No. _____

In the

Supreme Court of the United States

WINSTON-SALEM INDUSTRIES FOR THE BLIND

Applicant,

v.

PDS CONSULTANTS, INC.

Respondent.

Application For Order Directing the United States Court of Appeals For the Federal Circuit To Recall and Stay Mandate Pending Filing and Disposition of Petition for Writ of Certiorari

Application Directed to the Honorable John G. Roberts,
Chief Justice of the United States and Circuit Justice for the Federal Circuit

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Applicant Winston-Salem Industries for the Blind states that Winston-Salem Industries for the Blind is a not-for-profit corporation. It has no shareholders, parents, subsidiaries, or affiliates.

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In the

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WINSTON-SALEM INDUSTRIES FOR THE BLIND

Applicant,

v.

PDS CONSULTANTS, INC.

Respondent.

Application For A Stay or Recall of The Mandate of the United States Court of Appeals for the Federal Circuit Pending Certiorari

To the Honorable John G. Roberts, Chief Justice of the United States and Circuit Justice for the Federal Circuit:

In accordance with this Court's Rule 23, and as authorized by 28 U.S.C. 2101(f), Applicant Winston-Salem Industries for the Blind ("IFB" or "Applicant") respectfully requests that the Court issue an Order directing the United States Court of Appeals for the Federal Circuit ("Federal Circuit") to recall and then stay the mandate issued on May 20, 2019 in *PDS Consultants, Inc.* v. *United States & Winston-Salem Industries for the Blind*, Nos. 2017-2379, 2017-2512, pending Applicant's filing a timely petition for writ of certiorari and this Court's disposition of that petition.

A copy of the Federal Circuit's October 17, 2018 Opinion is attached to this Application as Ex. A; a copy of the Federal Circuit's May 10, 2019 Order denying

IFB's petition for rehearing and rehearing en banc is attached as Ex. B; a copy of the Federal Circuit's May 20, 2019 Order denying IFB's motion to stay issuance of the mandate pending the filing and disposition of a petition for writ of certiorari is attached as Ex. C; and a copy of the Federal Circuit's Mandate, issued on May 20, 2019, is attached as Ex. D.

INTRODUCTION

I. Nature of Case

Applicant is a 501(c)(3) not-for-profit organization that provides employment opportunities and support services for people who are blind or visually impaired, including through the manufacture of high-quality prescription eyewear that is sold to the U.S. Department of Veterans Affairs ("VA"). As an AbilityOne Non-Profit Agency ("NPA"), more than 75 percent of its direct labor workforce is comprised of people who are blind or visually impaired. Applicant not only provides meaningful employment to individuals who as a group are historically and chronically underemployed nation-wide at a level of 70 percent, but also it provides employee support services to ease some of the burdens associated with regular employment that most people take for granted. For example, Applicant provides its employees with subsidized transportation to work, an on-site cafeteria that allows employees access to hot meals, and on-site medical care to assist with secondary health issues associated with blindness. Critically, Applicant also reinvests its revenue into community-based services that are not otherwise available and are designed to improve the lives and well-being of the blind and visually impaired communities in North Carolina and Arkansas. These services include training courses, low-vision

health resources, occupational therapy, and other programs and adaptive resources for people of all ages who are blind.

Applicant seeks an order recalling and staying the mandate and the judgment below because without such an order, Applicant, along with all other similarly situated NPAs that employ individuals who are blind and severely disabled will suffer immediate, severe, and irreparable harm. Applicant will have no choice but to terminate potentially hundreds of employees, leaving these individuals without the realistic possibility of other employment and without crucial support services. In turn, the blind communities of North Carolina and Arkansas will no longer have resources to support vital, life-saving programs because Applicant is currently the only provider in these geographic regions.

It is this extremely vulnerable population whom Congress specifically sought to protect through the Javits-Wagner-O'Day Act, 41 U.S.C. 8501-8506 ("JWOD"), which authorized creation of the AbilityOne Program in order to improve employment opportunities for people who are blind or severely disabled. These beneficiaries face an immediate loss of critical opportunities and support because of the Federal Circuit's misinterpretation of the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. 8127-8128 ("VBA"), which focuses on increasing contracting opportunities for both service disabled veteran-owned small businesses ("SDVOSBs") and veteran-owned small businesses ("VOSBs") (collectively, "VOSBs").

Each statute contains a distinct mandate denoted by the imperative "shall." JWOD, for its part, requires all federal government agencies to obtain goods or services on the AbilityOne "Procurement List" exclusively from designated NPAs for the blind or severely disabled (see 41 U.S.C. 8405) as part of a non-competitive acquisition process. By contrast, the VBA requires the VA to prioritize competitive contract awards to VOSBs with respect to other small businesses through a form of restricted competition known as the "Rule of Two" that is designed to favor small businesses, if at least two qualified entities exist, over large businesses. The Federal Circuit's ruling that the VBA supersedes JWOD effectively repealed JWOD by implication. The VA effectuated that repeal the day after the mandate issued by changing its implementing regulations to eliminate JWOD's priority as a mandatory source for all VA contracting and taking steps to terminate existing AbilityOne contracts, including those performed for years by Applicant. If the mandate is not recalled and stayed, disastrous consequences will follow for Applicant, the AbilityOne Program, and the blind and severely disabled individuals whom it serves.

