

No. 19-329

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 Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit**

**Brief of Alphapointe; Association for Vision
Rehabilitation and Employment, Inc.; Austin
Lighthouse; Beacon Lighthouse, Inc.; Beyond Vision;
Central Association for the Blind & Visually
Impaired; Cincinnati Association for the Blind &
Visually Impaired; Envision; LC Industries, Inc.;
Lighthouse *for the* Blind – St. Louis; Lighthouse
Louisiana; Olmsted Center for Sight; San Antonio
Lighthouse for the Blind & Vision Impaired; and
The Lighthouse for the Blind, Inc. – Seattle as
Amici Curiae in Support of Petitioner and Reversal**

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INTEREST OF THE *AMICI CURIAE*¹

Amici curiae (listed below in alphabetical order) are fourteen § 501(c)(3) nonprofit agencies (“NPAs”) that currently employ 2,000 people who are blind. These NPAs also employ more than 250 U.S. military veterans, about 35 of whom are blind.

- **Alphapointe** (Kansas City, Missouri)
(alphapointe.org)
- **Association for Vision Rehabilitation and Employment, Inc. (AVRE)** (Binghamton, New York) (avreus.org)
- **Austin Lighthouse** (Austin, Texas)
(austinlighthouse.org)
- **Beacon Lighthouse, Inc.** (Wichita Falls, Texas)
(beaconwf.com)
- **Beyond Vision** (Milwaukee, Wisconsin)
(beyondvision.com)
- **Central Association for the Blind & Visually Impaired (CABVI)** (Utica, New York) (cabvi.org)

¹ Petitioner’s and Respondents’ counsel of record were provided timely notice and have consented to the filing of this brief. In accordance with Supreme Court Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or part, and that no party or counsel other than the *amici curiae* and their counsel made a monetary contribution intended to fund preparation or submission of this brief. Prior to the filing of the petition for writ of certiorari, counsel for *amici curiae* provided Petitioner’s counsel with limited preliminary advice in connection with Petitioner’s application to this Court for a stay of mandate.

- **Cincinnati Association for the Blind & Visually Impaired (CA.BVI)** (Cincinnati, Ohio) (cincyblind.org)
- **Envision** (Wichita, Kansas) (envisionus.com)
- **LC Industries, Inc. (LCI)** (Durham, North Carolina) (lcindustries.com)
- **Lighthouse *for the Blind* – St. Louis** (St. Louis, Missouri) (lhbindustries.com)
- **Lighthouse Louisiana** (New Orleans, Louisiana) (lighthouselouisiana.org)
- **Olmsted Center for Sight** (Buffalo, New York) (olmstedcenter.org)
- **San Antonio Lighthouse for the Blind & Vision Impaired (SALB)** (San Antonio, Texas) (salighthouse.org)
- **The Lighthouse for the Blind, Inc. – Seattle** (Seattle, Washington) (lhblind.org)

These NPAs’ skilled and dedicated, full-time employees—most of whom would have great difficulty finding stable and gainful employment elsewhere—manufacture or provide a variety of products and services for federal departments and agencies, including the Department of Veterans Affairs (“VA”), under the AbilityOne Program established by the Javits-Wagner-O’Day Act (“JWOD”), 41 U.S.C. §§ 8501-8506. See <https://www.abilityone.gov>.

AbilityOne “provides employment opportunities for people who are blind or have other severe disabilities in the manufacture and delivery of products and services to the Federal Government.” 71 Fed. Reg.

68431, 68492 (Nov. 27, 2006). The AbilityOne Commission's "Procurement List" of mandatory-source, NPA-manufactured, SKILCRAFT®, co-branded, and other products is wide ranging. It includes aircraft, vehicular, and electrical equipment and supplies; clothing, textiles, and individual equipment; food products and packaging; medical and dental supplies and equipment; office supplies, equipment, and furnishings; cleaning and janitorial supplies; mattresses and bedding; and paints and tools. *See* AbilityOne Procurement List Products.²

The similarly varied Procurement List of AbilityOne services that NPA employees provide to federal departments and agencies includes, for example, staffing switchboards at VA medical centers; supplying custodial, environmental, administrative, transcription, computer technology, fleet supervision, and contract management support services; and operating Base Supply Centers at U.S. military installations. *See* AbilityOne Procurement List Services.³

The ready availability of these AbilityOne products and services, all of which are needed by federal departments and agencies or the U.S. military, reflects numerous NPAs' substantial, long-term investments in both customized manufacturing facilities and equipment and highly specialized training of employees who are blind or severely

² Avail. at https://abilityone.gov/procurement_list/product_list.html

³ Avail. at https://abilityone.gov/procurement_list/services_list.html

disabled. AbilityOne employees long have relied on the AbilityOne Program for financial stability, and for acquiring skills and work experiences that enable them to lead dignified, productive, and independent lives.

