No. 19-329

In the Supreme Court of the United States

WINSTON-SALEM INDUSTRIES FOR THE BLIND,
PETITIONER

v.

PDS CONSULTANTS, INC., ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States Court of Federal Claims had jurisdiction under the Tucker Act, 28 U.S.C. 1491, to adjudicate a prospective offeror's complaint that, in procuring eyewear products and services, the Department of Veterans Affairs (VA) was failing to apply a contracting preference for certain veteran-owned small businesses mandated by the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. 8127 *et seq.*.

2. Whether the VA is required, under 38 U.S.C. 8127(d), to determine whether two or more veteran-owned small businesses would likely compete for a contract if offered through a restricted competition, before the agency can issue a non-competitive contract to a nonprofit agency for the blind or the severely disabled that has been designated as a mandatory source of goods and services under the Javits-Wagner-O'Day Act, 41 U.S.C. 8501 *et. seq*.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Federal Claims:

PDS Consultants, Inc. v. *United States*, No. 16-1063C (May 30, 2017)

United States Court of Appeals (Fed. Cir.):

PDS Consultants, Inc. v. *United States*, No. 17-2379 (Oct. 17, 2018)

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OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on October 17, 2018. A petition for rehearing was denied on May 10, 2019 (Pet. App. 54a-55a). On July 22, 2019, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 9, 2019, and the petition was filed that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. Legal Background

1. In 1984, Congress enacted the modern statutory framework for federal procurements, the Competition in Contracting Act of 1984, Pub. L. No. 98-369, Div. B, Tit. VII, 98 Stat. 1175 (codified as amended in scattered sections of Titles 10, 31, and 41 of the United States Code). In general, the Competition in Contracting Act requires that all executive agencies, when procuring goods or services, must "obtain full and open competition through the use of competitive procedures in accordance with the requirements of [the Act] and the Federal Acquisition Regulation." 41 U.S.C. 3301(a)(1). Those requirements, however, are subject to several statutory exceptions. See, *e.g.*, 41 U.S.C. 3303-3304. This case concerns the interaction of two such exceptions.

a. Section 3304 identifies certain circumstances in which an agency "may use procedures other than competitive procedures." 41 U.S.C. 3304(a). As relevant here, one of those circumstances is when "a statute expressly authorizes or requires that the procurement be made through another executive agency or from a specified source." 41 U.S.C. 3304(a)(5). The Javits-Wagner-O'Day Act (JWOD), 41 U.S.C. 8501 *et seq.*, is a statute that "expressly * * * requires that the procurement be made * * * from a specified source." 41 U.S.C. 3304(a)(5).

The JWOD was enacted in 1938 to provide employment opportunities for the blind and, as amended in 1971, other significantly disabled persons. The JWOD established a federal agency now known as the AbilityOne Commission (AbilityOne), 41 U.S.C. 8502(a), to create and maintain a "procurement list" that identifies products and services produced by nonprofit entities

that are operated in the interest of, and employ, individuals who are blind or severely disabled. 41 U.S.C. 8503(a). The JWOD directs that

> [a]n entity of the Federal Government intending to procure a product or service on the procurement list referred to in section 8503 of this title shall procure the product or service from a qualified nonprofit agency for the blind or a qualified nonprofit agency for other severely disabled in accordance with regulations of the Committee and at the price the Committee establishes if the product or service is available within the period required by the entity.

41 U.S.C. 8504(a). When following the JWOD's mandate to procure goods and services from a "qualified nonprofit agency," procuring agencies do not use competitive procedures.

b. Section 3303 of the Competition in Contracting Act, by contrast, identifies circumstances in which an agency that *is* using competitive procedures may restrict competition to particular groups of offerors—*i.e.*, use competitive procedures to obtain something less than "full and open" competition, 41 U.S.C. 3301(a). For example, agencies may reserve certain procurements for small businesses or certain kinds of small businesses, by excluding from competition all offerors "other than small business concerns in furtherance of sections 9 and 15 of the Small Business Act (15 U.S.C. 638, 644)." 41 U.S.C. 3303(b). The Small Business Act, 15 U.S.C. 631 *et seq.*, establishes a government-wide goal to obtain 23% of the value of procurement contracts from small business concerns, 15 U.S.C. 644(g)(1)(A)(i) (Supp. V 2017), and it requires agencies to establish goals for contracting with particular kinds of small businesses. See, e.*g.*, 15 U.S.C. 637(a) (2012 & Supp. V 2017)

(small businesses owned by socially and economically disadvantaged individuals); 15 U.S.C. 637(m) (2012 & Supp. V 2017) (women-owned small businesses); 15 U.S.C. 657a (2012 & Supp. V 2017) (historically underutilized business zones (HUBZone) small businesses); 15 U.S.C. 657f (small businesses owned and controlled by veterans with service-connected disabilities).

