No. 19-329

IN THE

Supreme Court of the United States

WINSTON-SALEM INDUSTRIES FOR THE BLIND,
Petitioner,

v.

PDS CONSULTANTS, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

In its Brief in Opposition ("Opp."), the government agrees that the Federal Circuit misinterpreted the Veterans Benefits, Health Care, and Information Technology Act of 2006 (the "2006 VBA"), Pub. L. No. 109-461, 120 Stat. 3403, as displacing the mandatory-purchasing program created by the Javits-Wagner-O'Day Act ("JWOD"), 41 U.S.C. § 8501 *et seq*. The government further recognizes that the decision below, if left intact, will inflict a severe injury—including lost jobs and lost services—on thousands of blind and severely disabled Americans.

The government nevertheless urges the Court to deny review for three reasons: First, the legal question decided by the Federal Circuit is "close"; second, the damage wrought by the Federal Circuit's (concededly incorrect) decision is not sufficiently "widespread"; and, third, the Federal Circuit's decision struck a rational balance between the policy interests at issue in this case: benefiting for-profit, veteran-owned businesses versus employing the blind and severely disabled.

These arguments do not justify leaving a patently incorrect and socially harmful decision in place. First, the central question in this case—whether the 2006 VBA trumps JWOD's mandate to acquire goods and services from an AbilityOne nonprofit whenever possible—is not "close." The government's brief itself proves this point, systematically dismantling every argument the Federal Circuit invoked in support of its decision.

Second, the government's bare assertion that this case does not merit review because its impact will not be sufficiently "widespread" (Opp. 19) is doubly

wrong, because it both underestimates the grievous harm that the decision below will inflict on thousands of blind and severely disabled Americans and fails to appreciate the damage that the decision will cause to the broader procurement system and to future generations of blind and severely disabled individuals. As reflected in the six amicus briefs filed in support of the petition, the impact of the decision is profound and widespread.

Third, the government's suggestion that review be denied because the Federal Circuit's decision yields a reasonable policy outcome rests on two false premises: (1) that the soundness of a decision turns on its *policy* merits rather than whether it faithfully reflects the policy choice selected by *Congress*; and (2) that the Federal Circuit's decision, which will cost thousands of blind and severely disabled Americans their jobs and deprive thousands more of necessary medical, vocational, and other services, can fairly be described as a "reasonable" result rather than the gut-wrenching tragedy that it is.

This Court's review is manifestly warranted.

ARGUMENT

Before addressing the merits question at the heart of this case, a word about the jurisdictional question is in order. The government rests its argument that the Court of Federal Claims correctly exercised jurisdiction exclusively on the fact that PDS's Complaint challenged (among other things) efforts by the Department of Veterans Affairs ("VA") to negotiate 90-day extensions of IFB's prescription-eyewear contracts. Opp. 12-13. Although this point was not relied on by either the Federal Circuit or the Court of Federal Claims, see Pet. App. 18a-19a, 45a, it possesses at least arguable merit. Accordingly, the

Court may be able to satisfy its obligation to confirm its jurisdiction, see *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008), even if it does not grant review on the first question presented. Of course, under this theory all future cases raising the merits question presented here will be filed in the Court of Federal Claims and appealed exclusively to the Federal Circuit, which makes review in *this* case particularly compelling.

In any event, nothing in the government's brief diminishes the bases for granting review on the second question presented; if anything, those grounds are demonstrably stronger now that the government has confirmed that the Federal Circuit's decision cannot be squared with the text, structure, history, and context of JWOD and the 2006 VBA.

I. THE GOVERNMENT'S BRIEF CONFIRMS THAT THE FEDERAL CIRCUIT'S DECISION IS WRONG AND MERITS REVIEW.

A. The Government Agrees That The Federal Circuit's Decision Is Incorrect.

Despite repeatedly labeling the ultimate interpretive question a "close" one, the government's brief is nothing less than a methodical and comprehensive dismantling of the Federal Circuit's entire statutory analysis. For example, the Federal Circuit placed dispositive weight on the naked text of 38 U.S.C. § 8127(d), concluding that because that section is not *facially* limited to contracts being awarded on the basis of competition, no such limitation exists. Pet. App. 22a-23a. But, as the government amply explains, "[r]eading 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." Opp.

