No. 19-329

IN THE

Supreme Court of the United States

WINSTON-SALEM INDUSTRIES FOR THE BLIND,

Petitioner,

v.

PDS CONSULTANTS, INC., *et al.*,

Respondent.

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

BRIEF OF NATIONAL INDUSTRIES FOR THE BLIND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae National Industries for the Blind ("NIB") is designated as a Central Nonprofit Agency by the Committee for Purchase from People Who Are Blind or Severely Disabled (now known as the "U.S. AbilityOne Commission") to distribute federal government orders for products and services on the AbilityOne Procurement List ("Procurement List") among qualified nonprofit agencies ("NPAs") for the blind. 41 U.S.C. § 8503(c). NIB's mission is to enhance the personal and economic independence of people who are blind, primarily through creating, sustaining, and improving employment. NIB has more than 100 associated NPAs, which, together with NIB itself, form the nation's largest employer of people who are blind.

NIB and its associated NPAs provide employment for people who are blind largely by selling products and services through the AbilityOne Program established by the Javits-Wagner-O'Day Act ("JWOD Act"), with such sales providing employment to approximately 6,000 people who are blind in fiscal year 2018. In that same year, approximately 15% of NIB's associated NPAs' sales were to the Department of Veterans Affairs ("VA").

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1. No party's counsel in this case authored this brief in whole or in part, and no one other than NIB contributed money intended to fund the preparation and submission of this brief. Counsel provided timely notice to all parties of its intent to file this brief, and all parties have given their express written consent.

SUMMARY OF ARGUMENT

This case is not about government contracting preferences. Rather, it is about the livelihood of people who are blind or significantly disabled.

The JWOD Act operates entirely through nonprofit agencies with one singular goal—providing meaningful employment opportunities for individuals who are blind or significantly disabled. This goal is critically important, as the private sector has failed to provide meaningful employment opportunities for such individuals. The JWOD Act's mandate allows the AbilityOne Program to help more than 45,000 people who are blind or significantly disabled find employment each year through AbilityOne NPAs. *See AbilityOne Program*, AbilityOne.gov, https://www.abilityone.gov/abilityone_program/ (last visited Oct. 10, 2019). Approximately 3,000 of those individuals are veterans. *Id.*

The Veterans Benefits, Health Care, and Information Technology Act of 2006 ("VBA"), by contrast, creates set-asides for small, for-profit businesses owned by veterans.[2] The goal of that statute is to award contracts to veteran-owned businesses regardless of whether those businesses otherwise employ veterans. By incorrectly holding that the VBA contracting preference implicitly repeals the JWOD

2. The VBA was amended in 2016 to add "small business concerns owned and controlled by veterans with service-connected disabilities" to the relevant Rule of Two provisions that originally related only to "small business concerns owned and controlled by veterans." Pub.L. 114-328, § 1832(b)(2)(C). For ease of reading, we refer throughout to "SD/VOSBs" to include both veteran-owned small businesses and service-disabled veteran-owned small businesses.

Act, the Federal Circuit's decision directly undermines the purpose of the JWOD Act and jeopardizes "opportunities for gainful employment to those who have been afflicted with blindness," S. Rep. No. 75-1330 at 2 (1938), or other significant disabilities.

The petition for certiorari should thus be granted first and foremost because this case involves an issue of exceptional importance. In creating what is now called the AbilityOne Program to support employment of individuals who are blind, Congress concluded that the "Government should spare no effort to aid and assist them." *Id.* By effectively repealing the JWOD Act with respect to the VA, the Federal Circuit instead improperly erected a roadblock to employment for people who are blind or significantly disabled—many of whom are veterans themselves.

The petition should also be granted because the Federal Circuit's decision that the VBA implicitly repeals the JWOD Act conflicts with the decisions of this Court holding that "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest." *Hui v. Castaneda*, 559 U.S. 799, 810 (2010). Indeed, the Federal Circuit itself recognized that "[i]f any interpretation of the statutory provisions at issue allows both statutes to remain operative, the court must adopt that interpretation absent a clear congressional directive to the contrary." App.22a. But it then proceeded to disregard a reasonable interpretation of the two statutes that would have reconciled them and avoided the implicit repeal of the JWOD Act with respect to the VA.