To meet these contracting goals, the Small Business Act authorizes (but generally does not require) agencies to "award contracts on the basis of competition restricted to small business concerns" in the particular preference program, according to what is generally known as the "Rule of Two"—*i.e.*, "if the contracting officer has a reasonable expectation that not less than 2 small business concerns [in that program] will submit offers and that the award can be made at a fair market price." *E.g.*, 15 U.S.C 657f(b). The Small Business Act further provides that certain lower-valued contracts "shall be reserved exclusively for small business concerns unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and are competitive with regard to the quality and delivery of the goods or services being purchased." 15 U.S.C. 644(j)(1).

2. In conjunction with the Competition in Contracting Act, the Federal Acquisition Regulation (FAR) establishes the principal regulatory framework for government procurements. The FAR was promulgated in 1983 and became effective in 1984. 48 Fed. Reg. 42,102 (Sept. 19, 1983). It codifies and publishes a uniform set of policies for all executive agency acquisitions of goods and services. 41 U.S.C. 1303(a)(1); 48 C.F.R. 1.101. Part 8 of the FAR prioritizes the sources of supplies and services for use by the government. 48 C.F.R. 8.000 *et seq.*

In prioritizing sources, the FAR categorizes sources as either mandatory or non-mandatory. 48 C.F.R. 8.002-8.004. FAR 8.002 prioritizes certain mandatory government sources over other kinds of mandatory sources and non-mandatory sources, directing that except "as otherwise provided by law, agencies shall satisfy requirements for supplies and services from or through the mandatory Government sources and publications listed [in FAR 8.002]." 48 C.F.R. 8.002(a). Supplies and services that are on the AbilityOne procurement list are one such mandatory government source. *Ibid.*

FAR 8.004 addresses non-mandatory sources, suggesting that agencies turn to these sources when they cannot satisfy their requirements from a mandatory source. 48 C.F.R. 8.004. It identifies "[c]ommercial sources * * * in the open market" as non-mandatory sources. 48 C.F.R. 8.004(b). When procuring agencies satisfy requirements from such non-mandatory sources, FAR 8.004 directs the agencies to take into account the contracting provisions for "small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business * * * , and women-owned small business concerns." 48 C.F.R. 8.004.

3. Over the last 20 years, Congress has taken several steps within this general statutory and regulatory framework to increase the procurement contracts awarded to small businesses owned by service-disabled veterans. In 1999, Congress amended the Small Business Act to establish a government-wide goal of awarding no less than three percent of the value of procurement contracts and subcontracts to "small business concerns owned and controlled by service-disabled veterans." Veterans Entrepreneurship and Small Business

Development Act of 1999, Pub. L. No. 106-50, § 502(a), 113 Stat. 247 (15 U.S.C. 644(g)(1)(A)(ii)). In 2003, Congress further amended the Small Business Act to authorize a discretionary, government-wide procurement preference for service-disabled veteran-owned small businesses. See Veterans Benefits Act of 2003 (2003 VBA), Pub. L. No. 108-183, § 308, 117 Stat. 2662 (15 U.S.C. 657f).

The 2003 VBA authorizes contracting officers in all agencies to award any size contract on the basis of a competition restricted to service-disabled veteran-owned small businesses if the Rule of Two is satisfied (*i.e.*, if the officer has a "reasonable expectation" that two or more such businesses would submit offers and that "the award can be made at a fair market price"). 15 U.S.C. 657f(b). It also authorizes contracting officers to award lower-dollar contracts on a sole-source basis to service-disabled veteran-owned small businesses, if the Rule of Two is not satisfied. 15 U.S.C. 657f(a)(1)-(3).