Absent the requested relief, the first of Applicant's current contracts with the VA will end in June, with the remainder ending shortly thereafter. This will precipitate an immediate and permanent loss of revenue, compelling Applicant to terminate the employment of at least dozens of individuals who are blind and to curtail other valuable assistance programs that benefit members of the blind and severely disabled communities. The immediate financial and emotional damage to

these individuals cannot be undone once their employment has been terminated, and the Court should not allow these injuries to be suffered without first reviewing the merits of the Federal Circuit's decision.

Moreover, that decision will have far-reaching consequences for the AbilityOne Program as well as for federal procurement more broadly, given the existence of other mandatory "shall" statutes now at risk of being subordinated to the VBA.[1] Congress cannot possibly have intended sub silentio to eliminate the 80 year-old AbilityOne Program by enacting an unrelated statute designed to prioritize one type of small business over another in competitive procurements completely beyond the reach of JWOD. Despite clear congressional intent to preserve JWOD in its current form as a mandatory source program, the impacts of the Federal Circuit's mandate will be immediate and irreparable. These consequences have already begun to be felt notwithstanding the reasonable probability that, given the opportunity, this Court would grant certiorari and reverse the judgment below.

In the first place, this case involves a challenge to the validity of the AbilityOne Program as it applies to the VA —a type of challenge that falls exclusively within the jurisdiction of courts outside the Federal Circuit. Persistent confusion regarding this issue, which this Court has not had the opportunity to address, is evidenced by the fact that the federal government previously has challenged jurisdiction in this matter and in two other cases currently pending in

[1] In this regard, while acknowledging that the mandate did not address Federal Prison Industries ("FPI"), the VA has determined to expand the mandate's application to include this statutory program in addition to AbilityOne.

federal district courts in the District of Columbia and Colorado, both of which also involve the interplay between the VBA and JWOD.[2] Further, this Court routinely has intervened to reverse erroneous decisions concerning the interaction of complex statutory schemes, particularly when the lower court's resolution has turned on the misapplication of statutory construction canons. Both of those problems plague the decision in this case and warrant this Court's intervention.

II. Statutory Background

Pursuant to the Competition in Contracting Act of 1984 ("CICA"), all federal government acquisitions must employ "full and open competition" through the use of competitive procedures unless otherwise provided by law. 41 U.S.C. 3301 (a)(1)-(2). One recognized exception to CICA's pro-competition command exists where a statute expressly authorizes or requires federal agencies to contract without regard to any competition. See 41 U.S.C. 3304. JWOD, under which federal government agencies are required to obtain goods and services in a specific manner and prior to the implementation of any competitive contracting procedures, is an example of such a statute.

First enacted in 1938 and expanded in 1971, JWOD is the enabling legislation for the AbilityOne Program, which seeks to provide job opportunities for the blind and severely disabled by requiring the federal government to purchase certain products and services from qualified AbilityOne NPAs that employ these

[2] See *Alphapointe* v. *U.S. Dep't of Veterans Affairs; Nat'l Institutes for the Blind, et al.,* v. *U.S. Dep't of Veterans Affairs*, Case No. 1:17-cv-992-KBJ (U.S. District Court for the District of Columbia); *Bayaud Enterprises, Inc. et al* v. *U.S. Dep't of Veterans Affairs et al.*, Case No. 1:17-CV-01903 (U.S. District Court for the District of Colorado (Denver) (Status Report Filed May 14, 2019)).

individuals. U.S.C. 8501-8506. At least 75 percent of an NPA's direct labor must consist of individuals who are blind or have severe disabilities, which impacts the ability of these individuals to participate in a competitive marketplace. As such, CICA authorizes, and its implementing regulations[3] require, that federal government agencies first utilize products and services offered by AbilityOne NPAs before engaging in the competitive government contracting process.

The AbilityOne Program is overseen by the U.S. Committee for the Purchase From People Who Are Blind or Severely Disabled (the AbilityOne "Commission"), which is an independent federal agency authorized by Congress to place products and services on the AbilityOne "Procurement List." 41 U.S.C. 8503(a)(2). Once the Commission places an item on the Procurement List, it becomes a mandatory source for federal government purchasers:

> An entity of the Federal Government intending to procure a product or service on the procurement list … shall procure the product or service from a qualified nonprofit agency for the blind or a qualified nonprofit agency for other severely disabled in accordance with the regulations of the Committee and at the price the Committee establishes if the product or service is available within the period required by the entity.

41 U.S.C. 8504(a).

If an executive branch agency seeks to acquire products or services *not* on the Procurement List, it must then avail itself of the competitive acquisition process outlined by CICA. In order to advance a government-wide preference for small business contracting, CICA permits federal agencies in certain circumstances to

[3] CICA's implementing regulations are codified in the Federal Acquisition Regulation ("FAR"), 49 C.F.R. Parts 1-52.

contract on the basis of restricted (as opposed to full and open) competition if it determines that there are at least two qualified small businesses able to perform the work at a fair and reasonable price that represents the best value to the Government (*i.e.,* the "Rule of Two"). See 41 U.S.C. 3303. The portion of the VBA at issue here addresses the use of this type of restricted competition in VA contracting.