AbilityOne contracts are noncompetitive and are expressly exempted from the requirement that agencies "obtain full and open competition through the use of competitive procedures" in contracting. 41 U.S.C. § 3301(a)(1). By contrast, the VBA was designed to "improve[] the status of veteran and disabled veterans small businesses ***when competing for*** contracts at the [VA]." 152 Cong. Rec. H8995-02, H9014, (daily ed. Dec. 8, 2006) (emphasis added) (Statement of Rep. Buyer). Accordingly, the VBA's so-called "Rule of Two"—which requires the VA to restrict competition to SD/VOSBs when there is a "reasonable expectation" that two or more such businesses will submit offers at "a fair and reasonable price," 38 U.S.C. § 8127(d)—simply does not apply to JWOD Act procurements and thus need not conflict with the JWOD Act.

Indeed, nothing in the VBA suggests that the Rule of Two should apply to the ***noncompetitive*** procurements mandated by the JWOD Act, and the VBA's lack of a *non obstante* (i.e., "notwithstanding") clause, or any other language addressing the AbilityOne Program, strongly suggests the opposite. By expanding the scope of the Rule of Two to embrace both competitive and noncompetitive contracts, the Federal Circuit manufactured a conflict between the two statutes in direct contravention of this Court's precedents disfavoring implicit repeals. There is simply no way Congress intended *sub silentio* to gut the eighty-year-old AbilityOne Program at the VA. The Federal Circuit's decision must be reversed.

ARGUMENT

I. The Gainful Employment Of People Who Are Blind Or Significantly Disabled—Including Many Veterans—Is An Issue Of Exceptional Importance That Is Jeopardized By The Federal Circuit's Decision.

The Federal Circuit's decision undermines longstanding congressional efforts to guarantee employment for one of the most vulnerable communities in the country—individuals who are blind or significantly disabled, including veterans who are blind or significantly disabled. In order to create employment opportunities for people who are blind, Congress created what is now known as the AbilityOne Program in 1938. In doing so, Congress recognized that the "opportunities for gainful employment to those who have been afflicted with blindness are limited" and concluded that the "Government should spare no effort to aid and assist them." S. Rep. No. 75-1330 at 2 (1938).

Congress later expanded the AbilityOne Program to support employment for people who are significantly disabled as well, in part to help "many of the more than 120,000 Vietnam veterans [then] drawing compensation for service-connected disabilities," who are now "eligible for employment in workshops having contracts under the expanded Wagner-O'Day Act." S. Rep. 92-41 at 3 (1971). In support of the expansion, Senator Javits noted that the provisions of the JWOD Act were "hard-nosed proposals to help those who have no choice but to help themselves. The blind and the severely handicapped wish to be self-supporting and to be taxpayers . . . ." Hr'g before Special

Subcommittee on Handicapped Workers at 19 (June 9 and 10, 1970) (Statement of Sen. Javits).

This history highlights the fundamental difference between the JWOD Act and the VBA. While the VBA creates set-asides for small, for-profit businesses owned by veterans, the JWOD Act is focused entirely on providing meaningful employment opportunities for individuals who are blind or significantly disabled—which are unfortunately scarce.

Importantly, veterans make up a significant group helped by the AbilityOne Program. To that end, the U.S. AbilityOne "Commission, NIB and SourceAmerica® are dedicated to a variety of programs that reach out to veterans with disabilities and connect them with local NPAs and other resources." *Veterans and Wounded Warriors*, AbilityOne.gov, https://www.abilityone.gov/abilityone_program/veterans.html (last visited Oct. 10, 2019). As the Commission notes, "NIB collaborates with the Department of Veterans Affairs (VA) and connects veterans with job training, job placement and other career development services offered through its associated NPAs across the country." *Id.* Moreover, "NIB's Wounded Warrior Program offers critical training in areas such as contract management support, business management training, leadership training and fellowship programs." *Id.*

The programs offered by these organizations that support veterans are life-changing for those who participate. One veteran's story is particularly telling:

> Change happened for David Kendrick, who participated in the Warrior SALUTE Program,

> offered by Continuing Developmental Services (CDS), an AbilityOne® NPA in Webster, N.Y. He was on the verge of being homeless due to his unemployment and service-connected disability when he joined CDS. Expressing his gratitude, he explained, "The CDS program gave me a second chance because I thought nobody cared about soldiers out there. It was really hard, and I searched everywhere, and nobody wanted to give me a hand. ***Without the CDS program, I would be out there on the street***."