Revenues generated by federal procurement of AbilityOne products and services enable NPAs for the blind to employ individuals at locations throughout the United States. These funds also help NPAs offer an array of employee and community services that otherwise would not be available. They include low vision clinics; vision rehabilitation therapy; orientation & mobility and other daily living skills training; computer and adaptive technology instruction; vocational training; educational and recreational programs for children, teenagers, and young adults; and other programs that empower people who are blind to lead enriched, fruitful lives. Loss of AbilityOne revenues, even from a single department or agency such as the VA, would have a significant, and in some cases devastating, impact on many NPAs' ability to employ people who are blind and continue offering (often as the only local provider) many essential community services.

* * * * *

The NPAs submitting this *amicus* brief are deeply concerned about the actual and potential impacts of the Federal Circuit's decision in this case. The entire AbilityOne Program is founded upon JWOD's decades-old requirement for mandatory-source—i.e., non-competitive—procurement of AbilityOne products and services from qualified NPAs for the blind or severely disabled. *See* 41 U.S.C. § 8504(a). The court of

appeals held, however, that a “narrower” and “later-enacted,” department-specific requirement applicable to *competitive* procurements—the 2006 Veterans Benefits, Health Care, and Technology Information Act (“VBA”) “Rule of Two” competitive-bidding preference for veteran-owned small businesses, 38 U.S.C. § 8127(d)—“override[s]” JWOD’s unequivocal mandate that *all* federal government entities intending to acquire a product or service on the AbilityOne Procurement List “shall procure” it from a qualified NPA. 41 U.S.C. § 8504(a); Pet. App. 23a, 25a. As the petition for a writ of certiorari demonstrates, the Federal Circuit’s deeply flawed application of statutory construction principles turns the federal procurement system on its head.

This Court should grant certiorari and reverse the Federal Circuit’s holding. It not only is wrong as a matter of law, but also, as this *amicus* brief explains, poses a significant threat to the venerable AbilityOne Program. Loss of AbilityOne business from the VA—and potentially from other AbilityOne customers looking for ways to circumvent JWOD’s mandatory-source directive—would cause enormous harm to NPAs, their employees, and the communities they serve.

SUMMARY OF ARGUMENT

The Federal Circuit’s facile application of statutory construction principles purports to reconcile the VBA with JWOD by holding that the former’s Rule of Two restricted-competition preference for veteran-owned small businesses (including service-disabled veteran-owned small businesses) must be given higher priority than JWOD’s non-competitive, government-wide, job-

creating, AbilityOne mandatory-source requirement. But rather than resolving a conflict, the court of appeals has *created* one—an unnecessary and illusory clash between two statutes that the court’s opinion acknowledges were enacted to serve *different* purposes. See Pet. App. 3a (“JWOD was enacted . . . to provide employment opportunities for the blind”); *id.* at 24a (“The VBA . . . was expressly enacted to ‘increase contracting opportunities for small business concerns owned and controlled by veterans and . . . by veterans with service-connected disabilities.’”) (quoting 38 U.S.C. § 8127(a)(1)). See also *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1973 (2016) (the VBA was enacted to “encourage contracting with veteran-owned and service-disabled veteran-owned small businesses by restricting competition”); *Nat’l Telecommuting Inst., Inc. v. United States*, 123 Fed. Cl. 595, 598 (2015) (JWOD was enacted “to provide jobs”).

Instead of recognizing that the two statutes, *because* of their different goals, do not conflict and can continue to co-exist harmoniously, the court of appeals unnecessarily has set two equally worthy groups—military veterans and individuals who are blind or severely disabled—against each other, at least in the complex world of federal procurement. And the court has done so despite any hint that Congress intended to jeopardize the AbilityOne Program in this manner. This is reason enough for the Supreme Court to grant certiorari and reverse the Federal Circuit’s judgment.

