No. 14-916

IN THE

Supreme Court of the United States

KINGDOMWARE TECHNOLOGIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The Veterans Benefits, Health Care, and Information Technology Act of 2006 provides that contracting officers at the Department of Veterans Affairs "shall award" contracts on the basis of competition restricted to small businesses owned by veterans whenever there is a "reasonable expectation" that two or more such businesses will bid for the contract at "a fair and reasonable price that offers best value to the United States." 38 U.S.C. § 8127(d). The Federal Circuit, however, relied on a prefatory clause in the statute to limit the application of this mandate to situations in which the Department believes that applying it is necessary to meet the goals that the Department establishes for contracting with veteran-owned small businesses.

The question presented is:

Whether the Federal Circuit erred in construing 38 U.S.C. § 8127(d)'s mandatory set-aside restricting competition for Department of Veterans Affairs' contracts to veteran-owned small businesses as discretionary.

CORPORATE DISCLOSURE STATEMENT

Petitioner Kingdomware Technologies, Inc. has no parent corporation, and no publicly held corporation holds 10% or more of its stock.

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BRIEF FOR PETITIONER

INTRODUCTION

The United States has long recognized a special obligation to protect and reward those who "drop their own affairs to take up the burdens of the nation" in military service. *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943). This case involves a series of legislative actions, many taken during the nation's most recent armed conflicts, to honor the extraordinary service of veterans by ensuring that they have a fair opportunity to participate in contracting with the federal government. The Federal Circuit's decision in this case gutted the most important of those provisions and should be reversed.

The statute at issue, the Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, 120 Stat. 3403 ("2006 Veterans Act"), was the culmination of years of efforts to encourage federal agencies to increase contracting opportunities for veterans. Congress began in 1999 by amending the Small Business Act to require the government to set annual goals for awarding contracts to small businesses owned by veterans with service-related disabilities. 15 U.S.C. § 644(g). After nearly every agency—including the Department of Veterans Affairs ("VA")—failed to meet those goals, Congress again amended the Small Business Act in 2003 to permit, but not require, contracting officials to restrict competition for some contracts to small businesses owned by service-disabled veterans. *Id.* § 657f(a) (contracting officers "may award" contracts using limited competition).

When that too proved inadequate, Congress enacted the 2006 Veterans Act as stand-alone legislation, separate from the Small Business Act. The 2006 Veterans Act focuses solely on the VA and extends to all veteran-owned small businesses as well as service-disabled veteran-owned small businesses. The Act provides that the VA "*shall* award" contracts on the basis of competition restricted to service-disabled or other veteran-owned small businesses whenever a contracting officer reasonably expects 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." 38 U.S.C. § 8127(d) (emphasis added). The only exceptions to this VA-specific mandate to restrict competition to veteran-owned small businesses provide that a contracting officer "*may*" award certain small contracts directly to a

veteran-owned small business using non-competitive procedures. *Id.* § 8127(b), (c) (emphasis added).

A divided panel of the Federal Circuit, however, held that the "mandate" in § 8127(d) applies only when a VA contracting officer, in his or her discretion, determines that a particular contract should be used to help the VA meet its annual goals for contracting with veteran-owned small businesses. To reach this conclusion, the panel majority relied on § 8127(a), which requires the VA Secretary to set such annual goals, and a prefatory clause in § 8127(d), which states that contracting officers shall award contracts on the basis of restricted competition "'for purposes of meeting the [annual] goals.'" Pet. App. 20a. In the majority's view, "as long as the goals … are met," the statute does not require any particular contracting procedures. *Id.* The majority viewed a mandatory mechanism for achieving the VA's annual goals as inconsistent with the Secretary's discretion to set the goals. *Id.*

That interpretation is deeply flawed. It fails to give effect to § 8127(d)'s plain language and disregards this Court's teaching that "shall" is the language of command, not discretion. It also improperly imbues the "for purposes of" clause in § 8127(d) with an operative force Congress never intended; properly construed, the clause explains the intended result of the mandate but does not limit or qualify it. The Federal Circuit's interpretation also rests on the false premise that agency-wide goals are incompatible with a mandatory mechanism for satisfying or surpassing the goals. There is no reason to think Congress wanted the goals to operate as a ceiling rather than a floor. Finally, the Federal Circuit's results-oriented view that the mandate is discretionary "as long as" the annual goals are met leaves the statute unworkable in practice, particularly in cir-

cumstances in which the agency fails to meet the goals it sets for itself.

If the Federal Circuit's interpretation of § 8127(d) is allowed to stand, the loss to America's veterans will be significant. Military service poses unique challenges for veterans reentering civilian life and operating small businesses. Congress has recognized those challenges and has sought to provide economic assistance, including procurement assistance, to ensure that the sacrifices made by the country's veterans are properly rewarded. To that end, § 8127(d) of the 2006 Veterans Act requires the VA—the agency uniquely responsible for serving America's veterans—to consider whether veteran-owned and service-disabled veteran-owned small businesses can supply the goods and services needed by the agency on reasonable terms, before turning to other suppliers. The agency should not be permitted to defy that statutory command.

OPINIONS BELOW

The opinion of the Federal Circuit (Pet. App. 1a-32a) is reported at 754 F.3d 923. The opinion of the Court of Federal Claims (Pet. App. 33a-71a) is reported at 107 Fed. Cl. 226.

JURISDICTION

The Federal Circuit entered judgment on June 3, 2014, and denied Kingdomware's petition for rehearing en banc on September 10, 2014. Pet. App. 1a, 73a-74a. Kingdomware filed a timely petition for a writ of certiorari on January 29, 2015, and this Court granted the petition on June 22, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutory provision at issue states:

> (d) 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, a contracting officer of the Department shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

38 U.S.C. § 8127(d). The subsections that immediately precede this provision state:

> (a) CONTRACTING GOALS.—(1) In order to increase contracting opportunities for small business concerns owned and controlled by veterans and small business concerns owned and controlled by veterans with service-connected disabilities, the Secretary shall—
>
> > (A) establish a goal for each fiscal year for participation in Department contracts (including subcontracts) by small business concerns owned and controlled by veterans who are not veterans with service-connected disabilities in accordance with paragraph (2); and
> >
> > (B) establish a goal for each fiscal year for participation in Department contracts

(including subcontracts) by small business concerns owned and controlled by veterans with service-connected disabilities in accordance with paragraph (3).

(2) The goal for a fiscal year for participation under paragraph (1)(A) shall be determined by the Secretary.

(3) The goal for a fiscal year for participation under paragraph (1)(B) shall be not less than the Government-wide goal for that fiscal year for participation by small business concerns owned and controlled by veterans with service-connected disabilities under section 15(g)(1) of the Small Business Act (15 U.S.C. 644(g)(1)).

(4) The Secretary shall establish a review mechanism to ensure that, in the case of a subcontract of a Department contract that is counted for purposes of meeting a goal established pursuant to this section, the subcontract was actually awarded to a business concern that may be counted for purposes of meeting that goal.

(b) USE OF NONCOMPETITIVE PROCEDURES FOR CERTAIN SMALL CONTRACTS.—For purposes of meeting the goals under subsection (a), and in accordance with this section, in entering into a contract with a small business concern owned and controlled by veterans for an amount less than the simplified acquisition threshold (as defined in section 134 of title 41), a contracting officer of the Department may use procedures other than competitive procedures.

> (c) SOLE SOURCE CONTRACTS FOR CONTRACTS ABOVE SIMPLIFIED ACQUISITION THRESHOLD.—For purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department may award a contract to a small business concern owned and controlled by veterans using procedures other than competitive procedures if—
>
> > (1) such concern is determined to be a responsible source with respect to performance of such contract opportunity;
> >
> > (2) the anticipated award price of the contract (including options) will exceed the simplified acquisition threshold (as defined in section 134 of title 41) but will not exceed $5,000,000; and
> >
> > (3) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price that offers best value to the United States.

Id. § 8127(a)-(c). The appendix to Kingdomware's petition for certiorari reproduces 15 U.S.C. §§ 644(g) and 657f, 38 U.S.C. §§ 8127-8128, and 48 C.F.R. subpart 819.70. Pet. App. 77a-95a.

STATEMENT

Congress often establishes alternative procurement procedures to accomplish policy goals that might be disserved by unrestricted competition. The statute at the center of this case, 38 U.S.C. § 8127(d), is one such example. It employs a form of restricted competition for government contracts, called the "Rule of Two," that is also used in other contexts to promote

contracting with small businesses. While the specifics vary, the idea behind a Rule of Two is that if there is a reasonable expectation that two or more small businesses of a particular type will submit bids at fair market prices for a contract, competition is limited to such businesses, which then compete among themselves to be awarded the contract. The Rule of Two in § 8127(d) applies only to the VA and favors small businesses owned by veterans and service-disabled veterans.

A. Procurement Background

Before turning to the specific statutory provision at issue, this section provides a brief overview of the framework governing federal procurement, including government-wide small business preferences that arise from the Small Business Act. 15 U.S.C. §§ 631-657s. Those preferences are not at issue here, but their shortcomings when extended to small businesses owned by service-disabled veterans provided the backdrop against which Congress enacted the VA-specific Rule of Two in § 8127(d).

1. The Small Business Act and FAR part 19

Congress enacted the Small Business Act after determining that the nation's economic "security and well-being cannot be realized unless the actual and potential capacity of small businesses is encouraged and developed," and that doing so requires ensuring that small businesses receive "a fair proportion of the total purchases and contracts … for the Government." 15 U.S.C. § 631(a). The Act has two relevant features. First, it requires the President to establish annual government-wide goals for the percentage of contracts awarded to small businesses and to particular types of small businesses. *Id.* § 644(g)(1)(A). Each agency must

also set "an annual goal that presents, for that agency, the maximum practicable opportunity" for contracting with small businesses. *Id.* § 644(g)(1)(B).