16. In other words, as IFB has argued, the Federal Circuit's reading "ignores the broader context of federal acquisitions law and the different methods federal agencies follow in acquiring goods or services—no competition, restricted competition, or 'full and open' competition." Pet. 27.

Similarly, where the Federal Circuit categorically dismissed the FAR because it includes a safety-valve provision anticipating that its mandatory-source directive could be superseded if "otherwise provided by law," Pet. App. 27a (quoting 48 C.F.R. § 8.002), the government counters by underscoring the substantial weight the FAR must be afforded when attempting to reconcile the various procurement-related statutes Congress has enacted over the past 90 years. See Opp. 16-17.[1]

The government likewise shows the error in the Federal Circuit's use of the specific-versus-general canon of statutory construction. See Pet. App. 23a. As the government rightly notes, "there is no conflict to resolve between the JWOD and the 2006 VBA" because "[b]oth statutes can be given full effect in their appropriate and distinct spheres"—"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.' The 2006 VBA, by contrast, is best read to address only whether any required competition must be either 'full and open' or

[1] If anything, the government's brief *under*-sells the degree of deference the FAR is entitled to on this question, given Congress's directive that agencies must act "in accordance with the requirements of . . . the Federal Acquisition Regulation." 41 U.S.C. § 3301(a)(1).

restricted." Opp. 15, 17 (alterations in original) (citation omitted).

And, in rejecting the Federal Circuit's reliance on the textual difference between the 2003 VBA (which expressly excepted products and services on the AbilityOne Procurement List from its veterans preference) and the 2006 VBA (which did not), the government again underscores the Federal Circuit's failure to appreciate the importance of locating both the 2006 VBA and JWOD within the broader procurement landscape. Opp. 17 ("[G]iven 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."). Congress would not silently inflict immeasurable harm on individuals who are blind and severely disabled without saying so explicitly and without any dissenting opinion from anyone in Congress.

Finally, the government exposes the error in the Federal Circuit's assertion that its holding "finds support in th[is] . . . Court's decision in *Kingdomware* [*Technologies, Inc.* v. *United States*, 136 S. Ct. 1969 (2016)]." Pet. App. 26a-27a. For its part, respondent PDS, despite ostensibly declining to respond to the petition, nevertheless attempts to bolster this portion of the Federal Circuit's analysis, arguing in its waiver letter that *Kingdomware* is dispositive. See Ltr. from David S. Gallacher to the Hon. Scott S. Harris 1-2 (Dec. 9, 2019).[2]

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[2] Given PDS's decision to rely exclusively on *Kingdomware* in its waiver letter, and its choice to wait 89 days from the docketing of IFB's petition to submit that letter, IFB respectfully sub-

As the government rightly explains, however, the Federal Circuit erred in shearing the language of *Kingdomware* from the facts and issues actually presented in that case. Opp. 18 ("The JWOD's mandate to use specified-source procedures in certain circumstances was not at issue in *Kingdomware*. . . . 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.").

B. The Government's Assertion That The Merits Question Is "Close" Does Not Justify Denying Review.

Despite the foregoing, the government nevertheless declines to urge the Court to grant review—a position it justifies based on the rather remarkable theory that the question is a "close" one and the Federal Circuit's resolution of it is "reasonable." Opp. 18-19. Even assuming (counterfactually) that the question here *were* a close one, that is no reason to deny certiorari. To the contrary, virtually *every* case that comes before this Court for resolution after briefing and argument could fairly be described as "close." Indeed, that is why divisions in the courts of appeals usually arise: a question is close, and reasonable jurists find themselves divided over its proper resolution. The mere fact that a question is "close" is hardly a basis for denying review.