See id.

The Federal Circuit's mistaken interpretation of the VBA will have devastating effects on people who are blind or significantly disabled and employed through the AbilityOne Program. Indeed, individuals who are blind or significantly disabled have already lost their jobs as a direct result of the court's decision. *See IFB Solutions loses 47 jobs in Winston-Salem as VA ends optical contract*, WXII (Sept. 10, 2019, 5:11 PM), https://www.wxii12.com/article/ifb-solutions-loses-47-jobs-in-winston-salem-as-va-ends-optical-contract/28981703#. As of early September, 47 employees at IFB Solutions were laid off when IFB Solutions lost one of its VA contracts. *Id.* Another 90 are in jeopardy. *Id.* (as described in the video link). All told, contracts employing thousands of people who are blind or significantly disabled will be lost if the Federal Circuit's decision is allowed to stand. Indeed, numerous AbilityOne NPAs have already been notified that they are losing their VA contracts or that the VA intends to procure their products and services from SD/VOSBs in the near future. The loss of these contracts will also significantly diminish

the funding NPAs use to provide job training and other services in their local communities for individuals who are blind or significantly disabled.

In fiscal year 2018, prior to the Federal Circuit's decision, NIB's associated NPAs had 76 active VA contracts and blanket purchase agreements under the AbilityOne Program, and NIB-associated NPAs held $113 million worth of active VA contracts. These contracts and agreements accounted for more than 15 percent of overall AbilityOne sales by qualified NPAs for the blind. That same year, NIB and its associated NPAs employed more than 600 veterans.

As the VA implements the Federal Circuit's decision across all procurements, NIB-associated NPAs will likely lose all of their VA business. The VA's database of verified SD/VOSBs to which it may award contracts under the VBA lists 13,705 businesses. Vendor Information Pages ("VA VIP"), U.S. Department of Veterans Affairs, http://www.vip.vetbiz.va.gov (last visited Oct. 10, 2019); *see also* 38 U.S.C. § 8127(e)-(f). Among these verified SD/VOSBs, there are numerous businesses that offer the same items currently supplied to the VA by qualified NIB-associated NPAs.

For example, 74 SD/VOSBs offer ophthalmic goods under North American Industry Classification System ("NAICS") code 339115, the category that includes eyewear products currently provided to the VA by Petitioner, including the contracts at issue in this case.[3] Some 404

3. VA VIP search for "all" SD/VOSBs matching NAICS code 339115; *see also*, *e.g.*, *Procurement List*, AbilityOne.gov, https://www.abilityone.gov/procurement_list/ (last visited Oct. 10, 2019) (listing

SD/VOSBs sell surgical supplies (other than medical instruments) under NAICS code 339113, a category that includes items presently provided to the VA by other NIB-associated NPAs.[4] And another 122 SD/VOSBs provide telephone answering services under NAICS code 561421, another category that includes services currently provided to the VA by NIB-associated NPAs.[5]

In fact, of the 76 VA contracts and basic ordering agreements held by NIB-associated NPAs in 2018 prior to the Federal Circuit's decision, ***only one*** was for a NAICS code for which the VIP database does not list two or more veteran-owned businesses that provide similar products or services. Given the large volume of potential providers of Procurement List items in the VA's small business database, the Federal Circuit's decision will result in the VA ceasing to use the Procurement List for essentially all the products and services it currently buys from AbilityOne NPAs. NPAs that focus on VA contracting—including Petitioner—may not survive, or at the very least, they may have to substantially downsize as a result of the loss of VA contracts employing thousands of people who are blind or significantly disabled in direct contravention of the entire purpose of the JWOD Act.

