No. 08-546

In the Supreme Court of the United States

BLUEPORT COMPANY, LLC, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

In 28 U.S.C. 1498(b), Congress has waived the sovereign immunity of the United States for certain copyright-infringement suits. Section 1498(b) sets forth three limitations on the waiver of sovereign immunity, one of which is that a government employee may not sue for infringement "where he was in a position to order, influence, or induce use of the copyrighted work by the Government." The questions presented are as follows:

1. Whether a plaintiff who sues the United States for copyright infringement bears the burden of proof with respect to the limitations in Section 1498(b).

2. Whether the court of appeals correctly held that petitioner's infringement claim should be dismissed because petitioner's copyright was obtained from a government employee who "was in a position to order, influence, or induce use of the copyrighted work by the Government."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 533 F.3d 1374. The opinion of the Court of Federal Claims (Pet. App. 21a-101a) is reported at 76 Fed. Cl. 702.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2008. The petition for a writ of certiorari was filed on October 22, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. By enacting 28 U.S.C. 1498(b), Congress has waived the government's sovereign immunity for certain claims of copyright infringement. When the federal government is alleged to have infringed a copyright, Section

1498(b) provides that "the exclusive action which may be brought for such infringement shall be an action by the copyright owner against the United States in the Court of Federal Claims." 28 U.S.C. 1498(b).

That waiver is subject to three express limitations set forth in Section 1498(b) itself. First, a government employee may not sue the United States for copyright infringement "where he was in a position to order, influence, or induce use of the copyrighted work by the Government." 28 U.S.C. 1498(b). Second, Section 1498(b) confers no right of action "with respect to any copyrighted work prepared by a person while in the employment or service of the United States, where the copyrighted work was prepared as a part of the official functions of the employee." *Ibid.* Third, Section 1498(b) confers no right of action "with respect to any copyrighted work * * * in the preparation of which Government time, material, or facilities were used." *Ibid.*

2. Petitioner alleges that the United States Air Force infringed petitioner's copyright on a computer software program known as "the AUMD program." Pet. App. 2a. The AUMD program was created by Air Force Technical Sergeant Mark Davenport. *Ibid.* After creating an initial version of the AUMD program at home, Sergeant Davenport shared copies of it with his co-workers, *ibid*; posted it on an official Air Force web page, *id.* at 3a-4a, 14a-15a, 78a-79a; trained Air Force personnel to use it, *id.* at 4a; and demonstrated it to senior Air Force personnel at an annual conference, *ibid.* As the AUMD program became popular within the Air Force, Sergeant Davenport continued to improve it based on feedback from his co-workers. *Ibid.* As a result of the improvements, Sergeant Davenport released ten different versions of the AUMD program between

May 28, 1998, and January 5, 2000. *Id.* at 32a n.10. The expiration date for the last version of the AUMD program was May 15, 2000. *Id.* at 37a.

Air Force officials became increasingly concerned that the Air Force was becoming too reliant on an undocumented computer program. As a result, Sergeant Davenport's supervisors requested access to the program's source code. Pet. App. 4a, 34a-36a. When Sergeant Davenport refused, the Air Force solicited bids from private contractors to create a similar program. *Id.* at 36a. The selected private contractor created the new program, and, at the Air Force's request, also modified the AUMD program to extend its expiration date. *Id.* at 37a-38a.

Sergeant Davenport assigned his rights in the AUMD program to petitioner, a company formed by Sergeant Davenport and his uncle. Pet. App. 36a. On March 9, 2000, petitioner registered its copyright for the AUMD program. *Id.* at 36a-37a.

3. Petitioner filed this action against the United States in the Court of Federal Claims (CFC) pursuant to 28 U.S.C. 1498(b). After a full trial on the merits, the CFC concluded that petitioner's claim was barred by each of Section 1498(b)'s three provisos. Pet. App. 78a-101a.

At the outset of its opinion, the CFC held that the three provisos are jurisdictional and that petitioner therefore bore the burden of proving they did not bar suit. Pet. App. 41a-69a. The court then concluded that all three provisos were applicable to this case. The court explained in that regard that, "even if the exceptions are not jurisdictional, the evidence is overwhelming that [petitioner's] claim falls under all three exceptions." *Id.* at 68a n.25.

