

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 NATIONAL ASSOCIATION FOR THE
EMPLOYMENT OF PEOPLE WHO ARE BLIND AS
AMICUS CURIAE IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*¹

National Association for the Employment of People Who Are Blind (“NAEPB”) is a membership association of nonprofit agencies that share the common goal of providing employment opportunities for people who are blind, including service-disabled veterans. Since its founding in 2001, NAEPB has represented and protected the collective interest of its member organizations in maximizing opportunities for people who are blind, including through advocacy efforts.

NAEPB’s 61 member agencies participate in the AbilityOne Program, a federal procurement program aimed at increasing employment opportunities for individuals who are blind and severely disabled. NAEPB’s members produce a diverse assortment of products and services that are included on the AbilityOne Procurement List, which serves as a mandatory procurement source for all federal government agencies, including the U.S. Department of Veterans Affairs (“VA”).

The AbilityOne Program and resulting procurement contracts with the VA have played an indispensable role in creating and maintaining a market for the products and services that NAEPB’s members and their blind employees supply. The revenues from these contracts enable NAEPB’s members not only to pay the salaries of their blind employees, but also to

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amicus curiae* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

provide critical training and support services to members of the broader blind and disabled communities.

The Federal Circuit's decision has already resulted in the cancellation of numerous VA procurement contracts held by NAEPB's members. As a result, hundreds of blind employees (and scores of others) are at imminent risk of losing their jobs—jobs that are uniquely and increasingly challenging to secure. The loss of revenues from VA contracts will also force NAEPB's members to scale back or eliminate training, education, rehabilitation, and outreach programs for the blind and disabled. In some parts of the country, NAEPB's members are the only local providers of these vital services. In light of these grave consequences for NAEPB's members, their employees, and their communities, NAEPB has a strong interest in reversal on the merits of the decision below and respectfully submits this brief as *amicus curiae* in support of Petitioner Winston-Salem Industries for the Blind.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented in this case is of paramount importance to *amicus curiae* NAEPB and to all blind Americans. This chronically underemployed community has long struggled to overcome systemic barriers to gainful employment. To remedy this problem, Congress enacted the Javits-Wagner-O’Day Act (“JWOD”), 41 U.S.C. § 8501 et seq., with the aim of leveraging federal purchasing power to stimulate the creation of jobs for blind and disabled individuals. Specifically, Congress directed *all* federal government agencies to procure designated products and services from qualified nonprofit agencies that employ blind and disabled individuals, such as NAEPB’s members. Since its enactment, that statutory mandate—and *many* billions of dollars in federal spending—has generated tens of thousands of jobs for blind and disabled Americans, promoting their economic independence, self-sufficiency, and individual empowerment.

Notwithstanding the meaningful progress this federal procurement program has achieved, the employment prospects for blind and disabled Americans remain bleak. In 2017, only 30.5% of visually impaired working-aged adults were employed full-time. See Cornell University Yang Tan Institute on Employment and Disability, *Disability Statistics* (“Yang Tan Institute Statistics”).² At the same time, federally facilitated job placements for the blind and disabled have been on a multi-year decline. This means that finding a job is harder than ever for the more than 2.5

² Available at <http://www.disabilitystatistics.org/reports/acs.cfm?statistic=4> (last visited Oct. 7, 2019).

million visually impaired American adults who do not currently have full-time jobs.³

Against this backdrop, the dramatic real-world consequences of the Federal Circuit’s decision become manifest. The court of appeals held that the competitive-bidding preference for veteran-owned small businesses (“VOSBs”), commonly called the “Rule of Two,” established by the Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, 120 Stat. 3403, 3431-35 (2006) (“VBA”), 38 U.S.C. § 8127(d), takes precedence over the VA’s mandatory obligation to procure designated products and services from qualified nonprofit employers of the blind and disabled under the JWOD. Pet. App. 20a-28a. Following that decision, the VA has terminated, or given notice of its intent to wind down, numerous procurement contracts with NAEPB’s members.⁴ These cancellations will force NAEPB’s members to lay off *more than 800 blind employees*, including veterans. *See* National Industries for the Blind, *Protecting Jobs of Americans Who Are Blind* (“NIB Release”)⁵; Letter from NIB and NAEPB to Ranking Members of

³ The Yang Tan Institute estimates that 1,133,700 out of 3,714,400, or 30.5%, of non-institutionalized visually impaired persons aged 21 to 64 years in the United States were employed full-time in 2017; accordingly, more than 2.5 million members of that population were not employed full-time. *See* Yang Tan Institute Statistics, *supra*.

