No. 19-

IN THE

Supreme Court of the United States

WINSTON-SALEM INDUSTRIES FOR THE BLIND,
Petitioner,

v.

UNITED STATES OF AMERICA; PDS CONSULTANTS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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September 9, 2019

QUESTIONS PRESENTED

Congress enacted the Javits-Wagner-O'Day Act ("JWOD"), 41 U.S.C. § 8501 *et seq*., to increase employment for individuals who are blind and severely disabled, two groups that have been chronically underemployed throughout history. JWOD furthers its mission by requiring that the federal government acquire certain goods and services exclusively from nonprofit entities that employ blind and severely disabled individuals. Congress also enacted a small business contracting preference for veterans in 38 U.S.C. § 8127(d), which requires the Department of Veterans Affairs (the "VA") to prioritize veteran-owned small businesses in all restricted competitions for the purchase of goods and services. The issues in this case are:

1. Whether the Tucker Act's grant of bid protest jurisdiction to the Court of Federal Claims extends to suits that challenge the lawfulness of a federal agency's acquisition policies and practices, and their underlying statutory foundation, outside the context of a specific solicitation regarding, or the award of, a government contract.

2. Whether Congress intended 38 U.S.C. § 8127(d)'s competitive-bidding preference for providers owned and controlled by veterans to trump the mandatory requirements of JWOD that dictate that agencies must acquire goods and services in the first instance using the AbilityOne Procurement List.

RULE 29.6 STATEMENT

Petitioner Winston-Salem Industries for the Blind has no parent corporation, and, no publicly held corporation holds stock in the organization.

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PETITION FOR A WRIT OF CERTIORARI

Winston-Salem Industries for the Blind ("IFB") respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Federal Circuit (App. 1a-28a) is reported at 907 F.3d 1345. The opinion of the Court of Federal Claims (App. 29a-53a) is reported at 132 Fed. Cl. 117.

JURISDICTION

The Federal Circuit entered judgment on October 17, 2018 (App. 1a), and denied IFB's timely petition for panel rehearing and rehearing en banc on May 10, 2019 (App. 54a-55a). The Chief Justice extended the time to file this petition to September 9, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves two statutes. The first is the Javits-Wagner-O'Day Act, 41 U.S.C. §§ 8501-8506. Section 8503(a)(1) of Title 41 states:

> **(a) Procurement List.—**
>
> (1) Maintenance of list.—The [AbilityOne Commission] shall maintain and publish in the Federal Register a procurement list. The list shall include the following products and services determined by the Committee to be suitable for the Federal Government to procure pursuant to this chapter:

(A) Products produced by a qualified nonprofit agency for the blind or by a qualified nonprofit agency for other severely disabled.
(B) The services those agencies provide.

The following section, 41 U.S.C. § 8504, provides:

(a) In general.—
An entity of the Federal Government intending to procure a product or service on the procurement list referred to in section 8503 of this title 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.

(b) Exception.—
This section does not apply to the procurement of a product that is available from an industry established under chapter 307 of title 18 and that is required under section 4124 of title 18 to be procured from that industry.

The second statute at issue is 38 U.S.C. § 8127(a)-(d):

(a) Contracting goals.—
(1) In order to increase contracting opportunities for small business concerns owned and controlled by veterans and small business concerns owned and controlled by veterans with service-connected disabilities, the Secretary shall—
(A) establish a goal for each fiscal year for participation in Department contracts (in-

cluding subcontracts) by small business concerns owned and controlled by veterans who are not veterans with service-connected disabilities in accordance with paragraph (2); and

(B) establish a goal for each fiscal year for participation in Department contracts (including subcontracts) by small business concerns owned and controlled by veterans with service-connected disabilities in accordance with paragraph (3).

(2) The goal for a fiscal year for participation under paragraph (1)(A) shall be determined by the Secretary.

(3) The goal for a fiscal year for participation under paragraph (1)(B) shall be not less than the Government-wide goal for that fiscal year for participation by small business concerns owned and controlled by veterans with service-connected disabilities under section 15(g)(1) of the Small Business Act (15 U.S.C. 644(g)(1)).

(4) The Secretary shall establish a review mechanism to ensure that, in the case of a subcontract of a Department contract that is counted for purposes of meeting a goal established pursuant to this section, the subcontract was actually awarded to a business concern that may be counted for purposes of meeting that goal.

(b) Use of noncompetitive procedures for certain small contracts.—

For purposes of meeting the goals under subsection (a), and in accordance with this section, in entering into a contract with a small business concern owned and controlled by veterans or a

small business concern owned and controlled by veterans with service-connected disabilities for an amount less than the simplified acquisition threshold (as defined in section 134 of title 41), a contracting officer of the Department may use procedures other than competitive procedures.

(c) Sole source contracts for contracts above simplified acquisition threshold.—
For purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department may award a contract to a small business concern owned and controlled by veterans or a small business concern owned and controlled by veterans with service-connected disabilities using procedures other than competitive procedures if—

(1) such concern is determined to be a responsible source with respect to performance of such contract opportunity;

(2) the anticipated award price of the contract (including options) will exceed the simplified acquisition threshold (as defined in section 134 of title 41) but will not exceed $5,000,000; and

(3) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price that offers best value to the United States.

(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 shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans or small business concerns owned and

> controlled by veterans with service-connected disabilities if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans or small business concerns owned and controlled by veterans with service-connected disabilities will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

The appendix reproduces 38 U.S.C. §§ 8127-8128, 41 U.S.C. §§ 3301, 3303-3304, and 8501-8506, and 48 C.F.R. §§ 8.000-8.004. App. 56a-86a.

INTRODUCTION

Throughout our history, the blind and severely disabled have been the most difficult segment of our nation's population to employ and to keep employed. Recognizing that fact, Congress—first in 1938 and then again with expanded coverage in 1971—passed the Javits-Wagner-O'Day Act ("JWOD"), 41 U.S.C. §§ 8501-8506. Under JWOD, Congress empowered an independent federal agency, which is now known as the AbilityOne Commission, to identify goods and services that reasonably could be provided to the federal government by qualified nonprofit agencies that employ the blind and severely disabled.[1] Congress then directed that any "entity of the Federal Government intending to procure a product or service on the procurement list [maintained by the AbilityOne Commission] *shall procure* the product or service from a qualified nonprofit agency for the blind or a qualified nonprofit agency for other severely disa-

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[1] To qualify as an AbilityOne nonprofit, an entity must source at least 75 percent of its direct labor hours from individuals who are blind or severely disabled. 41 U.S.C. § 8501(6)(C).

bled." *Id.* § 8504(a) (emphasis added). It would be difficult for Congress to draft a mandate that more clearly states how federal agencies should proceed in acquiring goods and services.

