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

BRIEF OF *AMICUS CURIAE* SOURCEAMERICA IN SUPPORT OF PETITIONER

ROBERT REEVES ANDERSON
Counsel of Record
ARNOLD & PORTER
KAYE SCHOLER LLP
370 Seventeenth St., Ste. 4400
Denver, CO 80202
(303) 863-1000
Reeves.Anderson@arnoldporter.com

CRAIG A. HOLMAN
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000

QUESTIONS PRESENTED

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 regulations and their underlying statutory foundation.

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 the Javits-Wagner-O'Day Act, 41 U.S.C. § 8501–06, that dictate that agencies must acquire goods and services in the first instance using the AbilityOne Procurement List.

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INTEREST OF *AMICUS CURIAE* [1]

Congress enacted the Javits-Wagner-O'Day Act ("JWOD"), 41 U.S.C. § 8501–06, "to increase employment and training opportunities for persons who … have [significant] disabilities." 41 C.F.R. § 51-1.1(a). To achieve that goal, JWOD created an independent federal agency, the U.S. AbilityOne Commission, to "maintain and publish in the Federal Register a [P]rocurement [L]ist" of goods and services that can be provided by those with significant disabilities. 41 U.S.C. § 8503(a). JWOD provides that any "entity of the Federal Government intending to procure a product or service on the procurement list … shall procure the product or service from a qualified nonprofit agency for the blind or a qualified nonprofit agency for other severely disabled" individuals in accordance with regulations established by the Commission. *Id.* § 8504(a).

The AbilityOne Commission designated *amicus curiae* SourceAmerica as the nationwide central nonprofit agency "to represent … nonprofit agencies serving people with [significant] disabilities other than blindness." 48 C.F.R. § 8.701; 41 U.S.C. § 8503(c). In this role, SourceAmerica represents more than 400 nonprofits that participate in the AbilityOne program, including large national nonprofits, such as Goodwill Industries, and smaller local nonprofits. Federal regulations implementing JWOD grant SourceAmerica the authority

[1] No counsel for a party authored this brief in whole or in part. No one other than *amicus curiae*, its members, or *amicus*'s counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. Counsel of record for the petitioner and respondents received notice at least ten days prior to the due date of *amicus*'s intention to file this brief.

to address "[d]isputes between a nonprofit agency and a contracting activity." 41 C.F.R. § 51-6.15.

The decision below and consequent actions taken by the Department of Veterans Affairs threaten the viability of nonprofits represented by SourceAmerica, as well as the livelihoods and independence of the vulnerable workers they support. Accordingly, SourceAmerica participated as *amicus curiae* in this case before the Federal Circuit. SourceAmerica also has brought its own action against the VA and the United States in the U.S. District Court for the District of Colorado, raising similar legal questions. *See Bayaud Enters., Inc. v. U.S. Dep't of Veterans Affairs*, No. 17-cv-1903 (D. Colo.).

SourceAmerica respectfully offers this *amicus* brief to focus on three issues relevant to certiorari: (1) the urgent need to clarify the jurisdictional framework that governs challenges to procurement regulations; (2) the chaos caused by the decision below to the long-standing and cohesive statutory framework of government procurements, and (3) the nationwide harms precipitated by the Federal Circuit's misapplication of JWOD.

INTRODUCTION AND STATUTORY FRAMEWORK

In 1938, Congress passed the Wagner-O'Day Act to leverage the federal procurement system to create jobs for the blind. Act of June 25, 1938, ch. 697, 52 Stat. 1196. Senator Javits broadened the Act in 1971 to cover people with other significant disabilities. Act of June 23, 1971, Pub. L. No. 92-28, 85 Stat. 77. In its current form, JWOD requires federal agencies and contractors to procure specified products (such as interment flags) and services (such as cafeteria maintenance or mailroom services) listed on an official "Procurement List" from designated nonprofit agencies that employ the blind and significantly disabled. 41 U.S.C. § 8504 (excepting only supplies available from

Federal Prison Industries).[2] The U.S. AbilityOne Program employs more than 45,000 people who are blind or significantly disabled, including more than 3,000 veterans.