AbilityOne NPAs for the blind are heavily dependent upon Procurement List revenues to create and maintain employment opportunities for blind or

visually impaired individuals, and to fund myriad programs for them and the broader community of people with vision loss. NPA employees who are blind thrive at their jobs, which typically require NPAs to make major financial investments in specialized equipment and training. But these employees would encounter tremendous obstacles, and suffer significant hardship, if forced to look for similarly meaningful work outside of the nonprofit environment. This is why social enterprise in the form of the AbilityOne Program continues to be essential.

The Federal Circuit's ruling represents a serious peril to the stability and operation of the AbilityOne Program, and for some NPAs, poses an existential threat. When the court's mandate issued last Spring, the VA *instantaneously* revised its procurement regulation on use of mandatory sources, 48 C.F.R. § 808.002, to give the VBA's Rule of Two restricted-competition set-aside priority over JWOD's mandatory-source directive. The VA already has begun to solicit competitive bids from veteran-owned small businesses to replace longtime AbilityOne NPA contracts and employees who are blind.

If the Federal Circuit's opinion is allowed to stand, other federal departments and agencies can be expected to rely on that court's easy-to-follow roadmap for circumventing the AbilityOne Procurement List. In fact, lack of compliance with JWOD's mandatory-source requirement within many federal procurement offices already is a problem.

ARGUMENT

The Court should grant review because the Federal Circuit's ruling jeopardizes the AbilityOne Program's job-creation purpose

A. The AbilityOne Program's purpose is both beneficial and necessary

1. AbilityOne NPAs employ thousands of people who are blind

The Federal Circuit's opinion acknowledges that "JWOD was enacted in 1938 to provide employment opportunities for the blind, and was amended in 1971 to provide such opportunities for 'other severely disabled' individuals." Pet. App. 3a. Indeed, in May 2010 the AbilityOne Commission issued a formal Policy Declaration emphasizing that AbilityOne "is an **employment** program for people who are blind or have other severe disabilities" and "achieves its mission of creating **employment** through the effective and innovative use of the Federal procurement system."⁴ *See also* 41 C.F.R. § 51-1.1(a) ("It is the policy of the Government to increase employment and training opportunities for persons who are blind or have other severe disabilities through the purchase of commodities and services from

⁴ Avail. at https://www.abilityone.gov/media_room/documents/Policy_Declaration.pdf

qualified nonprofit agencies employing persons who are blind or have other severe disabilities.”).

AbilityOne’s job-creation mission has been immensely successful. The Program is the nation’s largest employer of individuals with disabilities. *See* AbilityOne Comm’n Policy Decl., *supra*. AbilityOne employs more than 45,000 people who are blind or have severe disabilities, including approximately 3,000 veterans, some of whom are wounded warriors. *See* AbilityOne Program Fact Sheet (updated Aug. 2019).⁵

Achievement of the AbilityOne Program’s objectives is dependent upon federal departments’ and agencies’ compliance with JWOD’s mandatory-source requirement: “An entity of the Federal Government intending to procure a product or service on the [AbilityOne Commission’s] Procurement List . . . *shall procure* the product or service from a qualified nonprofit agency for the blind” 41 U.S.C. § 8504(a) (emphasis added); *see also* 41 C.F.R. § 51-5.2(a) (“Nonprofit agencies designated by the [Commission] are *mandatory sources of supply for all entities of the Government* for commodities and services included on the Procurement List.”) (emphasis added); *id.* § 51-1.2(a) (Mandatory source priorities) (“The JWOD Act *mandates* that commodities or services on the Procurement List . . . be procured . . . from a nonprofit agency employing persons who are blind or have other severe

⁵ Avail. at https://www.abilityone.gov/media_room/documents/2019_Ability_One_Fact_Sheet_v20190807.pdf

disabilities, at a price established by the [AbilityOne Commission] . . . the JWOD Act *has priority . . . over any other supplier* of the Government’s requirements for commodities and services on the . . . Procurement List.”) (emphasis added).

The alternative—requiring AbilityOne NPAs to compete with for-profit corporations for federal procurement of goods and services—would destroy the AbilityOne Program. AbilityOne NPAs provide their products and services at the “fair market price” established by the AbilityOne Commission. *See* 41 U.S.C. § 8503(b) & 41 C.F.R. § 51-5.5. Those fair market prices offer enormous value (as well as high quality) to federal departments and agencies, while taking into account the fact that due to many factors, NPAs almost never can compete with the commercial sector on a lowest-price-wins basis.

