § 103(1)(A)–(B). The DoD implemented this definition through DFARS 212.102, which requires extra approval—"one level above the contracting officer"—whenever determinations rely on a category in the broader definition. 48 C.F.R. § 212.102(a)(1)(C). Acquiring this approval is procedurally burdensome, leading to commentary stating "documenting [commercial items] has become so burdensome and fraught with risk, it discourages contractors from buying commercial items or treating commercial items as such."[8] Some requirements have no commercial analogue whatsoever. DFARS 252.204-7012 mandates implementation of 110 NIST cybersecurity controls and seventy-two-hour incident

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62 Fed. Reg. 51,224, at 51,251 (Sept. 30, 1997), https://www.govinfo.gov/content/pkg/FR-1997-09-30/pdf/97-25666.pdf.

8. Defense Contract Mgmt. Agency, *DCMA CIG Industry Day* (Feb. 20, 2020) (slide deck), https://www.dcma.mil/Portals/31/Documents/CIG/DCMA%20CIG%20Industry%20Day%20slides%2020%20February%202020.pdf.

reporting—requirements vastly more burdensome than those commercial customers demand. 48 C.F.R. § 252.204-7012(b)(2); 48 C.F.R. § 252.204-7012(c)(1)(ii); Dep't of Def., Class Deviation 2024-O0013 (May 2, 2024).

On their own, each of the above changes could potentially be justified as policy, if not on textual grounds. The needs for pricing accuracy, quality assurance, and security are pressing. But Congress has spoken. Commerciality is to be the goal, and, cumulatively, these additions have buried it. If "to the maximum extent practicable" is to hold any meaning at all, then it must take priority over other considerations.

C. The Section 809 Panel Documented How Far Agencies Had Strayed From The Text

By 2016, Congress could no longer ignore the size of the gap between statutory text and actual practice. A 2009 GAO review had found nearly 19% of commercial contracts were in fact not commercial at all.[9] A further 2014 study found that half of contracts had inadequate market research documentation.[10] To get to the bottom of this gap, Congress chartered the Section 809 Panel to

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9. U.S. Gov't Accountability Off., *Contract Management: Minimal Compliance with New Safeguards for Time-and-Materials Contracts for Commercial Services and Safeguards Have Not Been Applied to GSA Schedules Program*, GAO-09-579, at 28 (2009), https://www.gao.gov/assets/gao-09-579.pdf.

10. U.S. Gov't Accountability Off., *Market Research: Better Documentation Needed to Inform Future Procurements at Selected Agencies*, GAO-15-8, at 14 (2014), https://www.gao.gov/assets/gao-15-8.pdf.

document how commercial procurement had failed at the DoD. Over three years, the Panel produced nearly 2,000 pages documenting the extent of the non-compliance.

The Panel identified 109 clauses—54 in FAR, 55 in DFARS—that the DoD was imposing on commercial contracts in direct violation of FASA's statutory criteria for when government-unique terms could be added.[11] 109 clauses out of a total of 165. Nearly two thirds of the clauses included in commercial defense procurement contracts were illicitly added.

Expert commentary on the panel found that the processes for determining whether a procurement should be commercial had become "so unwieldy that they sometimes consume even more time and paperwork than the traditional development contracts that are designed for military-unique systems."[12] The Panel "recommended the [109] clauses…be removed" to restore commercial item contracting to the original intent—laid out in FASA.[13] As of 2025, the status quo has prevailed and most remain.

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11. Advisory Panel on Streamlining & Codifying Acquisition Regulations (Section 809 Panel), *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations*, vol. 1 of 3, at A-41 (Jan. 2018), https://discover.dtic.mil/wp-content/uploads/809-Panel-2019/Volume1/Sec809Panel_Vol1-Report_Jan2018.pdf.