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clear plastic single vision eyewear frames and lenses as a product the VA obtains through NIB-associated nonprofits).

4. VA VIP search for "all" SD/VOSBs matching NAICS code 339113; *see also*, *e.g.*, Procurement List (listing "Kit, Suture Removal, Sterile, Disposable" and surgical latex gloves as products the VA obtains through NIB-associated nonprofits).

5. VA VIP search for "all" SD/VOSBs matching NAICS code 561421; see also, e.g., Procurement List (listing Switchboard Operation as a service provided through NIB-associated nonprofits to the VA at multiple locations).

By contrast, restoring AbilityOne's priority as a noncompetitive mandatory source would barely dent the enormous volume of VA contracts awarded to SD/VOSBs. In fiscal year 2017, the last year for which official data is available from the VA, the VA awarded $5.1 billion in contracts to Service-Disabled Veteran-Owned Small Businesses ("SDVOSBs") and $5.4 billion to Veteran-Owned Small Businesses ("VSOBs"). These figures represent 19.5% and 20.6%, respectively, of the VA's total procurement of $26.1 billion. *See VA increases contracting with Service-Disabled and Veteran-Owned Small Businesses*, U.S. Department of Veterans Affairs (Apr. 8, 2019, 10:57 AM), https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5232.

The percentage of obligations set aside for SD/VSOBs increased from fiscal years 2014 to 2017. The number of individual awards to SD/VOSBs also increased as a percentage of total VA awards from fiscal years 2014 to 2017. *See* U.S. Gov't Accountability Off., GAO-18-648, Veterans First Program: VA Needs to Address Implementation Challenges and Strengthen Oversight of Subcontracting Limitations (2018). The GAO found that the number of certified SD/VOSB firms listed in the Vendor Information Page database increased each year from fiscal year 2014 through fiscal year 2017, leading to a growth in the number of SD/VOSB firms receiving set-aside awards in the same period. *Id.* at 17. In general, "veteran owned business is booming." *See* Sgt. Crystal Reidy, *Veteran owned business is booming*, DVIDS (Mar. 1, 2016), https://www.dvidshub.net/news/193192/veteran-owned-business-booming.

In short, while the Federal Circuit's decision is poised to have a devastating impact on employees who

are blind or significantly disabled, a contrary decision would barely affect the enormous success of federal contracting preferences for veteran-owned businesses. Given the importance of the issues presented in this case to the livelihoods of people who are blind or significantly disabled, this Court's review is imperative.

II. The Federal Circuit Ignored A Reasonable Interpretation Of The VBA That Reconciles The VBA With The JWOD Act.

While the VBA never expressly addresses the JWOD Act, the Federal Circuit held that the VBA implicitly repeals the JWOD Act based on a conflict between the statutes. In fact, as explained above, the Federal Circuit's ruling will essentially nullify the JWOD Act with respect to the VA. Contrary to the Federal Circuit's decision, however, the VBA can be read consistent with the JWOD Act. And in failing to employ such a reading, the Federal Circuit ignored one of this Court's basic tenets of statutory construction.

It has long been a "cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible." *United States v. Borden Co.*, 308 U.S. 188, 198 (1939); *see also, e.g.*, *Hui*, 559 U.S. at 810 ("[R]epeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest."). The Federal Circuit's implicit repeal of the JWOD Act—and its resulting devastating effects on the employment of people who are blind or significantly disabled—should not be allowed to stand because it flies in the face of this cardinal principle.

The JWOD Act and the VBA can be reconciled so that the JWOD Act continues to require the purchase of products and services on the Procurement List, while the VBA's Rule of Two applies in all of the VA's competitive procurements.

A. The Federal Circuit's Decision Is Contrary To The Unambiguous Language Of The JWOD Act.

For decades, the JWOD Act has unambiguously mandated that all government agencies—including the VA—procure products and services on the Procurement List from qualified NPAs. *See* 41 U.S.C. §§ 8501-8506. Indeed, the statutory language could not be clearer:

> 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 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) (emphasis added). This mandate allows the AbilityOne Program to help more than 45,000 people who are blind or significantly disabled find employment each year, including thousands who are veterans.

