

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
AMERICAN COUNCIL OF THE BLIND
IN SUPPORT OF PETITIONER**

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INTRODUCTION AND INTEREST OF AMICUS CURIAE¹

The American Council of the Blind (ACB) is a non-profit organization that seeks to enhance the independence, security, equality of opportunity, and quality of life for all blind and visually impaired people. Founded in 1961, ACB has 70 state chapters and affiliates and thousands of individual members spread across the United States.

Throughout its history, the ACB has advocated for the interests of the blind and visually impaired in Congress and the courts. A central part of these efforts has been the promotion of employment opportunities for visually impaired persons. Together with other disability organizations, the ACB played an important role in the passage and implementation of the Rehabilitation Act, the Americans with Disabilities Act, and the Randolph-Sheppard Act. The ACB has also partnered directly with employers and rehabilitation providers to advance its mission of securing equality of opportunity for all blind and visually impaired people.

The Federal Circuit's decision in this case jeopardizes this mission. AbilityOne, the program at the heart of this case, is the largest employer of blind per-

¹ The parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amicus curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

sons in the United States. *Performance and Accountability Report Fiscal Year 2018*, U.S. AbilityOne Commission 3 (2018). Providing jobs to more than 43,000 blind and severely disabled persons, the program plays a vital role in securing work for a group facing immense barriers to stable employment. *Id.* at 21. The Federal Circuit's decision threatens the successes AbilityOne has allowed many blind and visually impaired persons to attain.

ACB respectfully submits this amicus brief to explain the role AbilityOne nonprofits play in the blind community across the United States and how the Federal Circuit's decision endangers that role. One side of this is empirical. In this respect, the brief will describe what the data show about challenges the blind face finding employment, what specific part AbilityOne plays in addressing these challenges, and how many people's livelihoods are threatened by the Federal Circuit's decision. The other side is more personal. As important as the data are, the stories of individuals whose lives have been improved by the AbilityOne program are even more compelling. And those individuals' lives will be upended if the Federal Circuit's erroneous decision stands.

This case is immensely important to blind and visually impaired persons across the United States. If the Federal Circuit's judgment prevails, it will have profound and adverse consequences for persons who are blind, visually impaired, or severely disabled, including many veterans. For these reasons, ACB urges this Court to grant the petition for certiorari and reverse the judgment below.

SUMMARY OF ARGUMENT

The Court should grant review and reverse the Federal Circuit's decision because of the substantial harm it would inflict on the blind community across the United States.

I. Blind and visually impaired persons must overcome significant hurdles to find and retain steady employment. They encounter, among other obstacles, negative employer attitudes, transportation and mobility barriers, and inadequate accommodations, as concrete examples illustrate all too well. For these reasons, the percentage of blind and visually impaired persons in the workforce is barely half that of the general population and the unemployment rate is more than twice as high.

II. Nonprofit organizations that carry out the AbilityOne program play a key role in employing blind and visually impaired persons and offering rehabilitation services. AbilityOne nonprofits directly employ tens of thousands of blind and severely disabled persons across the country. And beyond direct employment, these organizations also invest millions of dollars earned through government contracts in community programs ranging from vision centers to after-school programs that train and otherwise benefit the blind.

III. The Federal Circuit's decision threatens the success of this program. A significant proportion of revenue earned by nonprofits employing the blind comes from contracts with the Department of Veter-

ans Affairs. These contracts are now at risk of termination. Under the ruling below, many blind and visually impaired people throughout the United States stand to lose their jobs and their access to essential rehabilitative and training services. For affected individuals, this is a very real, not an abstract, concern.

Only this Court's intervention can forestall the harmful effects of the Federal Circuit's erroneous decision. The Court should grant review.

ARGUMENT

I. The Blind And Visually Impaired Face Unique Challenges In Finding And Keeping Steady Employment.

Blind and visually impaired persons encounter among the highest barriers to employment of any group in the United States. As of April 2017, only 39 percent of people with vision loss ages 16 to 64 were working or actively seeking work, and 10 percent were unemployed. *Key Employment Statistics for People Who Are Blind or Visually Impaired*, American Foundation for the Blind (2017), <https://tinyurl.com/yxbafepq> (summarizing data from Bureau of Labor Statistics). During the same period, 73 percent of the general population ages 16 and above were working or seeking work and only 4 percent were unemployed. *Id.* This means that visually impaired persons participate in the workforce at barely half the

rate of the general population, and they have an unemployment rate 2.5 times as high.² The employment numbers for persons with visual impairments are worse than for nearly any other group of adults for which the Bureau of Labor Statistics keeps track.³

There are many reasons for the disparity between employment rates for the visually impaired and employment rates for the general population. Most significantly, this group faces negative employer attitudes, limited job opportunities, transportation and mobility barriers, and insufficient adaptive equipment and accommodations.⁴ On account of these and other challenges, many visually impaired persons understandably exit the labor force. Those that remain often struggle to maintain employment when they have it or to find employment when they need it. Crudden et al., *supra*, at 342-43.