Petitioner Winston-Salem Industries for the Blind ("IFB") is one of several hundred nonprofit agencies that supply goods and services to the federal government pursuant to that mandate. IFB's mission centers on the support and empowerment of the blind and visually impaired. Prior to the Federal Circuit's decision, IFB employed over 500 blind and visually impaired individuals in more than 20 facilities across the country, in industries ranging from textiles to office-supply manufacturing to the creation of prescription eyewear for patients at medical centers operated by the Department of Veterans Affairs (the "VA"). But IFB's support for the blind and visually impaired extends far beyond its own employees. IFB also offers educational, life-skills, and vocational programming, as well as vision-related medical services, for blind and visually impaired individuals in the public at large. As discussed at greater length below, the jobs of hundreds of IFB's employees, and the many community-based services that IFB offers around the country, are now in grave jeopardy because of the Federal Circuit's erroneous decision.

Notwithstanding the clarity of Congress's stated intent in enacting JWOD and the fundamental importance of the interests served by that mandate, the Federal Circuit's decision in this case undoes what Congress clearly intended. What is worse is that the court's holding is based on a gross misapplication of a statute that employs a dramatically different tool (restricting the pool of contractors eligible to compete for a contract) to remedy a far different problem (the underutilization of veteran-owned contractors by the

Department of Veterans Affairs) than Congress sought to address in passing JWOD. 38 U.S.C. § 8127(d). To be sure, the Federal Circuit's decision attempts to solve a legitimate concern, but it does so in a way that does irreparable damage to individuals whom Congress commanded should be first in line for jobs that they can perform and have performed successfully.

In the Federal Circuit's stunningly simplistic view of statutory construction, Congress's directive to the VA that it "shall award" contracts to veteran-owned small businesses over other types of small businesses effectively displaced JWOD's identical command that every executive agency "shall" protect the blind and severely disabled. That decision is as wrong as its consequences for the blind and severely disabled are profound.

The Federal Circuit's decision upends a system that has stood, undisturbed, for the better part of a century, without requiring any clear evidence of Congress's intent to perform such significant surgery on the federal acquisitions system. Moreover, the Federal Circuit disregards the time-honored rule that all repeals by implication are disfavored and should be accepted only when there is no way that the two statutes can possibly be harmonized. The laws here easily can be reconciled: JWOD directs the VA first to purchase the relatively limited number of goods and services found on the AbilityOne Procurement List from a qualified nonprofit agency that employs the blind and severely disabled and, for all other goods and services, the VA satisfies its needs by giving preference to veteran-owned businesses over other types of small businesses.

The harms from the Federal Circuit's decision are deeply disturbing. Already, the VA has cancelled

numerous contracts held by AbilityOne nonprofit agencies, which will result in the near-immediate termination of employment of hundreds of blind and severely disabled individuals, some of whom are veterans themselves. The injury does not stop there. The loss of those jobs means there will be a corresponding reduction in the ancillary services that these nonprofit agencies can provide to the blind and severely disabled in their communities, with the ultimate consequence being a greater drain on state and federal safety-net programs. Given the chronic difficulty that blind and severely disabled individuals confront in finding long-term, stable employment, the personal toll imposed by the Federal Circuit's decision will be both debilitating and lasting.

Only this Court can protect countless blind and severely disabled Americans from a devastating loss that Congress never intended. The Court should intervene now to protect those who are most in need of protection.

STATEMENT

A. Governing Legal Framework

Prior to a wave of reforms Congress initiated in the late 1970s and early 1980s, the federal government's system for acquiring goods and services was a crazy-quilt of overlapping and conflicting regulations, with no organized, centralized system for regulating the expenditure of federal contracting dollars. *MAPCO Alaska Petroleum, Inc.* v. *United States*, 27 Fed. Cl. 405, 408, 409 (1992), *abrogated on other grounds by Tesoro Haw. Corp.* v. *United States*, 405 F.3d 1339 (Fed. Cir. 2005) (purpose of reforms was "to unify and simplify the federal procurement system"); "Types of Contracts," 46 Fed. Reg. 42,303 (1981) (stating that the "fundamental purposes" of the new regime are "to

reduce proliferation of regulations; to eliminate conflicts and redundancies; and to provide an acquisition regulation that is simple, clear and understandable").

1. Congress began to rationalize the federal procurement system with the enactment of the Competition in Contracting Act of 1984 ("CICA"). In addition to many other reforms, CICA enshrined a fundamental question at the core of every potential acquisition of goods or services—namely, whether, for each proposed acquisition of goods or services, the government would conduct a "competitive" process or would instead satisfy its needs via one of several (non-competitive), mandatory-sourcing programs Congress had created. See 41 U.S.C. §§ 3301(a)(1), 3304(a)(5); *id.* § 152.

Specifically, where "a statute expressly authorizes or requires that the procurement be made . . . from a specified source," competitive procedures are not to be used, and the acquisition must be made from the source that Congress specified. *Id.* § 3304(a)(5). JWOD, which is at issue here, is one such statute. It requires that any "entity of the Federal Government intending to procure a product or service on the procurement list referred to in section 8503 of this title *shall procure* the product or service from a qualified nonprofit agency for the blind or a qualified nonprofit agency for other severely disabled." *Id.* § 8504(a) (emphasis added). The Procurement List referenced in Section 8504(a) is maintained—and goods and services added or removed—by the AbilityOne Commission, an independent federal agency that is comprised of 15 members appointed by the President, 11 of whom are officers or employees from a set list of federal departments and agencies, including the VA. *Id.* § 8502(b)(1)(H).

Where the government's needs cannot be met through a mandatory source, the acquisition proceeds via a "competitive" process—either the "full and open" competition that is the default under CICA, *id.* § 3301(a)(1), or some form of "restricted" competition—*e.g.*, excluding one or more particular offerors, *id.* § 3303(a), or restricting the pool of eligible offerors to small businesses, *id.* § 3303(b) (allowing agencies to exclude all non-small businesses from a procurement).[2]

2. The other main pillar of Congress's drive to streamline federal procurement processes is the Federal Acquisition Regulation ("FAR"). Since its promulgation in 1984, the FAR has been widely recognized as the single, authoritative source for the order of operations that a federal agency or department must follow when it wishes to obtain goods or services. See *Establishing the Federal Acquisition Regulation*, 48 Fed. Reg. 42,102-01-B (1983).