The Federal Acquisition Regulation ("FAR"), 48 C.F.R. ch. 1, is the principal set of rules that govern procurements by U.S. agencies. 48 C.F.R. § 1.101 (purpose of FAR is to create "uniform policies and procedures for acquisition").[3] The FAR divides all supplies and services procured by the federal government into two categories: mandatory sources and non-mandatory sources. *Compare* 48 C.F.R. §§ 8.002, 8.003 (mandatory sources, including "inventories of the requiring agency") *with* 48 C.F.R. § 8.004 (non-mandatory sources, including competitive "set-aside" categories like veteran-owned small businesses). The FAR identifies the AbilityOne Program as a mandatory source that agencies must utilize before considering competitive (non-mandatory) sources. All small business preference programs—such as disadvantaged small businesses, women-owned small businesses, historically underutilized small businesses, and veteran-owned small businesses—are within the non-mandatory, competitive framework.

Within the context of this existing procurement system, Congress amended the Small Business Act in 2003 to give government contracting officers discretion to prioritize service-disabled veteran-owned small businesses (SDVOSBs) over other small business concerns when deciding competitive procurements. Veterans Benefits Act

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[2] The current Procurement List is available at https://www.abilityone.gov/procurement_list/.

[3] The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration jointly issue the FAR. 48 C.F.R. § 1.103. Other agencies may issue supplemental regulations. For example, the VA issues the Veterans Affairs Acquisition Regulation ("VAAR"), codified at 48 C.F.R. §§ 801–873.

of 2003, Pub. L. No. 108-183, § 308, 117 Stat. 2651. SDVOSBs are for-profit business that are owned by, but are not required to employ, veterans. The 2003 Act states that contracting officers "may award contracts on the basis of competition restricted to small business concerns owned and controlled by service-disabled veterans," provided "the contracting officer has a reasonable expectation that not less than 2 small business concerns owned and controlled by service-disabled veterans will submit offers and that the award can be made at a fair market price." 15 U.S.C. § 657f(b). This benchmark is known as the "Rule of Two." For its part, the VA's goal was to award at least 3% of annual procurements to SDVOSBs. 15 U.S.C. § 644(g)(1)(A)(ii); *see also* Exec. Order No. 13,360, 3 C.F.R. § 13360 (2005).

Following the 2003 amendment, however, the VA failed to meet its goal through discretionary, restricted competition. Legislators did not hide their disappointment: "There would be a reasonable expectation, Mr. Speaker, that [ ] of [all] the Federal Government's agencies [ ] the Department of Veterans Affairs would be a leader in achieving the President's goal for annual procurement from at least 3 percent of the disabled veteran-owned businesses. Sadly, our most recent data from fiscal year 2005 indicates that the VA did barely over half of what the President directed and the public law required." 152 Cong. Rec. H8995-02, H9014 (daily ed. Dec. 8, 2006) (statement of Rep. Buyer).

In response to this shortcoming, Congress passed the Veterans Benefits, Health Care, and Information Technology Act of 2006 ("VBA") to "improve[] the status of veteran and disabled veteran small businesses *when competing for contracts* at the Department of Veterans Affairs." *Id.* (emphasis added). In contrast to the 2003 Act's provision for discretionary use of restricted competition, the VBA provided that VA contracting officers "*shall* award

contracts on the basis of competition restricted to small business concerns owned and controlled by veterans … if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans … will submit offers." 38 U.S.C. § 8127(d) (emphasis added).

The VBA's Rule of Two was designed to "establish priority of veteran and service-disabled veteran small businesses relative to other set-aside groups" (such as disadvantaged small businesses and women-owned small businesses), and to ensure "that any veteran or service-disabled veteran-owned small business that also qualifies under another category be given priority within that category in VA procurement." H.R. Rep. No. 109-592, at 17 (2006). In other words, the new Rule of Two promoted veteran-owned small businesses (VOSBs) to the top of the non-mandatory source list when the VA engaged in restricted competition on the open market.

Notably, the VBA did not address (much less change) how the VA makes procurement decisions with respect to mandatory sources under JWOD. Rather, the VBA applied only to priorities among *competitive* procurements from other sources like VOSBs and SDVOSBs. Thus, for over a decade following the VBA's passage in 2006, the VA recognized that the VBA's Rule of Two did not affect the AbilityOne Procurement List process. *VA Acquisition Regulation: Supporting Veteran-Owned and Service-Disabled Veteran-Owned Small Businesses*, 74 Fed. Reg. 64,619, 64,622 (Dec. 8, 2009); Dep't of Veterans Affairs, *VA Acquisition Update No. 2008-03* at 69–71 (Aug. 29, 2017), https://bit.ly/2B2Ee7C.

SUMMARY OF ARGUMENT

The decision below upended this cohesive and long-standing procurement practice in two respects.