Second, the Act requires that small businesses receive a "fair proportion" of government contracts. 15 U.S.C. § 644(a)(3). The regulations implementing that provision, which are contained in part 19 of the Federal Acquisition Regulation ("FAR"), adopt procedures for contracting officers to "set aside" some contracts, or "reserve [them] exclusively or partially for the participation" of small businesses. Nash et al., *The Government Contracts Reference Book* 456 (4th ed. 2013); *see also* 48 C.F.R. § 19.502-2(b). Congress has also amended the Small Business Act to add other set-asides in favor of particular types of small businesses, all of which are implemented in FAR part 19. *E.g.*, 15 U.S.C. § 637(m)(2) (women-owned small businesses); 48 C.F.R. § 19.1505(c) (implementing regulation).

The government-wide set-asides implemented in FAR part 19 are distinct from the VA-specific Rule of Two enacted in 38 U.S.C. § 8127(d), which is implemented in the VA-specific procurement regulations, known as the Veterans Affairs Acquisition Regulation. 48 C.F.R. ch. 8.

2. FAR part 19 and federal supply schedules

By regulation, the small business set-asides in FAR part 19 "do not apply" when a contracting officer orders goods or services from a Federal Supply Schedule ("FSS") contract. 48 C.F.R. § 8.404(a); *see also id.* § 8.405-5(a) ("the preference programs of [FAR] part 19 are not mandatory" when placing FSS orders); *id.* § 19.502-1(b) (exemption within FAR part 19 stating

that government-wide set-aside "does not apply" to FSS contracts).

FSS contracts are typically negotiated on behalf of the government by the General Services Administration and are intended to provide contracting officers with a "simplified process for obtaining commercial supplies and services." 48 C.F.R. § 8.402(a). An FSS contract requires a business to commit to providing "[i]ndefinite delivery" of particular goods or services "at stated prices for given periods of time." *Id.* Suppliers publish a list of "the items offered pursuant to [the] base contract, as well as the pricing, terms, and conditions applicable to each item." *Sharp Elecs. Corp.* v. *McHugh*, 707 F.3d 1367, 1369 (Fed. Cir. 2013). "Individual agencies issue purchase orders under the base contract as needed." *Id.*

The regulatory exemption of FSS orders from the set-asides in FAR part 19 is consistent with the text of the Small Business Act, which FAR part 19 implements. Unlike the provision at issue in this case, the set-asides in the text of the Small Business Act are expressly discretionary, not mandatory. *E.g.*, 15 U.S.C. § 637(a)(1)(A) (contracting officer "in his discretion" may set aside contracts for award to § 8(a) program participants); *id.* § 637(m)(2) ("contracting officer may restrict competition" to women-owned small businesses); *id.* § 657a(b)(2)(B) (contracts "may be awarded" using set-asides for small businesses in historically underutilized business zones).

B. Amendments To The Small Business Act For Service-Disabled Veterans

1. The 1999 Veterans Act

In 1999, after finding that "[t]he United States ha[d] done too little to assist veterans, particularly service-disabled veterans, in playing a greater role in the economy of the United States by forming and expanding small business enterprises," Congress enacted the Veterans Entrepreneurship and Small Business Development Act. Pub. L. No. 106-50, § 101(3), 113 Stat. 233, 234 ("1999 Veterans Act"). The 1999 law amended the Small Business Act to require that the President and each agency set annual goals for contracting with service-disabled veteran-owned small businesses—akin to the annual goal-setting already required for other types of small businesses. *Id.* § 502, 113 Stat. at 247-248 (amending 15 U.S.C. § 644(g)). The government-wide goal must be 3% or more. 15 U.S.C. § 644(g)(1)(A)(ii).

The purpose of the 1999 Veterans Act was to spur contracting officers to take a greater interest in awarding contracts to "veterans who sacrificed their health and limbs for our Nation." S. Rep. No. 106-136, at 2 (1999); *see also* H.R. Rep. No. 106-206, at 14 (1999) (annual goals were intended to "raise the awareness of federal procurement officials").

By all accounts, that approach failed. Federal agencies, including the VA, fell so far short of the 3% goal—itself just the bare minimum—that the Administrator of the Office of Federal Procurement Policy described the relevant statistics as "disturbing" and "unacceptable." *The State of Veterans' Employment: Hearing before the H. Comm. on Veterans' Affairs*, 108th Cong. 22 (2003) (statement of Angela B. Styles). A VA Deputy Secretary acknowledged that, even hav-

ing tripled its performance from the year before, the agency was "at 6/10 of 1 percent" for contracts awarded to service-disabled veteran-owned small businesses in 2002. *H.R. 1460, The Veterans Entrepreneurship Act of 2003 [et al.]: Hearing before the Subcomm. on Benefits of the H. Comm. on Veterans' Affairs*, 108th Cong. 9 (2003) (statement of Leo S. Mackay, Jr.).

2. The 2003 Veterans Act

Congress responded to these failures with the Veterans Benefits Act of 2003, which amended the Small Business Act to create explicit—but discretionary—government-wide contracting preferences in favor of service-disabled veterans. Pub. L. No. 108-183, § 308, 117 Stat. 2651, 2662 ("2003 Veterans Act"). The 2003 Veterans Act permits contracting officers to set aside certain smaller contracts for small businesses owned by service-disabled veterans. 15 U.S.C. § 657f(a) ("sole source" awards). The Act also contains a discretionary form of the Rule of Two, under which a contracting officer "*may* award contracts on the basis of competition restricted to" service-disabled veteran-owned small businesses when at least two such businesses will submit offers and "the award can be made at a fair-market price." *Id.* § 657f(b) (emphasis added).

As the President explained when directing agencies to implement the law, the discretionary preferences for service-disabled veteran-owned small businesses were meant to "honor[] the extraordinary service rendered to the United States by veterans with disabilities" and to spur agencies "to significantly increase" their contracting with such businesses. Exec. Order No. 13,360, 3 C.F.R. 231, 231 (2005).

C. The 2006 Veterans Act

The combination of annual goals and discretionary tools also proved unsatisfactory. By 2006, the House Committee on Veterans' Affairs—which had initiated both the 1999 and 2003 amendments to the Small Business Act—"remain[ed] frustrated with respect to the efforts of the majority of federal agencies" and with the apparent "culture of indifference" among contracting officers. H.R. Rep. No. 109-592, at 15 (2006); *see H.R. 3082, The Veteran-Owned Small Business Promotion Act of 2005 [et al.]: Hearing before the Subcomm. on Econ. Opportunity of the H. Comm. on Veterans' Affairs*, 109th Cong. 2 (2005) ("*2005 Hearing*") (statement of Rep. John Boozman, Chairman) ("virtually no Federal agency, including the VA, has achieved either the spirit or the will of the [1999] law," despite the discretionary tools provided in 2003). Veterans' advocates explained that existing measures were "generally ignore[d]" at federal agencies because "no real sanctions" existed to require compliance. *Id.* 11 (statement of Carl Blake, Paralyzed Veterans of America).

Rather than amend the Small Business Act yet again, the Committee set out to enact a contracting program specifically tailored to the VA, in recognition of its unique obligation to the nation's veterans. The result was the 2006 Veterans Act. Pub. L. No. 109-461, §§ 502-503, 120 Stat. 3403, 3431-3436 (codified as amended at 38 U.S.C. §§ 8127-8128).

1. Statutory text and purpose

The purpose of the 2006 Veterans Act was to ensure that veteran-owned small businesses are "routinely … granted the primary opportunity to enter into VA procurement contracts." H.R. Rep. No. 109-592, at 14-

15. By doing so, Congress aimed to make the VA into an "example among government agencies for procurement with veteran and service-disabled veteran-owned small businesses." *Id.* at 16; *see 2005 Hearing* 29 (statement of Chairman Boozman) ("It is hard for us to get the other agencies to fall in line if we can't have [the VA] as a great model to say, hey, you can do this without the world falling apart.").

Subsection (a) of § 8127 requires the Secretary of the VA to set annual goals for contracting with veteran-owned and service-disabled veteran-owned small businesses. The goal for service-disabled veteran-owned small businesses must equal or exceed the government-wide goal established by the President under the Small Business Act. 38 U.S.C. § 8127(a)(3).

Congress then made a critical choice in the subsections that followed. Rather than combine those goals with purely discretionary tools—the approach that had failed in the 2003 Veterans Act—Congress enacted a VA-specific provision stating that VA contracting officers "shall" restrict competition to veteran-owned small businesses when the Rule of Two is satisfied:

> Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department *shall* award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable

> price that offers best value to the United States.

38 U.S.C. § 8127(d) (emphasis added).

The statute contemplates only two exceptions ("[e]xcept as provided in subsections (b) and (c)"), both of which are even more favorable to veteran-owned small businesses than the Rule of Two provision that would otherwise apply. Under the first, a contracting officer "*may* use procedures other than competitive procedures" to award contracts to veteran-owned small businesses below a threshold amount. 38 U.S.C. § 8127(b) (emphasis added); *see* 41 U.S.C. § 134 (threshold of $100,000). Under the second, a contracting officer "*may* award a contract to a [veteran-owned small business] using procedures other than competitive procedures" if the contract is above $100,000 but not greater than $5 million, the contracting officer determines the business is a responsible source, and the award can be made at "a fair and reasonable price." 38 U.S.C. § 8127(c) (emphasis added). These exceptions to the Rule of Two in § 8127(d) are discretionary. A contracting officer "may" use them to award non-competitive or sole-source contracts to veteran-owned small businesses if the statutory criteria are met. If the officer decides not to use § 8127(b) or (c), then § 8127(d) still requires the officer to apply the Rule of Two.

The set-aside procedures dovetail with other provisions of the Act contemplating routine contracting with veteran-owned small businesses. The Act requires the VA to maintain a database of eligible businesses and establishes elaborate certification procedures for inclusion in the database, including penalties for misrepresentation. 38 U.S.C. § 8127(e)-(g). This ensures that VA contracting officers have a ready source of infor-

mation on eligible suppliers when applying the Rule of Two, and the VA's regulations state that "[w]hen conducting market research, VA contracting teams shall use the … database," 48 C.F.R. § 810.001. The Act also includes a provision requiring the Secretary to "give priority to a small business concern owned and controlled by veterans" when choosing suppliers, even if the Secretary is permitted by "any other provision of law" to use a different contracting preference. 38 U.S.C. § 8128(a).