That order of operations is set forth in Sections 8.002 through 8.004 of the FAR. Reflecting the dichotomy that Congress established in passing CICA, Section 8.002 first directs agencies to "satisfy requirements for supplies and services from or through the mandatory Government sources and publications listed" in Section 8.002(a) and the additional mandatory sources prescribed in Section 8.003. 48 C.F.R. § 8.002(a). One of those mandatory sources is "the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely

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[2] Congress has also mandated that, when agencies are using competitive procedures (which, as noted above, include restricted competition), the agencies must operate "in accordance with the requirements of . . . the Federal Acquisition Regulation." 41 U.S.C. § 3301(a)(1).

Disabled," which is now known as the AbilityOne Commission. *Id.* § 8.002(a)(1)(iv).

Section 8.004 in turn prescribes that, "[i]f an agency is unable to satisfy requirements for supplies and services from the mandatory sources listed in 8.002 and 8.003," the agency then turns to competitive processes. *Id.* § 8.004. Within the world of "competitive" procurement, Congress has established a system of preferences to aid agencies in selecting a contractor to fulfill requirements that must be satisfied from competitive sources. See 41 U.S.C. § 3303(a)-(b) (authorizing agencies to restrict competition by excluding one or more potential offerors and by limiting the pool of potential offerors to certain small businesses).

For example, federal agencies may, in certain circumstances, "set aside an individual acquisition or class of acquisition for competition among small businesses." *Id.* § 19.502-1(a). One threshold requirement for pursuing small business set-asides is the agency's reasonable expectation that offers will be received from "two or more responsible small business concerns that are competitive in terms of market prices, quality and delivery." *Id.* § 19.502-2(a). This threshold inquiry, which has applied for decades with all types of competitive small business set-asides, is known as the "Rule of Two."

3. In 1953, Congress passed the Small Business Act, Pub. L. No. 83-163, 67 Stat. 232. In that statute and its various amendments, Congress authorized federal agencies to set aside part or all of any particular competitive acquisition for small business concerns, provided (among other criteria) the Rule of Two is satisfied. See 15 U.S.C. § 637(a)(1)(D)(i) ("A contract opportunity offered for award pursuant to this subsection shall be awarded on the basis of competition restricted to eligible Program Participants

if . . . there is a reasonable expectation that at least two eligible Program Participants will submit offers and that award can be made at a fair market price . . . ."). This set-aside program allows contracting officers to restrict competition to particular types of small business concerns, including HUBZone small businesses,[3] service-disabled veteran-owned small businesses, and small businesses owned by historically disadvantaged individuals. *Ibid.*; see also 48 C.F.R. §§ 19.805-1, 19.1305, 19.1405.

When Congress enacted the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127-8128 (the "2006 VBA"), it sought to "increase contracting opportunities" for businesses owned by veterans. 38 U.S.C. § 8127(a). It did so, in part, by reshuffling the system of permissive set-asides established by the Small Business Act. In particular, the 2006 VBA establishes a *mandatory* (rather than a permissive) narrowing of the pool of eligible offerors by prioritizing "small business concerns owned and controlled by veterans" for all competitive contracting opportunities offered by the VA and creates a heightened Rule of Two standard for this purpose. Section 8127(d) thus provides, in relevant part:

> 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 [of Veterans Affairs] *shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans* if the contract-

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[3] A "HUBZone small business" is one located within a "historically underutilized" zone. *See generally* HUBZone Act of 1997, Pub. L. No. 105-135, 111 Stat. 2592.

> ing 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) (emphasis added).

The central issue in this case is how this competitive preference can be reconciled with JWOD's noncompetitive mandatory-source directive.

B. Factual And Procedural History

1. The VA's provision of medical services is organized by geographic regions, known as VISNs (Veterans Integrated Service Networks). Each VISN contains multiple VA medical centers. Prior to this lawsuit, the AbilityOne Procurement List included prescription eyewear for VISNs 2-North (upstate New York) and 7 (Alabama, South Carolina, and northern and central Georgia), and some locations in VISN 8 (Florida, Puerto Rico, the U.S. Virgin Islands, and southern Georgia). The AbilityOne Commission designated IFB as the nonprofit agency to provide prescription eyewear in those VISNs. Indeed, IFB has been the provider for VISN 2 since 2006, for VISN 7 since 2002, and for some locations within VISN 8 since 2001. See 67 Fed. Reg. 15,173-02, 15,174 (2002) (VISN 7); 70 Fed. Reg. 73,195-01, 73,195-96 (2005) (VISN 2); 80 Fed. Reg. 48,830-01, 48,830 (2015) (VISN 8); 79 Fed. Reg. 18,892-01 (2014) (same); 65 Fed. Reg. 78,466-02 (2001) (same).

2. In August 2016, respondent PDS Consultants, Inc. ("PDS") instituted this lawsuit in the Court of Federal Claims, styling the case as a bid protest and naming the United States as a defendant. App. 56a. IFB sought and was granted leave to intervene.

Although it had labeled its case a "bid protest," PDS did not challenge any specific solicitation, request for proposals, or contract award. Instead, PDS's Complaint challenged the validity of a VA policy memorandum, a final order of the AbilityOne Commission, and the VA's decision to continue purchasing certain vision-related products from IFB in VISNs 2 (North), 7, and 8 pursuant to its preexisting contracts. PDS alleged that each of these determinations was irreconcilable with the 2006 VBA as interpreted by this Court in *Kingdomware Technologies, Inc.* v. *United States*, 136 S. Ct. 1969 (2016), and what PDS believed to be the VA's statutory obligation to conduct a Rule of Two analysis for *all* of its acquisitions of goods and services—even those listed on the AbilityOne Procurement List. App. 89a (Compl. ¶ 6).

Both IFB and the Government sought judgment on the administrative record, arguing that (1) PDS's claims rested on a misreading of *Kingdomware*, because that case had not addressed the statutory-construction question presented here; and (2) in any event, PDS was reading the 2006 VBA far too broadly and without regard to the distinction between competitive procedures (including competition that is restricted to a subset of potential offerors) and the mandatory-source procedures established by JWOD. The Government also sought dismissal of PDS's claims on the ground that they did not fall within the limited jurisdiction conferred on the Court of Federal Claims by the Tucker Act. App. 43a. PDS cross-moved for judgment on the administrative record. *Ibid.*

On May 30, 2017, the court granted PDS's motion and denied the Government's and IFB's. App. 53a. Specifically, the court held that (1) PDS's challenge qualified as a "bid protest" within the scope of juris-

diction conferred by the Tucker Act, App. 45a; and (2) the 2006 VBA requires the VA to perform a Rule of Two analysis before reverting to the AbilityOne Procurement List and treating it as a mandatory source, App. 50a-51a. The court entered judgment in PDS's favor on June 30, 2017, and both the Government and IFB timely appealed to the Federal Circuit. IFB sought, and the Court of Federal Claims granted, a stay of its judgment pending appeal.