I.A. *First*, the Federal Circuit expanded the limited jurisdiction of the Court of Federal Claims—an Article I tribunal—to encompass respondent PDS Consultants' challenge to the validity of VA regulations implementing JWOD and the VBA. Such claims have historically and properly been brought in Article III courts pursuant to the Administrative Procedure Act. The Federal Circuit's ruling has injected uncertainty into the jurisdictional balance between the Tucker Act and the APA, with the United States now using the decision below to argue that federal district courts across the country lack jurisdiction over APA claims involving new procurement regulations, even when no specific procurement is at issue.

I.B. *Second*, after the decision below, the VA expanded the Federal Circuit's erroneous merits ruling to cover *all* VA procurements, rather than simply the goods and regions challenged by PDS. In doing so, the VA's new policy haphazardly rearranges the order in which the VA considers mandatory and non-mandatory sources—an approach that has no basis in the statutory text or the decision below. Compounding the oddity of the VA's new approach, if a VOSB needs any item on the Procurement List in order to perform a contract, the VOSB itself must purchase the item from the Procurement List-designated nonprofit agency, resulting in wasteful circular purchasing. 48 C.F.R. § 8.002(c). The VA's strained attempts to implement the decision below are a direct result of the analytical errors made by the Federal Circuit.

II. The VA has already notified numerous AbilityOne nonprofits that the VA will award work currently covered by the AbilityOne Procurement List to SDVOSBs based on the decision below. Scores of nonprofit agencies and their disabled employees will suffer severe, imminent

harm from that errant ruling. Several nonprofits face the devastating prospect of shuttering their doors, leaving unemployed the significantly disabled workers that they supported for decades. Many of the affected nonprofits also will have to reduce or discontinue community support services for the significantly disabled, including career counseling and ADA compliance advocacy. And many disabled workers will have no choice but to rely on public assistance, contrary to Congress's purpose in enacting JWOD.

The Court should grant certiorari on these important issues that affect our nation's most vulnerable workers.

ARGUMENT

I. The Court's intervention is needed to address two critical issues relating to government procurements.

A. The Tucker Act does not give the Court of Federal Claims jurisdiction to review the validity of agency regulations.

This Court should grant certiorari to clarify whether the Tucker Act's grant of jurisdiction over bid protests extends to respondent's challenge regarding the validity of agency regulations. Although the United States initially contested jurisdiction in the Court of Federal Claims, the United States is now using the decision below to resist judicial review of the VA's subsequent rule changes in federal district courts across the country. This Court's intervention is warranted to resolve this important jurisdictional question.

The Tucker Act gives the Court of Federal Claims jurisdiction over, *inter alia*, an "alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1). With the enactment of the Administrative Dispute Resolution Act of 1996, Congress removed concurrent jurisdiction over such actions from the federal district courts, beginning on

January 1, 2001. Pub. L. No. 104-320, § 12(d), 110 Stat. 3870, 3875 (1996).

Thereafter, courts followed a clear jurisdictional delineation between two types of actions with respect to government procurement disputes. First, a party objecting to the validity of an agency's rules or regulations relating to procurements could seek relief under the Administrative Procedure Act in an Article III court. *See Fire-Trol Holdings, LLC v. U.S. Forest Serv.*, 209 F. App'x 625, 627 (9th Cir. 2006). Alternatively, when a party objected to the proper *application* of those regulations—that is, whether the agency followed its own rules in soliciting or awarding a government contract—the action fell under the Tucker Act and was pursued in the Court of Federal Claims. *See Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071, 1080 (Fed. Cir. 2001).

The Federal Circuit recognized this distinction in *Southfork Systems, Inc. v. United States*, 141 F.3d 1124 (Fed. Cir. 1998). In *Southfork,* the protester claimed that, by complying with binding regulations and negotiating with the Texas Commission for the Blind for cafeteria services, the Air Force acted contrary to statute. *Id.* at 1130. Affirming the dismissal of these claims, the Federal Circuit agreed with the Court of Federal Claims' assessment that, "[i]f these regulations extend the statute beyond the manifest intention of Congress, as [the protester] contends, then [the protester's] recourse lies in a suit against the Secretary, for it is the Secretary's regulations that are the source of [the protester's] injury, not the actions of the contracting agency." *Id.* at 1133. The Federal Circuit held, "If a bidder wishes to challenge the validity of a regulation governing a procurement, the proper method of doing so is to bring an action in federal district court under the Administrative Procedure Act, 5 U.S.C. § 702." *Id.* at 1135.