2. Implementing regulations

In 2009, the VA adopted regulations to implement the 2006 Veterans Act. *VA Acquisition Regulation*, 74 Fed. Reg. 64,619, 64,632-64,633 (Dec. 8, 2009) (codified at 48 C.F.R. subpt. 819.70). The regulations implementing the Rule of Two in § 8127(d) prioritize service-disabled veterans over other veterans; they also repeat and confirm the mandatory language of the statute:

> The contracting officer shall consider [service-disabled veteran-owned small business] set-asides before considering [veteran-owned small business] set-asides. Except as authorized by 813.106, 819.7007 and 819.7008, the contracting officer *shall* set-aside an acquisition for competition restricted to [service-disabled veteran-owned small business] concerns upon a reasonable expectation that [the Rule of Two will be satisfied].

48 C.F.R. § 819.7005(a) (emphasis added); *accord id.* § 819.7006(a) (same, for other veteran-owned small businesses).

The VA's regulations do *not* limit this mandate based on the prefatory clause in § 8127(d) or the goal-

setting provisions in § 8127(a). Instead, the three exceptions in the regulations mirror the exceptions in the statute. One permits a contracting officer to use noncompetitive procedures for certain small contracts, as contemplated by § 8127(b). 48 C.F.R. § 813.106. The other two recognize that a VA contracting officer "*may* award" contracts on a sole-source basis, as contemplated by § 8127(c). *Id.* § 819.7007(a) (emphasis added) (service-disabled veteran-owned small businesses); *id.* § 819.7008(a) (veteran-owned small businesses). The regulations emphasize that use of the sole-source procedures authorized by § 8127(c) is discretionary, not mandatory: "The contracting officer's determination whether to make a sole source award is a business decision wholly within the discretion of the contracting officer." *Id.* §§ 819.7007(b), 819.7008(b). There is no analogous provision purporting to make the Rule of Two in § 8127(d) discretionary.

The implementing regulations also do not purport to authorize contracting officers to place FSS orders without considering the Rule of Two in § 8127(d). Indeed, the regulations do not address the FSS program at all. In the preamble to its final rulemaking, however, the VA stated that it had received several requests to clarify how the proposed rules would affect FSS orders, including from commenters concerned that "failure to apply the rule to orders made under FSS contracts would severely limit the rule's effectiveness." 74 Fed. Reg. at 64,624. The VA responded that the rule "does not apply to FSS" orders because the small-business set-asides in "part 19 of the FAR … do not apply to … FSS acquisitions." *Id.* The VA did not address the fact that part 19 of the FAR implements only government-wide set-asides arising from discretionary language in

the Small Business Act and, by its own terms, does not apply to the VA-specific Rule of Two in § 8127(d).

3. Subsequent amendments

Congress has revisited and strengthened the 2006 Veterans Act several times. In 2008, the House Committee on Veterans' Affairs "became aware that the VA had concluded an agreement with the U.S. Army that would have the Army providing contracting services to the VA," and that the VA believed "the veteran-owned small business provisions of [the 2006 Veterans Act] did not apply to agents acting on behalf of the Department." H.R. Rep. No. 110-785, at 4-5 (2008). Congress responded to the VA's apparent effort to evade the statute by enacting § 8127(j), which requires that agents contracting on the VA's behalf agree to comply with the law "to the maximum extent feasible." Veterans' Benefits Improvement Act of 2008, Pub. L. No. 110-389, § 806, 122 Stat. 4145, 4189.

Congress also twice toughened the criteria to be certified as an eligible veteran-owned or service-disabled veteran-owned business. Veterans Small Business Verification Act, Pub. L. No. 111-275, § 104(b)(1), 124 Stat. 2864, 2867 (2010) (additional verification requirements); Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112-154, § 706, 126 Stat. 1165, 1206 (additional penalties for misrepresentation).

D. *Aldevra* Bid Protests

Notwithstanding the mandatory language of the statute and regulations, the VA continued to place orders from FSS contracts after the passage of the 2006 Veterans Act without first considering whether to conduct a set-aside for veteran-owned small business un-

der the Rule of Two. That practice triggered a slew of bid protests by veteran-owned small businesses.

A bid protest is a written objection by an interested party to a solicitation or other request by an agency for the procurement of property or services. 48 C.F.R. § 33.101. By filing a bid protest, a government contractor challenges a federal agency's violation of procurement statutes or regulations that prejudice the contractor's ability to compete for a specific contract. Bid protests may be filed with the agency conducting the procurement, the Government Accountability Office ("GAO"), or the Court of Federal Claims. *Id.* §§ 33.103-33.105.

The first bid protest over the VA's continued use of the FSS was filed with the GAO in 2011. *Matter of Aldevra*, 2011 WL 4826148, at *1 (Comp. Gen. Oct. 11, 2011) ("*Aldevra I*"). The VA conceded that the Rule of Two was satisfied for at least one of the disputed procurements—that is, that two or more veteran-owned small businesses could provide the goods at fair and reasonable prices. *Id.* at *2. The VA contended, however, that it was not required to conduct the Rule of Two analysis mandated by § 8127(d) because FSS acquisitions are exempted by regulation from the government-wide small business set-asides implemented in FAR part 19. *Id.* at *3. Citing the preamble to its final rulemaking (*supra* p.17), the agency claimed that the statutory preferences "only come into play when and if the VA decides to procure from commercial sources without using FSS schedules." Letter from Dennis Kulish, VA, to Jacqueline Maeder, GAO, re *Aldevra I*, at 2 (Sept. 27, 2011) (No. B-405524).

The GAO rejected the VA's position. It observed that both the 2006 Veterans Act and the VA's own im-

plementing regulations "unequivocal[ly]" require the VA to restrict competition to veteran-owned small businesses when the Rule of Two is satisfied. *Aldevra I*, 2011 WL 4826148, at *2. As to the regulations cited by the VA, the GAO explained that the FAR exempts FSS procurements from the small business set-aside requirements of part 19, such as the government-wide, explicitly discretionary set-aside for service-disabled veteran-owned small business authorized by the 2003 Veterans Act. *Id.* at *3 (discussing 48 C.F.R. § 8.404(a)). That regulatory exemption "has no application to the [2006 Veterans Act]," which is a separate statutory scheme and which is not implemented in FAR part 19. *Id.* at *4.

The GAO confirmed its view in a second Aldevra bid protest in 2012. *Matter of Aldevra*, 2012 WL 860813 (Comp. Gen. Mar. 14, 2012) ("*Aldevra II*"). In that protest, for the first time in "numerous" protests on the same issue, the VA offered a new argument to support its FSS procurements—namely, that because § 8127(d) contains the prefatory clause "for purposes of meeting the goals under subsection (a)," the statute requires use of the Rule of Two only when the VA decides, in its discretion, that a particular procurement should be used to further its annual contracting goals. *Id.* at *3. The VA argued that the "for purposes of" clause, which it had not cited in *Aldevra I* or its rulemaking, was actually an "extremely important" qualifier preserving the agency's discretion. Letter from Phillipa Anderson, VA, to Lynn Gibson, GAO, re *Aldevra II*, at 2, 8 (Jan. 4, 2012) (No. B-406205). The GAO also rejected that argument, noting that the clause "explains the purpose for the mandate" but "does not create an exception to the mandate." *Aldevra II*, 2012 WL 860813, at *4.

The VA declined to follow the *Aldevra* decisions or nearly twenty other GAO bid protest decisions on the same issue. GAO, *Report to Congress*, 2012 WL 5510908, at *1 (Comp. Gen. Nov. 13, 2012); *see* JA6-7 (internal VA guidance); JA8-10 (VA press release). Although the GAO's resolution of a protest is not binding, 31 U.S.C. § 3554(b), "[a]n agency's decision to disregard a GAO recommendation is exceedingly rare," *CMS Contract Mgmt. Servs.* v. *Massachusetts Hous. Fin. Agency*, 745 F.3d 1379, 1384 (Fed. Cir. 2014).

The standoff between the VA and the GAO ended in December 2012, after the decision of the Court of Federal Claims in this case. The GAO announced that it stood by its interpretation of the 2006 Veterans Act but that it would no longer hear bid protests on the issue because protestors could not "obtain meaningful relief" from the VA's unlawful procurements. JA41.

E. Prior Proceedings

1. Kingdomware is a small business that develops and manages web, software, and database applications for both the public and private sectors. It is owned by Timothy Barton, a veteran who served in the U.S. Army during Operation Desert Storm and sustained a service-related injury that rendered him permanently disabled. The VA has certified Kingdomware as a service-disabled veteran-owned small business. JA20, 33.

Kingdomware filed multiple bid protests at the GAO over the VA's failure to apply the Rule of Two before using the FSS for procurements. JA25-28. One of Kingdomware's protests concerned a February 2012 procurement for emergency notification services for a group of VA hospitals and clinics, which the VA awarded to an FSS supplier without considering § 8127(d).

JA30-31.[1] This occurred even though the VA contracting officer was aware at the time of the procurement that at least twenty service-disabled veteran-owned small business suppliers "were capable of meeting the requirements at issue." JA18. The GAO sustained Kingdomware's bid protests. JA19. However, as with the *Aldevra* bid protests, the VA refused to follow the GAO's decisions. JA11-12, 32.

2. Kingdomware then brought this action in the Court of Federal Claims for declaratory and injunctive relief from the VA's refusal to apply § 8127(d)'s Rule of Two before ordering from FSS suppliers. JA20, 28-29; *see* 28 U.S.C. § 1491(b)(1) (Court of Federal Claims' jurisdiction over such suits). The VA acknowledged that its contracting officer made no effort to comply with the Rule of Two for the procurement at issue. JA31.

The Court of Federal Claims nevertheless granted summary judgment to the VA. Applying the framework of *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), the court first found the statute to be ambiguous. In the court's view, the "for purposes of" clause in § 8127(d) and the statute's overall "goal-setting nature" "cloud[ed] the clarity" of the otherwise clear "shall award" language. Pet. App. 62a. Proceeding to the second step of *Chevron*, the court deferred to the agency's position in the preamble to its final rulemaking, which the court understood as interpreting the 2006 Veterans Act to "hav[e] no effect on [the VA's]

[1] The VA's response to this protest made no mention of the "for purposes of" clause of § 8127(d). Instead, the agency again cited its rulemaking preamble, in which it claimed to have "interpret[ed] [the] statute in conjunction with the entire procurement system" and to have determined that "FSS acquisitions" were not "impacted" by the law. JA14.

ability to use the FSS without limitation." *Id.* 69a. At the parties' request, the court also entered judgment on two other claims brought by Kingdomware raising the same legal question as to other procurements. JA35-37.