Congress passed the VBA in 2006 "in order to increase contracting opportunities" for small businesses that are owned by veterans by elevating them over other small business categories (*e.g.,* women-owned, 8(a), small disadvantaged, HUB-Zone) in competitive procurements under CICA. 38 U.S.C. 8127(a). In addition to allowing sole-source awards to such VOSBs in certain circumstances on a permissive basis (see 38 U.S.C. 8127(b)-(c)), the VBA provides in part as follows:

> (d) Use of Restricted Competition. Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department [VA] shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and the award can be made at a fair and reasonable price that offers best value to the United States.

38 U.S.C. 8127(d).

III. Case Background

On August 25, 2016, PDS Consultants, Inc. ("PDS") filed an action in the U.S. Court of Federal Claims against the VA and the Commission (collectively the

"Government"). Despite the lack of any proposed contract award, PDS, an SDVOSB, styled its action as a bid protest and sought an injunction requiring the VA to perform, pursuant to the VBA, a "Rule of Two" analysis before ordering prescription eyewear from the AbilityOne Procurement List. The Court of Federal Claims granted Applicant's motion to intervene in the case on August 30, 2016. In their respective Motions for Judgment on the Administrative Record, both Applicant and the Government asserted that the court lacked jurisdiction to entertain claims challenging the VA's purchases under existing AbilityOne contracts or AbilityOne Procurement List determinations.

In an Opinion issued on May 30, 2017, the Court of Federal Claims ruled in PDS's favor on the merits. After first determining that it had jurisdiction over the case, the court held that although the VBA and JWOD are not always in conflict, the VA could only prioritize one statute when a product or service appears on the Procurement List. Relying upon the statutory language of the VBA and this Court's opinion in *Kingdomware Technologies, Inc.* v. *United States,* 136 S. Ct. 1969 (2016), the court held the VA is required to conduct a Rule of Two for all new procurements for eyewear, whether or not the product or service appears on the Procurement List. *PDS Consultants, Inc.* v. *United States*, 132 Fed. Cl. 117, 125-126 (2017), aff'd, 907 F.3d 1345 (Fed. Cir. 2018).

Applicant and the Government each timely filed a Notice of Appeal. Applicant also filed a Motion for Stay Pending Appeal on July 31, 2017. In granting Applicant's Motion for Stay, the Court of Federal Claims noted that the proper

interpretation of the interplay between the VBA and JWOD presented a "substantial case on the merits." *PDS Consultants, Inc.* v. *United States*, 133 Fed. Cl. 810, 817 (2017).

The Federal Circuit affirmed the lower court's decision on October 17, 2018. Ex. A. On March 12, 2019, Applicant filed a combined Petition for Rehearing and Rehearing En Banc, which was denied on May 10, 2019. Ex. B.

In anticipation of filing a petition for a writ of certiorari in this Court, Applicant filed a Motion to Stay Execution of the Mandate at the Federal Circuit on May 16, 2019. One business day later, on May 20, 2019, the Federal Circuit panel denied Applicant's motion without explanation and issued the mandate. Exs. C and D.

REASONS TO GRANT THE APPLICATION

The Court's criteria for recalling the mandate and staying a lower court judgment pending the filing and disposition of a petition for writ of certiorari are well established. To obtain a stay, Applicant "must demonstrate (1) 'a reasonable probability' that this Court will grant certiorari, (2) 'a fair prospect' that the Court will then reverse the decision below, and (3) 'a likelihood that irreparable harm [will] result from the denial of a stay.'" *Maryland* v. *King*, 567 U.S. 1301 (2012) (Chief Justice Roberts, in chambers) (quoting *Conkright* v. *Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers)). These standards are readily satisfied in this case, and the balance of equities also tips in Applicant's favor.

A. There Is a Reasonable Probability That This Court Will Grant Certiorari

If stayed pending this Court's review, this case presents an opportunity to address the substantial confusion that currently exists regarding the limits of federal court jurisdiction in cases like this one, as well as to provide critical guidance regarding the proper method to reconcile JWOD and the VBA. It is reasonably probable that this Court will grant certiorari for two reasons: (1) the Court regularly grants certiorari to interpret and clarify the limits of federal court jurisdiction, but has never addressed the scope of bid protest jurisdiction under the Tucker Act, 28 U.S.C. 1491, as amended by the Administrative Dispute Resolution Act of 1996 ("ADRA"), Pub. L. 104-320, § 12, 110 Stat. 3870, 3874 (Oct. 19, 1996); and (2) Applicant's petition would allow the Court to clarify the rules of statutory interpretation and the need in the first instance to reconcile potentially conflicting federal procurement statutes before concluding that one trumps the other, to the detriment of potentially thousands of blind and severely disabled individuals.

1. Given the importance of jurisdictional questions generally, and the confusion evidenced by the Government's shifting position regarding jurisdiction here and in other cases that involve the interplay between the VBA and JWOD, there is a reasonable probability that four Justices would vote to grant certiorari—particularly since the Court has never interpreted the scope of bid protest jurisdiction under the ADRA and the Tucker Act.