On October 17, 2018, a three-judge panel affirmed the judgment of the Court of Federal Claims. The Federal Circuit first agreed with the Court of Federal Claims that PDS's lawsuit qualified as a bid protest and therefore was within the exclusive jurisdiction of the Court of Federal Claims. App. 17a-20a. On the merits, the Federal Circuit held that JWOD and the 2006 VBA conflicted with one another and that, as the later-in-time and (supposedly) narrower of the two statutes, the VBA's mandate supersedes JWOD for all acquisitions of goods and services by the VA. App. 23a-26a.

On March 12, 2019, IFB petitioned the full Federal Circuit for rehearing *en banc*, which that court denied on May 10, 2019. App. 55a.

REASONS FOR GRANTING THE PETITION

I. THE FEDERAL CIRCUIT IMPERMISSIBLY EXPANDED THE TUCKER ACT'S GRANT OF BID PROTEST JURISDICTION TO THE COURT OF FEDERAL CLAIMS.

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) (citations omitted). But that

does not mean that all federal courts are created equal or with equivalent jurisdiction. To the contrary, Congress has been meticulous in setting the metes and bounds between the jurisdiction of the district courts, on the one hand, and the jurisdiction of various Article I tribunals—from the Court of International Trade, to the Tax Court, to the Court of Federal Claims—on the other. See, *e.g.*, *Hinck* v. *United States*, 550 U.S. 501 (2007) (Tax Court has exclusive jurisdiction to review IRS denials of requests to abate interest); *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988) (agency actions reviewable in district court pursuant to the APA rather than the Court of Federal Claims pursuant to the Tucker Act). The decision below upends that careful allocation of decisional authority, and dramatically expands the jurisdiction of the Court of Federal Claims at the expense off the district courts. Review is warranted to restore the jurisdictional balance struck by Congress.

A. The Tucker Act's Grant Of Bid-Protest Jurisdiction Is Restricted To Challenges To Specific, Identified Procurements.

The Court of Federal Claims' bid-protest jurisdiction stems from the Tucker Act, which was passed by Congress in 1887. As amended, the Tucker Act grants the Court of Federal Claims jurisdiction over "action[s] 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).

The root of the Federal Circuit's jurisdictional error was its failure to recognize that this text restricts the Court of Federal Claims' jurisdiction to agency action taken in the context of, and in connection with, a spe-

cific, identified procurement. That intent is apparent in, among other things, Congress's enumeration of a closed list of actions that may be challenged:

- "a solicitation . . . for bids or proposals for a proposed contract;"
- "a proposed award . . . of a contract;"
- "the award of a contract;" and
- "any alleged violation of statute or regulation in connection with a procurement or proposed procurement."

Ibid.

Of course, if Congress had wanted a capacious grant of jurisdiction, it could have accomplished that easily, *e.g.*, with a conferral of jurisdiction over "actions by an interested party objecting to anything done or not done in connection with or relating to the Federal Government's acquisition of goods or services." Congress did not choose such all-encompassing language, however, and its more targeted conferral of jurisdiction warrants respect. See, *e.g.*, *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 686 n.8 (1983) ("If Congress had intended the far-reaching result urged by respondents, it plainly would have said so, as is demonstrated by Congress' careful statement that a *less* sweeping innovation *was* adopted." (emphasis in original)).

The procurement-specific scope of Section 1491(b)(1) is confirmed by its use of the term "interested party," which federal procurement law defines as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by failure to award the contract." See 31 U.S.C. § 3551(2)(A); *Am. Fed'n of Gov't Emps., AFL-CIO* v. *United States*, 258 F.3d 1294

(Fed. Cir. 2001) (applying Section 3551's definition of "interested party" to the Tucker Act). This is in contrast to the meaning of "interested party" under the APA, which is phrased in much broader terms that better align with the sort of inchoate interest in future contracting opportunities that PDS sought to vindicate with its lawsuit. See 5 U.S.C. § 702 (defining "interested party" as "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action").

This construction of the Court of Federal Claims' jurisdiction finds further support in Congress's enactment of the Administrative Dispute Resolution Act of 1996 ("ADRA"), Pub. L. No. 104-320, 110 Stat. 3870. "Prior to the ADRA, the Court of Federal Claims and the federal district courts had enjoyed overlapping jurisdiction to hear" bid protests. *Labat-Anderson, Inc.* v. *United States*, 346 F. Supp. 2d 145, 149 (D.D.C. 2004). ADRA, however, ended that overlap as of January 1, 2001. See Pub. L. No. 104-320, § 12(d), 110 Stat. 3870, 3875 (1996), codified at 28 U.S.C. § 1491 note.

The result was a clear divide between the respective courts' jurisdictional mandates: where a plaintiff challenges the *validity* of an agency's policies, rules, or regulations related to purchasing or procurement generally, as opposed to their proper *application* in the context of a particular procurement, such a challenge is properly brought under the APA, and jurisdiction resides solely in federal district court. And where, by contrast, the plaintiff seeks to challenge the selection of a particular offeror, the requirements of a particular request for proposals, or the application of the agencies' rules or policies to a particular solicitation, its challenge is cognizable as a bid protest in the Court of Federal Claims. As shown below,

PDS's claims fall on the district court side of this divide.

B. PDS's Claims Fall Outside The Tucker Act's Limited Jurisdictional Grant.

As noted above, PDS challenged various VA procurement rules and directives on their face and without regard to any specific procurement. Accordingly, its claims should have been brought in district court pursuant to the APA.

PDS's Complaint shows this clearly. It sought review of (1) "a recent VA Policy Memorandum that authorizes orders from [petitioner] and AbilityOne without first conducting a Rule of Two analysis;" (2) a final rule issued by the AbilityOne Commission "requiring the VA to purchase vision-related products from IFB as a mandatory source for VISN 6;" and (3) the VA's "continued ordering certain vision-related products from [IFB] for certain [VISNs]" pursuant to the VA's existing contracts with IFB. App. 89a (Compl. ¶ 6).