3. A divided panel of the Federal Circuit affirmed on different grounds. Unlike the Court of Federal Claims, the panel majority "perceive[d] no ambiguity in § 8127." Pet. App. 15a. In its view, the statute "links the Rule of Two mandate (denoted by the word 'shall') in subsection (d) to the goals set under subsection (a)." *Id.* 20a. To put those provisions in what the majority described as "harmonious context" (*id.*), the majority held that "the Secretary 'shall' use Rule of Two procedures" when the VA wishes to use a procurement to meet its annual goals but "may elect to use the FSS at other times so long as the goals are met" (*id.* 15a). The majority asserted that a contrary reading would render the statutory requirement that the Secretary set goals "superfluous" because the number of contracts awarded to veteran-owned small businesses would be determined not by the goals but rather by "the success or failure of the Rule of Two in the marketplace." *Id.* 20a.

The majority also relied on extra-record statistics about VA contract awards to veteran-owned and service-disabled veteran-owned small businesses in recent years. The government submitted those statistics at the court's request after oral argument. JA42-55. The majority accepted and relied on these untested numbers to conclude that the VA had met the annual goals it was required to set for itself. Pet. App. 9a. Under that circumstance, "as long as the goals set under sub-

section (a) are met," the majority saw "no reason to compel" use of the Rule of Two. *Id.* 20a, 21a.[2]

Judge Reyna dissented. In his view, the mandatory force of the statutory language "could not be clearer" (Pet. App. 23a), and the majority's construction "guts the Rule of Two imperative" of any force (*id.* 22a). Addressing the majority's reliance on the phrase "for purposes of meeting the goals," Judge Reyna explained that "'a prefatory clause does not limit or expand the scope of the operative clause.'" *Id.* 26a; *see id.* 22a ("In relying entirely on prefatory language to second-guess Congress, the majority becomes policy maker and departs from our duty to enforce the proper interpretation of the statute regardless of our policy views."). He further explained that the majority's interpretation is undermined by the VA's own regulations, which repeat the mandatory statutory language

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[2] In fact, the statistics are inaccurate. An audit by the VA's inspector general concluded that the agency overstated its awards to veteran-owned and service-disabled veteran-owned small businesses in fiscal year 2010—the only year studied—by at least $500 million and possibly more, attributable largely to awarding and counting contracts to ineligible businesses. VA OIG, *Audit of Veteran-Owned and Service-Disabled Veteran-Owned Small Business Programs* 3 (July 25, 2011). The audit demonstrated that the VA may have awarded as few as 6% of its contracts to veteran-owned small businesses in 2010 (*id.* 32 tbl. 5)—far short of its reported 23% and its goal of 12% (Pet. App. 9a). The government has claimed that the problems revealed by the audit were fixed by legislative changes in 2010. Opp. 8 n.2. However, the VA's senior procurement official testified to Congress *in 2015* that "VA small-business goal accomplishments have been and continue to be overstated" and that the VA has "duped the veteran-owned business community" by inflating its purported annual achievements. Jan R. Frye, VA Deputy Ass't Sec'y for Acquisition & Logistics, *Statement to the Subcomm. on Oversight & Investigations of the H. Comm. on Veterans' Affairs* 2 (May 14, 2015).

("shall award") and *omit* the prefatory clause ("for purposes of"). *Id.* 27a-29a.

Finally, Judge Reyna addressed the majority's reliance on the goal-setting provisions of subsection (a). In his view, the majority "overlook[ed] that participation goals are aspirations, not destinations," and thus may be exceeded without becoming superfluous. Pet. App. 30a. He also faulted the majority for "a misapprehension of the interplay between a Rule of Two analysis and agency-wide goals." *Id.* 31a. The goals are set by the Secretary, but the Rule of Two analysis "is undertaken by the contracting officer on a contract-by-contract basis." *Id.* "Significantly, there is no evidence in the record to show that VA contracting officers rely on, or have access to, these types of data [on whether the agency is meeting its goals] in making contracting decisions[.]" *Id.* 27a. There is thus no practical way "contracting officers can determine that these goals have been 'met' before the end of the fiscal year." *Id.* 32a. Judge Reyna concluded that, far from rendering subsections (a) and (d) harmonious, the majority's decision "deprives the Rule of Two mandate of its force and effect," "impedes congressional objectives," and "renders § 8127(d) inoperative and unnecessary." *Id.*

The Federal Circuit denied Kingdomware's petition for rehearing en banc on September 10, 2014. Pet. App. 73a-74a.

SUMMARY OF ARGUMENT

I. The unambiguous text of § 8127(d) mandates that VA contracting officers "shall award" contracts using competition restricted to veteran-owned and service-disabled veteran-owned small businesses when the Rule of Two is satisfied. "Shall" is the language of

command, not discretion. The conclusion that § 8127(d) is mandatory is further strengthened by comparing it to the expressly discretionary language ("may use" and "may award") in § 8127(b) and (c), as well as in prior measures, the shortcomings of which led Congress to enact the 2006 Veterans Act.

The Federal Circuit's contrary view rested on a prefatory clause in § 8127(d) that states that the Rule of Two is to be used "for purposes of" meeting annual goals the VA Secretary must set under § 8127(a). The prefatory "for purposes of" clause explains the outcome Congress sought to achieve but does not limit the operative clause ("shall award"). The annual goals are a floor, not a ceiling. They promote accountability and can spur the VA to take additional action if needed, but their overarching purpose is to "increase contracting opportunities," 38 U.S.C. § 8127(a)(1), not limit them.

By ascribing operative force to the "for purposes of" clause, the Federal Circuit has left the operation of § 8127(d) unclear and unworkable. The statute cannot be read as discretionary "as long as" the goals are met. Pet. App. 20a. Such an interpretation could interfere with the grants of authority to use non-competitive procedures or sole-source awards in § 8127(b) and (c), which contain the same prefatory clause as § 8127(d). Moreover, contracting officers do not know whether the annual, agency-wide goals have been or are being met when awarding contracts. Nor can § 8127(d) be read as "mandatory" only when a contracting officer decides to use it, as the government has contended. That would effectively rewrite "shall" as "may."

The legislative history of the Act and the veterans canon further confirm what the text itself makes plain: Congress required the VA to consider veteran-owned

small business suppliers first, applying the Rule of Two, before turning to other sources of supply.

II. Because the text of the statute is unambiguous, the case should be resolved at the first step of *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984). The second step of *Chevron* also clearly favors Kingdomware. The regulations the VA adopted to implement § 8127(d) mirror the mandatory statutory language ("shall award") and omit the "for purposes of" clause. The regulations thus show that the VA did not view the "for purposes of" clause as significant during its rulemaking, did not purport to resolve any ambiguity created by it, and instead adopted mandatory regulations that are inconsistent with its current litigating position.

Rather than rely on the regulations, the government has argued that the VA's interpretation of the statute is entitled to deference based on a preamble to the agency's final rulemaking. However, the legal reasoning of the preamble is clearly mistaken, and the government has abandoned it. The VA relied not on the "for purposes of" clause but rather on other provisions in the FAR that are inapplicable to the 2006 Veterans Act. The preamble is also not owed deference because it lacks the force of law and conflicts with the plain language of the regulation. Nor does the 2006 Veterans Act contain any gaps regarding the FSS for the agency to fill under *Chevron*.

III. Congress required the VA to apply the Rule of Two for sensible reasons that an executive agency may not second-guess. Veterans face special challenges in reintegrating into the civilian workforce, and Congress has sought to address those challenges through economic assistance, including procurement preferences. In this instance, Congress determined that a mandato-

ry Rule of Two specific to the VA is appropriate to support and encourage veteran entrepreneurship. The VA may not disregard that command.

The government's contrary policy arguments cannot override the text and are, in any event, mistaken. Applying the Rule of Two will not cause waste or inefficiency because competition is only restricted if there is a reasonable expectation that the award will be made "at a fair and reasonable price that offers best value to the United States." 38 U.S.C. § 8127(d). Contracting officers will not be overburdened if required to consider the Rule of Two.

Finally, the VA's inability to provide an accurate account of its annual progress in meeting its small business goals provides yet another reason to conclude, as the text indicates, that the mandate in § 8127(d) does not depend on the agency's self-reported success in achieving those goals.

ARGUMENT

I. THE TEXT, PURPOSE, AND HISTORY OF THE 2006 VETERANS ACT CONFIRM THAT THE RULE OF TWO IS MANDATORY, NOT DISCRETIONARY

A. The Plain Language Of § 8127(d) Is Mandatory

"As in all statutory construction cases," the inquiry "begin[s] with the language of the statute." *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). The text of § 8127(d) is clear and unambiguous: "a contracting officer of the Department shall award contracts" to veteran-owned small businesses using restricted competition whenever the Rule of Two is satisfied, "[e]xcept as provided in subsections (b) and (c)." The plain language thus requires VA contracting officers to

consider veteran-owned small businesses first, before turning to other potential suppliers or the FSS system.

This Court has repeatedly recognized that the word "shall" signifies a command or mandatory duty, not a grant of discretion. *E.g.*, *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("shall" is "mandatory" and "normally creates an obligation impervious to judicial discretion"); *Alabama* v. *Bozeman*, 533 U.S. 146, 153 (2001) ("The word 'shall' is ordinarily 'the language of command.'" (quoting *Anderson* v. *Yungkau*, 329 U.S. 482, 485 (1947))); *see also United States* v. *Monsanto*, 491 U.S. 600, 607 (1989) (with the language "'shall forfeit,'" "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory"). By contrast, Congress uses "may" in a statute to confer "some degree of discretion." *United States* v. *Rodgers*, 461 U.S. 677, 706 (1983). As explained in the House drafting manual in effect when the 2006 Veterans Act was enacted, "[f]or granting a right, privilege, or power, use 'may' …. For directing that action be taken, use 'shall[.]'" *House Legislative Counsel's Manual on Drafting Style* 61-62 (1995).