In 2006, after government-wide contracting did not attain the three percent goal for contracting with service-disabled veteran-owned small businesses, Congress imposed additional procurement requirements specifically on the Department of Veterans Affairs (VA). In the Veterans Benefits, Health Care, and Information Technology Act of 2006 (2006 VBA), Pub. L. No. 109-461, 120 Stat. 3403, Congress required the VA to establish contracting goals for both service-disabled veteran-owned small businesses and small businesses owned by veterans who are not service-disabled, 38 U.S.C. 8127(a)(1)(A) and (B). It also expanded the VA's contracting authorities and obligations in order to meet those goals. As most important here, the

2006 VBA required the VA to award procurement contracts on the basis of a competition restricted to service-disabled veteran-owned small businesses and veteran-owned small businesses where the Rule of Two is met. 38 U.S.C. 8127(d). Section 8127(d) provides:

> USE OF RESTRICTED COMPETITION.—Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, [the VA] shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans or small business concerns owned and controlled by veterans with service-connected disabilities if the contracting officer has a reasonable expectation that two or more [such businesses] will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

Ibid.

B. The Present Controversy

1. The VA provides healthcare through its regionally organized Veterans Integrated Service Networks (VISNs) and associated medical facilities. In 2000, AbilityOne began to identify petitioner as a required source for prescription eyewear for certain VISNs. AbilityOne added petitioner to the procurement list for prescription eyewear and associated services for VISN 7 in 2002 and for VISN 2 in 2005. Pet. App. 12a. Respondent PDS Consultants, Inc. (PDS) is a service-disabled veteran-owned small business that provides vision-related products (such as prescription eyewear) and services to the federal government. *Id.* at 87a-88a.

On August 25, 2016, PDS filed a bid-protest complaint in the Court of Federal Claims (CFC), invoking

the court's Tucker Act jurisdiction, 28 U.S.C. 1491(b). Pet. App. 87a-108a. In its complaint, PDS alleged that petitioner and the VA were then negotiating extensions to petitioner's contracts with the VA for eyewear in VISNs 2 and 7, and that those parties had entered into a series of 90-day contracts, with the VA continuing to order from petitioner in those VISNs. *Id.* at 97a. PDS claimed that, in extending the agreements with petitioner, the VA was not applying the Rule of Two as required under the 2006 VBA. *Ibid.*

PDS alleged that it was a "prospective veteran-owned bidder that would submit a quotation if given the opportunity to compete for the procurements in any of [these] VISNs." Pet. App. 90a; see *id.* at 102a. It further asserted that it had "suffered a non-trivial competitive injury because the restriction of veteran opportunities in VISN 2, VISN 7, [and other VISNs] ha[d] deprived and w[ould] deprive [it] of the chance to submit a bid or offer for these VISN opportunities." *Id.* at 91a.

PDS "s[ought] review of the [VA's] continued ordering of certain vision-related products from [petitioner]" without the VA first applying Section 8127(d). Pet. App. 89a. PDS requested, among other forms of relief, a permanent injunction "ordering the VA to conduct procurements" for VISNs 2 and 7 (among others) "in compliance with the VBA's requirement to apply the Rule of Two to all contracting determinations, regardless of whether the items are on the Procurement List." *Id.* at 106a.

2. After granting petitioner leave to intervene as a defendant, the CFC entered judgment in favor of PDS. Pet. App. 29a-53a.

The CFC first held that 28 U.S.C. 1491(b)(1) vested the court with jurisdiction over PDS's complaint. Pet.

App. 44a-45a. The court observed that PDS had challenged "both existing contracts between the VA and [petitioner] and the addition of VISNs to the List when the VA had not first performed a Rule of Two analysis." *Id.* at 45a. It also noted that PDS was "seeking to prevent the VA from awarding future contracts to [petitioner] in VISNs 2 and 7 without first performing a Rule of Two analysis." *Ibid.* Such a challenge, the court held, was "in connection with a procurement or proposed procurement" and thus within the court's bid-protest jurisdiction. *Ibid.* (quoting 28 U.S.C. 1491(b)(1)).

On the merits, the CFC held that the 2006 VBA "requires the VA to perform the Rule of Two analysis for *all* new procurements for eyewear, whether or not the product or service appears on the AbilityOne List." Pet. App. 46a. The court stated that the 2006 VBA "establishes a preference for veteran-owned small businesses as the VA's first priority." *Id.* at 47a. The CFC concluded that "the [2006] VBA must be read to take precedence over the JWOD," because the 2006 VBA applies only to the VA and is therefore more specific than the JWOD, which applies to all procuring agencies. *Id.* at 50a. Accordingly, the court ordered the VA "not to enter into any new contract for eyewear in VISNs 2 and 7 from the AbilityOne List unless it first performs a Rule of Two analysis and determines that there are not two or more qualified veteran-owned small businesses capable of performing the contracts at a fair price." *Id.* at 53a.