Further, PDS framed its requested relief in generic terms, seeking to force the VA to align all of its future contracting decisions with PDS's view of the law—as opposed to modifying, suspending, or canceling any particular procurement. For example, PDS requested "permanent injunctive relief ordering the VA not to conduct any 'contracting determination' (including award of a contract or issuance of an order) without first conducting a Rule of Two analysis." App. 90a (Compl. ¶ 8); see also *ibid.* (Compl. ¶ 8) (seeking "a declaratory judgment that VA procurements must be conducted in accordance with the plain language of the VBA, and that the VBA holds priority over purported 'mandatory' purchasing requirements under [JWOD]"); *ibid.* (Compl.¶ 9) (demanding "permanent

injunctive relief ordering the Committee to cease adding any new products or services relating to the VA" to the Procurement List "without first ensuring that the VBA" was being adhered to).[4]

The Federal Circuit's decision finding jurisdiction was error. The source of that error appears to be the Federal Circuit's overbroad belief that because "the VBA is a statute that relates to all VA procurements" and that "dictates the methodology the VA must employ for its procurements," any legal challenge seeking to conform the VA's conduct to the requirements of the VBA could properly be brought as a (nominal) bid protest. App. 19a.

That holding has no basis in the text of the Tucker Act. To be sure, Section 1491(b) does refer to statutory violations, but it does so *in the context of a particular procurement*. It does not authorize a legal challenge that alleges a conflict between an agency's general procurement *practices* and the requirements of federal procurement law. See 28 U.S.C. § 1491(b)(1) (granting jurisdiction over challenges to "any alleged violation of statute or regulation *in connection with* ***a*** *procurement or proposed procurement*" (emphasis added)).

The Federal Circuit's fallback justification is that PDS's request for judicial "review of the Department's continued ordering of certain vision-related products" in VISNs 2 and 7, App. 89a (Compl. ¶ 6), qualifies as a challenge to a "procurement" for Tucker Act purposes because "all stages of the process of acquiring property or services" prior to "contract completion and closeout" qualifies as a "procurement" under the

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[4] PDS's Prayer for Relief is to much the same effect. App. 75a-76a.

Tucker Act, App. 19a (internal quotation marks omitted).

Dubbing PDS's challenge a "bid protest" strains credulity for three reasons. First, the Federal Circuit's sweeping definition of "a procurement" ignores this Court's caution that waivers of sovereign immunity are to be narrowly construed in favor of the sovereign. *McMahon* v. *United States*, 342 U.S. 25, 27 (1951).

Second, that definition likewise ignores—or, more precisely, assumes that Congress ignored—the need for there to be a reasonable end-point to disappointed bidders' ability to disrupt the Government's acquisition of goods and services.

Third, the Federal Circuit's classification of PDS's suit as a bid protest obscures the suit's true nature as a challenge to the addition of vision products and services to the Procurement List—decisions that were made for both VISNs 2 and 7 well over a decade ago. It is difficult to believe that Congress would have considered such stale decisions to be fair fodder for a "bid protest," especially because Congress has prescribed a method for challenging both the addition of items to the AbilityOne Procurement List and the removal of (or the AbilityOne Commission's refusal to remove) items from that list: an action in district court under the APA. See 41 U.S.C. § 8503(a)(2) (directing that any changes to the AbilityOne Procurement List be effectuated through notice and comment rulemaking pursuant to the APA); see also, *e.g.*, *McGregor Printing Corp.* v. *Kemp*, 20 F.3d 1188 (D.C. Cir. 1994) (setting aside decision to add tabulating machine paper to Procurement List); *HLI Lordship Indus., Inc.* v. *Comm. for Purchase from the Blind*, 791 F.2d 1136 (4th Cir. 1986) (setting aside decision to add military medals to Procurement List); *Platt*

River Indus., Inc. v. *Comm. for Purchase from People Who Are Blind or Severely Disabled*, No. 07-CV-00842-CMA-CBS, 2010 WL 965524 (D. Colo. Mar. 16, 2010).

This litigation is not a "bid protest;" it is a demand for declaratory and injunctive relief under the APA. The Federal Circuit's erosion of the scheme established by Congress should be reviewed by this Court and reversed.

II. THE FEDERAL CIRCUIT'S DECISION INCORRECTLY READ THE 2006 VBA AS SUPERSEDING JWOD'S MANDATORY-SOURCE DIRECTIVE FOR VA ACQUISITIONS.

A. The Federal Circuit's Decision Ignores The Statutory Text, Context, And History Of Both JWOD And The 2006 VBA.

The upshot of the Federal Circuit's statutory analysis is that Congress intended to use a single subsection in a veterans-benefits statute to rewrite fundamental features of a complex statutory acquisitions system that has been in place—and essentially undisturbed—for over 30 years.

As explained above, under that system, an agency first determines whether a particular product or service is included on the Procurement List thereby mandating that it be acquired through the AbilityOne Program, see 41 U.S.C. §§ 3301(a), 3304(a); 48 C.F.R. § 8.002. If so, the agency simply buys the good or service from an AbilityOne nonprofit. If not, then the agency ascertains whether it must (or may) narrow the field of potential commercial providers of that good or service—*i.e.*, use restricted (as opposed to "full and open") competition to source the items in question, see 41 U.S.C. §§ 3301(a), 3303(a); 48 C.F.R.

§ 8.004. See generally *Establishing the Federal Acquisition Regulation*, 48 Fed. Reg. 42,102-01-B (1983). Without any basis, the Federal Circuit flipped that order and, in the process, undermined the primacy of the AbilityOne Program, left countless blind and severely disabled Americans jobless, and undermined the foundation of the federal acquisitions process. Its analysis accords with neither the statutory text nor the obvious purpose that animated both statutes.

1. Section 8127(d) operates in parallel with, and does not supersede, the mandatory-source directive of JWOD.

The Federal Circuit's construction of JWOD and the 2006 VBA cannot be squared with the available textual and historical evidence of Congress's intent.

Start with the text of Section 8127(d) that governs VA procurements. It provides:

> 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 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 [such] businesses . . . will submit offers . . . .

38 U.S.C. § 8127(d) (emphasis added). In holding that this provision requires the VA to "apply competitive mechanisms to determine to whom the contract should be awarded" whenever "the Rule of Two is triggered," the Federal Circuit relied exclusively on the fact that this provision "by its express language . . applies to *all* contracts—not only *competitive* contracts." App. 22a (emphasis in original).