⁴ Allegedly *ultra vires* actions undertaken by the VA following the Federal Circuit’s decision in this case are the subject of ongoing litigation in the District of Columbia, *Alphapointe v. Department of Veterans Affairs*, Case No. 1:19-cv-02465-APM (D.D.C. filed Aug. 15, 2019).

⁵ Available at <https://www.nib.org/working-for-america/>.

House and Senate Committees on Veterans' Affairs (May 29, 2019) ("Letter to Veterans' Affairs Committees").⁶ These individuals will move from productive jobs to the unemployment rolls. Moreover, the loss of these contracts will deprive several of NAEPB's members of revenues they need to continue providing vital services for the blind and disabled in their local communities.

Policy consequences alone cannot drive statutory interpretation, "but when the consequences are this bad, it is useful to double-check the work." *United States v. Davis*, 139 S. Ct. 2319, 2355 (2019) (Kavanaugh, J., dissenting). The devastating impact the Federal Circuit's interpretation of the JWOD will have on the very population Congress intended to benefit cries out for double-checking. The Federal Circuit gave woefully short shrift to both the letter and purpose of the JWOD; misconstrued this Court's decision in *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969 (2016); and disregarded the obvious (and most natural) way of reconciling the JWOD and the VBA: The JWOD's mandatory-source requirement governs *non-competitive* acquisitions across all federal agencies, whereas the VBA's competitive-bidding preference determines which contractors can compete for *competitive* VA contracts. This Court should grant the petition for certiorari to ensure that the court of appeals' deeply flawed decision to the contrary does not become the death knell of the JWOD's noble endeavor.

⁶ Available at <https://www.nib.org/wp-content/uploads/VA-Comm-leadership-ltr-from-NIB-NAEPB-5-29-19-FINAL.pdf>.

ARGUMENT**I. THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE FOR THE BLIND AMERICANS THE JWOD WAS ENACTED TO BENEFIT**

The Federal Circuit held that the VBA requires the VA to prioritize VOSBs over the JWOD’s mandatory-source requirements. This holding has already had—and absent this Court’s intervention, will continue to have—dramatic consequences for NAEPB’s members, their employees, and the broader blind community in the United States. That result is anathema to the purpose of the JWOD and threatens to undermine fundamentally the federal policy of providing meaningful employment opportunities, training, and support for blind Americans.

A. Congress Enacted The JWOD To Create Meaningful Employment Opportunities For Blind And Disabled Americans

1. Individuals who are blind or have significant disabilities make up a chronically underemployed and underutilized segment of the American workforce. This population has “experienced the lowest employment rate of any segment of U.S. society,” U.S. AbilityOne Commission, *Fiscal Year 2018 Performance and Accountability Report* (“2018 AbilityOne Report”), at 3,⁷ with an overall historical unemployment rate of 70-80%, see U.S. AbilityOne Commission, *Fiscal Year*

⁷ Available at <https://www.abilityone.gov/commission/documents/U.S.%20AbilityOne%20Commission%20PAR%20FY%202018%20Post%20Final.pdf>.

2017 Performance and Accountability Report (“2017 AbilityOne Report”), at 3.⁸

2. To address this problem, in 1938 Congress enacted the Wagner-O’Day Act, with the intent of using federal purchasing power to create jobs for the blind “in the manufacture of products to be sold to the Federal Government.” H.R. Rep. No. 92-228, at 1-2 (1971), reprinted in 1971 U.S.C.C.A.N. 1079, 1080 (“House Report”). In 1971, Congress expanded the Act’s coverage to address the employment needs of the severely disabled and also the provision of services; as amended, the statute became the JWOD. *See* 2018 AbilityOne Report, *supra*, at 5.

The JWOD established the Committee for Purchase from People Who Are Blind or Severely Disabled, 41 U.S.C. § 8502, which is today known as the U.S. AbilityOne Commission (“Commission”), 2018 AbilityOne Report, *supra*, at 5. The Commission is a federal executive agency charged with administering the AbilityOne Program. 41 U.S.C. § 8502. Among other responsibilities, this entails the maintenance and publication of a Procurement List of products and services that federal agencies “*shall*” procure from qualifying nonprofit entities that employ the blind and severely disabled before pursuing competitive procurement sources. *Id.* §§ 8503-8504 (emphasis added). In 2017, the federal government purchased more than \$3.3 billion in products and services through the Program. 2018 AbilityOne Report, *supra*, at 3, 25.