The Federal Circuit's decision nullifies the unambiguous, mandatory language of the JWOD Act

with respect to the VA. Specifically, that decision requires the VA to apply the VBA's competitive Rule of Two when procuring products or services on the Procurement List rather than acquire such goods or services from qualified NPAs. As a practical matter, this requirement effectively terminates the VA's obligation to participate in the AbilityOne Program. As shown above, it is highly likely that there will be at least two SD/VOSBs that can supply all Procurement List items to the VA, resulting in set-aside procurements for SD/VOSBs at the expense of AbilityOne NPAs, thereby undermining their ability to employ individuals who are blind or significantly disabled, including veterans who are blind or significantly disabled.

B. The VBA Did Not Repeal The Unambiguous Language Of The JWOD Act.

Contrary to the Federal Circuit's ruling, the VBA does not supplant the mandatory language of the JWOD Act. Again, "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007) (internal quotation omitted). "It is not enough to show that . . . two statutes produce differing results when applied to the same factual situation, for that no more than states the problem." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976). Here, there is no indication that Congress intended the VBA to repeal the mandatory requirements of the JWOD Act.

First, nothing in the VBA's text indicates that Congress intended for the Rule of Two to supersede the JWOD Act. *See generally* VBA, Pub. L. No. 109-461, 120 Stat. 3403 (2006). In fact, the absence of a *non obstante*

clause—or any other repeal language—with respect to the JWOD Act suggests otherwise.

Drafters use *non obstante* clauses, also referred to as "notwithstanding clauses," to signal that a new statute containing the clause will override an older, conflicting statute. *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993). The VBA includes two such clauses. *See* 38 U.S.C. §§ 7902(c)(4), 7903(d)(3) (mandating that financial assistance and education debt reduction payments shall not be considered income or resources in determining eligibility for benefits under federal programs "[n]otwithstanding any other provision of law"). It also expressly repealed several additional statutory provisions. *See, e.g.*, VBA, Sec. 210, 120 Stat. at 3418 (expressly repealing term of office for Under Secretary for Health). Therefore, the VBA's failure to address the JWOD Act with a *non obstante* clause or other repeal language suggests that Congress had no intent to supplant the AbilityOne Program by implication. *See* 1A *Sutherland Statutory Construction* § 23:11 (7th ed.) ("[A] specific repealer is some evidence that a legislature does not intend further repeals (by implication).").

Second, nothing in the VBA's legislative history even suggests an intent to repeal the JWOD Act. *See* 152 Cong. Rec. H8995 (2006). The legislative history states only that "veteran and disabled veteran-owned small businesses would be given priority in VA contracting as well as priority among other set-aside groups eligible for preferential treatment under the Small Business Act." *Id.* at H9014 (Statement of Rep. Buyer). AbilityOne NPAs, however, are not covered by the Small Business Act. *Compare* 15 U.S.C. § 632(a)(1) (defining a small business

concern in part as "independently owned and operated") *with* 41 U.S.C. § 8501(6)-(7) (defining a qualified nonprofit agency for the AbilityOne Program in part as an agency "of which no part of the net income of the agency inures to the benefit of a shareholder or other individual"). Accordingly, this language suggests not that the VBA repealed the JWOD Act, but that the VBA had no effect on the priority of SD/VOSBs vis-à-vis qualified NPAs under the JWOD Act. *See also* 38 U.S.C. § 8127(i) (listing, without mentioning the AbilityOne Program, the order of preferences for awarding contracts to small business concerns).