That same logic should have compelled the Federal Circuit to dismiss this case for lack of jurisdiction. Respondent PDS's lawsuit did not claim that the contracting officer failed to follow governing provisions of the AbilityOne Commission regulations, the FAR, or the VAAR. Rather, respondent complained that the VA *did* and *would* follow the governing regulations, which required the contracting officer to prioritize the JWOD Procurement List over the VBA Rule of Two. PDS thus challenged the regulations themselves, arguing that the regulations improperly implemented the VBA and JWOD. *See* Pet. 14.

The Court of Federal Claims and the Federal Circuit nevertheless found jurisdiction under the Tucker Act (over the United States' objection[4]), reasoning that "rather than challenge the validity of the VAAR and AbilityOne programs … [PDS] alleged a statutory violation—namely, that the VA acted in violation of the VBA by awarding contracts without first conducting the Rule of Two Analysis." Pet. App. 18a–19a.[5] But PDS was

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[4] *See* Pet. App. 44a–45a. The United States has consistently argued that the Court of Federal Claims lacks jurisdiction over rulemaking disputes. *See, e.g.*, *Fire-Trol Holdings, LLC v. United States*, 62 Fed. Cl. 440, 443 (Fed. Cl. 2004) ("the Government argues that this Court lacks jurisdiction over plaintiff's claim relating to defendant's alleged failure to comply with the APA because the Court lacks jurisdiction to entertain suits challenging the validity of agency rules under the APA").

[5] Although reaching the same result, the courts below applied different rationales. The Court of Federal Claims reasoned that because respondent was "seeking to prevent the VA from awarding *future* contracts … without first performing a Rule of Two analysis," the suit was "in connection with a procurement or a proposed procurement." Pet. App. 45a (emphasis added). The Federal Circuit, by contrast, reasoned that respondent was challenging *existing* contracts previously awarded to petitioner, and that these contracts were the "procurements" at issue. *Id.* at 19a. The fact that neither

transparent in its attack on the governing VA regulations. *See, e.g.*, Pet. App. 100a (Compl. ¶ 37) (challenging VA policy "in all VA contracting determinations"). The VA saw things the same way. Following the decision below, the VA has maintained that the judgment of the Court of Federal Claims and affirmance by the Federal Circuit compelled the VA to amend its regulations. *See* Issuance of Class Deviation From VA Acquisition Regulation (VAAR) Part 808—Required Sources of Supplies and Services and Conforming Amendments, 84 Fed. Reg. 29,389, 29,390 (June 24, 2019) ("binding" ruling "necessitated immediate policy change"). The upshot is, by allowing this case to proceed, the Federal Circuit has effectively expanded the Tucker Act's carefully circumscribed bid-protest jurisdiction to cover a *de facto* APA challenge.

This approach upends the careful division between Article I tribunals and Article III courts set by *Southfork*. It also draws into question the Court of Federal Claims' constitutional authority, as an Article I tribunal, 28 U.S.C. § 171, to declare invalid a regulation promulgated and enforced by the Executive Branch, based on that court's construction of two statutes enacted by Congress. That authority is even more suspect when it is exercised not in parallel, but to the exclusion, of Article III courts, which alone wield the "judicial Power of the United States" to decide "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties." U.S. Const. art. 3, §§ 1, 2; *see Stern v. Marshall*, 564 U.S. 462, 483–84 (2011). The legislative branch has the power "'to prescribe general rules for the government of society,' but 'the application of those rules to individuals in society' is the 'duty' of the judiciary." *Patchak v. Zinke*,

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court could agree on what procurement is actually in dispute here illustrates the sweeping and nebulous construction of Tucker Act jurisdiction under the decisions below.

138 S. Ct. 897, 915 (2018) (Roberts, C.J., dissenting) (quoting *Fletcher v. Peck*, 6 Cranch 87, 136 (1810)). To permit Article I jurisdiction under these circumstances would flout the maxim "that the power of making ought to be kept distinct from that of expounding, the laws." 2 Records of the Federal Convention of 1787, p. 75 (M. Farrand ed. 1911).

The "public rights" doctrine, *see N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 68 (1982) (plurality op.), does not resolve the constitutional concern. "The public-rights doctrine is grounded in a historically recognized distinction between," on the one hand, "matters that could be conclusively determined by the Executive and Legislative Branches," and, on the other hand, "matters that are 'inherently … judicial.'" *Id.* (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929)). The political branches may have the power to police themselves to ensure compliance with their own rules and regulations, and the Tucker Act situates some of those disputes in the Court of Federal Claims. But that is not this case. Rather, the Court of Federal Claims here declared what the law *is*, overturning the VA's lawfully promulgated interpretation. This is the apex of an "inherently judicial" act. *Id.* An Article I judge, vested and appointed by an Article I body, resolved the legal meaning of two Article I statutes to effectively strike the Executive Branch's interpretation and implementation of those same statutes. Given the separation-of-powers risks posed by such action, the Court has cautioned "that even with respect to matters that arguably fall within the scope of the 'public rights' doctrine, the presumption is in favor of Art[icle] III courts." *N. Pipeline*, 458 U.S. at 69 n.23.[6]

[6] Appellate review by an Article III court does not alone cure the constitutional defect. *Stern*, 564 U.S. at 487, 500–01.