3. The AbilityOne Program and its more than 550 participating nonprofit agencies, including NAEPB’s

⁸ Available at <https://abilityone.gov/commission/documents/U.S.%20AbilityOne%20Commission%20FY%202017%20PAR-Final.pdf>.

61 members, have become a critical source of employment opportunities for the blind and severely disabled in the United States. *Ibid.* More than 6,000 blind Americans, including veterans, presently have jobs because of the AbilityOne Program. *See* NIB Release.

The AbilityOne Program has benefitted not only individual employees and their families, but also society as a whole. Opportunities created by the Program have enabled blind Americans to transition from public safety-net programs into gainful, private-sector employment. This reduced burden on the public fisc has been a goal of the Program since its inception. *See* House Report at 1080 (explaining that the Wagner-O'Day Act enabled approximately 15,000 blind individuals to “pass[] from public assistance rolls . . . into private competitive employment” and “pursue productive lives” as “wage earners and tax payers”); S. Rep. No. 75-1330, at 2 (1938) (noting that creating employment opportunities for the blind “prevents [those individuals] from becoming public charges”).

The AbilityOne Program has also benefitted tens of thousands of veterans. According to the Commission, more than 7,000 veterans are presently employed through the Program and more than 36,000 veterans and their families have benefitted from the ancillary support services offered by qualified nonprofit Program participants, such as NAEPB's members. *See* 2018 AbilityOne Report, *supra*, at 5. Supporting veterans has also been a longstanding priority of the AbilityOne Program. *See* 117 Cong. Rec. 18,457 (1971) (“[O]ne of the most valuable accomplishments of [the JWOD] is that its benefits will go directly to some of the disabled veterans returning from Vietnam. . . .

[The JWOD] would make a contribution toward alleviating unemployment conditions among these disabled and handicapped veterans.”).

4. In the decades since enacting the JWOD, Congress has consistently reaffirmed its commitment to the AbilityOne Program. Congress not only appropriates funds annually to provide for continued operation of the Commission and the AbilityOne Program,⁹ but has also recently enacted legislation related to oversight and management of the Program. *See, e.g.*, Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, 129 Stat. 2242, 2639-40 (2015) (creating Office of Inspector General for AbilityOne Program).

5. Since the passage of the JWOD, Congress has also enacted other statutes that have helped open the doors to meaningful employment for blind Americans. These include, *inter alia*, the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq., and the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq.

The Rehabilitation Act, in particular, has furthered the purposes of the JWOD by coordinating federal and state efforts to develop and implement vocational rehabilitation and job placement programs for disabled individuals. To achieve these objectives, the Rehabilitation Act established the Rehabilitative Services Ad-

⁹ These appropriations are not insignificant; for FY 2020, for example, the Commission has requested a \$9.4 million budget from Congress. *See* Committee for Purchase From People Who are Blind or Severely Disabled, *Fiscal Year 2020 Congressional Budget Justification*, 1, available at https://www.abilityone.gov/commission/documents/CPBSD%20AbilityOne%20FY2020%20CBJ_Final%2020190311-Updated.pdf (last visited Oct. 7, 2019).

ministration, an agency of the Department of Education (“DOEd”) tasked with overseeing and supporting federal-state vocational rehabilitation (VR) agencies in providing VR and other services to individuals with disabilities “to maximize their employment, independence and integration into the community and the competitive labor market.” *See* U.S. Dep’t of Educ., *About RSA*.¹⁰

The ADA has advanced these same goals by aiming to remove the physical and social barriers that have inhibited disabled Americans from enjoying “independence, freedom of choice, control of their lives, [and] the opportunity to blend fully and equally into the rich mosaic of the American mainstream.” Remarks of President George Bush at the Signing of the Americans with Disabilities Act (July 26, 1990).¹¹

B. Notwithstanding This Federal Policy, Blind Americans Face Worsening Employment Prospects

Despite nearly a century of federal policy aimed at promoting job creation and placement and many billions of dollars spent in furtherance of that effort, employment prospects for blind Americans are worsening every day.

¹⁰ Available at <https://www2.ed.gov/about/offices/list/osers/rsa/index.html>.

¹¹ Available at https://www.eeoc.gov/eeoc/history/35th/videos/-ada_signing_text.html.