Nor does the Veterans Benefit Act of 2003 ("2003 Act") have any bearing on whether the VBA implicitly repealed the JWOD Act, as the Federal Circuit suggested. *See* App.25a. Rather, the 2003 Act—which remains in effect—is part of an amendment to the Small Business Act that provides for discretionary awarding of contracts to SDVOSBs in all federal agencies in the context of small business competitions. *See* Veterans Benefits Act of 2003, Pub. L. No. 108-183, Sec. 308, 117 Stat. 2651, 2662 (2003); 15 U.S.C. § 657f(c). Thus, the inclusion of a JWOD Act exception in the 2003 Act provides no insight into Congress's decision not to include a JWOD Act exception in the VBA. *Contra Russello v. United States*, 464 U.S. 16, 23-24 (1983) (addressing the impact of deleted language included in an earlier version of a single ***bill***).

C. The Federal Circuit Failed To Reconcile The VBA With The JWOD Act, Contrary To This Court's Precedents.

Although there is no evidence that Congress intended to repeal the JWOD Act in the VBA, the Federal Circuit nevertheless failed to construe the VBA to give meaning to both statutes. Specifically, the court failed to limit application of the VBA's Rule of Two to competitive procurements—*i.e.*, procurements that have not been rendered noncompetitive by the JWOD Act or another mandatory exception to the Competition in Contracting Act ("CICA"), 31 U.S.C. §§ 3551-56—even though such an interpretation is consistent with the text, history, and purpose of each statute, and gives effect both to the JWOD Act's protection of qualified NPAs for the discrete number of products and services on the Procurement List, as well as the VBA's goal of prioritizing SD/VOSBs in the vast universe of non-JWOD-Act, competitive procurements at the VA.

An unnecessarily broader reading of the VBA—like the one adopted by the Federal Circuit—implicitly repeals the mandatory language of the JWOD Act contrary to congressional intent and black letter law. *See Radzanower*, 426 U.S. at 155 ("Repeal is to be regarded as implied only if necessary to make the (later enacted law) work, and even then only to the minimum extent necessary."). The JWOD Act and the VBA "are capable of co-existence." *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) ("[W]here two statutes are 'capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'") (quoting *Blanchette v. Conn. Gen. Ins. Corps.*,

419 U.S. 102 (1974))); *see also Angelica Textile Servs., Inc. v. United States*, 95 Fed. Cl. 208, 222 (2010) (finding that the JWOD Act and VBA "exist in tension, albeit not in direct conflict"). And the Federal Circuit acted contrary to this Court's precedent when it failed to apply such a reading of the statutes.

AbilityOne contracts are noncompetitive. They are mandatory and expressly exempt from the general requirement established in CICA that executive agencies "obtain full and open competition through the use of competitive procedures" in procuring products and services. *See* 41 U.S.C. § 3301(a)(1) (excepting from this requirement "procurement procedures . . . expressly authorized by statute"); *see also* 48 C.F.R. § 6.302-5(b)(2) (identifying the JWOD Act as a statute expressly authorizing that acquisition be made from a specified source without full and open competition). In other words, to ensure employment for people who are blind or significantly disabled, the JWOD Act secures federal contracts for qualified NPAs without subjecting them to competitive procedures. *See* S. Rep. 1330, Calendar No. 1383, Committee on Purchase of Blind-Made Products, 75th Cong., 3d Sess. at 2 (1938) ("The opportunities for gainful employment to those who have been afflicted with blindness are limited. The Government should spare no effort to aid and assist them by means other than a relief grant.").

The VBA, by contrast, was designed to "improve[] the status of veteran and disabled veterans small businesses ***when competing for*** contracts at the [VA]." 152 Cong. Rec. H8995, H9014, (2006) (emphasis added) (Statement of Rep. Buyer). To that end, the statute prioritizes SD/VOSBs in the context of competitive procurements.

Specifically, § 8127(d) mandates a "restricted competition" among SD/VOSBs to the extent two or more such businesses are expected to 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). Subsections (b) and (c) allow—but do not mandate—VA contracting officers to "use procedures other than competitive procedures" to award contracts to SD/VOSBs when the contracts are below specific dollar amounts. *See id.* §§ 8127(b)-(c).