3. A unanimous panel of the Federal Circuit affirmed. Pet. App. 1a-28a.

The court of appeals held that the CFC had properly exercised jurisdiction over PDS's complaint. Pet. App. 17a-20a. The court concluded that PDS was an "interested party" within the meaning of 28 U.S.C. 1491(b)(1)

because it was "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract[s]" for VISNs 2 and 7. Pet. App. 18a (quoting 31 U.S.C. 3551(2)(A)); see *American Fed'n of Gov't Emps., AFL-CIO* v. *United States*, 258 F.3d 1294, 1302 (Fed. Cir. 2001) (interpreting "interested party" in Section 1491(b)(1) in accordance with the Competition in Contracting Act, 31 U.S.C. 3551), cert. denied, 534 U.S. 1113 (2002). The court further found that PDS had "alleged [a] violation of [a] statute" (specifically, the 2006 VBA) "in connection with a procurement or a proposed procurement" (specifically, the contracts with petitioner for VISNs 2 and 7). *Id.* at 18a (quoting 28 U.S.C. 1491(b)(1)).

On the merits, the court of appeals agreed with the CFC that the 2006 VBA requires the VA to apply the Rule of Two for all new procurements, even when the relevant product or service appears on the AbilityOne List. Noting the mandatory language contained in both the 2006 VBA and the JWOD, the court of appeals read the 2006 VBA as an exception to the JWOD, explaining that "[w]hile the JWOD applies to all agencies of the federal government, the VBA applies only to VA procurements and only when the Rule of Two is satisfied." Pet. App. 23a. The court observed that, unlike the 2003 VBA, the 2006 VBA did not include an exception for procurements that would otherwise be governed by the JWOD, and it "assume[d] that Congress was aware that it wrote an exception into [the 2003 VBA]" when it omitted such an exception from the 2006 VBA. *Id.* at 25a. The court of appeals viewed this Court's decision in *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969 (2016), which held that the VA must perform a

Rule of Two analysis even after it has met its contracting goals for veteran-owned small businesses, as supporting the court's resolution of the interpretive question presented here. Pet. App. 26a-27a.

4. The court of appeals denied petitioner's petition for rehearing en banc, without noted dissent. Pet. App. 54a-55a.

ARGUMENT

Petitioner contends (Pet. 15-34) that the court of appeals erred in holding that (1) the CFC possessed jurisdiction over PDS's bid-protest complaint, and (2) the 2006 VBA takes precedence over the JWOD. As to the first question presented, the court of appeals' jurisdictional holding is correct and does not conflict with any decision of this Court or another court of appeals. Further review of the jurisdictional question therefore is not warranted.

As to the second question, the government agrees that petitioner offers the better reading of the interplay between the 2006 VBA and the JWOD. Nevertheless, the legal question is close. The court of appeals' decision reasonably reconciles two statutory mandates, each of which is intended to favor a public interest that Congress has deemed compelling. And although the case is undoubtedly important to the individuals affected, in the government's view, the issue does not carry the broad significance that would warrant this Court's intervention. The petition for a writ of certiorari should be denied.

1. a. The court of appeals correctly held that PDS's complaint fell within the CFC's bid-protest jurisdiction. The Tucker Act, 28 U.S.C. 1491, confers on that court the authority "to render judgment on an action by an interested party objecting to a solicitation by a Federal

agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. 1491(b)(1). That jurisdiction exists "without regard to whether suit is instituted before or after the contract is awarded." *Ibid.* PDS's complaint falls squarely within that jurisdictional grant.

Although the Tucker Act does not define the term "interested party," 28 U.S.C. 1491(b)(1), that term is defined in a related Competition in Contracting Act provision, 31 U.S.C. 3551(2)(A), that governs protests before the Government Accountability Office. Section 3551(2)(A) defines "interested party" as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." *Ibid.*; see *American Fed. of Gov't Emps., AFL-CIO* v. *United States*, 258 F.3d 1294, 1302 (Fed. Cir. 2001) ("[T]he fact that Congress used the same term in § 1491(b) as it did in the [Competition in Contracting Act] suggests that Congress intended the same standing requirements * * * to apply."), cert. denied, 534 U.S. 1113 (2002). PDS met that definition by alleging that it and at least one other veteran-owned small business would have submitted bids or offers for the eyewear products for VISNs 2 and 7, in which the VA and petitioner were then negotiating contract extensions. See Pet. App. 97a, 102a.