² These numbers likely understate the gap, given that the age range in the general-population data (16 and up) is broader than the range in the vision-impaired data (16 to 64).

³ *News Release: The Employment Situation April 2017*, Bureau of Labor Statistics 1, 4 (May 5, 2017), <https://tinyurl.com/yyy974mp>.

⁴ Adele Crudden & Lynn W. McBroom, *Barriers to Employment: A Survey of Persons Who Are Visually Impaired*, 93 *J. Visual Impairment & Blindness* 341, 341-42 (1999); see also Jamie O'Mally & Karla Antonelli, *The Effect of Career Mentoring on Employment Outcomes for College Students Who Are Legally Blind*, 110 *J. Visual Impairment & Blindness* 295, 295-96 (2016).

Concrete illustrations abound. The experience of ACB member Nimer Jaber is typical.⁵ In 2013, Nimer lost his job at HP when his contract ended. In his words:

I was out of work for nearly six months. I tried so hard to find work. I completed online applications. I communicated to my friends that I was looking for employment. I applied in person. I attended inaccessible job fairs. I actively worked with Alabama's Department of Vocational Rehabilitation. I completed a number of interviews and answered many questions in respect of my blindness. I was even asked how I would locate the restroom. This was a long, drawn out, and frustrating process. Many applications were not accessible, I was not able to move forward with a number of job interviews because the systems the employers used were inaccessible, and I was unable to locate a suitable remote employment opportunity for the same reason. Had I not been receiving unemployment benefits, I am not sure what I would have done.

After many months, Nimer eventually found another position, and he now works with ETouch Systems as a vendor for Google. But the challenges he faced finding employment—including transportation barriers, inaccessible application processes, negative employer attitudes, and the cost of assistive technologies—are

⁵ Each of the individuals mentioned in this brief has consented to the use of his or her name and information.

the same ones preventing thousands of others like him from finding steady employment.

Rhonda Chapman's experience was similar. After losing her vision in just ten short days, Rhonda spent five years searching for a job. During that time, she completed a rehabilitation program run by Bosma Enterprises, a nonprofit that operates as part of the AbilityOne program. Her long search ended when Bosma itself hired her to work on AbilityOne contracts. Rhonda now manages the Independent Living Store, which provides adaptive aids for the blind.

Lee Hartline spent ten years as a custom cabinet-maker before he lost his sight due to Retinitis Pigmentosa. No longer able to continue building cabinets, Lee was homebound for 21 years and got by with the support of his mother and disability benefits. In 2014, his social worker connected him with Winston-Salem Industries for the Blind (IFB), where he was hired to work in their Optical Department on an AbilityOne contract. The job changed his life. In addition to his work at IFB, he now contributes to the community as Vice President for the North Carolina Deaf Blind Associates.

Rebekah Grieb became legally blind in her early twenties. Even though she had a college education and had learned skills in mobility, adaptive technology, and braille, Rebekah spent several years unemployed. In a familiar story for the visually impaired, she found that she could not make it past the first round of face-to-face interviews, likely on account of employers' hesitations about hiring someone with vi-

sion impairments. When things were getting desperate, Rebekah learned about the Contract Closeout Specialist position she currently holds at Alphapointe, an AbilityOne nonprofit. The job, where she has now worked for more than one year, offered her not just stable employment, but a role consistent with her skills and education.

Every person's experience differs. But the challenges Nimer, Rhonda, Lee, and Rebekah have encountered typify those faced by other visually impaired persons. *See* Crudden et al., *supra*, at 341-42. Their stories also help persons without vision impairment understand why the labor-force participation rate for this group is just 39 percent. When employers refuse to hire, transportation is difficult to find, and accommodations are unavailable, it is unsurprising that many blind and visually impaired persons find that work is unavailable.

II. The AbilityOne Program Offers Stable Employment And Rehabilitation Services To Thousands Of Blind And Visually Impaired Persons.