To begin, the longstanding consensus view of federal acquisitions law is that restricting the pool of eligible offerors to small businesses (or veteran-owned small businesses) is both conceptually distinct from, and procedurally subsequent to, an agency's determination whether its needs can be fulfilled by a mandatory source. Compare 41 U.S.C. § 3303(b) ("An executive agency may provide for the procurement of property or services covered by section 3301 of this title *using competitive procedures*, but excluding other than small business concerns . . . ." (emphasis added)), with *id.* § 3304(a)(5) (authorizing use of "procedures *other than competitive procedures* . . . when . . . a statute expressly authorizes or *requires that the procurement be made . . . from a specified source* . . . ." (emphases added)). See also 48 C.F.R. § 8.004 (authorizing use of competitive procedures "[i]f an agency is unable to satisfy requirements for supplies and services from the mandatory sources listed in 8.002 and 8.003" and directing agencies, when using competitive procedures, to "see 7.105(b) and part 19 regarding consideration of . . . veteran-owned small business, service-disabled veteran-owned small business, [and other small business] concerns").

Nor is there any doubt that Section 8127(d) mandates a form of "restricted competition" based on a strict and specific application of the Rule of Two (rather than a mandatory source). The text itself bears this out, saying that awards shall be made "on the basis of *competition restricted* to small business concerns owned and controlled by veterans" whenever the Rule of Two is satisfied. 38 U.S.C. § 8127(d) (emphasis added). The title of Section 8127(d), "Use of restricted competition," further supports this conclusion. See *Porter* v. *Nussle*, 534 U.S. 516, 527-28 (2002) (quoting *Almendarez-Torres* v. *United States*,

523 U.S. 224, 234 (1998), for the proposition that "[t]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute"); accord *Fla. Dep't of Revenue* v. *Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008). If that were not enough, it has been understood for decades that "the 'rule of two' is part of *the standard of competitiveness* required before an acquisition may be set aside for small business." Federal Acquisition Regulation (FAR) "Rule of Two"; Requirements for Setting Aside Acquisitions for Small Business, 49 Fed. Reg. 40,135-01 (1984) (emphasis added).

The fact that Section 8127(d) dictates whether unrestricted or restricted competition shall be used, and what sort of restriction should be imposed, is reinforced by Section 8127(h), which articulates the hierarchy of preferences the VA should use when judging between various otherwise-qualified offerors. That subsection, which is titled "Priority for Contracting Preferences," states that "[p]references for awarding contracts to small business concerns shall be applied in the following order of priority" and then lists (1) small businesses owned and controlled by service-disabled veterans, (2) small businesses owned and controlled by non-service-disabled veterans; (3) small businesses owned and controlled by socially and economically disadvantaged individuals; (4) HUBZone small businesses; and (5) any other small business preference.

This text, moreover, is consistent with the Senate Report that accompanied the final version of what became Section 8127: "New Section 8127 . . . would give preference to small businesses owned and controlled by veterans relative to other set-aside groups and within other set-aside groups when another set-aside

contracting preference category is being used by VA." 152 Cong. Rec. S11609-03, S11615 (Dec. 8, 2006).

In short, the textual and historical evidence demonstrates that Section 8127 addresses how the VA should restrict competition for individual procurements subject to competitive processes; it has no bearing at all on the antecedent question whether a particular good or service should be obtained from a non-competitive mandatory source or, instead, through a competitive process.

A comparison of the text of Section 8127(d) to that of JWOD confirms their different orientation. Whereas Section 8127(d) tells an agency *how it should decide* where to obtain its goods and services (*i.e.*, by directing the agency to use "restricted competition"), 38 U.S.C. § 8127(d), JWOD affords the agency no discretion in selecting the ultimate source for the good or service and instead simply tells the agency where to buy the product (from the nonprofit agency designated by the AbilityOne Commission) and even how much to pay for it—"the price the [Commission] establishes," 41 U.S.C. § 8504(a).

What is more, if Congress had wanted to supersede JWOD's mandate, it had a clear model it could have used based on the subsection immediately following JWOD's purchasing mandate. Section 8504(b) states that JWOD's directive "does not apply to the procurement of a product that is available from an industry established under chapter 307 of title 18 and that is required under section 4124 of title 18 to be procured from that industry," *i.e.*, from Federal Prison Industries. 41 U.S.C. § 8504(b). Congress included no such carve-out for the VA, however, which further underscores that, just like the set-aside preference methodology described in the Small Business Act, Section 8127(d) was intended to operate in paral-

lel with—rather than supersede—the requirements of JWOD.

2. The Federal Circuit's contrary conclusion rests on an overly narrow reading of the statutory text.

Rather than heed the structural, historical, textual, and contextual evidence described above, the Federal Circuit rested its analysis on a single phrase from Section 8127(d). It held: "Rather than limit its application to competitive contracts, § 8127(d) requires the VA to 'award contracts on the basis of competition.' That is, by its express language, the statute applies to *all* contracts—not only *competitive* contracts." App. 22a. This conclusion ignores the broader context of federal acquisitions law and the different methods federal agencies follow in acquiring goods or services—no competition, restricted competition, or "full and open" competition—discussed above.

That failure, in turn, led the court to ignore the remainder of the clause it quoted—namely, language directing the VA to "award contracts on the basis of competition *restricted to small business concerns owned and controlled by veterans*." 38 U.S.C. § 8127(d) (emphasis added). The emphasized language shows that Congress was telling the VA (1) which form of competitive procedures to use ("full and open," "full and open" but with one or more particular offerors excluded, or restricted to a particular pool of offerors); and (2) to what precise pool of prospective offerors it should restrict its solicitations.

In sum, by focusing on a particular phrase unmoored from both its surrounding text and the broader statutory context, the Federal Circuit found a conflict where none existed and dramatically over-read

the extent of the revision to federal acquisition law that Congress effected in the 2006 VBA.[5]

Once the Federal Circuit's perceived conflict is removed, that court's remaining analysis—which focused chiefly on which of the two statutes was "more specific" and which was "more general"—becomes superfluous. In the first place, the specific-versus-general canon of construction is a statutory tool that applies only when two provisions are in irreconcilable conflict or one would render the other superfluous. *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012). As shown above, however, there is neither conflict nor superfluity in JWOD and the 2006 VBA, and so this canon has no purchase here.

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[5] This error also infected the Federal Circuit's comparison of the 2006 VBA to the 2003 VBA. The Federal Circuit concluded that, because the 2003 VBA stated that contracting officers "'*may* award contracts on the basis of competition restricted to small business concerns owned and controlled by service-disabled veterans,'" the use of the word "shall" in the 2006 VBA meant that Congress intended the 2006 VBA to trump all other directives on how agency procurement needs should be sourced. App. 24a-25a. Again, this ignores the fact that the veterans preferences at issue all occur within the "competitive" side of the federal-procurement universe. Viewed through that lens, the Federal Circuit's construction is plainly wrong. The 2003 VBA afforded *all* federal agencies *discretion* to use restricted (as opposed to "full and open") competition in order to increase the share of federal contracting dollars directed to small businesses owned and controlled by service-disabled veterans. The 2006 VBA, by contrast, gave a mandatory directive to the VA—and the VA alone—that it *must* use restricted (rather than "full and open") competition whenever there will be an adequate number of veteran-owned businesses as offerors. But *neither* statute even purports to trench on the scheme Congress has established for mandatory-source (*i.e.*, no-competition) acquisitions.