Unsurprisingly, the Federal Circuit's ruling has already injected uncertainty into the jurisdictional balance between the Tucker Act and the APA. The United States has used the decisions below to argue that federal district courts lack jurisdiction over APA claims involving new procurement regulations, even when no specific procurement is at issue, because such claims could now be brought in the Court of Federal Claims according to the holdings below. *See* VA's Opp'n to Mot. for Prelim. Inj. at 11–14, *Nat'l Indus. for the Blind v. Dep't of Veterans Affairs*, No. 17-cv-992 (D.D.C. Aug. 22, 2017), ECF 30; VA's Mot. to Dismiss and Opp'n to Mot. for Prelim. Inj. at 11–20, *Bayaud Enters., Inc. v. U.S. Dep't of Veterans Affairs*, No. 17-cv-1903 (D. Colo. Aug. 2, 2019), ECF 58.

By precipitously changing positions, the United States is using the Federal Circuit's erroneous jurisdictional ruling to strip the district courts of the critical role they play in regulatory challenges. This Court should grant certiorari to resolve this uncertainty over the scope of Tucker Act jurisdiction.[7]

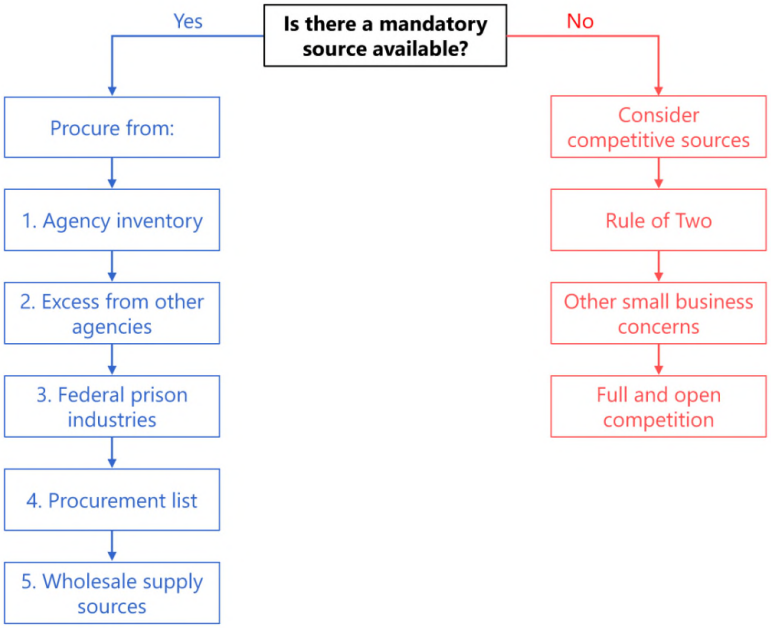
B. The decision below misinterprets the interplay between JWOD and the VBA's Rule of Two, which now extends to all VA procurements.

This Court also should grant certiorari to address the merits of the decision below. The petition forcefully describes why the Federal Circuit erred in holding that the VBA's Rule of Two takes priority over the VA's obligation to purchase goods and services on the Procurement List from designated mandatory sources. *See* Pet. 22–34.

[7] If the Federal Circuit's jurisdictional holding is left undisturbed and APA-type challenges relating to VA procurements are within the exclusive jurisdiction of the Court of Federal Claims under the Tucker Act, then a circuit split over the second question presented is unlikely to arise. Under such circumstances, the Court should grant certiorari since further percolation of the issue will not aid this Court's review.

The immediate need for this Court's plenary review is reinforced by the fact that, after the decision below, the VA inexplicably expanded the Federal Circuit's erroneous holding to cover *all* VA procurements.