The AbilityOne program dates to 1938, when Congress passed the groundbreaking Wagner-O'Day Act to increase employment opportunities for the blind and visually impaired. Pub. L. No. 75-739, 52 Stat. 1196 (1938). Expanded in 1971 through the Javits-Wagner-O'Day Act (JWOD), the program requires federal agencies to purchase specified products and services from nonprofits that employ a significant number of blind and disabled persons. Pub. L. No. 92-

28, §§ 1-2, 85 Stat. 77, 80 (1971) (codified at 41 U.S.C. §§ 8501-8506).

The program is overseen by the AbilityOne Commission, comprised of 15 presidentially appointed members. The Commission maintains a list of designated products and services and oversees two central nonprofit organizations responsible for implementing the program. 41 U.S.C. §§ 8501-8503. If a product or service appears on the list, federal agencies generally must purchase it from a designated AbilityOne nonprofit. *Id.* § 8504(a). To qualify as a designated nonprofit, at least 75 percent of an organization's direct labor hours must be performed by persons who are blind or have severe disabilities. 41 U.S.C. § 8501(6)(C). Nonprofits invest the revenue from these contracts into rehabilitation and other services for the blind and disabled.

The AbilityOne program is among the most ambitious government efforts to expand equality of opportunity for the blind and visually impaired in U.S. history. It works in two basic ways. First, AbilityOne nonprofits directly employ thousands of people, many of whom otherwise would not have stable employment and might be collecting federal disability benefits. Second, AbilityOne nonprofits supply rehabilitation and job-training services to blind and visually impaired persons who wish to enter the workforce and improve their employment prospects.

While its goals are ambitious, its means are more quotidian. The precious opportunities the program makes available are generated through the federal

procurement process, encompassing a range of products and services from janitorial supplies to call-center services. In this way, the federal government advances the prospects of the visually impaired—both through employment and rehabilitation and training services—while simply buying the products and services it already needs: a win-win arrangement for all concerned.

A. AbilityOne is the largest and most successful provider of employment to the blind and visually impaired in the United States.

In 2017, AbilityOne nonprofits employed 43,831 blind and severely disabled people across the United States. *Performance and Accountability Report Fiscal Year 2018*, U.S. AbilityOne Commission 21 (2018). More than 3,000 are blind or disabled veterans. *Id.* at 3.

While substantial in and of themselves, these numbers do not fully capture the anchoring roles many of these nonprofits play in communities across the country. AbilityOne nonprofits have crafted American internment flags in Huntsville, Alabama.⁶ They manufacture janitorial products and military

⁶ McKinley Strother, *Dozens of disabled workers face layoffs after Huntsville flag manufacturer's federal contract ends*, WAFF (June 28, 2019), <https://tinyurl.com/y3dv82mm>.

uniforms in Queens, New York.⁷ And they make supplies for the Department of Defense in Kansas City, Missouri.⁸ All provide a stable occupational base for blind and visually impaired persons.

Jobs provided through AbilityOne differ from many of the positions available to the visually impaired in the larger marketplace. Unlike many private employers, AbilityOne nonprofits appreciate the capabilities of the blind and visually impaired. The jobs they offer build on the experiences that many blind people have in other areas and industries. Accommodations absent from other employer settings are built into the workplace. Alphapointe's Kansas City manufacturing plant, for example, has adapted its manufacturing machines for visually impaired employees, implementing tactile labels and protective procedures. Olsen, *supra*. AbilityOne employers, in short, offer vocational opportunities that blind and visually impaired persons would not otherwise have.

Again, concrete examples are illustrative. Consider the experience of TJ McElroy. While in the Marine Corps, TJ suffered a training injury that left him blind. He received rehabilitative training through the VA and ultimately became the first blind certified Salesforce Administrator. With that certification, he worked to train other veterans to be administrators.

⁷ John Crudele, *How this NYC company created the perfect environment for blind workers*, N.Y. Post (Feb. 11, 2019), <https://tinyurl.com/yyrzef4m>.

⁸ Patricia R. Olsen, *He Operates Molding Machines. But He Can't See Them*, N.Y. Times (Sept. 28, 2018), <https://tinyurl.com/y7hpqkcx>.

But when the training program ended, TJ found himself out of work. After months of looking for a job, he finally found one at Bosma Enterprises, the above-mentioned AbilityOne nonprofit, where he now trains people with disabilities across the country to become Salesforce Administrators.⁹

Demarrious Bowens has a similar account. He was born legally blind, and his early years were challenging. IFB eventually hired him as a sewing operator, and he has since transitioned to IFB's Optical Department. With the support of a supervisor, he became the third visually impaired person in the country to earn a certification from the American Board of Opticianry. He is now working to prepare nine other IFB Optical employees for the certification exam.