12. Jared Serbu, Section 809 panel's final report prescribes "revolutionary" changes to DoD buying, Federal News Network (Jan. 15, 2019), https://federalnewsnetwork.com/acquisition-policy/2019/01/section-809-panels-final-report-prescribes-revolutionary-changes-to-dod-buying/.

13. Section 809 Panel, *Vol. 1 Report*, at A-41 (Jan. 2018). discover.dtic.mil

Despite these documented violations spanning thousands of contracts and billions of dollars of waste, "the application of 10 U.S.C. § 2377 has not often been addressed…in the context of a bid protest." *Analytical Graphics, Inc. v. United States*, 135 Fed. Cl. 378, 424 (2017). Standing doctrine ensures that there is no mechanism to challenge violations post-award where incentives are weakest, so enforcement is effectively nonexistent. The statute had teeth in theory. In practice, it has none.

D. The Empirical Consequences Of Nonenforcement Have Been Stark

Decades of this nonenforcement have taken a toll on the defense ecosystem. Agencies' evasion of commercial-item mandates has produced twelve-year delivery timelines, billions in waste, and an exodus of small businesses from the defense market. With the en banc court's decision in *Percipient.ai* set to further foreclose review, these harms will accelerate unchecked.

D1. Skipping Market Research Adds Years of Delay and Billions in Cost

As previously stated, GAO has repeatedly found that agencies provide inconsistent or inadequate market-research documentation. Without such documentation, which informs the agency about the scope of offerings and modifications available, agencies cannot determine whether feasible commercial alternatives exist. Without that determination, agencies cannot satisfy the "maximum extent practicable" standard. Instead, they acquire blindly and default to custom development. The consequences for delivery timelines have been predictably bad:

Product[14]	**Commercial Cycle**	**DoD Custom Development**	**Delay Added**
Vehicles	2 years	4.6 years	~2.5 years
Drones	~1 year[15]	3.8–15.3 years[16]	~3–14 years
Satellite	1.5-3 years[17]	8.8 years	~6–7 years

14. Unless otherwise cited, all data on the chart is from Alec C. Blivas, Brenen Tidwell & Morgan Dwyer, *Cycle Times and Cycles of Ac*quisition Reform, CSIS Briefs (Aug. 5, 2020), https://www.csis.org/analysis/cycle-times-and-cycles-acquisition-reform.

15. Ben, Complete DJI Drone History & Release Date Timeline (2013–2025), Gadgets N Tech (Oct. 14, 2025), https://gadgets-n-tech.com/complete-dji-drone-history-release-date-timeline/.

16. On the low end, RQ-28A Short-Range Reconnaissance drone at 3.8 years (Nov 2018 - Sep 2022), at the high-end, there is MQ-4C Triton at 15.3 years.

Tajha Chappellet-Lanier, *Army, Defense Innovation Unit Move Forward With Surveillance Drone Project*, FedScoop (Apr. 29, 2019), https://fedscoop.com/army-diu-short-range-reconnaissance-drones-award/ (reporting DIU solicitation issued Nov. 2018); U.S. Army, *New Short Range Reconnaissance Capability Begins Fielding to Soldiers* (Oct. 12, 2022), https://www.army.mil/article/261063/new_short_range_reconnaissance_capability_begins_fielding_to_soldiers (last visited Nov. 4, 2025). U.S. Navy, *NAS Sigonella Welcomes First MQ-4C Triton* (Apr. 1, 2024) (noting VUP-19 achieved initial operational capability in Sept. 2023), https://www.navy.mil/Press-Office/News-Stories/Article/3725909/nas-sigonella-welcomes-first-mq-4c-triton/; Northrop Grumman, *U.S. Navy Awards $1.16 Billion BAMS UAS Contract to North*rop Grumman (Apr. 22, 2008), https://investor.northropgrumman.com/news-releases/news-release-details/us-navy-awards-116-billion-bams-uas-contract-northrop-grumman (last visited Nov. 4, 2025).