To be sure, context may sometimes require reading "shall" as discretionary in exceptional circumstances. *Rodgers*, 461 U.S. at 706; *see Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 432 n.9 (1995). But where "the word 'may' is used in special contradistinction to the word 'shall,' … there can be no reason for 'taking such a liberty.'" *United States ex rel. Siegel* v. *Thoman*, 156 U.S. 353, 359 (1895). When a single provision uses "both 'may' and 'shall', the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory." *Anderson*, 329 U.S. at 485.

Section 8127 uses "may" and "shall" in precisely that contrasting way. Subsection (d) uses "shall" to indicate that VA contracting officers must conduct a restricted competition in all cases where the Rule of Two is satisfied, "[e]xcept as provided in subsections (b) and (c)." Subsections (b) and (c), by contrast, use "may" to indicate that they permit, but do not require, contracting officers to award non-competitive or sole-source contracts in lieu of restricted competition in certain cases. Thus, reading § 8127(d) in the broader context of its sibling provisions confirms that "shall award" is mandatory rather than discretionary.

The conclusion that Congress used "shall" in deliberate contrast to "may" is further strengthened by considering the predecessors to the 2006 Veterans Act. *See Rodgers*, 461 U.S. at 706-708 (drawing similar comparison). The 1999 and 2003 Veterans Acts required yearly goals and established explicitly discretionary ("may award") set-aside authority for service-disabled veteran-owned small businesses. 15 U.S.C. §§ 644(g), 657f(b). Disillusionment with that discretionary regime spurred Congress to pass the more stringent 2006 Veterans Act. For the revamped initiative, which applies exclusively to the VA and extends to all veteran-owned small businesses, Congress adapted the set-aside language from existing law and replaced "may award" with "shall award." Interpreting § 8127(d) as though it said "may" would be indefensible given that history.

B. The "For Purposes Of" Clause Does Not Limit The Rule Of Two Mandate

To avoid the plain meaning of the "shall award" language in § 8127(d), the government and the Federal Circuit relied on a prefatory clause stating that the Rule of Two is to be used "for purposes of meeting the

goals set under subsection (a)." Pet. App. 20a. However, the "for purposes of" clause does not render the Rule of Two discretionary, nor does it cause the Rule of Two to cease to apply "as long as" (*id.*) or "after" (*id.* 17a) the VA meets its goals. Such readings are unsupported by the text, unworkable in practice, and improperly transform the floor created by the annual goals into a ceiling.

1. The "for purposes of" clause is a prefatory statement of purpose

Section 8127(d)'s prefatory "for purposes of" clause simply announces one objective Congress hoped to achieve by requiring contracting officers to apply the Rule of Two: to have the VA meet its annual goals, which it had failed to do for years before Congress enacted the 2006 Veterans Act. *Supra* pp.11-13. That prefatory statement of purpose does not override or otherwise impose a cap on § 8127(d)'s operative clause, which states that "a contracting officer of the Department shall award contracts" when the requirements of the Rule of Two are met. Rather, the prefatory clause merely states an anticipated or hoped-for outcome from applying the operative clause as written.

This commonsense reading accords with the text of § 8127(a) itself, which shows that the annual goals are intended to *increase* contracting opportunities for veteran-owned small businesses, not to limit them. Subsection (a) provides: "*In order to increase contracting opportunities* for small business concerns owned and controlled by veterans … [or] veterans with service-connected disabilities, the Secretary shall … establish"

annual goals for contracting with such businesses. 38 U.S.C. § 8127(a) (emphasis added).[3]

Further, the Secretary must set an annual goal for service-disabled veteran-owned small businesses that is at least as high as the government-wide goal set under the Small Business Act. 38 U.S.C. § 8127(a)(3). The cross-referenced provision of the Small Business Act likewise uses open-ended language without a ceiling. 15 U.S.C. § 644(g)(1)(A)(ii) ("*not less than* 3 percent" (emphasis added)).

A plain reading of § 8127(a) thus shows that the overarching purpose of the goals is to require the agency to do more, not less. Nothing in § 8127(a) supports the idea that the goals were precise targets to be achieved but not exceeded.

This reading of the "for purposes of" clause also adheres to the well-established principle that "a prefatory clause does not limit or expand the scope of the operative clause." *District of Columbia* v. *Heller*, 554 U.S. 570, 578 (2008); *accord id.* at 643 n.7 (Stevens, J., dissenting); *see also Yazoo & Miss. Valley R.R.* v. *Thomas*, 132 U.S. 174, 188 (1889); *Association of Am. Railroads* v. *Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977); *National Wildlife Fed'n* v. *Marsh*, 721 F.2d 767, 773 (11th Cir. 1983); *Florentine* v. *Church of Our Lady of Mt. Carmel*, 340 F.2d 239, 241-242 (2d Cir. 1965);

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[3] The fact that § 8127(a) itself has a prefatory clause ("[i]n order to increase contracting opportunities") and an operative clause (the Secretary "shall … establish" annual goals) further confirms Kingdomware's reading of § 8127(d). The "[i]n order to increase" clause cannot be sensibly read to have operative force. Doing so would suggest, for example, that the Secretary is required to set a higher goal each year because the goal must be established "to increase contracting opportunities."

2A Singer & Singer, *Statutes and Statutory Construction* § 47:4 (7th ed. 2014).

Prefatory language may be used to resolve ambiguities in the operative language, *e.g.*, *Heller*, 554 U.S. at 577-578, but it may not be used to "*create* doubt or uncertainty," 2A Singer & Singer § 47:4 (emphasis added). Here, § 8127(d)'s operative clause requiring application of the VA-specific Rule of Two is unambiguous ("shall" means "shall"), making it unnecessary to resort to the "for purposes of" clause to resolve the meaning of the mandate.

The government has sought to distinguish this long line of authority as addressing preambles, not prefatory clauses within a single statutory section. Opp. 19-20. But that distinction is unfounded; a legislature may announce its purpose wherever it chooses. *See, e.g.*, *Heller*, 554 U.S. at 578 & n.3 (prefatory clause of amendment, distinct from formal preamble); *Parish Oil Co.* v. *Dillon Cos.*, 523 F.3d 1244, 1249, 1253 (10th Cir. 2008) (introductory clause of § 113 of Colorado's Unfair Practices Act, distinct from declaration of purpose in § 102); *SEC* v. *Straub*, 921 F. Supp. 2d 244, 260-261 (S.D.N.Y. 2013) (non-operative "statement of purpose" at the end of statutory provision); *see also* Scalia & Garner, *Reading Law* 220 (2012) ("Expressions of purpose are usually placed [in a preface], but they do not have to be."); Sedgwick, *The Interpretation and Construction of Statutory and Constitutional Law* 44-45 (2d ed. 1874) ("A preamble is sometimes prefixed to a particular clause, the tenor of which it is meant to explain, or which it is intended to elucidate."); Dwarris, *A General Treatise on Statutes* 109 (Potter ed., 1871) (similar). The purpose clause here is prefatory because, by its words, it "announces a purpose." *Heller*, 554 U.S. at 577.

Interpreting a statement of purpose to limit operative language is improper because legislation commonly exceeds the problem or mischief that motivated its enactment. *See Heller*, 554 U.S. at 578 ("'It is nothing unusual in acts … for the enacting part to go beyond the preamble; the remedy often extends beyond the particular act or mischief which first suggested the necessity of the law.'" (quoting Bishop, *Commentaries on the Written Laws and Their Interpretation* § 51 (1882))); *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils"). For example, "if a statute provides that dogs are to be muzzled for the purpose of stamping out rabies they must continue to be muzzled so long as the statute is in force, even though rabies has been stamped out." Hibbert, *Jurisprudence* 95 (1932). By the same token, the Rule of Two still applies, regardless of whether the agency has met its goals for the year. *Infra* pp.38-40.

The Federal Circuit's stated concern that § 8127(d)'s operative clause must be limited to avoid rendering the "for purposes of" clause "superfluous" is misplaced. Pet. App. 19a-20a. Where "'the text of a clause itself indicates that it does not have operative effect, such as "whereas" clauses in federal legislation …, a court has no license to make it do what it was not designed to do.'" *Hawaii* v. *Office of Hawaiian Affairs*, 556 U.S. 163, 175 (2009) (quoting *Heller*, 534 U.S. at 578 n.3). Interpreting a prefatory clause as non-limiting does not render it superfluous because the function of such a clause is simply to explain legislative action, not to expand or limit operative rights or duties.

Had Congress wanted the Rule of Two to apply only until the annual goals were met, it would have imposed an express condition, as it has done in other in-

stances. For example, under a since-discontinued program that was in effect when the 2006 Veterans Act was enacted, a participating agency was required to apply the government-wide set-asides in the Small Business Act "[i]f [the] agency has failed to attain its small business participation goal under" the program, and was required to continue applying the set-asides until "its contract awards to small business concerns meet the required goals." Small Business Competitiveness Demonstration Program Act of 1988, Pub. L. No. 100-656, § 713(b), 102 Stat. 3853, 3892 (codified as amended at 15 U.S.C. § 644 note (2006)), *repealed by* Small Business Jobs Act of 2010, Pub. L. No. 111-240, § 1335, 124 Stat. 2504, 2543.

Finally, the government's own pre-litigation conduct shows that even the VA did not regard the "for purposes of" clause as limiting the Rule of Two in § 8127(d). The VA *entirely omitted* any reference to the prefatory clause in its implementing regulations, which instead mirror the statutory text of § 8127(d)'s operative clause. 48 C.F.R. §§ 819.7005(a), 819.7006(a). The VA also made no mention of the "for purposes of clause" when the agency asserted an exemption for FSS procurements in the preamble to its rulemaking. *See VA Acquisition Regulation*, 74 Fed. Reg. 64,619, 64,624 (Dec. 8, 2009). Nor did the VA rely on the clause or ascribe any operative significance to it in the "numerous" bid protests that preceded *Aldevra II*. 2012 WL 860813, at *3 (Comp. Gen. Mar. 14, 2012). Only after the GAO rejected the VA's prior, flawed rationales did the agency belatedly adopt its current view. *Id.*; *supra* p.20. If the natural reading of the purpose clause were a substantively limiting one, it would not have taken the VA over five years to discover it.