Prior to May 2019, the VA followed a cogent and straightforward decision tree when purchasing goods or services, reflecting the mandatory versus non-mandatory source distinction that defines the traditional procurement process:



See Dep't of Veterans Affairs, *Applying the VA Rule of Two* (July 25, 2016), https://bit.ly/335y7eU. Consistent with the text and history of the VBA, the VA recognized that if mandatory sources were available, the VA had to "proceed" with the procurement, and "38 U.S.C. 8127 [*i.e.*, the VBA Rule of Two] does not apply." *Id.* Only if all mandatory sources were unavailable to satisfy the VA's needs would the VA then apply the Rule of Two for competitive procurements from nonmandatory sources. *Id.* The VA acknowledged that the VBA implicated only the right side

of the decision tree—how the VA is required to conduct *competitive* procurements. The VBA did not affect the mandatory-source side of the decision tree.

The decision below upended that reasonable interpretation. When the Federal Circuit issued its mandate on May 20, 2019, the VA simultaneously issued a Class Deviation that "revise[d] VAAR 808.002 … to reflect language consistent with the Federal Circuit's decision in *PDS Consultants, Inc.*, that the Veterans First Contracting Program takes precedence over AbilityOne and Federal Prison Industries."[8] But rather than limiting the deviation to the individual commodities at issue in *PDS*, the VA took the radical step of changing its practices for *all* future procurements, requiring contracting officers "to apply the VA Rule of Two … prior to considering an award to an AbilityOne non-profit organization." *Id.* The "new policy" went into effect immediately. *Id.*[9]

A month later, on June 24, 2019, the VA reacted to criticism that the Class Deviation violated the APA's requirement for notice and comment prior to rulemaking, and published notice in the Federal Register of its intent to "make conforming amendments to the CFR" to reflect the Class Deviation and to "immediately implement the Federal Circuit's mandate." 84 Fed. Reg. 29,389, 29,389 (June 24, 2019). The Federal Register notice states that the decision below created "a binding circuit precedent which necessitated immediate policy change," and that "the Federal Circuit's mandate required that the agency's

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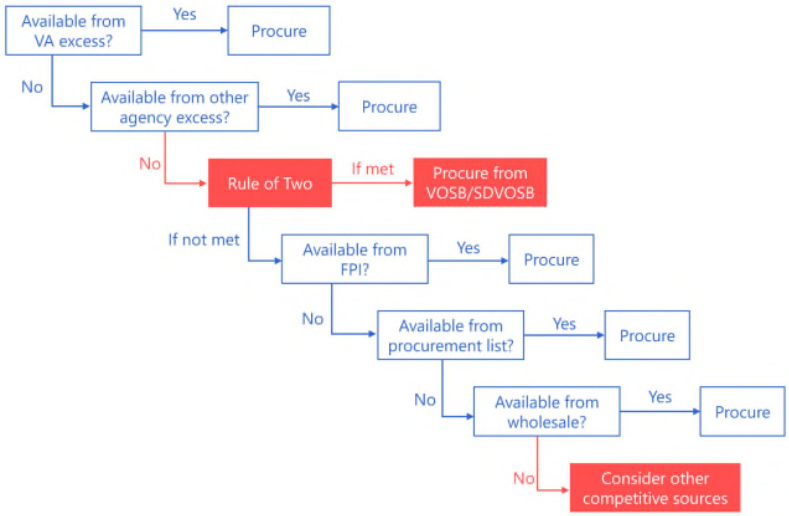
[8] Dep't of Veterans Affairs, *Memorandum: Class Deviation* (May 20, 2019), https://bit.ly/30Mb7Qn.

[9] Because the proceedings below involved only eyeglass procurements covering two regional areas, the Federal Circuit's mandate required the VA only to issue two *individual* deviations, one for each procurement at issue. Instead, the VA arbitrarily chose to implement an unnecessarily broad measure, issuing a *class* deviation and then an amended rule.

acquisition workforce immediately comply with the binding precedent." *Id.* at 29,390.

The proposed Amended Rule does much more than implement the Federal Circuit's mandate, however. The Amended Rule haphazardly rearranges the order in which the VA considers various mandatory and non-mandatory sources. The VA's decision tree now looks like this:



See 84 Fed. Reg. 29,389, 29,390.