Cameron Black has also benefitted from the opportunities created by the AbilityOne program. When he was young, Cameron lost his sight due to congenital glaucoma and underwent numerous eye surgeries before he turned 13. As an adult, Cameron had no employment opportunities where he and his wife lived, in rural Missouri, so they moved to Kansas City. There, he started working for Alphapointe's call center, where he is now a supervisor. Cameron's wife stays at home with their two small children, and they are entirely dependent on this job to support their family.

⁹ Andy Ober, *Bosma Launches Salesforce Training Program*, Inside Indiana Business (May 18, 2018), <https://tinyurl.com/y2xhk6ae>.

AJ Johnson, a Navy Veteran decorated for his service during the Vietnam War, realized he was losing his vision in 1992. He failed an eye exam and thus was denied a chauffeur's license. Finding employment in the period following his vision loss was difficult. Recognizing his skills and experience from the military, Alphapointe, an AbilityOne nonprofit, hired him four years ago as a machinist, a position he continues to hold.

Ken Mullins was a senior operations manager at a Fortune 500 company when his vision started to deteriorate. He spent a year out of work, during which he applied for 50 jobs across the country. Like many other visually impaired persons, however, he did not proceed past the interview process on account of many employers' hesitations about hiring people with vision loss. He finally found employment with IFB's Optical Department as a production manager.

AbilityOne nonprofits offer thousands of people like TJ, Demarrious, Cameron, AJ, and Ken stable and fulfilling jobs. While they are capable of working in similar jobs in the private sector, visually impaired persons like these five are routinely turned away by skeptical employers or discouraged by the lack of basic accommodations. Nonprofits like Bosma, IFB, and Alphapointe thus provide essential employment options that would otherwise be unavailable.

B. AbilityOne nonprofits provide crucial rehabilitation and other services to their communities.

These nonprofits do more than just provide direct employment opportunities to the blind and significantly disabled. With the revenue derived from selling products and services to the government, they also offer the local blind and disabled communities a host of invaluable services.

Bosma Enterprises, for example, provides rehabilitation services, like mobility and computer training, to persons adjusting to vision loss.¹⁰ IFB Solutions runs community low-vision centers, which supply assistive technologies to the blind community.¹¹ Alphapointe has a summer camp and an after-school program that teach visually impaired teens computer skills through adaptive software.¹² Several AbilityOne nonprofits provide transitional housing and family support services to disabled veterans. *Performance and Accountability Report Fiscal Year 2018*, U.S. AbilityOne Commission 3. And this is just a

¹⁰ Nick Werner, *Blinded in Combat, Businessman Leads Battle for Workplace Equality*, Ball State University Magazine (July 18, 2019), <https://tinyurl.com/yxtau9rs>.

¹¹ *Asheville's older adults feel lucky to have the Community Low Vision Center*, WLOS (Nov. 26, 2018), <https://tinyurl.com/y63agwmc>.

¹² Jessica Eley, *Summer camp teaches visually impaired teens computer skills through adaptive software*, FOX4KC.com (June 26, 2019), <https://tinyurl.com/yxcaf57k>.

small sample of the ways these organizations give back in communities across the United States.

These services can change people's lives. They did for Cheryl Rayburn, who was diagnosed with Retinitis Pigmentosa when she was 16. After ten years in the mortgage industry, she stopped working due to her vision loss. She also gave up many of her hobbies. Then she found Alphapointe, where she enrolled in trainings in Braille, Orientation and Mobility, and Adaptive Technology. She began cooking again, walking and traveling on her own, and babysitting her grandchildren. Cheryl also started working at Alphapointe, where she is now a Low Vision Practice Manager.

Chris Dunlavy was a successful attorney when he was diagnosed with Retinitis Pigmentosa. After trying to hide his vision loss, he eventually gave up his career. Then he learned about Bosma Enterprises. After completing Bosma's comprehensive training program, funded through its AbilityOne contracts, Chris was hired by Bosma to speak to companies around Central Indiana about the benefits of hiring the blind. With the benefit of these experiences, he has now returned to his legal career.

AbilityOne contracts thus do much more than simply employ thousands—they help thousands more receive training and rehabilitation to find jobs in other parts of the marketplace. The actual number of people who benefit from the program is hard to pinpoint, but it assuredly exceeds by a substantial margin the 43,000 who are directly employed.