This trend is evident in data collected by the DOEd, which paints a bleak picture of federally facilitated job placements through VR programs:¹²

- Job placements for blind and disabled individuals through VR programs have been declining since 2000.
- This trend has worsened since the passage of the 2014 Workforce Innovation & Opportunity Act (“WIOA”), 29 U.S.C. § 3102 et seq., which modernized the 1973 Rehabilitation Act. The DOEd reports that in the five years since, there has been an approximately *40% decline* in job placements for the blind through VR programs.
- In 2018, the DOEd reported only 7,000-some job placements for the visually impaired through VR programs nationwide.

These numbers convey the stark realities facing blind job-hunters in the United States today. If a blind person who is employed full-time—which is already more than twice as unlikely as being unemployed or employed part-time—loses his or her job, it is increasingly hard to get back to work.

¹² The Rehabilitation Act charges the DOEd with the annual collection and publication of information regarding “applicants for, and eligible individuals receiving, services” through VR programs. 29 U.S.C. §§ 710, 721(a)(10).

C. The Court of Appeals' Decision Will Have A Devastating Impact On The Blind Community in the United States

The Federal Circuit's decision has disrupted a procurement scheme that has existed for decades. NAEPB is uniquely positioned to shed light on the harms this sea change will visit on its members, their employees, and their communities.

1. 35 of NAEPB's members do substantial business with the VA. For about a half-dozen members, VA contracts constitute *more than 90%* of their business; for another half-dozen, VA contracts make up 20-50% of their business. Some of these members have made significant investments into technology and equipment to meet the VA's requirements and have structured their business plans, operations, and hiring in anticipation of ongoing contractual commitments with the VA.¹³ If the VA is no longer required to source items from the AbilityOne Procurement List, NAEPB's members will lose these and future contracts with the VA. The loss of these critical revenues will be devastating for these NAEPB members and their employees.

2. NAEPB members are already keenly feeling these impacts. In the wake of the Federal Circuit's decision, the VA has not only started diverting contracts to VOSBs that should be sourced from AbilityOne providers under the JWOD's mandate, but have also

¹³ See, e.g., Declaration of Reinhard Mabry, *Alphapointe v. Dep't of Veterans Affairs*, Case No. 1:19-cv-02465-APM (D.D.C. filed Aug. 15, 2019), ECF No. 3-3, Memorandum Exhibit 2 ("Mabry Declaration"), ¶¶ 7, 18, 20, 27; Declaration of Dan Kelly, *Alphapointe v. Dep't of Veterans Affairs*, Case No. 1:19-cv-02465-APM (D.D.C. filed Aug. 15, 2019), ECF No. 3-3, Memorandum Exhibit 3 ("Kelly Declaration"), ¶¶ 18, 22.

started cancelling existing contracts with NAEPB's members. The loss of these contracts will put hundreds of blind employees out of work.

For example, the VA has already cancelled, or provided notice of its intent to cancel, several optical contracts with NAEPB member IFB Solutions. IFB Solutions is the largest employer of visually impaired individuals in the United States, employing more than 500 people in 14 states who are blind. If the VA is permitted to follow through with these cancellations, IFB Solutions will have to dismiss approximately 15% of its total workforce, terminate more than two dozen additional administrative personnel, and eliminate planned positions for 24 new blind hires.¹⁴

Similarly, the VA has provided notice of its intent to cancel contracts for switchboard services and prescription bottles and caps with NAEPB member Alphapointe. Alphapointe is another major employer of blind persons in the United States, employing approximately 230 visually impaired persons. If the VA follows through with these plans, Alphapointe will have to dismiss as much as 70% of its plastics department (which includes 25 blind employees), most, if not all, of its switchboard department (which includes approximately 6 blind employees), and an additional 8-15 administrative personnel. Alphapointe will also be forced to eliminate planned positions for 5-10 new blind hires.¹⁵

¹⁴ See Kelly Declaration, *supra*, ¶¶ 1, 10-17, 21-22.

¹⁵ See Mabry Declaration, ¶¶ 1, 17-18, 21-27.

NAEPB member Association for Vision Rehabilitation and Employment (“AVRE”) also provides switchboard operation services for the VA. If the VA cancels AVRE’s switchboard contracts—which seems likely given the VA’s termination of switchboard services with both Alphapointe and Lighthouse Louisiana, another participant in the AbilityOne Program¹⁶—that would mean the loss of \$1.1 million in annual revenue and 16 full-time positions.