For example, compared to for-profit companies, NPAs’ overhead costs generally are higher since they use domestic materials whenever available, strictly adhere to federal design and performance specifications, and often invest substantial amounts in customized manufacturing and/or adaptive equipment and specialized training for employees who are blind or severely disabled. Further, although NPAs’ manufacturing operations are semi-automated, they typically seek to maximize employment opportunities by using comparatively *less* automated manufacturing equipment and processes than for-profit companies.

And unlike many for-profit suppliers, AbilityOne NPAs employ their own production personnel—and provide them with fair, meaningful wages and benefits that foster financial independence—rather than rely

directly or indirectly upon low-paid foreign labor. In fact, the VA permits service-disabled veteran-owned small businesses to avoid capital investments in production equipment, and instead subcontract and supply foreign-produced items, by taking advantage of the Small Business Administration's "non-manufacturer rule," 13 C.F.R. § 121.406, and class waivers to that rule, *id.* § 121.1201 *et seq.*

Finally, since NPAs are *nonprofit* organizations and thus not accountable to shareholders, they use part of their AbilityOne revenues to help fund many costly employee and community programs, often not otherwise available, for people who are blind or severely disabled.

2. Most NPA employees who are blind are unable to find employment elsewhere

Although JWOD's roots go back 80 years, the need for the AbilityOne Program remains as vital today as ever. Based on Bureau of Labor Statistics data, the American Foundation for the Blind ("AFB") reports that for the period May 2016 through April 2017, 63% of working-age individuals (ages 16 to 64) with vision loss were *not* in the labor force (i.e., they either have dropped out of the labor force or never entered it). In contrast, during the same period, only 27% of the general working-age population was not in the labor force. *See* AFB, Key Employment Statistics for People Who Are Blind or Visually Impaired.⁶ Further, according to the National Eye Institute, the number of

⁶ Avail. at <https://www.afb.org/research-and-initiatives/statistics/key-employment-statistics>

cases of blindness in the United States is projected to quadruple between what it was in 2010 and is expected to be in 2050. See NIH Nat'l Eye Inst., *Blindness Data and Statistics* (updated May 2019).⁷

Kirk Adams, President & Chief Executive Officer of the American Foundation for the Blind and previously President & Chief Executive Officer of *amicus curiae* Lighthouse for the Blind – Seattle, began his recent doctoral dissertation by explaining that “[b]lind and visually impaired people in the United States face a dire employment situation within professional careers and corporate employment.” Kirk Adams, *Journeys Through Rough Country: An Ethnographic Study of Blind Adults Successfully Employed in American Corporations* (March 2019) at iii (unpublished Ph.D. dissertation, Antioch University) (on file with the Antioch University Repository & Archive).⁸

Dr. Adams focused his research on “corporate America” since “there is clear direction among our major institutions dealing with disability toward elimination of specialized, facilities-based employment settings.” *Id.* at 13. He found, however, that “[c]orporate inclusion of *blind* employees is in its infancy.” *Id.* at iii (emphasis added). There are many well-known reasons why mainstream employers continue to be reluctant to hire people who are blind.

⁷ Avail. at <https://nei.nih.gov/learn-about-eye-health/resources-for-health-educators/eye-health-data-and-statistics/blindness-data-and-statistics>

⁸ Avail. at <https://aura.antioch.edu/etds/467/>

They include, for example, mistaken beliefs that employees who are blind may be incapable of performing job responsibilities, or may be unreliable, or may increase an employer's potential liability, or may be too difficult or expensive to accommodate.

Dr. Adams observed that in contrast, social enterprises such as AbilityOne NPAs “are succeeding to a degree mainstream employers do not.” *Id.* at 17. Referring to the AbilityOne NPA he previously headed, he explained that “[t]he problems and barriers that exist in most other organizations—marginalization, stigmatization, the need to mask disabilities, fear of asking for accommodations—do not exist in this [NPA] organization.” *Id.* Noting that integration into mainstream corporations “may not be the work of choice for many people with disabilities,” Dr. Adams indicated that within the environment of an AbilityOne NPA, “blind employees have demonstrated low absenteeism, longevity of employment, low turnover, loyalty, and enthusiasm.” *Id.* at 17, 18.