2. The statute mandates both goal-setting and application of the Rule of Two

The Federal Circuit's concern that the goal-setting provisions of § 8127(a) would be rendered superfluous also rested on a fundamental confusion about the nature and function of the goals. Congress had good reasons to require both annual goals under § 8127(a) and application of the mandatory Rule of Two in § 8127(d) without regard to whether the goals are met in any particular year.

First, annual small business goals are "aspirations, not destinations." Pet. App. 30a (Reyna, J., dissenting). Nothing in the text of the statute, the purposes behind it, or its legislative history suggests that Congress was concerned about *too much* contracting with veteran-owned small businesses, or that Congress intended the annual goals to control the force of the Rule of Two mandate. To the contrary, the stated purpose was to make sure that the VA would "meet, if not *exceed*, its contracting goals." H.R. Rep. No. 109-592, at 15 (2006) (emphasis added). By reading § 8127(d) as discretionary "so long as the goals are met" (Pet. App. 15a), the Federal Circuit improperly transformed the goals from a floor into a ceiling.

Second, contrary to the Federal Circuit's apparent belief, a mandatory set-aside does not guarantee that veteran-owned small businesses will always receive contracts in excess of the Secretary's annual goals. Veteran-owned small businesses must clear multiple hurdles before they are eligible to be considered under the Rule of Two. For example, veteran-owned small businesses are subject to elaborate certification procedures before they are eligible for VA set-asides. 38 U.S.C. § 8127(e)-(g). Also, VA contracting officers may

limit competition to veteran-owned small businesses only if there is a "reasonable expectation" of two or more offers "and that the award can be made at a fair and reasonable price that offers best value to the United States." *Id.* § 8127(d). The mandatory set-aside is no guarantee that any particular number of contracts will be awarded to veteran-owned small businesses or that the Secretary's goals will be met.

Third, the "fair and reasonable price" and "best value" requirements ensure that the Rule of Two will not cause any fiscal waste even if application of the Rule leads the agency to exceed its annual goals. "Best value" is a term of art in government contracting, requiring an outcome "that, in the Government's estimation, provides the greatest overall benefit in response to the requirement." 48 C.F.R. § 2.101.

Fourth, the Federal Circuit failed to appreciate the sensible justifications behind setting a goal for agency leadership and a mandate for rank-and-file agency officials. Pet. App. 31a (Reyna, J., dissenting). Requiring the Secretary to establish goals allows the Secretary, Congress, and the public to measure progress and to impose accountability when the agency falls short. *See* H.R. Rep. No. 109-592, at 16 ("The Committee … expects the Secretary to aggressively monitor the Department's performance."). The goals may also inform how the VA trains and supervises contracting officers and the priorities the VA leadership communicates to its employees. A shortfall might, for example, signal that § 8127(d) is not being implemented properly, or that the VA needs to provide additional training to its contracting officers or do additional outreach to eligible businesses. The goals can also help guide the VA's use of its discretionary authority to award contracts to veteran-owned small businesses under § 8127(b) and (c).

In sum, affording § 8127(d) its natural, mandatory reading is entirely consistent with the "overall statutory scheme" of the 2006 Veterans Act, including the Secretary's duty to set annual goals under § 8127(a). *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). "In order to increase contracting opportunities" for veteran-owned small businesses, § 8127(a) requires the Secretary of the VA to establish yearly goals for the VA to contract with veteran-owned small businesses. For purposes of meeting those goals, Congress enacted veteran contracting preferences in subsections (b) through (d). And because federal agencies had consistently failed to meet past contracting goals using existing discretionary authority and because the goals were never intended to set a ceiling, Congress required ("shall award") VA contracting officers to apply the Rule of Two in § 8127(d). The annual goal-setting and the mandatory Rule of Two work in tandem to achieve the purposes of the statute.

3. Contrary readings of the "for purposes of" clause are unworkable or indefensible

The Federal Circuit's effort to "link[]" the operative scope of the Rule of Two in § 8127(d) to the annual goals under § 8127(a) has left the statute unclear and unworkable in practice. Pet. App. 20a. Nor do any of the other interpretations of the statute suggested by the government in the course of these proceedings withstand scrutiny.

Discretionary as long as the goals are met. The panel majority stated that consideration of the Rule of Two is discretionary "as long as the goals set under subsection (a) are met." Pet. App. 20a; *see id.* 15a ("so long as the goals are met"). Elsewhere, the panel and the government stated that the Rule of Two is discre-

tionary "after" the goals are met. *See id.* 17a; Opp. 15. Both interpretations create multiple problems.

First, reading the "for purposes of" clause in § 8127(d) as turning the Rule of Two mandate off depending on whether the agency reaches its goals for the year would be problematic for § 8127(b) and (c), which both contain an identical "[f]or purposes of meeting the goals" clause. Such "'identical words and phrases within the same statute should normally be given the same meaning.'" *FCC* v. *AT&T Inc.*, 562 U.S. 397, 408 (2011). If the "purposes" clause is interpreted to mean that § 8127(d)'s mandate no longer applies if the goals are met, then it would also mean that § 8127(b) and (c) no longer apply. As a result, the VA's authority to use those discretionary provisions for sole-source awards or non-competitive contracts would also terminate—a result at odds with the purpose of the statute and the VA's practice of awarding sole-source contracts to veteran-owned small businesses in years when it claims to exceed its goals.[4]

Second, the goals are set on an annual basis by the Secretary, while procurement decisions are made year-round by individual contracting officers. As Judge Reyna explained in dissent, there is no evidence that VA contracting officers have any way of knowing whether the agency is meeting its goals when conducting a particular procurement. Pet. App. 27a.

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[4] To cite but one example, the Federal Procurement Data System shows a VA sole-source award to a veteran-owned small business even in the final month of the 2014 fiscal year, when the VA claims to have exceeded its annual goal. *See* Federal Procurement Data System-Next Generation, Transaction Report for VA Award ID VA24814P4886 (Sept. 29, 2014), https://www.fpds.gov/ezsearch/fpdsportal?q=VA24814P4886.

Third, the panel majority offered no guidance on whether or how the Rule of Two might become mandatory if the VA falls short of its goals. Would the Rule of Two be mandatory *until* the goals are met, such that veteran-owned small businesses would have a right to protest and overturn contracts awarded at the beginning of the year when the VA goals are, almost by definition, unmet? What about contracts awarded toward the end of the year that push the percentage awarded to veteran-owned businesses back below the required threshold? Alternatively, if the Rule of Two is discretionary *as long as* the goals are met, would all bid protests have to be held until after the end of the year to see whether the VA ultimately met its annual goals? If the VA falls short, would all or only some of the protests be sustained? Or would the remedy be to hold that § 8127(d) is mandatory for some unspecified period of time?

Moreover, given past irregularities with the VA's reported contracting statistics, extensive discovery and litigation might be required for every contract that was awarded just to resolve the threshold issue of whether the VA did or did not satisfy its yearly goals. *See supra* n.2; *see also infra* pp.56-58. These practical and procedural problems contrast starkly with the simplicity of Congress's straightforward command that VA contracting officers "shall" use the Rule of Two.

Mandatory when the agency decides to use it. The government argued in the Federal Circuit that the Rule of Two in § 8127(d) applies only "if the contracting officer determines *in his or her discretion* that a specific procurement should be set aside." Resp. C.A. Br. 16 (emphasis added); *see id.* 15 (the statute "grants contracting officers discretion in meeting the Secretary's discretionary goals" (capitalization altered)). Perhaps

recognizing the tension between this position and § 8127(d)'s mandatory language, the government subsequently reframed the point to argue that the Rule of Two is the "'*mandatory* … procedure' the VA *must* follow whenever it is contracting 'for purposes of meeting the [Secretary's] goals.'" Opp. 14 (emphases added). But despite the perfunctory label "mandatory," this interpretation does not constrain the VA's discretion.

A mandate that applies only when an agency decides to use it is not a mandate. Indeed, for a given acquisition, the statute would operate the same way if the mandatory "shall award" language in § 8127(d) were replaced with "may award." And if the function of the "for purposes of" clause were to convey that the agency has discretion to decide when to apply the mandate, there is no reason to include the same clause in § 8127(b) and (c), which are already discretionary by their plain terms ("may use" and "may award").

The natural reading of § 8127(d) is straightforward and easy to apply: VA contracting officers must set aside contracting opportunities for veteran-owned small businesses if the Rule of Two is satisfied. The unworkability, confusion, and internal contradictions that arise when departing from this plain meaning further confirm the wisdom of applying the statutory requirements as written.

C. The Legislative History And Purpose Of The Act Show That Congress Intended To Require The VA To Use The Rule Of Two

The 2006 Veterans Act emerged from years of failed efforts by federal agencies—including the VA—to use discretionary tools Congress already provided to achieve annual goals Congress already required them to set. H.R. Rep. No. 109-592, at 15-16. A frustrated

Congress responded by "rectify[ing] that as far as the VA is concerned." *2005 Hearing* 2 (statement of Chairman Boozman). As a result of the 2006 Veterans Act, Congress "expect[ed] VA to set the example among government agencies for procurement with veteran and service-disabled veteran-owned small businesses." H.R. Rep. 109-592, at 16. The Act thus established § 8127(d)'s unique, VA-specific set-aside to ensure that veteran-owned small businesses would "routinely be granted the primary opportunity to enter into VA procurement contracts." *Id.* at 14-15.

The Federal Circuit disregarded the clear indications that Congress did not intend to establish yet another discretionary set-aside essentially identical to the previously unsuccessful ones. It relied instead on portions of the legislative history taken out of context to override the plain meaning of the text. Pet. App. 20a-21a. For example, the majority relied on a statement in a committee report referring to "'the discretionary, not mandatory, nature of the goals'" (*id.* 20a), even though that statement was actually a reference to the *problems* that existed in the past, not an explanation of how the 2006 Act was intended to operate, H.R. Rep. No. 109-592, at 15.