The Court of Federal Claims is an Article I court "of limited jurisdiction … possessing only that power authorized by Constitution and Statute." *Gunn* v.

Minton, 568 U.S. 251, 256 (2013) (citation and internal quotation marks omitted); see also *United States* v. *Bormes*, 568 U.S. 6, 11-12 (2012). As relevant here, the scope of that jurisdiction is defined in the Tucker Act as amended by ADRA, which directs the Court of Federal Claims 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." 28 U.S.C. 1491(b)(1).

An area of significant jurisdictional confusion has emerged concerning the interplay between the Tucker Act and the Administrative Procedure Act, 5 U.S.C. 701-706 ("APA"). Separate and distinct from the Tucker Act, the APA permits suits against the government for nonmonetary damages when a government agency acts unlawfully. *Id.* § 702. The requisite analysis is whether a challenged government action constitutes an "alleged violation of statute or regulation in connection with a procurement or a proposed procurement" (28 U.S.C. 1491(b)(1)) or if it was simply unlawful agency action unrelated to that procurement. The Tucker Act confers jurisdiction on the Court of Federal Claims in the former situation but not in the latter, rendering it necessary in that circumstance to determine whether a basis exists for jurisdiction in federal district court under the APA and 28 U.S.C. 1331.[4]

[4] The APA includes a waiver of sovereign immunity in limited circumstances, but there is not "an implied grant of subject-matter jurisdiction to review agency actions." *Califano* v. *Sanders*, 430 U.S. 99, 105 (1977).

Courts have resolved this analysis inconsistently to date. In cases involving challenges to the validity of an agency's policies, rules, or regulations related to federal government acquisition generally (as opposed to their proper application in the context of a particular procurement), the Court of Federal Claims, the Federal Circuit, and the Ninth Circuit have held that such a challenge must be brought under the APA in federal district court. See *Southfork Sys., Inc.* v. *United States*, 141 F.3d 1124, 1135 (Fed. Cir. 1998); *Fire-Trol Holdings LLC* v. *United States Forest Serv.*, 209 Fed. Appx. 625, 627 (9th Cir. 2006); *Automated Commc'n Sys., Inc.* v. *United States*, 49 Fed. Cl. 570 (2001); see also *Precise Sys., Inc.* v. *United States*, 120 Fed. Cl. 586, 597 n. 13 (2016) (assuming for purposes of opinion that regulations allegedly violated by agency in connection with a procurement were duly authorized, valid, and enforceable, recognizing that "challenges to the validity of a regulation are properly brought to district court.") Yet in this case, which challenges the validity of JWOD and its applicability to VA contracting generally, both the Court of Federal Claims and the Federal Circuit accepted jurisdiction. *PDS Consultants, Inc.*, 132 Fed. Cl. at 125-126.

The confusion surrounding this analysis has been exacerbated by the Government's inconsistent position with regard to this issue. For example, the Government previously argued that the Court of Federal Claims lacked jurisdiction over PDS's claims in this matter, see *ibid.*, but has challenged jurisdiction in two other cases involving the interplay between the VBA and JWOD that are currently pending in federal district courts in the District of Columbia and Colorado. See

footnote 1, *supra*. Obviously, some court must have jurisdiction, but that is an issue that only this Court can resolve definitely. Given that "nothing is more wasteful than litigation about where to litigate", the Court should act now to clarify the proper venue for this kind of dispute. See *Bowen* v. *Massachusetts,* 487 U.S. 879, 930 (1988) (J. Scalia, dissenting).

In addition, this Court repeatedly has recognized that questionable decisions arising out of the Federal Circuit's exclusive appellate jurisdiction warrant scrutiny. See Shapiro & Geller, *Supreme Court Practice*, § 4.21 10th or later ed.) (Considerations Affecting Grant of Certiorari in Cases Coming From the Court of Appeals for the Federal Circuit) (noting that in connection with suits against the United States, "[t[he possibility of conflict with other courts is minimized, and the decisions of the Federal Circuit . . . alone often settle the law *in the absence of Supreme Court review*") (emphasis added); see also *ibid.* ("Important questions as to the jurisdiction of this court to resolve certain types of claims or determinations can also lead to certiorari review.") (citing cases). Applicant's petition would provide an appropriate vehicle for this Court to provide necessary scrutiny and address the scope of Tucker Act jurisdiction under 28 U.S.C. 1491(b)(1) where, as here, a party seeks to invalidate an entire statutory procurement program rather than merely to challenge agency action in the context of a specific procurement.

2. Second, Applicant's petition for writ of certiorari will provide this Court with the opportunity to clarify the appropriate priority for the United States to follow in making purchases of goods and services in light of two "shall" statutes,

which both Applicant and the Government have argued are not in conflict, but rather exist in parallel, non-intersecting tracks that allow meaning to be given to both. While the Federal Circuit purported to apply traditional rules of statutory interpretation in determining that the VBA effected an implied repeal of JWOD, see *PDS Consultants, Inc.*, 180 Fed. Cl. at 125-126, in doing so the Court ignored portions of the statutory text, elevated the importance of various statutory canons, and ultimately violated the "cardinal rule" of statutory construction that "repeals by implication are not favored." See*, e.g., Morton* v. *Mancari*, 417 U.S. 535, 549 (1974) (quoting *Posadas* v. *Nat'l City Bank,* 296 U.S. 497, 503 (1936)).