17. All SpaceX major satellite model refreshes, v1 Nov 2019, v1.5 Sep 2021, v2 Feb 2023, v3 exp. early 2026, *List of Starlink and*

These multi-year custom development projects lead to skyrocketing costs and technological obsolescence by delivery. And that development has itself elongated over time. From the turn of the millennium to today, GAO has reported an increase in time-to-deployment of over 40 months—from 103 to 144 months.[18] From 2024 to 2025, the cost of thirty major defense acquisition programs reviewed by the GAO increased by $49.3 billion.[19] That is an increase of nearly $50 billion in one year attributable to less than half of the 79 total programs.[20] The method of failure is simple. The DoD grants a large contract to a prime, who—safe in the knowledge that standing doctrine protects them from relevant complaints—prioritizes internal development while blowing past the original deadline and racking up billions in extra costs.

Examples abound. Development on the Sentinel ICBM started in 2020 with a targeted 2029 deployment but delivery has already been pushed to 2033—a four year slip in five years.[21] The F-35 fighter started in 1996, with

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Starshield launches, Wikipedia (last visited Oct. 31, 2025), https://en.wikipedia.org/wiki/List_of_Starlink_and_Starshield_launches.

18. U.S. Dep't of Def., *Performance and Accountability Report, Fiscal Year 2003*, at 36 (Dec. 23, 2003), https://comptroller.war.gov/Portals/45/Documents/afr/fy2003/00_Entire_Document.pdf.

19. U.S. Gov't Accountability Office, *Defense Acquisition Reform: Persistent Challenges Require New Iterative Approaches to Delivering Capability with Speed*, at 5 (June 11, 2025), https://www.gao.gov/assets/880/879068.pdf.

20. Id. at 2.

21. Frank Wolfe, Updated Sentinel Acquisition Strategy in Works; EMD Approval Goal Early to Mid-2027, Defense Daily

initial deployment to be spread between 2012-2015.[22] In reality, rollout did not conclude until 2019.[23] Even now, its Block 4 modernization is five years late and billions over budget.[24] MHS GENESIS, DoD's electronic health record system, started in 2015 and took nearly a decade to reach enterprise rollout.[25] By comparison, commercial electronic health records typically deploy in eighteen to twenty-four months.[26]

Experience in Ukraine has shown that Congress's mandates can work if allowed. Prior to Russia's 2022 invasion, Ukraine had a custom-development focused

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(Sept. 23, 2025), https://www.defensedaily.com/updated-sentinel-acquisition-strategy-in-works-emd-approval-goal-early-to-mid-2027/air-force/.

22. Cong. Research Serv., *F-35 Joint Strike Fighter (JSF) Program: Background and Issues for Congress*, at 8 (Dec. 22, 2009), https://www.everycrsreport.com/files/20091222_RL30563_4e4c38f6c1371c17b92fa2c7cc25a9c2aeae8df6.pdf.

23. U.S. Pac. Fleet, *F-35C Achieves Initial Operational Capability* (Feb. 28, 2019), https://www.cpf.navy.mil/Newsroom/News/Article/2664405/f-35c-achieves-initial-operational-capability/.

24. U.S. Gov't Accountability Office, *F-35 Joint Strike Fighter: Actions Needed to Address Late Deliveries and Improve Future Development*, at 1 (Sept. 2025), https://www.gao.gov/assets/gao-25-107632.pdf.

25. Adam Mazmanian, DoD Plans $1.4B Sole-Source Extension for Leidos on Health Care Record, Nextgov/FCW (Oct. 23, 2024), https://www.nextgov.com/acquisition/2024/10/dod-plans-14b-sole-source-extension-leidos-health-care-record/400501/.