Moreover, the Federal Circuit's conclusion makes little sense even on its own terms. It determined that the 2006 VBA is "more specific" because it affects only a single agency, whereas JWOD is "more general" because it applies to all agencies government-wide. App. 23a. But the question of specificity depends entirely on the question one chooses to ask. When the question is, as the Federal Circuit framed it, "Which statute applies to a narrower subset of federal agencies?" the answer is (quite obviously) the VBA. But if the question were, instead, "Which statute applies to a narrower subset of products or services to be procured?" the answer would be JWOD.[6] General versus specific simply does not help to interpret these statutes and has no role in statutory analysis where (as here) they can easily be read in harmony.

The Federal Circuit also misread 38 U.S.C. § 8128(a), which provides that, when the VA "procur[es] goods and services pursuant to a contracting preference under [Title 38] or any other provision of law," it "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*." 38 U.S.C. § 8128(a) (emphasis added). The Federal Circuit read this provision as requiring that, in cases where the VA wishes to obtain a product or service that appears on the Procurement List, it must first apply the Section 8127(d) Rule of Two to determine if it can instead source the

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[6] In 2017, for example, only $113 million of the VA's $26 billion contracting budget went to the purchase of goods and services from AbilityOne nonprofits, versus the $5.1 billion that went to small businesses owned by service-disabled veterans. *See* Federal Schedules, Inc., VA Agency Spending: FY 2017 Agency Spending, https://gsa.federalschedules.com/resources/va-agency-spending/ (last visited Sept. 6, 2019).

good or service from a veteran-owned business. App. 27a-28a.

That reading does not withstand scrutiny. Even assuming that JWOD qualifies as a "contracting *preference*," a qualified AbilityOne nonprofit agency could not be displaced in favor of a veteran-owned business pursuant to section 8128(a) unless that veteran-owned business "also me[t] the requirements of [JWOD]." 38 U.S.C. § 8128(a). But it is literally impossible for an entity to qualify *both* as a veteran-owned small business concern for purposes of the 2006 VBA (which requires that the entity be "organized for profit," 13 C.F.R. § 121.105), and also be a *not-for-profit* organization (which is required to qualify as a JWOD provider, 41 U.S.C. § 8501(6)(A)(iii), (7)(A)(iii)). Simply put, no business that qualifies for a contracting preference under the 2006 VBA can also "mee[t] the requirements of [JWOD]." 38 U.S.C. § 8128(a).

The only remaining argument offered in support of the Federal Circuit's conclusion is its observation that, unlike the 2006 VBA, the 2003 VBA had contained an express cross-reference to JWOD and reminded contracting officers that the preference contained therein had no effect on the mandatory-source side of the contracting universe. App. 24a-25a. In light of the other indicia of congressional intent surveyed above, the negative inference that the Federal Circuit drew from the textual differences in different statutes, enacted by different Congresses, in order to amend different titles of the U.S. Code (Title 15 in 2003 and Title 38 in 2006), simply cannot bear the weight of the Federal Circuit's holding. See note 5, *supra*.

B. The Federal Circuit's Decision Runs Counter To Additional Norms Of Statutory Construction.

In addition to the textual errors described above, the Federal Circuit also ran afoul of several additional—and well-established—guideposts that this Court has established for ascertaining congressional intent.

First, and most fundamentally, the Federal Circuit was clearly wrong to place overriding weight on the use of the single phrase "shall award" in the 2006 VBA. If Congress had intended to use that statute to *both* displace a social benefit program that had existed for nearly a century *and* alter fundamental attributes of an acquisitions system that had existed for decades, it surely would have said so in Section 8127(d). *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

Second, the Federal Circuit failed to heed this Court's command that its task in construing two potentially inconsistent statutes is to harmonize them with each other *and* with the broader purpose of the law. See *Watt* v. *Alaska*, 451 U.S. 259, 266-67 (1981) ("We must read the statutes to give effect to each if we can do so while preserving their sense and purpose."); cf. *Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring in the judgment) (courts should construe statutes to have the reading that is, *inter alia*, "most compatible with the surrounding body of law into which the provision must be integrated"). This directive is particularly important where, as here, the two statutes concern an intricate federal regime and one reading of the

statutes in question would effect a fundamental change to the operation of that scheme.

Third, in its haste to declare the VBA preeminent as the "later-enacted" of the two statutes at issue, the Federal Circuit defied the principle that "repeals by implication are not favored" and should be found only where the two statutes are not "capable of co-existence." *Morton* v. *Mancari*, 417 U.S. 535, 549, 551 (1974) (citation and internal quotation marks omitted). Had it looked any deeper than the presence of the word "shall" in both statutes, the Federal Circuit would have recognized that JWOD and the 2006 VBA are not irreconcilable and, indeed, each has full, operative effect within its respective sphere (non-competitive mandatory-source acquisitions on the one hand and competitive procurements on the other).

Fourth, the Federal Circuit's construction of Section 8127(d) yields illogical and inconsistent results that Congress could not have intended. For example, and as the U.S. Government Accountability Office noted in a recent bid protest, if *PDS Consultants* means what it says, then even VA printing requirements that would normally be fulfilled pursuant to the printing acquisition authority of the Government Publishing Office ("GPO") would need to be sourced via a Rule of Two inquiry. See *Veterans4You, Inc.*, B-417340, June 3, 2019, 2019 CPD ¶ 207 n.2. This is despite the fact that Congress previously directed that *all* printing work for *all* executive agencies ***must*** be done by or through the GPO. See 44 U.S.C. § 501; FAR 8.003, 8.008. Similarly, taking the Federal Circuit's decision at face value would mean that the VA must conduct a § 8127(d) Rule of Two analysis before it acquires public utility services, which likewise are listed as a mandatory-source service. 40 U.S.C. § 501. It would be surpassingly strange for Congress

to direct the VA to prioritize veteran-owned suppliers for printing services (despite directing the entire rest of the government to use the GPO) and public utility services (despite the extreme unlikelihood of finding public utilities that are owned and operated by veteran-owned, for-profit companies).