The government fares no better with its reliance on a joint statement issued by the House and Senate Committees on Veterans' Affairs. Opp. 20. The Committees explained that in some circumstances VA contracting officers "would be allowed to award noncompetitive contracts" to veteran-owned small businesses under § 8127(b) and would be "allowed, but not required, to award sole source contracts" to such businesses under § 8127(c). 152 Cong. Rec. 23,509, 23,515 (2006). The Committees then explained, in a sentence plucked out of context by the government, that

"[c]ontracting officers would retain the option to restrict competition" using the Rule of Two under § 8127(d). *Id.* That is not a general description of the Rule of Two as merely an "option," but rather a recognition that the Rule of Two may be used even when circumstances permit use of the discretionary sole-source or non-competitive provisions in the statute.

These cherry-picked portions of the legislative record confirm the wisdom of this Court's adage that legislative history is "of minimal, if any, relevance" when the language of the statute "leaves little doubt as to Congress' intent." *Metropolitan Stevedore Co.* v. *Rambo*, 515 U.S. 291, 298 (1995). Even if the government were able to identify snippets of legislative history to support its reading, other aspects of the legislative history point the other way, and the plain text of the law as actually passed should be given controlling weight.

D. The Veterans Canon Also Weighs In Favor Of Reading § 8127(d) As Mandatory

If the text of § 8127(d) were ambiguous, the canon of construction in favor of veterans would require that any "interpretive doubt … be resolved in the veteran's favor." *Brown* v. *Gardner*, 513 U.S. 115, 117-118 (1994). When Congress enacts legislation to benefit "those who left private life to serve their country," the legislation "is to be liberally construed" in favor of the veterans Congress sought to reward. *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (citing *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943)); *see also Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 441 (2011). Applying that canon here confirms that the Rule of Two is mandatory, not discretionary.

The government has sought to avoid application of this settled canon by claiming that the 2006 Veterans Act is a "government-contracting statute," "not a benefits statute" (Opp. 21 n.5), but that distinction is illusory. The veterans canon is not limited solely to statutes involving direct government benefits. *E.g.*, *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991) (applying canon to statute addressing right of civilian reemployment). The purpose of veteran small business preferences, like the statute in *King* and other forms of more direct assistance, is to reward those "who sacrificed their health and limbs for our Nation." S. Rep. No. 106-136, at 2 (1999). Section 8127 was enacted along with an array of other veterans benefits. *See, e.g.*, 2006 Veterans Act, Pub. L. No. 109-461, §§ 201-217, 120 Stat. 3403, 3409-3429 (healthcare); *id.* §§ 301-307, 120 Stat. at 3425-3429 (educational benefits); *id.* §§ 701-710, 120 Stat. at 3439-3441 (assistance to homeless veterans). Indeed, testimony at the hearings on § 8127 specifically noted that "veterans' benefits have always included assistance in creating and operating veteran-owned small businesses." *2005 Hearing* 19 (statement of Joseph C. Sharpe, Jr., American Legion). Like other veterans benefits, the Rule of Two in § 8127(d) should be liberally construed in favor of the veterans whom Congress sought to assist.

II. THE VA'S REGULATIONS FURTHER CONFIRM THAT THE RULE OF TWO IS MANDATORY AND UNDERCUT ANY ARGUMENT FOR DEFERENCE TO THE VA'S LITIGATING POSITION

A. There Is No Need To Proceed Beyond The First Step Of *Chevron*

Resolving the question presented does not require the Court to consider the agency's implementing regu-

lations or any canons of administrative deference. The first question the Court must confront is "always … whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842 (1984). If "'the intent of Congress is clear'" after "applying the ordinary tools of statutory construction," then "'that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1868 (2013) (quoting *Chevron*, 467 U.S. at 842-843).

As set forth above, the text, purpose, and history of the 2006 Veterans Act all demonstrate that the Rule of Two in § 8127(d) is mandatory, not discretionary, and that the Rule applies without regard to the agency's preference for using the FSS system or its progress in meeting the annual goals it sets for itself under § 8127(a). Thus, there is no reason to proceed beyond the first step of *Chevron*.[5] On this "pure question of statutory construction," the meaning of the statute is clear and "must be given effect." *NLRB* v. *United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987). The Court should reverse the judgment below on this basis alone.

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[5] The veterans canon provides an additional reason to resolve the case at the first step of *Chevron*: Any ambiguity should be resolved in favor of the veterans whom § 8127(d) is intended to benefit. *Supra* pp.43-44. The application of such canons can clarify the meaning of a statute so "there is, for *Chevron* purposes, no ambiguity … for [the] agency to resolve." *INS* v. *St. Cyr*, 533 U.S. 289, 321 n.45 (2001) (presumption against retroactivity); *see, e.g.*, *Cobell* v. *Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (Indian canon of construction).

B. The Language Of The VA's Own Regulations Is Mandatory

Even if the statutory language were ambiguous, the second step of *Chevron* clearly favors Kingdomware. The implementing regulations mirror the mandatory statutory language and *omit* the "for purposes of" clause on which the government now rests its case. Indeed, the "for purposes of" clause appears nowhere in any of the regulations implementing the 2006 Veterans Act. 48 C.F.R. subpt. 819.70. The plain text of the regulations thus confirms that the Rule of Two in § 8127(d) is mandatory.

The relevant regulations, 48 C.F.R. §§ 819.7005(a) and 819.7006(a), are identical, except that § 819.7005(a) addresses service-disabled veteran-owned small businesses and § 819.7006(a) addresses veteran-owned small businesses. Both provide that set-asides for the former are given priority over the latter. *Id.* §§ 819.7005(a), 819.7006(a). The regulations then unambiguously mandate application of the Rule of Two, as the statutory text requires:

> Except as authorized by 813.106, 819.7007 and 819.7008, the contracting officer *shall* set-aside an acquisition for competition restricted to [service-disabled veteran-owned small business] concerns upon a reasonable expectation that,
>
> (1) Offers will be received from two or more eligible [service-disabled veteran-owned small business] concerns; and
>
> (2) Award will be made at a fair and reasonable price.

Id. § 819.7005(a) (emphasis added); *see id.* § 819.7006(a) (same rule for veteran-owned small businesses).

The regulations do not purport to limit this mandate based on whether the VA has achieved its annual contracting goals, nor do they contain any suggestion that a contracting officer has discretion to decide whether to apply the Rule of Two to meet those goals. The three stated exceptions, 48 C.F.R. §§ 813.106, 819.7007, and 819.7008, implement the non-competitive procedures and sole-source awards authorized by 38 U.S.C. § 8127(b) and (c) below certain threshold amounts. *Supra* pp.15, 30. By providing for only these exceptions, the regulations implementing the Rule of Two mirror the text of § 8127(d), which requires application of the Rule of Two "[e]xcept as provided in subsections (b) and (c)." Moreover, the mandatory language of the regulations implementing § 8127(d) ("shall") contrasts with the discretionary language of the regulations implementing § 8127(b) and (c) ("may"). 48 C.F.R. §§ 813.106, 819.7007-819.7008

The regulations thus confirm that § 8127(d) is neither ambiguous nor discretionary and, even if it were, the regulations themselves would dictate mandatory application of the Rule of Two. It was presumably for that reason that the Federal Circuit strained to hold that its counterintuitive interpretation of § 8127(d) was "'unambiguously'" required by the statutory text. Pet. App. 15a (quoting *Chevron*, 467 U.S. at 843). Had the panel proceeded to *Chevron*'s second step, it would have needed to confront the fact that the government's reliance on the "for purposes of" clause as a key part of the operative command in the statute is "belied" by the text of the regulations, which omit that clause and which "unequivocally require the VA to conduct a Rule

of Two analysis in every procurement." *Id.* 27a, 28a (Reyna, J., dissenting).

The government has thus effectively boxed itself into the first step of *Chevron*. Its central claim is that the mandatory force of "shall" in § 8127(d) is qualified by the "for purposes of meeting the goals" clause. Opp. 13. But the VA did not view that clause as significant during its rulemaking, did not purport to resolve any ambiguity created by it, and instead adopted mandatory regulations that are completely inconsistent with its current litigating position. The only way the government can now prevail before this Court on its goals-based interpretation of § 8127(d) is to prove that the statute unambiguously favors its position—an unreasonable and unpersuasive reading that should be rejected.

C. The VA's Attempt To Create An Exception For FSS Orders Is Not Entitled To Deference

1. Rather than rely on the regulations, the government has previously argued that the agency's view that it "may continue to use the FSS without regard to the Rule of Two" is entitled to deference based on a preamble to the agency's final rulemaking. Opp. 21. In the preamble, the VA asserted that the Rule of Two "does not apply to FSS task or delivery orders." 74 Fed. Reg. at 64,624; *see supra* p.17. However, the preamble is not entitled to any form of deference for several reasons. If anything, the preamble demonstrates that the government's effort to pour operative force into the "for purposes of" clause is merely a post hoc litigating position, not a considered exercise of the agency's discretion.

First, and most importantly, the preamble does not address or even mention the "for purposes of" clause and was instead premised on flawed legal reasoning that the agency later abandoned. It thus not only fails to resolve any putative textual ambiguity created by the "for purposes of" clause for *Chevron* purposes, but also lacks even the "power to persuade." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

The preamble addressed comments the agency received seeking clarification of the Rule of Two's application to FSS orders. 74 Fed. Reg. at 64,624. The agency stated that no clarification was needed because "this rule does not apply to FSS task or delivery orders," and "VA will continue to follow GSA guidance regarding applicability of 48 CFR part 19 of the FAR, Small Business Programs, which states that set-asides do not apply to FAR part 8 FSS acquisitions." *Id.*

That reasoning is clearly erroneous. It is true that the regulations governing the government-wide FSS program—the "48 CFR part 8 procedures" referenced in the preamble—provide that the small business set-asides contained *in FAR part 19* "do not apply" to FSS orders. 48 C.F.R. § 8.404(a); *see also id.* § 19.502-1(b).[6] But the government-wide set-asides in FAR part 19 implement the discretionary statutory language in the Small Business Act, not the VA-specific 2006 Veterans Act. *Supra* pp.9-10. As the GAO explained, those reg-

[6] Because of subsequent legislative and regulatory changes, contracting officers across the government in fact may now apply FAR part 19 small business set-asides when using the FSS program, although they are not required to do so. Small Business Jobs Act § 1331, 124 Stat. at 2541; 48 C.F.R. § 8.405-5(a)(1). By contrast, § 8127(d) requires VA contracting officers to consider the Rule of Two for all procurement contracts.

ulations have no bearing on whether § 8127(d) itself compels the VA to apply the Rule of Two before considering other procurement procedure. *Aldevra I*, 2011 WL 4826148, at *3-4 (Comp. Gen. Oct. 11, 2011).