III. The Federal Circuit's Decision Undercuts AbilityOne, Upending The Lives Of Blind And Visually Impaired People Around The United States.

The Federal Circuit decided in this case that a contracting preference for veteran-owned small businesses takes priority over the JWOD's requirement that designated products and services be purchased from AbilityOne nonprofits. As the petition for certiorari makes clear, that judgment is legally incorrect. But the real-life consequences of the decision for the blind community are also profound. Without this Court's intervention, thousands of blind, visually impaired, and significantly disabled persons will lose their jobs or will lose access to critical services provided by AbilityOne nonprofits.

In practical terms, the Federal Circuit's decision will cause many AbilityOne nonprofits to lose their contracts with the Department of Veterans Affairs. Under the court's interpretation, the VA must first consider whether it can award contracts to veteran-owned small businesses before it contracts with a nonprofit designated by the AbilityOne Commission. This will lead the VA to purchase many products from veteran-owned small businesses instead of AbilityOne nonprofits.

The termination of VA contracts would deal a heavy blow to AbilityOne. In 2018, about 15 percent of the products and services provided to the federal government by AbilityOne nonprofits employing the blind and visually impaired were for VA contracts and purchase orders. The Federal Circuit's decision calls

into question nearly all of these contracts, posing an existential threat to the jobs of persons working on them and to the essential services these contracts enable the nonprofits to make available.

The effects on certain AbilityOne nonprofits would be especially significant. Bosma Enterprises, for example, stands to lose \$36 million each year—nearly 96 percent of its annual revenue comes from VA contracts.¹³ IFB will potentially lose about \$15.4 million each year, about 20 percent of its annual total.¹⁴ Other nonprofits will face similar cuts.

For each of these organizations, the loss of revenue will mean layoffs: 137 jobs are threatened at IFB, including 76 held by blind people and 15 held by veterans; 47 people have already been laid off.¹⁵ The Huntsville plant that used to make internment flags lost its contract earlier this year because of the Federal Circuit's decision, and dozens of its workers face layoffs. Bosma will likely find itself in similar straits given its reliance on VA contracts.

The repercussions of these cutbacks are real, not abstract. At least three of the people discussed

¹³ Lindsey Wright, *Bosma Enterprises Sues VA Over Contracting Changes*, Indiana Public Media (May 25, 2017), <https://tinyurl.com/y548floo>.

¹⁴ Richard Craver, *47 workers lose jobs after IFB loses contract appeal*, Winston-Salem Journal (Sept. 10, 2019), <https://tinyurl.com/y47b97zd>.

¹⁵ *IFB Solutions facing loss of 76 jobs for people who are blind*, Winston-Salem Chronicle (July 25, 2019), <https://tinyurl.com/y5jrkp9s>.

above—Demarrious Bowens, Ken Mullins, and Lee Hartline—work on VA contracts and thus may soon lose their current jobs because of the Federal Circuit’s decision. Others are in similar situations, including Antonio Arbelo, a Navy veteran who was wounded in the line of duty and lost sight in one eye. After losing sight in the other eye years later, he joined Alphapointe as a packer and machinist in the plastics department, working on a VA contract that is now at risk of termination.

Lisa Ison has already felt the effects of the Federal Circuit’s decision, as she was laid off when IFB lost its VA contract. She was born with Optic Nerve Dysplasia/Hypoplasia and navigates the world with the help of her guide dog, Nori. After a difficult job search, in which many employers did not want to accommodate her vision impairment, Lisa was hired to work in IFB’s Marker Department. In 2016, she moved to a position at IFB Optical. But Lisa lost that job in September 2019 following the Federal Circuit’s decision in this case.

In short, many blind and visually impaired persons are likely to lose their jobs if the decision below stands. Given the immense challenges visually impaired persons face finding jobs in the marketplace, *supra* Section I, the effects on these people’s lives may well be profound and long-lasting.

The Federal Circuit’s decision also threatens to roll back many of the rehabilitation programs that AbilityOne nonprofits provide to their communities. Bosma may no longer be able to provide rehabilitation

and training services, a major loss to the state of Indiana, as Bosma is the sole provider of comprehensive rehabilitation programs for visually impaired persons in the state. IFB will likely have to cut back on its vision services and training programs. Other organizations will likely have to implement similar reductions.

The threatened cuts to valuable programs across the United States reinforce the importance of this case and the need for this Court's intervention to correct the Federal Circuit's mistaken interpretation of applicable federal law.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari and reverse the judgment of the Federal Circuit.

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