The VA's new practice mixes and matches mandatory and competitive sources in a manner that has no basis in the statutory text. Notably, the VA has elected to arbitrarily apply the Rule of Two before some, but not all, mandatory sources. The VA's position appears to be in response to criticisms leveled by *amicus curiae* that it would have been absurd for Congress to require competitive bidding under the Rule of Two for a commodity that is already available in excess supply within the VA or at another government agency. *See, e.g.*, Br. of *Amicus Curiae* SourceAmerica in Supp. of Pet. for Reh'g at 11, *PDS Consultants, Inc. v. United States*, No. 17-2379 (Fed. Cir. Mar. 20, 2019), ECF No. 148. The VA's new policy, while mitigating one absurd result, is neither grounded in the

statutory text nor faithful to the decision below. Nowhere does the VBA state that the Rule of Two shall take priority over some mandatory sources, such as Federal Prison Industries and the Procurement List, but not over other mandatory sources, such as excess from other agencies. Nor does the new policy explain how *other* mandatory sources will be treated, including public utilities, specified strategic and critical item sources, and acquisition from specified helium suppliers. *See* 48 C.F.R. §§ 8.002, 8.003. The decision below casts a cloud over all these programs, as well.[10]

The decision below leads to other irrational results. Any procurement by a VOSB of an item on the Procurement List would require wasteful circular purchasing, as the VOSB itself would have to purchase the item from the Procurement List-designated nonprofit agency. *See* 48 C.F.R. § 8.002(c) ("The statutory obligation for Government agencies to satisfy their requirements for supplies or services available from the Committee for Purchase From People Who Are Blind or Severely Disabled also applies when contractors purchase the supplies or services for Government use."). In prioritizing veteran-owned businesses for competitive VA contracts, Congress could not have intended that nonsensical result.[11]

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[10] The VA's revised policy also violates 48 C.F.R. §§ 8.002, 8.003, 8.004, and 8.704(b). These provisions require the VA to first consider whether it can meet its needs using *any* of the specified mandatory sources, and only if the agency cannot use a mandatory source, to consider competitive procurements sources. *Id.* At that point, the VBA applies, and the VA must prioritize awards to VOSBs and SDVOSBs above all other small business concerns.

[11] In its textual analysis, the Federal Circuit found relevant that the 2003 Act expressly excepted procurements under JWOD, whereas the 2006 VBA did not contain similar language. Pet. App. 25a. The omission of clarifying statutory language does not change

The Court should grant certiorari now to resolve the proper meaning of the VBA and restore the historical framework of government procurements.

II. The Federal Circuit's decision has precipitated immediate and nationwide harm to the country's most vulnerable workers.

The fallout from the decision below is already materializing across the country. At least five AbilityOne nonprofit agencies that SourceAmerica represents have received notice that the VA, after conducting a Rule of Two market analysis, has identified at least two eligible SDVOSBs capable of performing the contracts that these nonprofits currently perform. Accordingly, those nonprofits will not be eligible to receive future work relating to those goods or services under the AbilityOne program. Numerous other nonprofit agencies expect similar notices in the near future.

For example, the VA will award all contracts currently managed by Project HIRED, a California-based nonprofit, to a veteran-owned business in March 2020. Project HIRED depends on its Procurement List contracts for 90% of its revenue. Without these contracts, it cannot continue to employ 35 people, over 75% of whom are significantly disabled. It will also cease to offer free services in San Jose to approximately 200 significantly disabled persons annually, including job search consulting, one-on-one career counseling and plan support, job skills workshops, ADA training, requesting accommodations, job leads, introductions to employers, and other disability-specific guidance. Eventually, Project HIRED will close its doors altogether.

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the overall procurement framework, especially in light of other textual indicia, a longstanding regulatory backdrop, and contemporary agency guidance. *BNSF Ry. Co. v. Loos*, 139 S. Ct. 893, 901 (2019).

Other nonprofits that provide interment (burial) flags to the VA, such as Phoenix in Huntsville, Alabama, have already lost contracts to VOSBs. *See* McKinley Strother, *Dozens of Disabled Workers Face Layoffs After Alabama Flag Manufacturer's Federal Contract Ends*, WCTV.com (July 1, 2019, 4:40 PM), https://bit.ly/2nUXYHf (explaining that the decision below "ends a 25-year flag contract for a Huntsville-based company"). Phoenix employs 791 people through its AbilityOne contracts, including 75 veterans. Nearly two dozen employees worked on interment flags alone. *Id.*

These are just two examples of organizations across the country that are already hurting as a result of the decision below. Several additional AbilityOne nonprofits have received notice of the VA's intent to conduct a Rule of Two analysis. Due to the type of goods and services provided under these contracts, such as mail delivery, lawn mowing, and maintenance services, SourceAmerica expects that the VA will have no trouble identifying eligible VOSBs to take over these contracts from AbilityOne nonprofits.