This Court routinely accepts statutory construction cases involving potentially overlapping statutory schemes for review and makes every effort to reconcile the statutes rather than allow one simply to trump the other, particularly where, as here, the statutes can be read in a manner that gives meaning to both. See *ibid.*; see also*, e.g., J.E.M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 142 (2001); *Branch* v. *Smith*, 538 U.S. 254, 293 (2003), *Nat'l Assn. of Home Builders ("NAHB")* v. *Defenders of Wildlife*, 551 U.S. 644, 662 (2007); *POM Wonderful LLC* v. *Coca-Cola Co.*, 573 U.S. 102, 115 (2014). The decision in *POM Wonderful*, in which this Court found that the statutes at issue were "complimentary" and should be construed as such, with each statute given full effect, succinctly explains the important considerations at stake in such cases: "[w]hen two statutes complement each other, it would show disregard for the

congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other." 573 U.S. at 115.

Applicant's petition would allow this Court to provide needed guidance concerning the proper methodology for deciding cases such as this one, in order to ensure adherence to the statutory text and proper regard for the intent of Congress. At a minimum, Congressional silence and the fact that the Government itself has heretofore prioritized the statutory scheme in a way that is fundamentally at odds with the decision below provide strong evidence that the Federal Circuit's holding is both important and wrong, and respect should be accorded the Government's long-standing statutory interpretation, which gave meaning to both JWOD and the VBA.

B. There Is a Fair Prospect That This Court Will Reverse the Decision Below

The Federal Circuit erred when it affirmed the lower court's decision in this case, and there is a "fair prospect" that those errors would cause this Court to reverse the judgment. *King*, 567 U.S. at 1301. This is because the Federal Circuit: (1) lacked jurisdiction to address PDS's claims challenging the validity of the AbilityOne Program; and (ii) ignored statutory text and misapplied statutory construction canons in holding that the JWOD conflicts with the VBA, and thus the interests of blind and severely disabled individuals must give way to veterans when the VA makes purchases from the AbilityOne Procurement List.

1. The Federal Circuit erred in finding that it had jurisdiction over PDS's claims. As discussed above, the scope of jurisdiction at the Court of Federal Claims concerning federal government procurement matters is defined in the Tucker Act as

amended by ADRA. See § A(1), *supra*. Congress enacted ADRA in part to reorganize the jurisdiction of federal courts over bid protest cases, eliminating the concurrent jurisdiction of the district courts in such cases and vesting the Court of Federal Claims "with exclusive jurisdiction to review government contract protest actions." *Emery Worldwide Airlines, Inc.* v. *United States*, 264 F. 3d 1071, 1079 (Fed. Cir. 2001). The ADRA did not grant the Court of Federal Claims jurisdiction above and beyond bid protests, such as jurisdiction over challenges to the validity of an existing rule or regulation. See *Automated Commc'n Sys., Inc.*, 49 Fed. Cl. At 576-577; see also*, e.g.,* 142 Cong. Rec. S11, 848-849 (Sept. 30, 1996) (statement of Senator Cohen advising that the statute will "in no way" expand the jurisdiction of the court beyond bid protests). Likewise, "there is nothing in the ADRA that takes away the residual authority of the federal district courts to hear challenges to the validity of regulations or statutes." *Automated Commc'n Sys., Inc.*, 49 Fed. Cl. at 576; see also *Lawrence Battelle, Inc.* v. *United States*, 117 Fed. Cl. 579, 585 (2014) (noting that the Court of Federal Claims "does not itself have jurisdiction to consider challenges to agency action under the APA").

Here, PDS's lawsuit veered beyond the recognized jurisdictional limits of the Court of Federal Claims. Instead of challenging the VA's application of relevant regulations to a specific procurement, PDS sought to invalidate the AbilityOne Program's continued applicability in VA contracting generally. This is made abundantly clear by the VA's immediate response to the issuance of the mandate in this case, which was to issue a categorical deviation from its regulations requiring

the widespread implementation of the Rule of Two in *all* VA contracting decisions. The effect of that change is to override JWOD's requirement that all federal agencies (including VA) purchase products and services on the AbilityOne Procurement List exclusively from qualified NPAs. See Class Deviation from VAAR 808.002, Priorities for Use of Government Supply Sources and VAAR Subpart 808.6, Acquisition from Federal Prison Industries (May 20, 2019), attached as Ex. E. The Court of Federal Claims, the Federal Circuit, and the Ninth Circuit previously have held that challenges to the validity of an agency's policies, rules, or regulations outside the context of a particular procurement belong exclusively in federal district court. See*, e.g., Southfork Sys., Inc.,* 141 F.3d at 1134 (dismissing claims alleging that agency improperly promulgated the regulations it followed in conducting a particular procurement); *Fire-Trol Holdings,* 209 Fed. Appx. at 627 (same); *Automated Commc'n Sys.,* 49 Fed. Cl. at 576 (finding that to the extent plaintiff was challenging the validity of an agency's regulations related to purchasing or procurement generally, as opposed to their proper application in a specific procurement, such a challenge must be brought in federal district court under the APA)). The Federal Circuit's decision in this case departed from this precedent and should be reversed.