Moreover, even if being a "close" question were a basis to forgo further review, that argument would have no purchase here, because—as the government itself has persuasively shown—the question in this

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mits that no further response from PDS is needed before granting certiorari.

case is *not* "close." The statutory text, statutory structure, regulatory guidance, and deafening silence in the legislative history all weigh heavily *against* the Federal Circuit's decision. And, the cited canons of construction and supposedly controlling precedent are in fact inapplicable. There is, in short, nothing "close" about this question—and the mere fact that the government "ha[s] said it thrice," see Opp. 11, 14-15, 18-19, does not make it so.[3]

II. THE GOVERNMENT WOEFULLY UNDERESTIMATES THE SCOPE AND EXTENT OF HARM INFLICTED BY THE FEDERAL CIRCUIT'S DECISION.

Despite conceding (in a profound understatement) that "this case is undoubtedly important to the individuals affected," the government nevertheless maintains that review should be denied because "the practical effect of the court of appeals' decision is not likely to be widespread." Opp. 19. That position is untenable.

First, the government seeks to minimize the perceived impact of the Federal Circuit's ruling by focusing on the share of AbilityOne contracting dollars that the VA accounts for. *Ibid.* But such abstract statistics only obscure the actual, real-world harm the decision has inflicted and will continue to inflict on some of the most vulnerable members of our society. As petitioner's *amici* have explained, thousands of blind and severely disabled individuals now face the prospect of losing their jobs as a direct result of this decision. See, *e.g.*, American Council of the Blind ("ACB") Br. 16 ("Without this Court's intervention, thousands of blind, visually impaired, and significantly

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[3] *See* Lewis Carroll, *The Hunting of the Snark* 3 (1876).

disabled persons will lose their jobs or will lose access to critical services provided by AbilityOne nonprofits."); *id.* at 6-7, 11-13, 17-18 (chronicling the experiences of individuals who have lost or are in danger of losing their jobs due to the decision below); National Association for the Employment of People Who Are Blind ("NAEPB") Br. 14 (noting that the Federal Circuit's decision "will cost *800 blind Americans, including veterans, their jobs*"); SourceAmerica Br. 18 ("Unless corrected, the decision below . . . threatens the livelihood and independence of thousands of significantly disabled workers who rely on [AbilityOne] contracts . . . .").

The government's brief also elides the fact that the Federal Circuit's decision endangers not only the jobs of *current* AbilityOne nonprofit employees but also the ability of countless individuals in future generations to secure productive, affirming employment through VA contracts. See NAEPB Br. 13 (discussing elimination of planned positions for new hires); cf. Alphapointe Br. 20-21 (expressing uncertainty regarding the inclusion of AbilityOne contractors in future VA contracting initiatives).

Moreover—and similarly ignored by the government's brief—the harm from the Federal Circuit's decision will extend far beyond those directly employed by the VA's AbilityOne contractors. As *amicus* American Council of the Blind explains, AbilityOne 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." ACB Br. 14.

For example, Bosma Enterprises "provides rehabilitation services, like mobility and computer training, to persons adjusting to vision loss." *Ibid.* *Amicus* Al-

phapointe operates "a summer camp and an after-school program that teach visually impaired teens computer skills through adaptive software." *Ibid.* And a number of other AbilityOne nonprofits "provide transitional housing and family support services to disabled veterans." *Ibid.*

The Federal Circuit's decision wrongly imperils these programs. *Id.* at 17; NAEPB Br. 15 (discussing planned cutbacks in community services); SourceAmerica Br. 17 (discussing planned cutbacks for Project HIRED, an AbilityOne nonprofit that offers career counseling, vocational training, and other support services to severely disabled individuals in California).

Also missing from the government's analysis is the impact that the Federal Circuit's decision is likely to have on the public fisc, at every level from the municipal, see City of Winston-Salem Br. 7, to the national, see NAEPB Br. 8, 14-15. Indeed, that increased burden will be two-fold: a decrease in tax revenue as a result of lost jobs,[4] an increase in reliance on social safety-net services by displaced workers and by others in the community who can no longer obtain services from local AbilityOne nonprofits.