The AbilityOne Program continues to fulfill an important—and necessary—role for thousands of people who are blind by enabling them “to achieve their maximum employment potential.” Ability One Fact Sheet, *supra*.

B. The Federal Circuit’s ruling already is undermining the AbilityOne Program

1. The VA’s immediately effective “Class Deviation” implements the court’s decision

The VA wasted no time implementing the Federal Circuit’s decision. On May 20, 2019—the same day that the Federal Circuit’s mandate issued—the VA issued a Class Deviation from VAAR [Department of Veterans Affairs Acquisition Regulation] 808.002 (Priorities for Use of Government Supply Sources), 48 C.F.R. § 808.002.

According to the Memorandum accompanying the Class Deviation, “[t]he mandate issued by the Federal Circuit created a binding circuit precedent that, when a product or service is on the AbilityOne Procurement List and ordinarily would result in award under the JWOD program, the [Veterans Benefits] Act instead *unambiguously requires that priority be given to Veteran-owned small business.*” Mem. from Deputy Senior Procurement Executive to Heads of the Contracting Activities (emphasis added).⁹ The Memorandum states that “effective immediately,” rather than adhering to the “Current VAAR Policy [that] “supplies and services on the AbilityOne Procurement List . . . are mandatory,” the VA’s “New Policy” is that “Contracting officers shall apply the VA Rule of Two . . . *prior to awarding any contract to AbilityOne non-profit organizations*” (emphasis

⁹ VA, Mem., Class Deviation from VAAR 808.002, avail. at <https://www.va.gov/oal/docs/business/pps/deviationVaar20190520.PDF>

added). *Id.*; *see also* VA Acquisition Policy Flash! 19-18 (“This revised Class Deviation revises VAAR 808.002 to reflect language consistent with the decision of the . . . Federal Circuit . . . in *PDS Consultants, Inc.*).¹⁰

The “New Policy” described in the Class Deviation is reflected in a VA “temporary rule” revising VAAR 808.002. *See* 84 Fed. Reg 29389 (June 24, 2019) (setting forth a revised version of 48 C.F.R. § 808.002). Before the Federal Circuit’s ruling, VAAR 808.002 paralleled Federal Acquisition Regulation (FAR) 8.002 (setting forth “Priorities for use of mandatory Government sources,” including AbilityOne Commission products and services, which are referred to in FAR 8.002(a)(1)(iv) & (a)(2) as products and services on the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled).

The VA’s new rule, however, states that “[p]rior to considering award of a contract under the AbilityOne program, contracting officers shall apply the VA Rule of Two to determine whether a requirement should be awarded to veteran-owned small businesses If [such] an award is not made AbilityOne remains a mandatory source in accordance with FAR 8.002.” VAAR 808.002(a)(1)(iv) & (a)(2) (rev. June 24, 2019) (emphasis added); *see* 84 Fed. Reg. at 29390. This radical change to VAAR 808.002—like the Federal Circuit’s decision—turns the statutorily established order of federal acquisition priorities upside down.

¹⁰ *See* <https://www.va.gov/oal/business/pps/flash19-18.asp>

See Petition For a Writ of Certiorari at 9-11 (explaining that under the Competition in Contracting Act, 41 U.S.C. § 3304(a)(5), statutes such as JWOD requiring that acquisition of particular goods and services be made from a specified, i.e., mandatory, source take priority over competitive procurement procedures).

Moreover, as a result of the Federal Circuit's ruling, the VA appears to be flouting its own new rule to the detriment of NPAs. Case in point:

Since 1995, *amicus curiae* Alphapointe has produced over 800 million prescription drug bottles for the VA's Consolidated Mail Outpatient Pharmacy ("CMOP") program. In March 2017, prior to the Federal Circuit's decision, and after the VA conducted a Rule of Two review during 2016, the AbilityOne Commission, with the express concurrence of VA procurement officials, added child-resistant prescription bottle caps to the AbilityOne Procurement List. Relying upon its longtime relationship with the VA, Alphapointe not only developed the child-resistant bottle caps specifically and exclusively for the VA CMOP program, but also invested hundreds of thousands of dollars in production equipment so that it could fulfill the VA CMOP program's needs. The VA itself invested hundreds of thousands of dollars to outfit their CMOPs to accept the new bottle caps.