PDS also "alleged [a] violation of [a] statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. 1491(b)(1). Contrary to petitioner's assertion (Pet. 19-22), PDS's complaint did not challenge VA policy "without regard to any specific pro-

curement." Pet. 19. PDS alleged that the VA was violating the 2006 VBA by negotiating with petitioner to extend petitioner's VISN 2 and VISN 7 contracts, leading to 90-day extensions of those contracts without first applying the 2006 VBA's Rule of Two. Pet. App. 97a. The court of appeals thus correctly held that PDS was challenging the VA's policy in connection with a procurement for purposes of Section 1491(b)(1). *Id.* at 19a.

The decision below does not rest on an overly broad conception of "procurement." Cf. Pet. 21. As with "interested party," the Tucker Act does not define the term "procurement." The Federal Circuit therefore has consistently applied the definition of "procurement" in 41 U.S.C. 111, a provision of the statute that establishes the government-wide Office of Federal Procurement Policy. Pet. App. 19a; see, *e.g.*, *AgustaWestland N. Am., Inc.* v. *United States*, 880 F.3d 1326, 1330 (2018); *Distributed Solutions, Inc.* v. *United States*, 539 F.3d 1340, 1345-1346 (2008). Section 111 defines "procurement" to "include[] all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout." 41 U.S.C. 111. The VA contracting activity that PDS challenged here falls well within that broad definition.

Petitioner characterizes PDS's complaint as challenging "decisions that were made for both VISNs 2 and 7 well over a decade ago," Pet. 21, but the CFC "d[id] not understand that PDS [wa]s challenging the existing contracts between [petitioner] and the VA," Pet. App. 52a. Rather, that court understood PDS to be challenging only "'new contracting determinations,' including renewing or extending existing contracts" for the relevant regions. *Id.* at 32a n.3 (citation omitted). PDS's

complaint alleged that the VA and petitioner were then "currently negotiating extended framework agreements" and "entering into a series of 90-day 'extensions.'" *Id.* at 97a.

According to the administrative record, the VA had last extended the contract with petitioner for VISN 2 as recently as August 30, 2016. See Pet. App. 40a. And the current VISN 7 contract had been awarded on July 15, 2016. See *ibid.* PDS filed its protest complaint on August 25, 2016. *Id.* at 107a. Recognizing jurisdiction over a complaint contesting such ongoing contract negotiations does not exceed any "reasonable end-point" for disappointed bidders to challenge the government's "acquisition of goods and services." Pet. 21. Nor is there any plausible ground for declaring such a challenge to be "stale." *Ibid.*

b. Petitioner contends (Pet. 16) that jurisdiction over a dispute of this sort does not lie with the CFC, subject to the exclusive appellate jurisdiction of the Federal Circuit. Instead, petitioner contends (*ibid.*) that jurisdiction properly lies with a federal district court under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, presumably followed by appeal to the appropriate regional circuit. But petitioner identifies no decision in which a regional court of appeals has addressed the first question presented, let alone a decision that has resolved it in a manner that conflicts with the Federal Circuit's factbound jurisdictional ruling here. In the absence of a circuit conflict, the first question presented does not warrant this Court's review.

2. With respect to the second question presented, the government agrees with petitioner as to the appropriate reconciliation of the 2006 VBA and the JWOD under the circumstances of this case. Further review of

that issue is not warranted, however, because the court of appeals reasonably resolved a close legal question that involves a limited set of VA procurements and implicates two strong competing public-policy interests.

a. The Competition in Contracting Act generally requires federal agencies (1) to "obtain full and open competition" (2) "through the use of competitive procedures." 41 U.S.C. 3301(a)(1). The Act then separately defines exceptions to each of those requirements. Section 3304 defines the circumstances in which an agency is permitted or required to use *non*competitive procedures. See 41 U.S.C. 3304 ("Use of noncompetitive procedures"). Section 3303, by contrast, identifies circumstances in which an agency using competitive procedures is permitted or required to obtain something other than full and open competition. See 41 U.S.C. 3303 ("Exclusion of particular sources or restriction of solicitation to small business concerns"). The former exception potentially can apply whenever an agency undertakes a government procurement. The latter applies only when the agency uses competitive procedures.