The interplay between the Tucker Act and the APA provides an additional basis on which to conclude that the Federal Circuit lacked jurisdiction over PDS's claims. Uniquely in the realm of federal procurement, the AbilityOne Program uses formal notice and rulemaking procedures to add products and services to the

Procurement List (see 41 U.S.C. 8503(a)). Once on the Procurement List, federal government agencies must purchase the listed items from a designated NPA dedicated to providing employment opportunities and training to persons who are blind or severely disabled. Purchases from the Procurement List are mandatory and are not "procurements" for purposes of bid protest jurisdiction under the Tucker Act. Several courts that have addressed this issue have held that the appropriate time to challenge the inclusion and use of AbilityOne products and services is at the time the Commission decides to add a product and/or service to the Procurement List through the administrative rulemaking process. See *e.g., McGregor Printing Corp.* v. *Kemp*, 20 F.3d 1188 (D.C. Cir. 1994) (holding that the Committee failed to provide a sufficient rationale for its decision to add machine paper to Procurement List); *HLI Lordship Indus., Inc.* v. *Comm. for Purchase from the Blind*, 791 F.2d 1136 (4th Cir. 1986) (Committee failed to comply with the APA in adding military medals to Procurement List). Moreover, the appropriate venue for such a challenge—alleging a violation of agency action under the APA—is in federal district court. See *ibid.* The same rationale should apply here.

As the Court is likely to reverse the Federal Circuit on the issue of jurisdiction, a recall and stay of the Federal Circuit's mandate is warranted.

2. Even if this Court were to grant certiorari and reach the merits of the case, Applicant still likely would prevail. The Federal Circuit's decision contravenes this Court's precedent in several key respects.

As an initial matter, JWOD is a job-creation program for people who are blind or severely disabled and are otherwise unable to secure jobs in the commercial marketplace. See 41 U.S.C. 8501-8506. JWOD has been in place for over 80 years and it provides job opportunities for approximately 45,000 individuals[5] who otherwise would have virtually no realistic prospect for employment of any sort. JWOD's mandatory source requirement enables AbilityOne NPAs to provide jobs for these individuals, including many veterans, by redirecting limited federal procurement dollars from the competitive market to the non-competitive AbilityOne Program. See *id*. § 8504.

By contrast, the VBA addresses a wide range of veterans' issues, including benefits, health care, and information security programs, as well as increased contracting opportunities for VOSBs. The VBA is not about job creation; it is about the re-prioritization of federal contract awards to small businesses owned by veterans, and, as such, represents a modification to the hierarchies among different types of small businesses set forth in the Small Business Act. These laws are not in conflict—they are meant to address different and unrelated social policy concerns. Compare 38 U.S.C. 8127-8128 *with* 41 U.S.C. 8501-8506. It is for this reason that statutory canons of interpretation regarding specificity and timing are not useful in determining Congress's intent. One cannot assume that simply because the VBA was passed more recently that Congress intended to upend a decades-old employment program that has successfully assisted in providing jobs for a

[5] See www.abilityone.gov.

particularly vulnerable population that is known to be chronically underemployed. The notion that Congress intended to subordinate JWOD's mandatory source requirements to the VBA's restricted competition requirements, without any mention of JWOD, is wholly unjustified.

This Court previously has recognized in cases, like this one, where there is no evidence that Congress "clearly intended" the later-enacted statute "as a substitute" for the earlier statute, the earlier one should continue to operate within its sphere. *Branch*, 538 U.S. at 297 (O'Connor, J., concurring in part) (citation omitted); *id.* at 273 (plurality opinion); *id.* at 285 (Stevens, J., concurring in part and concurring in judgment). In such a case, before holding that the result of the prior enactment should be rejected in part, "it is reasonable for a court to insist on the legislature's using language showing that it has made a considered determination to that end." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974) (citation omitted). The same approach should prevail here.

Moreover, even if the Federal Circuit had to look to statutory construction canons to infer Congressional intent, it did not examine the VBA's Rule of Two in the context of the entire statute. The VBA's Rule of Two does not exist in a vacuum; § 8127(d) can only be understood in the context of the entire statute. See*, e.g.,* *Corley* v. *United States*, 556 U.S. 303, 314 (2009) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . .") (citation omitted). Two sections of the VBA—largely ignored by the Federal Circuit—reveal its intended reach.