But rather than adhering to its own revised version of VAAR 808.002 and awarding the bottle cap contract to Alphapointe in light of the VA's unsuccessful 2016 Rule of Two review, the VA has conducted a second Rule of Two review. It is unclear

at this time whether, despite Alphapointe's major, good faith investment in child-resistant bottle cap production equipment to meet the VA's needs, the VA will award the bottle cap contract instead to a veteran-owned small business—perhaps even to a small business that will obtain a non-manufacturer waiver so that it can subcontract bottle cap production to a foreign entity rather than investing in its own production equipment. The VA's position apparently is that as a result of the Federal Circuit's ruling, at least some AbilityOne contracts cannot be awarded to NPAs even if a Rule of Two Review does not identify qualified veteran-owned small businesses capable of doing the work. This example of the aggressive and inequitable manner in which the VA is interpreting and applying the Federal Circuit's decision is incredibly troubling and disruptive.

2. The VA has begun to replace AbilityOne contracts and eliminate jobs for people who are blind

Due to the way that the VA instantly seized upon issuance of the Federal Circuit's mandate, all AbilityOne NPAs that have contracts with the VA, or that seek future business with the VA, now face a significant risk that the VA's acquisition of many AbilityOne products and services soon will end or be curtailed. This will inflict a severe blow to the many AbilityOne NPAs which long have depended upon revenues from VA procurement to help fund their community activities, including creating and

maintaining meaningful employment opportunities for individuals who are blind or severely disabled.

Indeed, just the fourteen NPAs submitting this *amicus* brief employ approximately 270 individuals who are blind and work on VA contracts, which until the Federal Circuit's ruling accounted for more than \$42 million in annual sales to the VA (out of \$113 million annual AbilityOne sales to the VA). Because of the Federal Circuit's decision, these individuals' jobs either already have been lost or now are in jeopardy of being eliminated.

As discussed above, unlike the general labor force, employment opportunities for individuals who are blind are exceedingly limited. Laid-off AbilityOne employees face formidable barriers in finding other employment due to the hardship of having to relocate themselves and their families to a different city or region; employer misperceptions, bias, or discrimination; and lack of employer accommodations such as accessible work environments and adaptive technology and equipment.

Some of the NPAs submitting this *amicus* brief—and their employees—already have begun to suffer the consequences of the Federal Circuit's ruling by losing longtime VA medical center switchboard operator contracts and employment.

- Alphapointe had provided switchboard services at the Kansas City VA Medical Center since 2003. But in June 2019, the VA issued a solicitation notice for those services as a set-aside for veteran-owned small businesses. In July 2019, the VA awarded the switchboard services contract, effective October 1,

2019, to a veteran-owned small business. This represents a loss of \$650,000 in annual AbilityOne revenues to Alphapointe, as well as a loss of jobs or major salary reduction for 9 Alphapointe employees, 7 of whom are blind.

- Along the same lines, Lighthouse Louisiana had been providing switchboard services at the VA Gulf Coast Veterans Health Care System in Biloxi, Mississippi, for the past 17 years. Rather than allowing Lighthouse Louisiana to enter its second option year under its current contract, the VA is soliciting competitive bids from veteran-owned small businesses to replace that AbilityOne NPA. If the contract is awarded to a veteran-owned small business, Lighthouse Louisiana will lose \$600,00 in annual AbilityOne revenues. Even worse, 10 Lighthouse Louisiana employees, 9 of whom are blind, will lose their switchboard operator jobs.

- CABVI has been forced to team with a veteran-owned small business in order to retain its switchboard and reception desk contract at the VA Medical Center in Albany, New York. This will result in the loss of jobs by 4 CABVI employees who are blind, and the loss of more than half of the previous \$350,000 annual revenues attributable to that contract.

- Olmsted Center for Sight has provided switchboard services at VA Western New York Medical Center in Buffalo and the VA Medical Center in Erie Pennsylvania for the past 23 years. Those contracts employ 23 people, 19 of whom are blind. But in June 2019 the VA issued a “sources sought” solicitation to veteran-owned small businesses. Since

no qualified veteran-owned small businesses expressed interest in those locations at this time, Olmsted's contracts were renewed—for now.