The CFC first found that Sergeant Davenport was in a position to induce and influence the government's use of the AUMD program through his "willingness to allow unlimited, free, continuous use of the program." Pet. App. 79a. Second, the CFC found that the AUMD program was prepared as part of Sergeant Davenport's official functions. *Id.* at 84a-97a. Third, the court found that Sergeant Davenport had used government time, material, and facilities to prepare the AUMD program. *Id.* at 97a-101a. The trial court therefore entered judgment in favor of the government. *Id.* at 101a.

4. The court of appeals affirmed. Pet. App. 1a-20a. The court of appeals first rejected petitioner's argument that the three provisos are affirmative defenses rather than jurisdictional limitations. The court explained that the "text and structure" of 28 U.S.C. 1498(b) demonstrated that the provisos are jurisdictional. *Id.* at 11a. The court observed that "the provisos are part of the same sentence in which Congress granted the general waiver of sovereign immunity for copyright infringement," and that "the provisos themselves are phrased in terms of withholding a waiver of sovereign immunity for certain 'rights of action.'" *Ibid.* Given the jurisdictional nature of the provisos, the court of appeals held that petitioner "had the burden of showing that its claim is not barred jurisdictionally by the § 1498(b) provisos." *Id.* at 14a.

The court of appeals agreed with the CFC that petitioner's claim was barred by the first Section 1498(b) proviso because Sergeant Davenport was in a position to order, influence, or induce the government's use of the AUMD program. Pet. App. at 14a-16a. The court rejected petitioner's contention that the proviso was inapplicable because Sergeant Davenport was no longer in a position to influence the government's decisions regard-

ing use of the AUMD program at the time of the alleged infringing acts. *Id.* at 15a. The court explained that "[n]othing in § 1498(b) suggests that a party who was in a position to influence the Government's use of a copyrighted work can later bring a claim against the Government for continued use of that work after he lost his position of influence." *Ibid.* Because the court of appeals agreed with the CFC that the first Section 1498(b) proviso required dismissal of petitioner's suit, the court found it unnecessary to address the proper application of the other two provisos. *Id.* at 14a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.[1]

1. Petitioner contends (Pet. 14-21) that the court of appeals erred by requiring petitioner to bear the burden of proving jurisdiction under the Section 1498(b) provisos. That argument lacks merit.

a. Section 1498(b) waives the government's sovereign immunity for claims that the United States has infringed protected copyrights. As this Court has held, sovereign immunity is "jurisdictional in nature," *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994), and "the terms of [the government's] consent to be sued in any court define that court's jurisdiction to entertain the suit," *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941).

[1] Section 1498(b)'s first proviso is framed as a limitation on the right of government employees to file infringement actions. Petitioner does not dispute that, if the first Section 1498(b) proviso would have precluded Sergeant Davenport himself from filing suit, a suit by petitioner as Sergeant Davenport's assignee is similarly barred.

And as the court of appeals observed, the Section 1498(b) provisos "are part of" the same subsection and sentence as that provision's waiver of immunity, and "the provisos themselves are phrased in terms of withholding a waiver of sovereign immunity." Pet. App. 11a. The provisos thus "define the scope of the Government's waiver," *ibid.*, and therefore are jurisdictional in nature.

Because the provisos are jurisdictional, the court of appeals' conclusion that petitioner bore the burden of proof follows from the long-settled principle that the party who claims jurisdiction "must carry throughout the litigation the burden of showing that he is properly in court." *McNutt* v. *Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); see *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 612 n.28 (1979) (describing this as a "settled rule * * * especially * * * in a court of limited jurisdiction"). If the party's jurisdictional allegations are challenged, the party "must support them by competent proof." *McNutt*, 298 U.S. at 189; see *Thomson* v. *Gaskill*, 315 U.S. 442, 446 (1942). Thus, the court of appeals properly assigned to petitioner the burden of proving that the CFC had jurisdiction over petitioner's infringement claim.

b. Petitioner notes (Pet. 14-15) that, in the context of the discretionary function exception in the Federal Tort Claims Act (FTCA), 28 U.S.C. 2680(a), some courts of appeals have assigned the burden of proof to the government. Petitioner contends that the court of appeals' ruling in this case conflicts with those decisions. But because those decisions "interpret a statute, namely the FTCA, which is not at issue in this case," Pet. App. 13a, there is no conflict warranting this Court's review.