Furthermore, without even mentioning the JWOD Act, subsection (i) establishes the order of priority for awarding small business contracts absent an award under the procedures established in subsections (b)-(d). *See id.* § 8127(i) (giving the highest priority to SD/VOSBs over other preference programs under the Small Business Act). Read together, these provisions do not in any way contemplate application of the Rule of Two in mandatory, ***noncompetitive*** AbilityOne procurements.

Importantly, applying the VBA in only competitive procurements is consistent with this Court's decision in *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969 (2016). *Kingdomware* did not address the effect of the Rule of Two on the AbilityOne Program. But this Court did state that the VBA "unambiguously requires the Department to use the Rule of Two before contracting ***under the competitive procedures***." *Kingdomware*, 136 S. Ct. at 1976 (emphasis added). Thus, *Kingdomware* holds that Congress's use of the word "shall" in 38 U.S.C. § 8127(d) "mandates the use of the Rule of Two in all contracting ***before using competitive procedures***." *Id.* at 1977 (emphasis added).

Consistent with these conclusions, this Court therefore held that the Rule of Two must be applied before the VA orders products or services from the General Services Administration's Federal Supply Schedule ("FSS") program. Unlike mandatory, noncompetitive procurements for products and services offered on the Procurement List, procurements under the FSS program are optional and specifically included in CICA's definition of "competitive procedures," 41 U.S.C. § 152(3) (defining "competitive procedures" to include "the procedures established by the Administrator of General Services for the multiple awards schedule program" under certain conditions), and thus orders awarded through the FSS program are considered to be the result of full and open competition. *See* 48 C.F.R. § 8.404(a) ("[O]rders placed against a [Multiple Award Schedule], using the procedures in this subpart, are considered to be issued using full and open competition[.]"); *see also* 48 C.F.R. § 6.102(d)(3).

Finally, interpreting the VBA as applying only in competitive procurements is consistent with the VA's position for years. In its 2010 final rule implementing the relevant portions of the VBA, the VA chose to continue relying on the Federal Acquisition Regulation ("FAR") rule prioritizing AbilityOne procurements, rather than supplement that FAR provision with additional requirements in the VA Acquisition Regulation ("VAAR"). Indeed, the VA expressly stated in the Federal Register that implementation of the VBA would not change the VA's obligations with respect to the AbilityOne Program:

> AbilityOne's priority status has not been changed as a result of this rule. Further, this rule does not impact items currently on the

> AbilityOne procurement list or items that may be added in the future.

VA Acquisition Regulation: Supporting Veteran-Owned and Service-Disabled Veteran-Owned Small Businesses, 74 Fed. Reg. 64,619, 64,622 (Dec. 8, 2009); *see also* 48 C.F.R. § 8.002(a) (setting forth priorities for use of mandatory government sources including the Procurement List).

In April 2010, the VA's Office of Acquisition and Logistics issued an Information Letter reiterating that the final rule "does not affect AbilityOne's order of priority in relation to the Veterans First Contracting Program." VA Office of Acquisition and Logistics Information Letter No. 001AL-10-06, II.C., (Apr. 28, 2010).

Following the *Kingdomware* decision, the VA issued a policy memorandum and accompanying class deviation ("2016 Class Deviation") confirming ***again*** that the VA had "a continuing requirement to comply with all statutory mandates," including the JWOD Act. VA Procurement Policy Memorandum (2016-05), p. 11 ¶ b (July 25, 2016). The memorandum instructed contracting officers to follow the procedures outlined in FAR 8.705 for procuring supplies and services listed on the Procurement List. *Id.*; *see also* 48 C.F.R. § 8.705. The VA's abrupt about-face in the 2017 policy at issue here is contrary to *Kingdomware* and the underlying statutes.

For products on the AbilityOne Procurement List, the VBA Rule of Two simply does not apply because those products are not subject to competitive bidding. Under this interpretation, there is no conflict between the VBA and the JWOD Act because the statutes can

be reconciled to operate in their respective spheres. As such, that interpretation—unlike the Federal Circuit's interpretation—is consistent with this Court's precedent.

CONCLUSION

For the reasons stated above and in Winston-Salem Industries' petition for certiorari, NIB urges the Court to grant the petition.

Respectfully submitted,

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