All told, it is estimated that these and other VA procurement decisions resulting from the Federal Circuit’s decision will cost *800 blind Americans, including veterans, their jobs*—jobs these individuals fought tooth and nail to secure in a deteriorating employment environment. *See* NIB Release; Letter to Veterans’ Affairs Committees. That figure may seem small in the abstract, but in light of the historic underemployment of and dwindling job opportunities for blind Americans, the loss of 800 jobs will materially impact this community. Indeed, the number of jobs that will be lost because of the Federal Circuit’s decision—unless this Court intervenes—represents more than 10% of job placements for blind individuals through VR programs nationwide last year.

Losing 800 jobs will also have a significant impact on the public fisc. Given the obstacles facing blind job-hunters in the United States, these 800-some previously gainfully employed individuals will likely be forced to turn—at least for some period of time—to unemployment benefits and other public safety-net programs to support themselves and their families. This outcome conflicts directly with the JWOD’s goal of putting blind Americans to work and reducing reliance on

¹⁶ *See* Mabry Declaration, ¶ 19.

public support programs. *See infra* pg. 8 (citing House Report at 1080; S. Rep. No. 75-1330, at 2).

3. Beyond these effects on individual employees and their families, losing the VA business will also curtail the ability of NAEPB's members to provide crucial ancillary services to *thousands* of blind and disabled persons in their communities.

For example, IFB Solutions dedicates a significant portion of its revenues to providing support and training services for nearly 4,500 members of the blind community annually, including vocational training, independent living skills education, and rehabilitation and low-vision services. Absent alternative funding, IFB Solutions "will be forced to significantly scale back or eliminate these programs" without its VA business.¹⁷

Losing its VA contracts will similarly constrain Alphapointe's ability to continue providing community support programs. Like IFB Solutions, Alphapointe devotes a substantial portion of its revenues to providing support and training services for the visually impaired community, including vocational training, education, rehabilitation and outreach. These programs serve approximately 2,000 community members annually. Absent alternative funding sources, Alphapointe will have to significantly downsize or cut these programs without its VA business. That outcome would have a particularly consequential impact in the State of Missouri, where Alphapointe is headquartered and is the only comprehensive provider of many of these services.¹⁸

¹⁷ Kelly Declaration, *supra*, ¶ 23.

¹⁸ Mabry Declaration, *supra*, ¶¶ 1, 28.

The demise of these and similar programs offered by NAEPB's members will result in a greater drain on federal and state support programs and resources, as blind individuals and their families will be forced to turn to governmental providers for such services.

4. The widespread and serious harms the Federal Circuit's interpretation of the JWOD will visit on the very population of vulnerable Americans that statute was enacted to benefit presents an issue of exceptional importance that warrants this Court's review.

This Court has long admonished "that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). In this case, the Federal Circuit failed to consider adequately an alternative interpretation that would further the purposes of both the VBA and the JWOD: that the VBA restricts the pool of contractors eligible for *competitive contracts*, but leaves undisturbed the JWOD's mandatory-source directive for *non-competitive contracts*. Pet. App. 22a-23a. Indeed, as Petitioner explains, that is the more natural reading of the plain language in light of the broader statutory context. See Pet. 23-27.

But even if the plain language of the statutes did not support that reading (and it does), because the Federal Circuit's interpretation is so "demonstrably at odds with the intentions of [the JWOD's] drafters," this would be one of the "rare cases" in which "the intention of the drafters, rather than the strict language, controls." *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989) (quoting *Griffin*, 458 U.S. at 571). In this case, there can be no doubt that Congress did not

intend to send more than 800 blind employees—including veterans—back to the unemployment rolls, while stripping nonprofit providers like NAEPB's members of the resources they need to provide vital services to the blind community. This Court should grant certiorari to reconsider whether that outcome is consistent with the text and the policy goals of the JWOD and the VBA.

II. THIS COURT'S REVIEW IS MANIFESTLY WARRANTED

Absent intervention by this Court, the decision of the court of appeals will fundamentally undermine Congress's purpose in enacting the JWOD and disrupt procurement priorities that have stimulated meaningful employment opportunities for the blind and disabled for decades. The Court should grant review now to correct the Federal Circuit's misinterpretation of federal statutory and decisional law and forestall the grave consequences that will otherwise befall NAEPB's members, their blind employees, and the broader communities they serve.