Section 8127(h) addresses how the VA must prioritize small businesses for contract awards after a Rule of Two exercise. Entitled "Priority for Contracting Preferences," this provision confers on VOSBs limited priority over other small businesses in competitive procurements. It does not mention JWOD or its statutory mandate. 38 U.S.C. 8127(h)(1)-(4). The Federal Circuit disregarded this provision and, to avoid finding that the VBA eliminated JWOD's priority over all small businesses for VA contracting, read into the statute a new, non-existent requirement that obliges the VA first to conduct a Rule of Two and then, if unsuccessful, to revert back to JWOD before following the remainder of the § 8127(h) priority list. This construct does not follow the language of § 8127(h), however, and thus either wrongly implies congressional intent to prioritize all small businesses over AbilityOne NPAs in VA contracting or impermissibly inserts into § 8127(h) an extra step not contemplated by the statute. Because neither of these anomalous results is supported by the plain language or legislative history of the VBA, they cannot stand. See *Schein* v. *Archer and White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) (where Congress has designed a statute in a specific way, courts may not "redesign the statute" or "engraft [their] own exceptions onto the statutory text."); *Matson Nav. Co.* v. *United States*, 284 U. S. 352, 356 (1932), superseded on other grounds by Act of June 25, 1948, ch. 646, 62 Stat. 942 (where the words of a statute are clear, courts "are not at liberty to add to or alter them to effect a purpose which does not appear on its face or from its legislative history.")

Additionally, 38 U.S.C. 8128(a) expressly contemplates the operation of other statutes and the VA's obligation to adhere to their requirements in appropriate circumstances: "Contracting Priority. — In procuring goods and services pursuant to a contracting preference under this title *or any other provision of law*, the Secretary shall give priority to a small business concern owned and controlled by veterans, if such business concern also meets the requirements of that contracting preference." (emphasis added). The Federal Circuit acknowledged § 8128(a) but ignored the important caveat in its text requiring VOSBs to meet the requirements of such other laws before receiving priority. *Ibid.* The U.S. Government Accountability Office — which has specialized expertise in federal government procurement matters — has reviewed this issue and interpreted § 8128(a) correctly. See *Pierce First Medical et. al.*, B-406291.3 et. al., 2012 CPD ¶ 182 at 3-4 (Comp. Gen. Jun. 13, 2012) (rejecting protesters' argument that the VBA "establishes an absolute priority for . . . [VOSBs] in all VA contracting over preferences established 'under any other provision of law' . . . 8128(a) anticipates the operation of other statutory preferences, and requires that priority be given 'to . . . [a VOSB] if such business concern also meets the requirements of that contracting preference.'") (citations omitted).

Contrary to the Federal Circuit's conclusion, the absence of an express exemption for JWOD does not constitute "convincing evidence" that Congress intended the VBA to supersede it. See*, e.g., Burns* v. *United States*, 501 U.S. 129, 136 (1991), abrogated on other grounds as recognized by *Irizarry* v. *United States*,

553 U.S. 708 (1991); *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167 (2005)). This is especially true in light of all of the available evidence to the contrary, such as the 2011 recodification of JWOD. Congress's decision to recodify JWOD without change strongly supports the inference that the statute retains its primacy. See *Dalton* v. *Sherwood Van Lines, Inc.*, 50 F.3d 1014, 1018 (Fed. Cir. 1995) ("any suggestion that the predecessor of [the Transportation Act of 1940] was repealed by implication is put to rest by Congress's action in recodifying and amending [the relevant sections of the Transportation Act] on several occasions after the enactment of the Contract Disputes Act").

Beyond the implied repeal of JWOD, taken literally, the Federal Circuit's decision elevates the VBA over all other procurement "shall" statutes that predate it. If allowed to stand, the decision threatens to upend decades of established procurement law, which consistently has recognized and enforced JWOD's primacy in the federal acquisition context despite subsequent enactment of multiple procurement statutes containing a "shall" mandate. See, *e.g.*, 15 U.S.C. 644(a)(1) (small business concerns "shall receive" contract awards to ensure a fair proportion of government purchases are awarded to them); 41 U.S.C. 3307 (executive agencies "shall ensure" that agencies define their requirements to allow a preference for commercial items).[6]

[6] The Federal Circuit also relied on this Court's decision in *Kingdomware* to reach the conclusion that the VBA supersedes JWOD. However, *Kingdomware* is inapposite and cannot justify the Federal Circuit's resolution of the case. *Kingdomware* involved the interplay between the VBA and the Federal Supply Schedule, a non-mandatory competitive purchasing mechanism that is entirely different than the mandatory, non-competitive JWOD program at issue here.

C. Denial of a Stay Inevitably Will Result in Irreparable Harm

Unless the Federal Circuit's mandate is recalled and stayed, IFB and its employees, along with other AbilityOne NPAs and their employees, will suffer immediate, severe, and irreparable harm. See Declaration of David Horton ¶ 5, attached as Ex. F. The day after the Federal Circuit implemented its mandate, the VA modified its regulations to require contracting officers to implement the Rule of Two in all VA contracting decisions, despite JWOD's requirement to use products on the AbilityOne Procurement List as a mandatory source. See Ex. E. As a result of this regulatory change, the VA has advised it will begin to conclude IFB's optical contracts as early as June 30, 2019. See Ex. F ¶ 6. The loss of these contracts would mean the immediate and permanent loss of revenue, which would compel IFB to terminate the employment of dozens of individuals who are blind, including employees who are veterans. *Ibid.* Those laid off employees will incur serious if not permanent harm, as persons who are blind are well known to be underemployed in the workforce. See *id*. ¶ 7. Moreover, the financial and emotional toll these layoffs will inflict on each affected employee is incalculable.