In any event, the general interpretive approach taken by those cases is not at odds with the reasoning of the

court of appeals here. In *Prescott* v. *United States*, 973 F.2d 696 (1992), the case on which petitioner most heavily relies, the Ninth Circuit concluded that the burden of proof should be placed on the government because the discretionary function exception "is analogous to an affirmative defense." *Id.* at 702. The Section 1498(b) proviso on which the court of appeals relied in this case, however, states that "a Government employee shall have a right of action against the Government under this subsection except where he was in a position to order, influence, or induce use of the copyrighted work by the Government." 28 U.S.C. 1498(b). Rather than affording the government an affirmative defense, the proviso, where it applies, divests the plaintiff of any "right of action against the Government." Section 1498(b) similarly states that the statute "shall not confer a right of action" in circumstances where the other provisos apply. The text of Section 1498(b) thus confirms that the provisos are limitations on the government's consent to suit and therefore are jurisdictional in character.

Petitioner raises several other challenges to the court of appeals' holding on the burden issue, but none of them warrants this Court's review. Petitioner contends (Pet. 15-16) that the court of appeals' decision conflicts with *Zoltek Corp.* v. *United States*, 51 Fed. Cl. 829 (2002), which held that the government bears the burden of proof with respect to 28 U.S.C. 1498(c) ("The provisions of this section shall not apply to any claim arising in a foreign country."). Because *Zoltek* was decided by the CFC, a trial court whose decisions are reviewable by the Federal Circuit, it does not conflict with the appellate decision here.

Petitioner also asserts (Pet. 18) that the court of appeals "relied upon" cases that "addressed questions of

statutes of limitations in the context of waiver or estoppel, rather than burden of proof." That assertion is based on a misreading of the decision below, which did not rely on any such cases. Instead, the court of appeals merely found that the "text and structure of § 1498(b) demonstrate that the three provisos * * * are jurisdictional limitations," Pet. App. 11a, and therefore followed "the long-established practice of placing the burden of establishing jurisdiction on the party 'who claims that the power of the court should be exerted in his behalf,'" *id.* at 13a (quoting *McNutt*, 298 U.S. at 189).

Petitioner finally argues (Pet. 20-21) that the court of appeals' holding conflicts with the legislative intent of Section 1498(b). But because the court of appeals correctly found that the "text and structure" of Section 1498(b) established the provisos' jurisdictional character, it had no need to "assess the legislative history" in order to resolve that question. *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 119 (2001).

c. In any event, there is no reason to believe that this case would have been decided differently if the courts below had assigned to the government the burden of proof regarding the first Section 1498(b) proviso. Neither the court of appeals nor the CFC suggested that the evidence concerning the proviso was in equipoise. To the contrary, the CFC explained that it would have reached the same decision even if it had not regarded the provisos as jurisdictional because "the evidence is overwhelming that [petitioner's] claim falls under all three exceptions." Pet. App. 68a n.25. In sustaining the CFC's factual findings and ultimate conclusion, the court of appeals likewise did not suggest that the allocation of the burden of proof was decisive. See *id.* at 14a-15a. Nor is there any reason to suppose that the alloca-

tion of the burden will be outcome-determinative in any significant number of other cases. Cf. *Schaffer* v. *Weast*, 546 U.S. 49, 58 (2005) ("In truth, * * * very few cases will be in evidentiary equipoise."); *Medina* v. *California*, 505 U.S. 437, 449 (1992).