Against the backdrop of this statutory framework, the JWOD is best read to require the use of noncompetitive procedures under specified circumstances, *i.e.*, as a "statute [that] expressly * * * requires that the procurement be made * * * from a specified source." 41 U.S.C. 3304(a)(5). The 2006 VBA, by contrast, is best read to address only whether any required competition must be either "full and open" or restricted. See 38 U.S.C. 8127(d) (describing when the VA must employ the "[u]se of [r]estricted [c]ompetition"). Like the set-asides for small business concerns generally in the Small Business Act, Section 8127(d) is an exception to the requirement that competition be "full and open," not

to the requirement that "competitive procedures" must be used. See 15 U.S.C. 657f(b) (defining circumstances in which an agency may award a procurement contract "on the basis of competition restricted to small business concerns"); 41 U.S.C. 3303(b). Because the JWOD exempts agencies from using competitive procedures, the VA would have no occasion to hold a competition for goods and services on the procurement list, and thus no occasion to consider rules—including Section 8127(d)—that define the *scope* of such a competition.

Reading Section 8127(d) to apply only if the VA is otherwise using competitive procedures is consistent with the overall federal procurement scheme and with similar restricted-competition rules. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'") (citation omitted). For example, although the Small Business Act generally authorizes rather than requires the use of restricted competition, Section 644(j) provides that contracting officers "*shall* * * * reserve[]" certain lower-valued contracts exclusively for small businesses if the Rule of Two is met. 15 U.S.C. 644(j)(1) (emphasis added). The Small Business Act itself does not address how to reconcile that requirement with mandates to procure from a particular source using noncompetitive procedures. The FAR, however, has long reconciled the two types of mandates by requiring agencies to procure from mandatory sources *before* reserving a contract opportunity for commercial small businesses. Thus, FAR 8.004 instructs agencies to consider small-business preferences only "[i]f [the] agency is unable to satisfy requirements for supplies

and services from the mandatory sources listed in 8.002 and 8.003." 48 C.F.R. 8.004; see 48 C.F.R. 8.002(a)(1)(iv) and (a)(2) (listing supplies and services from the AbilityOne procurement list). The 2006 VBA's requirement to use restricted competition for veteran-owned small business concerns if the Rule of Two is satisfied is best read to operate in a similar manner.

b. In reaching the opposite conclusion, the court of appeals principally relied on the "basic tenet of statutory construction * * * that a specific statute takes precedence over a more general one." Pet. App. 23a (citation omitted); see *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). Petitioner counters that, in so doing, the court of appeals ran afoul of the separate canon that "repeals by implication are not favored." Pet. 32 (quoting *Morton* v. *Mancari*, 417 U.S. 535, 549 (1974)). Properly read, however, there is no conflict to resolve between the JWOD and the 2006 VBA, no repeal of either statute, and no need to resort to dueling canons of statutory construction. Both statutes can be given full effect in their appropriate and distinct spheres.

The court of appeals also observed that the 2003 VBA's authorization to use restricted competition for small business concerns, 15 U.S.C. 657f(c), included an express exception for procurements that are required to be made from an AbilityOne procurement list, whereas the 2006 VBA does not. Pet. App. 25a. But as explained above, given the way in which the JWOD and 2006 VBA mandates fit into the broader statutory scheme, no exception from the Rule of Two requirement is needed for the JWOD to be given full effect. The court of appeals therefore read too much into Congress' decision to omit the prior express exception from the 2006 Act.

Finally, this Court's decision in *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969 (2016), did not address the question presented here. See Pet. App. 26a (recognizing that "the precise question we consider today was not presented in *Kingdomware*"). In *Kingdomware*, the Court addressed whether Section 8127(d) applied to supplies and services acquired through the Federal Supply Schedule (FSS) after the VA had met its annual contracting goal for procurements from veteran-owned small businesses. 136 S. Ct. at 1974-1975.[1] The Court "h[e]ld that § 8127(d) unambiguously requires the Department to use the Rule of Two before contracting under the competitive procedures," and that the VA therefore must use Rule of Two procedures, even for orders under pre-existing FSS contracts and even after the VA has met its annual procurement goal. *Id.* at 1976; see *id.* at 1977-1978.