Additionally, with the loss of its VA optical contracts, IFB would immediately have to reduce or eliminate other programs that directly support its mission to provide employment, training and service to people who are blind. *Id.* ¶9**.** These programs include: (i) investment and operation of low vision centers and related community outreach programs; (ii) investment in summer camp and after-school programs for children who are visually impaired; (iii) investment and operation of

subsidized public transportation programs and on-site cafeteria options, both of which improve IFB's employees' challenged living standards; and (iv) operation and funding of an on-site medical team that can address secondary medical conditions related to blindness. See *ibid.* Loss of revenue from the VA optical contracts would be so devastating, IFB would have to take extreme measures to maintain the organization's ongoing viability, including by reducing or eliminating operations in other areas of the company. *Id.* ¶ 10. Those actions would jeopardize the jobs of hundreds of IFB employees who are blind and work in other parts of the organization, as well. As a practical matter, such actions would be irreversible, even if this Court were to grant certiorari and IFB ultimately were to succeed on the merits of its appeal. *Ibid.*

The trial court that oversaw litigation in this matter recognized that without a stay pending appeal, IFB and its constituents could suffer irreparable harm: "The court is persuaded that the loss of these contracts would have a severe impact on not only IFB's optical business but also IFB's mission as a nonprofit to provide employment, training, and services to persons who are blind." *PDS Consultants, Inc.*, 130 Fed. Cl. at 817. It consequently stayed its judgment pending IFB's appeal to the Federal Circuit. See *id.* at 818.

The same danger still exists and is imminent. The VA is actively taking steps to terminate existing AbilityOne contracts, including all of those performed by IFB. Unless this Court grants a stay, IFB and the nationwide community of people who are blind and/or severely disabled will suffer the irreparable harm resulting

from the Federal Circuit's decision for many years to come. Ex. F ¶ 11**.** Thousands of blind and severely disabled individuals throughout the United States who rely on jobs through the AbilityOne Program will be in immediate jeopardy of losing their livelihood. *Ibid*. Given the historic and chronic nature of unemployment of individuals who are blind or severely disabled, the affected individuals likely face years of unemployment going forward. These financial and emotional injuries should not be inflicted unless this Court decides that they are absolutely necessary, which of course requires the Court to grant certiorari and decide whether the decision of the Federal Circuit is correct.

D. The Balance of Equities Favors a Stay

Finally, equity favors a recall of a mandate and a stay in this matter. In granting a stay of its judgment pending appeal to the Federal Circuit, the trial court recognized that while Applicant would be irreparably harmed absent a stay, PDS and the public would not.

As between Applicant and PDS, the court weighed the concrete harm identified by Applicant against the hypothetical harm identified by PDS (i.e., the loss of an opportunity to compete) and concluded that the harm to Applicant outweighed the harm to PDS. Specifically, whereas "IFB has provided concrete examples of the severe negative consequences that could flow from loss of the [at issue work], including loss of revenue, forced layoffs and its inability to satisfy its core mission of employing the blind[,] PDS has not identified any concrete harm that will flow to it if it is not able to compete …." *PDS Consultants, Inc.*, 130 Fed. Cl. at 817. The same analysis holds true today.

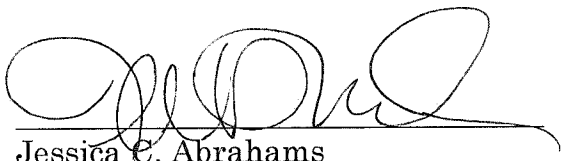
As for harm to the public interest, the trial court recognized that both JWOD and the VBA serve important public purposes. The court nonetheless found that "because the concrete harm to IFB without a stay outweighs the potential harm to PDS…the public interest tips in favor of allowing IFB to continue its work of employing blind and severely handicapped individuals under [the at issue contracts] until the appeal is resolved." *Ibid.* For much the same reasons, the threat of harm to the vulnerable population Applicant serves weighs heavily in favor of maintaining the status quo until Applicant's petition can be heard.

CONCLUSION

For the foregoing reasons, the Court should issue an order directing the Federal Circuit to recall and then stay its mandate pending Applicant's timely filing and the Court's disposition of a petition for writ of certiorari.

Dated: May 31, 2019

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Jessica C. Abrahams, counsel for Winston-Salem Industries for the Blind, hereby certify that on this 31th day of May, 2019, I caused one copy of the Application for Order Directing the United States Court of Appeals for the Federal Circuit to Recall and Stay Mandate Pending Filing and Disposition of Petition for Writ of Certoriari to be served by U.S. Mail on the following counsel:

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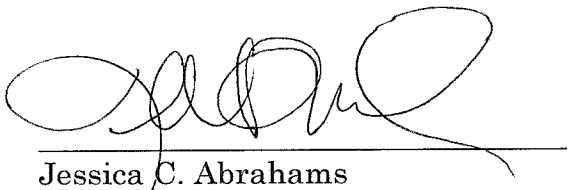

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