- Similarly, AVRE almost lost its switchboard contracts at VA Medical Centers located in the Bronx (New York City) and in the Hudson Valley (Montrose and Castle Point). Those contracts make it possible for AVRE to employ 16 individuals, 15 of whom are blind. No veteran-owned small business has yet expressed interest in those locations, so the VA has exercised the final option year for those contracts.

The looming draconian impacts of the Federal Circuit's ruling on NPAs that do or seek business with the VA are not limited to medical center switchboard services. For example, in addition to Alphapointe's possible loss of its investment in child-resistant bottle cap production facilities and equipment for the VA, Lighthouse for the Blind – Seattle was deterred from seeking a blood-pressure cuff contract with the VA as a result of the court's decision. That contract would have created 25 jobs for people who are blind.

Further, the VA is in the process of launching its Medical/Surgical Prime Vendor (MSVP) 2.0 program, a major procurement activity that will encompass acquisition of thousands of products used by VA facilities. In view of the VA's quickly expanding embrace of the Federal Circuit's decision, the extent to which that new program will include—or exclude—AbilityOne products is at best uncertain. For example, Lighthouse Louisiana's AbilityOne-listed paper cup products, which previously have accounted

for \$1.3 million in annual sales to the VA, already have been dropped from the VA's MSVP 2.0 program.

C. Additional federal departments and agencies may latch onto the Federal Circuit's ruling

1. The ruling purports to correctly apply well-established principles of statutory construction to supposedly conflicting statutes

The Federal Circuit's opinion addresses the supposed conflict between the Veterans Benefits Act and JWOD. But the court's flawed application of statutory construction principles may be general enough to tempt other federal departments and agencies—at least those subject to procurement statutes that seemingly conflict with JWOD's mandatory-source requirement—to construe the ruling as a green light for bypassing the AbilityOne Commission's Procurement List.

In the Federal Circuit's topsy-turvy view, a federal statute requiring that contracts be awarded “on the basis of competition,” in some way “applies to *all* contracts—not only *competitive* contracts.” Pet. App. 22a. And a “more specific, later-enacted statute” that “applies only” in the “narrower arena” of a particular department's restricted-competition procurements somehow “overrides” JWOD's mandatory-source requirement, which the court of appeals acknowledges not only is non-competitive, but also “*applies to all agencies* of the federal government.” *Id.* 23a, 25a. Based on this superficial and puzzling analysis, the court implausibly held—in the absence of the slightest hint that Congress intended to decimate AbilityOne's

decades-old employment program for people who are blind or severely disabled—that a department-specific procurement provision “unambiguously demands” that JWOD’s government-wide, mandatory-source requirement be relegated to a lower priority. *Id.* 28a.

2. The ruling will exacerbate existing noncompliance with JWOD’s mandatory-source requirement

The NPA *amici* fear that unless this Court grants review and reverses the Federal Circuit, additional federal departments and agencies will adapt the court’s analysis as a basis for circumventing JWOD’s mandatory-source requirement. In view of the programmatic erosion that the AbilityOne Program *already* experiences due to inadvertent or knowing lack of compliance on the part of many federal procurement personnel within various federal departments and agencies, there is a solid basis for this concern.

In December 2018 the AbilityOne Commission’s Office of Inspector General issued a Top Management and Performance Challenges Report.¹¹ The OIG report identifies “Erosion of Statutory Program Authority” as the top challenge facing the AbilityOne Program. OIG Report at 2. According to the report, “the challenge of program erosion is at a pivotal stage.” *Id.* at 4. The report identifies the Federal Circuit’s ruling in this case as a key example of how the AbilityOne Commission is “confronted with program

¹¹ Avail. at <https://www.oversight.gov/sites/default/files/oig-reports/TMC%20Web%20Posting%20V3%20%2821DEC2018%29.pdf>

encroachment.” *Id.* at 4, 5. “Efforts by the Small Business Administration to assert its preference programs over the mandated priority of the JWOD Act,” are identified as another top AbilityOne challenge. *Id.* at 8.