The JWOD's mandate to use specified-source procedures in certain circumstances was not at issue in *Kingdomware*. And the government did not argue in *Kingdomware* that any federal statute *required* the VA to use the FSS in the circumstances of that case. The Court therefore had no occasion to analyze the relationship between Section 8127(d) and a statutory provision (like the JWOD) that requires federal agencies to obtain particular goods or services from particular sources.

c. The government argued below that the JWOD mandate should take precedence here, and we agree with petitioner that the court of appeals' contrary decision is incorrect. For several reasons, however, further review is not warranted. The case presents a close legal

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[1] The FSS is "a streamlined method for Government agencies to acquire certain supplies and services in bulk." *Kingdomware*, 136 S. Ct. at 1974 (citing 48 C.F.R. 8.402(a) (2015)).

question, and the court's resolution is reasonable. Congress did not specifically address the manner in which the 2006 VBA and the JWOD should be reconciled. And while the government believes that the reading advanced here better accords with the statutory and regulatory scheme, FAR 8.002 contemplates that the general contract priorities may be altered as "otherwise provided by law." 48 C.F.R. 8.002(a).

Moreover, although this case is undoubtedly important to the individuals affected (both the veterans and the blind or severely disabled), the practical effect of the court of appeals' decision is not likely to be widespread. The question presented arises only when the VA procures supplies or services (1) that are on the AbilityOne procurement list and (2) for which the Rule of Two would be satisfied by veteran-owned small businesses for the relevant product in the relevant geographic area. In 2014, VA contracts accounted for only five percent of AbilityOne sales by qualified nonprofit agencies. U.S. AbilityOne Comm'n, *We Are AbilityOne: 2014 Annual Report* 12, https://go.usa.gov/xpmDb.[2] And under VA policy, even where Section 8127(d) applies, an AbilityOne nonprofit agency may ultimately be considered a mandatory source if the VA's procurement does not result in a contract award to a qualified veteran-owned small business. See VA Acquisition Regulation, Pt. 808, https://go.usa.gov/xpmDk.

Petitioner argues (Pet. 32) that, under the court of appeals' interpretation of Section 8127(d), the VA may be unable to comply with the statutory requirement, see 44 U.S.C. 501 (2012 & Supp. V 2017), to acquire its printing needs through the Government Publishing Office

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[2] AbilityOne has not reported similar agency-by-agency breakdowns in more recent years.

(GPO), or to acquire public-utility services from mandatory sources without first applying the Rule of Two. But the VA, like any agency, is not permitted to procure printing services; the GPO must procure those services. *Ibid.* As the CFC recently held, Section 8127(d) does not apply when the VA enters into an agreement or arrangement with another governmental entity—like the GPO—to acquire goods and services for the VA. *Veterans4You, Inc.* v. *United States*, 145 Fed. Cl. 181, 192 (2019). Rather, Section 8127(i) requires only that the VA include in the agreement or arrangement with the other government entity a "requirement that the [other governmental] entity will comply, to the maximum extent feasible, with the provisions of this section in acquiring such goods or services." 38 U.S.C. 8127(i).

Public-utility services contracts implicate a complex regulatory scheme and, depending on the circumstances, may be adopted through interagency agreements, competition, or General Services Administration "areawide" contracts. See 48 C.F.R. 41.202-41.206. But only the areawide contracts are mandatory, and even those are not mandatory when the services are available from more than one supplier. 48 C.F.R. 41.204(c)(1)(i). When the VA determines that there is more than one supplier, there would be no mandatory source for the VA to use. And if there is only one supplier, the Rule of Two would not be satisfied in any event.

Although petitioner and its amici assert (*e.g.*, Pet. 34-37) that the equities favor its position, both the JWOD and the 2006 VBA address policy concerns that Congress has deemed compelling. The 2006 VBA was intended to increase contracting opportunities for veteran-owned businesses—a group for which Congress has repeatedly expressed special solicitude. Pet.

App. 23a-24a; see pp. 5-7, *supra*. Through the JWOD and the 2006 VBA, Congress has indicated that both veterans and the blind and significantly disabled population deserve preferential treatment in government contracting. While the government agrees with petitioner that the relevant statutes taken together are better read to give priority to the JWOD's specified-source requirements where those requirements apply, the court of appeals' contrary holding also represents a reasonable reconciliation of the competing interests that are implicated here. And Congress of course remains free to mandate a different approach in response to the court's decision. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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