26. David Pumphrey, Tick-Tock: How to Perfect Your EMR Implementation Timeline, RiverAxe (Apr. 30, 2025), https://riveraxe.com/emr-implementation-timeline/.

procurement system like our own. However, when faced with mortal danger, they quickly pivoted to a commercial-first system. Reports state that with this new commercial focus, Ukraine has "reduce[d] timelines from years to months—even weeks."[27] Drone companies have scaled from dozens to hundreds in two years, and electronic-warfare countermeasures are deployed within weeks of new Russian threats.[28] The United States, by contrast, averages nearly twelve years to deployment and delivers obsolete technology.

D2. Uncontrolled Clause Proliferation Drove Out Thousands of Vendors

Through their actions, agencies drove out tens of thousands of vendors between FY2011 and FY2021—a 43 percent decline from 42,723 to 24,296.[29] First-time

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27. Ctr. for Strategic & Int'l Stud., *How Ukraine Rebuilt Its Military Acquisition System Around Commercial Technology*, at 2 (Jan. 2025), https://csis-website-prod.s3.amazonaws.com/s3fs-public/2025-01/250113_Bondar_Ukraine_Acquisition.pdf.

28. Compare Pavel Polityuk & Olena Harmash, Ukraine to Produce One Million Drones Next Year, Reuters (Dec. 19, 2023), https://www.reuters.com/world/europe/ukraine-produce-one-million-drones-next-year-zelenskiy-says-2023-12-19/, with Yuliia Dysa & Olena Harmash, Zelenskiy Woos US Businesses, Seeks to Grow Ukraine's Drone Industry, Reuters (Sept. 25, 2025), https://www.reuters.com/business/zelenskiy-woos-us-businesses-seeks-grow-ukraines-drone-industry-2025-09-25/, and Aosheng Pusztaszeri & Emily Harding, Technological Evolution on the Battlefield, Ctr. for Strategic & Int'l Stud. (Sept. 16, 2025), https://www.csis.org/analysis/chapter-9-technological-evolution-battlefield.

29. U.S. Gov't Accountability Office, *Small Business Contracting: Actions Needed to Implement and Monitor DOD's*

contractors across all agencies dropped 59 percent during the same period.[30] Defense prime contractors consolidated from 51 in the 1990s to 5 today—a 90 percent contraction.[31] Suppliers have exited precisely as AI, autonomy, cyber, and advanced computing shifted to commercial leadership. Roughly three-quarters of global R&D now occurs in the commercial sector, but U.S. acquisition barriers impede DoD access to that know-how.[32]

Adding dozens of clauses to commercial contracts since 1995 has raised regulatory burdens to uneconomical levels, driving commercial firms from defense markets and violating Congress's mandate to utilize commercial suppliers under § 3453. Reports support this thesis, with the Section 809 Panel labelling these clauses as "barriers" and a 2017 GAO survey where eleven of twelve companies cited "government specific contract terms and conditions" as a key challenge in supplying the defense market.[33]

Small Business Strategy, at 8 (Oct. 2021), https://www.gao.gov/assets/gao-22-104621.pdf.

30. Sarah Treuhaft et al., Fewer and Fewer Small Businesses Are Getting Federal Contracts, National Equity Atlas (Sept. 28, 2021), https://nationalequityatlas.org/federalcontracts.

31. U.S. Dep't of Def., *State of Competition within the Defense Industrial Base*, at 1 (Feb. 2022), https://media.defense.gov/2022/feb/15/2002939087/-1/-1/1/state-of-competition-within-the-defense-industrial-base.pdf.

32. OECD, *OECD Main Science and Technology Indicators: Highlights from the March 2024 Edition*, at 1 (Mar. 2024), https://www.oecd.org/content/dam/oecd/en/data/datasets/main-science-and-technology-indicators/msti-highlights-march-2024.pdf.

33. U.S. Gov't Accountability Office, *Military Acquisitions: DOD Is Taking Steps to Address Challenges Faced by Certain*

Comparisons with our rivals are stark. Senior acquisition leaders have testified that China achieves similar capability at a fraction of U.S. costs. Notably, China has fielded multiple hypersonic systems while the United States spent over $10 billion without a fielded system during the same period.[34] Even the former head of Air Force procurement is on record stating "China is… about five to six times faster than us in acquisition." China is able to take full advantage of its commercial business ecosystem, but due to enforcement failures, we cannot.