More broadly, the AbilityOne OIG report expresses concern about the “[l]ack of enforcement capabilities for the AbilityOne Program to assert its mandated source-priority when federal agencies fail to purchase AbilityOne products and services.” *Id.* In fact, federal departments’ and agencies’ lack of compliance with the AbilityOne Program (due to misunderstanding, ignorance, neglect, or otherwise), has become so rampant, the National Industries for the Blind—one of the central nonprofit agencies designated by the AbilityOne Commission to help administer the program, *see* 41 U.S.C. § 8503(c)—has established an “Essentially the Same” (“ETS”) process (i) for determining whether a commercial product should be designated as essentially-the-same as an AbilityOne-listed product; (ii) for monitoring federal e-commerce sites, including the GSA Federal Supply Schedules, to help foster compliance with AbilityOne; (iii) for reviewing NPA-reported instances of failure to comply with AbilityOne’s mandatory-source requirement; and (iv) for notifying federal purchasing agents in instances of noncompliance. *See* NIB, *Essentially the Same (ETS): The Overall Process*;¹² 41 C.F.R. § 51-5.3(a) (indicating that the AbilityOne mandatory-

¹² Avail. at <http://www.nib.org/sites/default/files/bulletin/The%20ETS%20Process-%20updated%2011%2015%202012.docx>

source requirement covers items that are “essentially the same as the listed item”); *id.* § 51-5.8 (“Any alleged violations of the JWOD Act . . . by entities of the Government shall be investigated . . .”).

Since FY 2015, NIB’s ETS Team has achieved conversion of 525 misdirected federal solicitations to AbilityOne, representing a potential value of \$156 million.¹³

The AbilityOne OIG report, *supra*, indicates that another major source of AbilityOne Program erosion is “Government-wide use of procurement through commercial e-commerce portals,” which is “both an opportunity and a challenge to the AbilityOne Program.” OIG Report at 8. According to the report, federal government use of e-commerce portals poses a “risk for significant [AbilityOne Program] erosion.” *Id.* Thus, “[i]t is paramount that . . . government agencies and their purchase officers, understand that the customer the E-Commerce platform seeks to serve is the AbilityOne Program itself.” *Id.*

But that is not always the case. The Air Force, for example, has embarked upon an e-commerce pilot program for use of the Amazon Business marketplace in connection with purchases below the current \$10,000 “micro-purchase threshold” established by the Department of Defense (DoD). The Air Force pilot program, however, apparently does not require “blocking” of Amazon Business marketplace products that are “essentially the same” as AbilityOne-listed products. *See* Roger Waldron, *Under the radar: The*

¹³ Personal communication from David Barrett, NIB Program Manager, ETS (Sept. 19, 2019).

Air-Force's e-commerce 'pilot,' Federal News Network (Sept. 21, 2018) (noting that “it would be helpful to understand” how mandatory-source requirements like AbilityOne “will be addressed” by the Air Force Pilot program since, “[b]y way of example, under GSA contracts and electronic systems, there is blocking to ensure that ‘essentially the same’ commercial products are not offered where an AbilityOne item exists and is offered”).¹⁴

Since DoD is an important consumer of AbilityOne products and services, its procurement officers’ full compliance with JWOD’s mandatory-source requirement is essential. Section 898 of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, established a Panel on Department of Defense and AbilityOne Oversight, Accountability, and Integrity. That Panel’s 2018 First Annual Report to Congress (June 2018) notes previous DoD oversight activities, including a June 2016 DoD Office of Inspector audit report, which “found issues both with how DoD contracting personnel used AbilityOne and their understanding of the Program.” Panel Report at 7.¹⁵ The Panel has developed a list of recommendations which, “when implemented, will result in greater awareness and compliance with the AbilityOne Program requirements with respect to DoD contracts.” *Id.* at 3. Along the same lines, the

¹⁴ Avail. at <https://federalnewsnetwork.com/commentary/2018/09/under-the-radar-the-air-forces-e-commerce-pilot/>

¹⁵ Avail. at https://www.acq.osd.mil/dpap/cpic/cp/docs/First_Annual_RTC_on_the_Panel_on_DoD_and_AbilityOne_Signed_18_July_18.pdf

AbilityOne OIG report explains that “it is vital to ensure that contracting officials have a thorough understanding of the [AbilityOne] Program to ensure its growth and proper implementation.” OIG Report at 9.

“In an effort to improve awareness about the AbilityOne Program, the AbilityOne Commission’s initiative of issuing educational materials and providing presentations to agencies is vital.” *Id.* If allowed to stand, however, the Federal Circuit’s decision in this case will result in further erosion of JWOD’s mandatory-source imperative by engendering confusion and uncertainty, and perhaps outright defiance, in procurement offices throughout the federal government.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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