1. This is not a case that would benefit from further ventilation in the lower courts. The intersection of the VBA's competitive-bidding preference and the JWOD's mandatory source directive is most likely to arise in bid protests. Bid-protest cases fall under the exclusive jurisdiction of the Court of Federal Claims pursuant to the Tucker Act, 28 U.S.C. § 1491(b)(1) & note,¹⁹ and thus the exclusive appellate jurisdiction of

¹⁹ The Tucker Act originally vested concurrent jurisdiction over such cases in the federal district courts; however, "as part of the [Administrative Dispute Resolution Act of 1996], Congress enacted a sunset provision, which terminated federal district court jurisdiction over bid protests on January 1, 2001." *Emery*

the Federal Circuit, 28 U.S.C. § 1295(a)(3). A circuit split is therefore unlikely to arise regarding this exceedingly important statutory interpretation question. Moreover, if the court of appeals' holding that the Tucker Act encompasses cases like this one—which broadly challenges VA procurement policies rather than a specific procurement—is permitted to stand, then no split could ever arise.

2. This case is a particularly appropriate candidate for review by this Court because the Federal Circuit's erroneous reconciliation of the JWOD and the VBA was based in part on a misreading of this Court's decision in *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969 (2016). See Pet. App. 26a-27a (“Our conclusion finds support in the Supreme Court’s decision in *Kingdomware*.”); see also *id.* 21a-23a.

Kingdomware did not present, and this Court did not consider, the interaction between the JWOD's mandatory-source requirements and the VBA's competitive bidding preference for VA procurements. Rather, in the words of the Court, that case required the Court to decide “whether the [VA] must use the Rule of Two every time it awards contracts or whether it must use the Rule of Two only to the extent necessary to meet annual minimum goals for contracting with veteran-owned small businesses.” 136 S. Ct. at 1973. The crux of that question was whether the VA has “discretion” in applying the Rule of Two “before contracting under the competitive procedures,” *id.* at 1976-77 (emphasis added)—not whether the VBA impliedly repealed the JWOD's non-competitive mandatory-

Worldwide Airlines, Inc. v. United States, 264 F.3d 1071, 1079 (Fed. Cir. 2001); accord Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12(d), 110 Stat. 3870, 3875 (1996).

source requirement. Indeed, the Court’s decision in *Kingdomware* does not even mention the JWOD. And, in the parties’ briefing, the statute came up only when the United States identified several mandatory government sourcing programs, including the JWOD and Federal Prison Industries, as taking priority over various contracting preferences for open-market competitive sourcing. See Brief of the United States, *Kingdomware Techs., Inc. v. United States*, No. 14-916, 2015 WL 5719745, at *4, 10 (filed Sept. 29, 2015). Nonetheless, the Federal Circuit believed itself bound by this Court’s statement that the VA must “apply the Rule of Two to *all* contracting determinations.” Pet. App. 26a (emphasis added by Federal Circuit) (quoting *Kingdomware*, 136 S. Ct. at 1976).

Only this Court can correct the Federal Circuit’s mistaken reliance on *Kingdomware*. The Court has not hesitated to grant certiorari where a court of appeals has misinterpreted or misapplied a decision of this Court in a way that “seriously frustrates the proper administration” of federal law. *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 109 (1958) (“We granted certiorari because of the claim that the Court of Appeals misinterpreted our decision in [*United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956)] and on the suggestion that its judgment seriously frustrates the proper administration of the Natural Gas Act.”); see also, e.g., *Altwater v. Freeman*, 319 U.S. 359, 363 (1943) (“The case is here on a petition for writ of certiorari which we granted because of the apparent misinterpretation by the Circuit Court of Appeals of our decision in *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241 [(1939)].”); *Schriber-Schroth Co. v. Cleveland Tr. Co.*, 311 U.S. 211, 217 (1940) (granting certiorari “on a petition which raised, among others, the question

whether the court of appeals had misinterpreted or unduly limited this Court’s earlier decision in this case and its decision in *Permutit Co. v. Graver Corp.*, [284 U.S. 52 (1931)]”). The Court should do the same here and take this opportunity to examine thoroughly—and for the first time—how to reconcile the JWOD and the VBA, while giving due weight to the important federal policy goals both statutes advance.

CONCLUSION

For the foregoing reasons, *amicus curiae* NAEPB respectfully requests that the Court grant the petition for certiorari and reverse the court of appeals’ decision.

Respectfully submitted,

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October 11, 2019