E. The En Banc Holding Would Remove the Last Available Brake on Nonenforcement

The Federal Circuit's en banc holding threatens to eliminate standing for the only party incentivized to remedy these commercial item violations. If left untouched, it will ensure that only prospective prime bidders retain standing—yet they have the least incentive to enforce commercial requirements. This mismatch will make the commercial item preference a dead letter.

The Federal Circuit has already ruled in *Palantir USG, Inc v. United States*, 904 F.3d 980 (Fed. Cir. 2018), that prospective commercial offerors who can meet the requirements of a solicitation have standing under

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Companies, at 9 (July 2017), https://www.gao.gov/assets/gao-17-644.pdf.

34. David Wright & Cameron Tracy, Hypersonic Weapons Are Mediocre. It's Time to Stop Wasting Money on Them., Bulletin of the Atomic Scientists (Mar. 12, 2024), https://thebulletin.org/2024/03/hypersonic-weapons-are-mediocre-its-time-to-stop-wasting-money-on-them/.

§ 1491(b). In that case, *Palantir* filed a pre-award bid protest challenging the army's solicitation, before it had awarded the contract. It is also well-established that a prospective bidder may lodge a pre-award GAO protest on the grounds that a solicitation failed to conduct the required market research. See *Triad Isotopes, Inc.*, B-411360, 2015 CPD ¶ 220 (Comp. Gen. July 16, 2015) (pre-award; sustained—set-aside based on inadequate market research). So it is true that failure to properly adhere to commercial item requirement duties creates standing for those otherwise able to bid—at least pre-award.

When the duty completes prior to the award, as in *Palantir*, this standing is sufficient. In that circumstance, the prospective bidder can point directly to the failure causing the harm before the award is granted. However, any commercial offeror that can only fulfill a future portion of the contract—even though equally supported by the statutory language—is out of luck.

Because of their contract-then-subsequent-task-order structure, indefinite delivery, indefinite quantity (IDIQ) contracts such as the one in *Percipient.ai* provide a particularly clear illustration of the problem. When these contracts are awarded, the task specifics are not often clear (hence, "indefinite"). Scope, quantities, and delivery schedules are examples of categories often left for the future. Nonetheless, Congress structured commercial-item duties to be ongoing, continuing after the contract award, even after the government issues each individual task order. In theory then, commercial offerors simply need to wait for these details to be released and then compete. But by that point they can't enforce their rights.

Traditionally, pre-award challenges to ongoing duties do not have standing, as the prospective failure of duty only exists in the future. But under the *en banc* court's opinion, post-failure challenges *also* have no standing. This is because the commercial duty exists in the present, but the court applies the "actual or prospective offeror" standing test—which adheres to the contract awarded in the past. To meet this bar would require the offeror to be not just prospective, but clairvoyant. As a result, *§* 1491(b) standing requirements under the lower court's opinion may reasonably be stated as: *If an agency specifies exactly how a contract should be undertaken, pre-award protests are available to commercial offerors; but if the agency does not provide specifics, no protest is available at all.* This standard rewards agencies for misbehavior and leaves potential plaintiffs like Percipient fully standing-barred—regardless of whether they can prove harm.

Under this holding, the only parties left with standing to enforce the duty will be prospective prime bidders on base contracts, the very people who *§* 3453 foists commercial item preferences onto. But prime bidders benefit from non-compliance. Custom development delivers higher margins, creates vendor lock-in, and eliminates competition. Non-compliance serves their economic interests, and without standing, no outside party is available to force compliance.

Commercial item vendors have the opposite incentives. They suffer direct economic injury when agencies ignore commerciality mandates. They lose sales, face improper technical data requirements, and watch procurement timelines stretch beyond their planning horizons. These vendors would enforce the statute.