The repercussions are hard to overstate. Unless corrected, the decision below, which the VA expanded to cover all procurements, threatens the livelihood and independence of thousands of significantly disabled workers who rely on contracts under the AbilityOne program. The U.S. Census Bureau reports that more than 38 million people in the United States have a significant disability, including more than 2 million who are blind or unable to see, more than 1 million with severe hearing loss, and more than 9.4 million non-institutionalized adults needing assistance with at least one central activity of daily living (e.g., bathing, dressing, or eating). Matthew W. Brault, U.S. Census Bureau, *Americans with Disabilities: 2010* at Tables 1, A-1 (July 2012), https://bit.ly/2FC5VEt.

As petitioner notes, Pet. 36, the effects are not limited to cancelled government contracts. SourceAmerica and the nonprofits it represents provide much-needed employment and support services to significantly disabled individuals in their communities. For many nonprofits, like Project HIRED and Goodwill Industries of North Louisiana, Procurement List contracts are the lifeblood of the organization, which allow the nonprofits to provide other additional vital services. AbilityOne nonprofits also make staffing, budgeting, and hiring decisions in reliance on the Procurement List contracts. Without these contracts, agencies will inevitably cut back, lay off employees, or in the case of nonprofits like Project HIRED, close their doors permanently.

The disruption to these programs and to government procurement priorities is not worth the candle. The U.S. AbilityOne Program, while critically important to the disabled citizens it serves, is relatively modest in scope, comprising less than 1% of federal contracting dollars. By contrast, the United States sets aside 23% of its contracting dollars for small businesses, which includes 5% for women-owned businesses, 5% for small disadvantaged businesses, and 3% for veteran-owned small businesses. 15 U.S.C. § 644(g). Notably, in addition to the 3% of government spending guaranteed to VOSBs, those VOSBs also may compete for procurements set aside for other small businesses. In 2017—prior to the decision below—the VA awarded 19.7% of the value of its contracts to SDVOSBs, far exceeding the VA's 3% annual target.[12]

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[12] Dep't of Veterans Affairs, *FY 2017 Small Business Procurement Scorecard* (Feb. 20, 2018), https://bit.ly/2mp3v8o. The VA procures over $26 billion in goods and services each year. In fiscal year 2017, the VA awarded over $10 billion to VOSBs and SDVOSBs. VA Press Release (Apr. 8, 2019), https://bit.ly/2v1QnHd. By contrast, the entire AbilityOne Program *across all federal agencies* provided

Nothing in the VBA's text or history indicates Congress's intent to transfer jobs from significantly disabled persons to for-profit business that are owned by, but are not required to employ, veterans. By contrast, Congress had compelling reasons to maintain the viability of the AbilityOne program. JWOD provides employment opportunities to tens of thousands of significantly disabled persons and over 3,000 significantly disabled veterans. By statutory definition, these individuals suffer from a disability so severe that it prevents them "from currently engaging in normal competitive employment." 41 U.S.C. § 8501. Thus, when AbilityOne loses these jobs, the significantly disabled individuals employed to do the work likely will have no alternative besides public assistance. U.S. AbilityOne Program Website FAQs, https://bit.ly/2nD4Hpt ("[C]ontracting with the AbilityOne Program allows people who are blind or have other significant disabilities an opportunity to gain meaningful employment, lead more independent lives, reduce dependence on government social programs and become taxpayers."). The AbilityOne program is a critical safety net for the nation's most underemployed workforce, a program that simultaneously serves the public's interest by reducing dependence on social programs. The VBA's Rule of Two is a service incentive for military members. Both serve important purposes, but they are not fungible.

Finally, the decision below has ensnared SourceAmerica and its nonprofits in a steady stream of bid-protest and APA litigation, diverting scarce resources away from service of the significantly disabled. *See, e.g.*, *A2Z Supply Corp. & A2Z PromoZone*, Nos. B-415006 & B-415006.2 (U.S. GAO filed July 31, 2017) (veteran-owned

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$3.3 billion worth of products and services to the federal government in fiscal year 2016. AbilityOne Commission, *Fiscal Year 2017 Performance and Accountability Report*, https://bit.ly/2IBwqOs.

business protesting option awards and contract award to various nonprofits that produce interment flags). This case presents a clean, efficient, and timely vehicle to resolve two critically important aspects of the government procurement system; deciding these issues now would curtail wasteful and inevitable litigation.

CONCLUSION

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

Respectfully submitted,

ROBERT REEVES ANDERSON
Counsel of Record
ARNOLD & PORTER
KAYE SCHOLER LLP
370 Seventeenth St., Ste. 4400
Denver, CO 80202
(303) 863-1000
Reeves.Anderson@arnoldporter.com

CRAIG A. HOLMAN
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000

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