Finally, the Federal Circuit's analysis seems to assume that, if the Rule of Two analysis fails to identify two qualified veteran-owned contractors, then the VA can simply turn back to the AbilityOne Procurement List to source its needs. App. 27a-28a; cf. App. 53a (trial court opinion). The problem, however, is that such an approach directly conflicts with the text of Section 8127(h), which directs that "[p]references for awarding contracts to small business concerns shall be applied in the [listed] order of priority." 38 U.S.C. § 8127(h). Small businesses owned by service-disabled veterans are first on that list, followed by other veteran-owned small businesses, and then various other types of (non-veteran-owned) small businesses. *Id.* § 8127(h)(1)-(4). No mention is made of JWOD or the AbilityOne Procurement List, and the Federal Circuit's decision fails to explain why, without some textual direction to do so, the VA would revert to the AbilityOne Procurement List after failing to satisfy the § 8127(d) Rule of Two rather than simply follow the hierarchy of small-business preferences set forth in Section 8127(h).

In short, neither the statutory text nor any other indicia of congressional intent support the sweeping effect that the Federal Circuit ascribed to Section 8127(d).[7] Granting certiorari in this case would allow

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[7] The Federal Circuit's reliance on *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969 (2016), is likewise misplaced. The Court's decision in that case addressed only two issues:

the Court to clarify the longstanding distinction between mandatory and non-mandatory sources in federal procurement law, and to ensure that the Federal Circuit's interpretation of the interplay between JWOD and the VBA is not allowed to disrupt the broader federal procurement system.

III. THE QUESTIONS PRESENTED ARE IMPORTANT BECAUSE THE FEDERAL CIRCUIT'S DECISION WILL IRREPARABLY DEVASTATE THE LIVES AND LIVELIHOODS OF COUNTLESS BLIND AND SEVERELY DISABLED AMERICANS.

This case is particularly worthy of review given the devastating effects the Federal Circuit's decision has had—and will continue to have—on individuals who are blind and severely disabled.

Immediately following the Federal Circuit's issuance of the mandate in this case, the VA began notifying numerous AbilityOne non-profit agencies that their contracts were in the process of being—or soon would be—terminated. IFB, for example, has been notified that its optical contracts in VISNs 2, 7, and 8 are being canceled, which will cause scores of blind individuals, including 15 veterans, to lose their jobs.

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(1) whether the VBA's directive "to use the Rule of Two before contracting *under the competitive procedures*" applies even after VA meets its veteran-owned small business subcontracting goals, 136 S. Ct. at 1976-77 (emphasis added); and (2) whether the Rule of Two analysis applies to orders placed under the Federal Supply Schedule (which is a form of competitive source selection), *id.* at 1978-79. Because neither of those questions required the Court to assess the interplay between Section 8127(d) and *non-competitive*, *mandatory-source* acquisition regimes like the Procurement List, the Federal Circuit's out-of-context invocation of *Kingdomware* was in error.

The impact of the Federal Circuit's decision does not end with IFB. As both the National Association for the Employment of People Who Are Blind and multiple AbilityOne nonprofit agencies will attest in their forthcoming amicus briefs, numerous other AbilityOne nonprofits are faring similarly. For example, on July 30, 2019, the VA notified Alphapointe, another AbilityOne nonprofit, of its intent to terminate Alphapointe's contract for the provision of switchboard telephone operator services at the Kansas City VA Medical Center and instead award the services on a sole-source basis to a small business owned by a service-disabled veteran. See VA Solicitation No. 36C-25519-Q-0004. The VA has also terminated contracts with Goodwill Industries of South Florida and Phoenix Industries in Alabama, both AbilityOne nonprofits that produce internment flags for the VA.

These business impacts are just the tip of the iceberg and, if anything, mask the true human toll that these cancellations will inflict. Hundreds, if not thousands, of blind and severely disabled people will lose the only jobs they have ever held. The impact of losing a job for a person who is blind or severely disabled is far greater than for other workers. For example, if a person who is blind loses a job, he or she is more than twice as likely never to go back to work. Data from 2016-2017 indicate that only 37 percent of visually impaired Americans of working age are in the workforce—25 percent employed and 12 percent unemployed but looking for work. See American Foundation for the Blind, Key Employment Statistics for People Who Are Blind or Visually Impaired, https://www.afb.org/research-and-initiatives/statistics/key-employment-statistics#Estimate (last visited Sept. 6, 2019). In contrast, workforce participation

among the sighted and able-bodied population in the same age cohort was 73 percent, with only a 5 percent unemployment rate. *Ibid.* Many of these blind and severely disabled individuals will be forced to rely on various public assistance and social safety-net programs, to the great detriment of both those individuals and the local, state, and federal support systems on which they will now be forced to rely.

Nor are the impacts of the Federal Circuit's decision limited to the employees of AbilityOne nonprofits. Many of those entities use revenues from their AbilityOne contracts to operate unique and critical programs that support the blind and severely disabled throughout their broader communities—programs they will be required to curtail or discontinue in light of these cancellations. IFB, for example, operates low-vision centers, related mobile centers, and community-outreach programs for the blind, as well as summer camp and after-school programs that serve approximately 200 blind or visually impaired children each year. All told, these programs serve approximately 4,000 visually impaired individuals each year.

With the projected loss the revenue from its AbilityOne contracts, the entire low vision program would be in jeopardy, which would threaten both the services themselves and the jobs of those IFB employees who provide them. At a minimum, community outreach and focus on literacy programs (which provide free assistive technology to children to use for educational enrichment and growth) would likely be reduced or eliminated, including elimination of approximately 20 annual mobile community clinics held in IFB's service area. Those impacted include people like a student who had been deemed "slow" by her teachers but, because of IFB's low vision clinic, was

diagnosed with impaired vision and provided with a CCTV low vision video magnifier. IFB's assistance enabled her to read and do her homework, and she quickly caught up with her grade level.

Given the historic and chronic nature of unemployment of individuals who are blind or severely disabled, individuals whose jobs are lost on account of the Federal Circuit's decision likely face years of unemployment going forward. Nor will there be any ready or easy replacement for the medical and vocational services that will be stripped away from the broader community of blind and severely disabled Americans. These financial and emotional injuries would be difficult to bear in any circumstance, but they are intolerable here because they derive from an erroneous decision that failed to honor the clear—and clearly reconcilable—intent of Congress in both JWOD and the 2006 VBA. This Court's review is needed to correct the Federal Circuit's clear error of law—and to prevent the manifest injustice that its decision will inflict on countless blind and disabled individuals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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