The parties who would enforce cannot sue. The parties who can sue will not. The documented failures—109 non-compliant clauses, 50% inadequate market research, 40% supplier exit, twelve-year timelines—persist because doctrine creates an enforcement vacuum. As agency use of IDIQ contracts continues to grow beyond 50% of all government procurement dollars, these problems are set to get worse.[35] If the en banc holding stands, forty years of congressional reform will fall.

II. THE SUPREME COURT SHOULD GRANT CERTIORARI TO ADDRESS ERROR ON AN IMPORTANT FEDERAL QUESTION

By itself, the erosion of America's defense-industrial base would not justify the grant of certiorari. What makes it appropriate in this case is that the Federal Circuit's opinion is grounded in a serious error of statutory interpretation, which fails to give proper consideration to the plain meaning of the language in the Tucker Act.

A. Textual Canons Strongly Suggest Differential Standing for Prong 3 Challenges

The procedural history of this litigation is complex, but the core legal task is a simple and familiar textual exercise: statutory interpretation. Who is an "interested party" in the context of the Tucker Act? To wit:

> *Both the United States Court of Federal Claims and the district courts of the United States*

35. Coalition for Gov't Procurement, *Market Report: The State of the Federal Market*, at 4 (May 2024), https://thecgp.org/images/2024/06/23-Market-Report-2.pdf.

> *shall have jurisdiction to render judgment on 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.*** (emphasis added, note district court authority has sunset). 28 U.S.C. *§* 1491(b)(1)

Established textual canons make clear that the Federal Circuit erred in its limitation of "interested party" to actual and prospective bidders, and support the broader interpretation that anyone with "a 'direct economic interest [that] would be affected by the [challenged §1491(b)(1) action]'" has standing under the law. Percipient.ai, Inc. v. United States, No. 23-1970, 2025 U.S. App. LEXIS 22128, at 48 (Fed. Cir. Aug. 28, 2025) (Stoll, J., dissenting).

Three principles form the basis for this conclusion. First, the "text must be construed as a whole…Context is a primary determinant of meaning."[36] The Federal Circuit departs from this principle in its review, instead importing an "interested party" definition from an entirely separate statute – the Competition in Contracting Act (CICA). This is then dogmatically applied to the three prongs of the Tucker Act with little regard to the context of the prongs themselves. Indeed, to justify this transplantation, the

36. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (Thomson/West 2012).

Federal Circuit opinion spends fourteen pages recounting a dense legislative history before ever examining the text of the statute itself.

This exercise is unnecessary. "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there…When the words of a statute are unambiguous, then…'judicial inquiry is complete.'" Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992). The words of the Tucker Act are clear. The context of "an interested party" shows it to simply mean a potential plaintiff with a harm derived from "any alleged violation of statute or regulation in connection with a procurement or proposed procurement." No limitation is express or implied.

Second, the plain language of the Tucker Act suggests an expansive reading. The statute grants standing to "an interested party objecting to…*any* alleged violation of statute or regulation in connection with a procurement or a proposed procurement (emphasis added)". "Any" statute or regulation is necessarily broad, and implies a broader scope of parties than those that are actual or prospective bidders. See *United States* v. *Gonzales,* 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning."). It stretches believability to think that Congress expressly calls out such a wide scope of violations only to silently limit such a rule to bidders.

Third, the presumption against surplusage also makes the meaning of "interested party" clear. The third prong of the Tucker Act makes explicit that it is intended to allow interested parties to challenge violations related to "a procurement or proposed procurement". If we are to "give

effect, if possible, to every clause and word of a statute" then it is unclear why Congress would have specifically called out procurements where it earlier references awards and proposed awards in prong 2. "Procurement" refers to the entire lifecycle of the process for acquiring goods and services for the government – identifying needs, scoping requirements, establishing budgets, soliciting for bids, awarding contracts, and all other steps from beginning to end.