2. Petitioner contends (Pet. 21-28) that the court of appeals erred by concluding that Sergeant Davenport "was in a position to order, influence, or induce use of the copyrighted work by the Government." 28 U.S.C. 1498(b). That claim lacks merit and does not warrant this Court's review.

a. The court of appeals correctly held that Section 1498(b) withholds jurisdiction over petitioner's suit because Sergeant Davenport "was in a position to order, influence, or induce use of the copyrighted work by the Government." 28 U.S.C. 1498(b). As the court of appeals explained, Sergeant Davenport had "access and authority to distribute the AUMD program freely to his colleagues," "shar[ed] individual copies [of the program] with his colleagues," "post[ed] the program on an Air Force web page," and "demonstrated" the program to his superiors. Pet. App. 14a-15a.

b. Petitioner notes (Pet. 23) that the government's alleged infringement of the AUMD program occurred after May 15, 2000, and that Sergeant Davenport opposed rather than encouraged the government's continued use of the program during that period. Petitioner argues (*ibid.*) that the court of appeals erred in "fail[ing] to require any nexus between the Government's infringing acts and the employee's alleged position of influence." By its terms, however, the first Section 1498(b) proviso bars suit when the copyright holder "was in a position to order, influence, or induce use of the copyrighted work," 28 U.S.C. 1498(b), and the court of ap-

peals correctly held that Sergeant Davenport was in such a position. To require a nexus between the employee's actions and the alleged acts of infringement by the government would in effect establish an implied exception to a jurisdictional limitation, contrary to this Court's recognition that "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Soriano* v. *United States*, 352 U.S. 270, 276 (1957).[2]

Petitioner also argues (Pet. 26) that "the Court should properly look to the law of implied license for guidance" in construing the proviso. Petitioner cites no judicial decision that has adopted that reasoning, however, and neither the text nor the structure of the proviso suggests that it is a mere codification of implied-license principles. The legislative history indicates that Congress intended the provisos to afford the government protection above and beyond affirmative defenses that existed "by operation of law," which would include a license defense. See H.R. Rep. No. 1726, 82d Cong., 2d Sess. 3 (1952). Petitioner's suggestion that the first Section 1498(b) proviso simply codifies a preexisting affirmative defense also discounts Congress's broad systemic goal in barring suits by government employees who are

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[2] *In re Government Acquisition of License to Employee's Invention*, 60 Comp. Gen. 248 (1981), is not relevant here because the employee in that case was not, as petitioner suggests (Pet. 24), "in a position to order, influence or induce, use of his patent[ed]" invention. The opinion states expressly that "[t]his situation does not exist in [the employee's] case where the Air Force seeks to purchase the right to use his invention." 60 Comp. Gen. at 251.

in a position to ensnare the government into potentially infringing conduct.[3]

Petitioner is also wrong in arguing (Pet. 27) that the decision below "disenfranchises copyright owners from the individual rights granted in the Copyright Act." The validity of petitioner's copyright is not at issue here. Instead, this case concerns only whether petitioner may bring suit against the government under Section 1498(b). For the reasons set forth above, the court of appeals correctly concluded that petitioner may not do so.

c. Even if questions concerning the proper application of Section 1498(b)'s first proviso otherwise warranted the Court's review, this case would be an unsuitable vehicle for resolving them. The CFC found "overwhelming" evidence that petitioner's claim was barred by "all three" Section 1498(b) provisos, Pet. App. 68a n.25, and each of the three provisos is an independently sufficient basis for dismissal of petitioner's suit. Although the court of appeals found it unnecessary to ad-

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[3] Contrary to petitioner's suggestions (Pet. 22, 23, 25-26), the purposes of the first Section 1498(b) proviso are directly implicated here even if Sergeant Davenport opposed the government's continued use of the AUMD program after May 15, 2000. The CFC's findings make clear that Sergeant Davenport was in a position to, and did, induce the government to use the program during an earlier period, see Pet. App. 32a-33a; that Air Force officials became concerned about the government's growing reliance on the program, see *id.* at 34a-35a; and that petitioner as Sergeant Davenport's assignee subsequently attempted to negotiate a licensing agreement with the Air Force and filed suit against the United States after the government rejected that overture, see *id.* at 36a-37a. Thus, even if Sergeant Davenport did not encourage the specific conduct through which the government is alleged to have breached petitioner's copyright, he was instrumental in setting in motion the chain of events that culminated in that alleged breach.

dress the second and third provisos, see *id.* at 14a, those provisos would furnish alternative grounds for dismissal of this action even if the Court granted review and ruled in petitioner's favor on the questions presented here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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