Finally, although the government disputes the extent to which the Federal Circuit's decision will spill over into other parts of the procurement system, Opp. 19-20, it nevertheless acknowledges that there are other procurement-related statutes that (like the

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[4] Moreover, because the VA allows veteran-owned businesses to subcontract to overseas suppliers, there is no guarantee that the tax revenue lost by the termination of thousands of blind and severely disabled workers will be replaced when the work is transitioned to a veteran-owned business. *See* 13 C.F.R. § 121.406; *id.* § 121.1201 *et seq.*

2006 VBA) use mandatory language. *Id.* at 16 ("Section 644(j) [of the Small Business Act] provides that contracting officers '*shall* . . . reserve[]' certain lower-valued contracts exclusively for small businesses if the Rule of Two is met. (omission and second alteration in original) (quoting 15 U.S.C. § 644(j)(1))). The decision below also threatens to upend the entire waterfall of sources listed in FAR 8.002, where JWOD is just one of a number of non-competitive mandatory sources that supersede competitive preference programs like the 2006 VBA.

In sum, the Federal Circuit's decision will be much more than "undoubtedly important"; it will be devastating for thousands of our fellow citizens. Some will lose jobs and will be forced to endure the indignity and insecurity of reliance on public assistance and the frustration of a long—and possibly fruitless—job search. Others will lose access to vital medical, vocational, and other support services. And all of that will drain the public coffers and divert scarce resources from other public services. The government thus errs—and errs cruelly—in suggesting that the harm from the Federal Circuit's decision is not substantial enough to merit review.

III. THE FEDERAL CIRCUIT'S USURPATION OF CONGRESS'S POLICYMAKING PREROGATIVE WEIGHS IN FAVOR OF REVIEW.

The government's final argument against review is that, although the Federal Circuit's decision was legally incorrect, the decision to displace JWOD in favor of Section 8127(d)'s Rule of Two analysis "represents a reasonable reconciliation of the competing interests" Congress sought to advance in JWOD and the 2006 VBA. Opp. 21.

Both the legal and factual premises of this position are irredeemably wrong. As for its legal premise, the government appears to believe that the (perceived) "reasonableness" of the policy result achieved by the Federal Circuit's decision excuses that court's failure to honor the policy result decreed *by Congress*. This defies even the most basic principles of separation of powers. See *Tenn. Valley Auth.* v. *Hill*, 437 U.S. 153, 194 (1978) ("While '[i]t is emphatically the province and duty of the judicial department to say what the law is,' it is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation." (alteration in original) (citation omitted) (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))).

Simply put, the federal courts *say what the law* ***is***. *Ibid.* They do not, as the government seems to suggest, just choose their preferred policy outcome from the universe of "reasonable" results and then punt the matter back to Congress for its review and possible correction. *Contra* Opp. 21 ("Congress of course remains free to mandate a different approach in response to the court's decision.").

The factual premise of the government's position—that the policy outcome achieved by the Federal Circuit's decision is a "reasonable" one—is just as wrong. Critically, neither the Federal Circuit nor the government points to any expression of congressional intent to harm the blind and severely disabled. If anything, JWOD's language and legislative history underscore Congress's intent to protect these vulnerable populations through the creation of jobs guaranteed by federal buying power. And as petitioner's *amici* have explained in detail, the Federal Circuit's deci-

sion will have a heartbreaking effect on thousands of blind and severely disabled Americans, including scores (if not hundreds) of veterans. See, *e.g.*, ACB Br. 2, 6-7, 10-13, 17-18; NAEPB Br. 8-9, 14 ("[M]ore than 7,000 veterans are presently employed through the [AbilityOne] Program . . . ."); SourceAmerica Br. 18; Alphapointe Br. 9, 18-20.

The government may be willing to turn its back on the plight of those injured by the Federal Circuit's mistake, but this Court should not be. Review is warranted here, and IFB's petition should be granted.

CONCLUSION

For the foregoing reasons and those stated in the petition, certiorari should be granted.

Respectfully submitted,

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