The plain language supports the conclusion that litigants like Percipient have standing. At the very least, the sharp 7-4 division within the Federal Circuit in its *en banc* review indicates the need for clarification, one that only the Supreme Court can provide.

B. "Floodgate" Concerns Are Speculative

The Government has offered the concern that a finding that litigants have standing to bring Prong 3 challenges if they are "someone with a 'direct economic interest [that] would be affected by the [challenged §1491(b)(1) action]'" will open the floodgates to costly and frivolous litigation. "Permitting unrelated third parties who had no involvement in the competitive process to interfere with the performance of ongoing contracts under the guise of bid protest review would threaten to destabilize every Government contract." Br. of Def.-Appellee United States at 35–6, No. 23-1970 (Fed. Cir. Apr. 4, 2025).

We would challenge this premise. For one, a party seeking to challenge a procurement or proposed procurement must still show an actual competition injury

stemming from a specific ongoing duty. Similarly, plaintiffs must offer facts indicating that the statutory violation was the cause of such injury. For example, showing how the inadequate market research harmed their ability to bid. It is worth noting that, to date, these evidentiary burdens appear to have limited the number of bona fide litigants under the Tucker Act significantly: there are a minuscule number of prong 3 cases which have been brought to challenge procurements or proposed procurements.

Second, courts continue to apply the standard machinery of justiciability requirements in allowing a litigant to pursue a claim against the Government. The analysis of redressability, ripeness, mootness all continue to be important considerations, and the decision in this case does not fundamentally change these Article III and prudential limits.

Third, providing plaintiffs the standing that they are intended to have under the Tucker Act does not allow any party with a grievance to challenge a procurement. "Direct economic interest" is itself a standard cabined by the typical zone-of-interests tests. Plaintiffs must show that their interests align with the statutory purposes at issue, and remote or tangential interests remain excluded.

Finally, given the limited universe of applicable statutes, the primary material outcome of a finding of standing in this case is that plaintiffs offering actual commercial products meeting the statutory definition can object to violations of statutes or regulations in connection with a procurement or a proposed procurement.

C. The Issues at Stake Implicate Critical Federal Questions

The grant of certiorari is appropriate when a case implicates "questions of general importance beyond the particular facts". Sup. Ct. R. 10. This is the situation presented by this case. Ultimately, whether the Supreme Court grants certiorari in this case will determine the economic shape of our defense-industrial base, and in connection our national security.

The involvement of the Court is particularly urgent in this area since it is one where no split between the Circuits will be forthcoming. The exclusive jurisdiction of the Federal Circuit conferred by Administrative Dispute Resolution Act means that it will serve as the last word in the absence of review by this Court.

American power has always relied on the dynamism of its defense industry. This dynamism has in turn relied on the ability for our nation to draw on a vibrant, highly competitive commercial ecosystem. For decades, Chrysler, Ford, and even General Mills were commercial businesses manufacturing cars and cereal at the same time they produced missiles, satellites, and guidance systems for the U.S. military.[37]

37. Shyam Sankar, *The Defence Reformation: 18 Theses for the Resurrection of the American Industrial Base*, 18Theses.com (Oct. 31, 2024), https://www.18theses.com/.

CONCLUSION

The historical record reviewed above in Part I shows how agency and judicial decisionmaking in past decades have systematically undermined this dynamism and given rise to a slow-moving, sclerotic sector resistant to new entrants. The decision of the Federal Circuit in this case only compounds this problem by leaving commercial players with little redress under the law when they are excluded in violation of the law.

The legal error presented by this case therefore implicates not just billions of dollars of federal funding but also offers the question of whether the U.S. shall have the powerful defense industry it needs in the coming, dangerous decades. Ensuring that it does begins with the simple act of guaranteeing that the government complies with existing law and allows real competition back into defense procurement. For these reasons, we urge the Court to grant certiorari in this case.

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Respectfully submitted,

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APPENDIX

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