The government tacitly conceded this error by abandoning the reasoning of the preamble after *Aldevra I*, in favor of its current interpretation centered on the "for purposes of" clause. *See Aldevra II*, 2012 WL 860813, at *3; *supra* p.20. Thus, the government's current explanation of *why* the 2006 Veterans Act should be read to preserve the agency's discretion is simply "a *post hoc* justification adopted in response to litigation," *Decker* v. *Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013), and not "a reasoned and consistent view" of the statute, *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988). "Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." *Id.* at 213.

Second, even setting aside the agency's legal error, the preamble "'do[es] not warrant *Chevron*-style deference'" because it is not a "regulation[] with the force of law." *Wos* v. *E.M.A. ex rel. Johnson*, 133 S. Ct. 1391, 1402 (2013). The view expressed in the preamble appeared for the first time in the final rulemaking, "without offering … interested parties notice or opportunity for comment," *Wyeth* v. *Levine*, 555 U.S. 555, 577 (2009), thus circumventing the formal procedures Congress imposed "to foster the fairness and deliberation that should underlie a pronouncement" before *Chevron* typically applies, *United States* v. *Mead Corp.*, 533 U.S. 218, 230 (2001). In these circumstances, no deference is warranted. *See, e.g.*, *Wyeth*, 555 U.S. at 577 (declining to defer to FDA's preamble to a final rule).

Third, the preamble is not owed deference because it conflicts with the regulations, which are mandatory and do not contain any exception for FSS orders. Language in the preamble to a rulemaking "is not controlling over the language of the regulation itself." *Wyoming Outdoor Council* v. *U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999); *cf. Decker*, 133 S. Ct. at 1340 (Scalia, J., concurring in part and dissenting in part) (in interpreting rules as well as statutes, the Court should be "bound by *what they say*").

For that reason, and contrary to the government's view (Opp. 21), the preamble cannot be construed as an interpretation of the regulation entitled to deference under *Auer* v. *Robbins*, 519 U.S. 452 (1997). Deference to an agency's understanding of its regulations is "warranted only when the language of the regulation is ambiguous," *Christensen* v. *Harris County*, 529 U.S. 576, 588 (2000), which is not the case here. An agency may not, "under the guise of interpreting a regulation," effectively rewrite it. *Id.* The VA's regulations do not contain (and the statute does not permit) any exception for FSS orders, and the VA may not create one by fiat in a preamble to its rulemaking.

Auer deference is also inapplicable because, as explained above, the relevant discussion in the preamble actually concerns government-wide procurement regulations in the FAR—regulations not promulgated by the VA, based on statutes not entrusted to the VA to administer. *Cf. Gonzales* v. *Oregon*, 546 U.S. 243, 266-267 (2006). The preamble is not the VA's interpretation

of its own regulation, but rather the VA's misinterpretation of other agencies' regulation.[7]

2. The government has also suggested at times that the 2006 Veterans Act is ambiguous because "it does not address the effect of the 2006 Act upon the FSS," allegedly leaving "a 'legislative gap for the agency to fill.'" Resp. C.A. Br. 29. The Court of Claims appeared to endorse that rationale, observing that the statute is "silent as to the relationship between its set-aside provision and the FSS." Pet. App. 62a. However, the fact that § 8127(d) does not contain an exception for FSS orders means that there is no such exception, not that the statute is ambiguous.

Congress prescribed a particular procedure that VA contracting officers must follow when awarding procurement contracts: Officers "shall" consider the Rule of Two. 38 U.S.C. § 8127(d). Requiring this specific procedure is, by implication, a '"negative of any other'" procedure. *Transamerica Mortg. Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 20 (1979). Where, as here, a statute's text "clearly requires a particular outcome, then the mere fact that it does so implicitly rather than expressly does not mean that it is 'silent' in the *Chevron* sense." *Engine Mfrs. Ass'n* v. *EPA*, 88 F.3d 1075, 1088 (D.C. Cir. 1996). The 2006 Veterans Act thus does not contain any gap for the VA to fill.

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[7] The FAR is promulgated under the authority of the Department of Defense, the General Services Administration, and NASA. 48 C.F.R. § 1.103(b).

III. CONGRESS REQUIRED THE VA TO APPLY THE RULE OF TWO FOR SENSIBLE REASONS THAT AN EXECUTIVE AGENCY MAY NOT SECOND-GUESS

A. Congress Determined That The Rule Of Two Is Necessary And Desirable

1. The 2006 Veterans Act was the culmination of years of congressional efforts to correct the "culture of indifference" among federal contracting officers with regard to promoting contracting opportunities for small businesses owned by service-disabled veterans. H.R. Rep. No. 109-592, at 15. Congress imposed a mandatory Rule of Two, specific to the VA, only after a combination of annual goals and discretionary tools failed to produce the level of contracting that Congress judged to be desirable. *Supra* pp.11-13. That policy choice belonged to Congress, not the executive branch, and any "appraisal of the wisdom or unwisdom of [the] particular course consciously selected by the Congress" must be set aside in interpreting the statute. *TVA* v. *Hill*, 437 U.S. 153, 194 (1978). Congress had ample reason to make the choice it made.

Economic assistance to military veterans after their service ends is a longstanding national commitment, traceable to "veterans benefit packages created by the Continental Congress." Sherman, *Note, Paved with Good Intentions*, 36 Pub. Cont. L.J. 125, 126 (2006). "Much of the legislation in this area has focused on assisting veterans in reentering the workforce and starting small businesses." *Id.* (citing examples).

For a variety of reasons, veterans face special challenges in reintegrating into the civilian workforce and experience above-average unemployment rates. Starting a small business can be an effective way for service-disabled veterans, in particular, to "customize their

employment to accommodate their challenges" and to maximize their talents, Shaheen & Myhill, *Entrepreneurship for Veterans with Disabilities* 2 (Oct. 2009), which may not be immediately recognized by civilian employers. Veterans are "more likely to be entrepreneurs" than non-veterans and are "at least 45 percent more likely than those with no active-duty military experience to be self-employed." Interagency Task Force on Veterans Small Business Development, *Heroes on the Home Front* 1 (Nov. 2012). They own millions of small businesses and create millions of jobs for others, often seeking to hire other veterans. *Id.*; *see* Camacho, *The Status and Needs of Small Businesses Owned and Controlled by Disabled Veterans* 80-81 (Nov. 2000).

Congress was well justified in concluding, as a matter of veterans policy, that a mandatory Rule of Two specific to the VA is appropriate to support and encourage veteran entrepreneurship. The VA procures approximately $18 billion of goods and services annually, making it one of the single most important sources of government contracts. National Contract Management Association, *2013 Annual Review of Government Contracting* 5 (2014). But inertia and "cultural problem[s]" relating to an irrational "lack of faith" in the capabilities of "disabled veterans" favor existing suppliers. *2005 Hearing* 24 (statement of John K. Lopez, Association for Service Disabled Veterans); *see also* H.R. Rep. 109-592, at 15. Congress recognized that the VA has a unique duty to shake off that inertia and those prejudices and to create opportunities for service-disabled veteran-owned and veteran-owned small businesses to establish themselves. Contracting with the VA can serve as a launching pad for these businesses, incubating them to grow and expand.

Moreover, Congress clearly envisioned that the VA-specific Rule of Two in § 8127(d) would foster contracting opportunities with other agencies as well. A central purpose of the 2006 Veterans Act was to transform the VA into a model agency to "set the example among government agencies for procurement with" veteran-owned and service-disabled veteran-owned small businesses. H.R. Rep. No. 109-592, at 16; *see supra* p.14. That purpose will be undermined if the government's discretionary reading of the statute prevails, and the VA is encouraged to do the bare minimum to meet its annual goals.

2. The government has contended that concerns for efficiency and administrative convenience favor its reading of the statute (Opp. 12, 15-17), but such "policy preferences" cannot alter the plain text, *Barnhart*, 534 U.S. at 461-462. Congress already made the relevant policy decision when it chose to favor veterans and enacted a clear and unambiguous mandate requiring application of the Rule of Two. The agency's contrary view of procurement policy is no basis for disregarding Congress's command.

The government's policy arguments are also unfounded. The statute automatically protects the public treasury. Under the Rule of Two, competition is only restricted if there is a reasonable expectation that the award will be made "at a *fair and reasonable price* that offers *best value to the United States*." 38 U.S.C. § 8127(d) (emphases added).

Nor will contracting officers be overburdened if required to consider the Rule of Two. The 2006 Veterans Act requires the VA to maintain a database of eligible veteran-owned and service-disabled veteran-owned small businesses. 38 U.S.C. § 8127(e)-(f); *supra* pp.15-

16.[8] The database ensures that contracting officers already have at their fingertips a list identifying companies eligible for consideration under the Rule of Two. Furthermore, as Judge Reyna explained, contracting officers will retain considerable discretion to determine whether the conditions of the Rule of Two are met for any particular procurement. Pet. App. 30a-31a.

Congress also provided a ready alternative to the Rule of Two for smaller value contracts. Section 8127(d) expressly permits contracting officers to use non-competitive procedures, 38 U.S.C. § 8127(b), or sole-source awards, *id.* § 8127(c), for contracts falling below certain threshold amounts. If the VA is genuinely concerned about the administrative costs of considering the Rule of Two for some small contracts relative to the value of those contracts, it has the discretion to use these alternatives. It does not have the discretion to ignore the unambiguous mandate in § 8127(d).

B. The VA's Difficulties Accurately Reporting Its Small-Business Contract Awards Confirm The Wisdom Of Congress's Choice

The VA's inability or unwillingness to accurately measure its annual progress in meeting its small business goals provides yet another reason to conclude, as the text indicates, that § 8127(d)'s mandate does not depend on the agency's self-reported success in achieving those goals.

The Federal Circuit concluded, wrongly, that Congress had "link[ed] the Rule of Two mandate … in sub-

[8] Consulting the database is already a mandatory part of pre-acquisition market research for VA contracting officers. 48 C.F.R. § 810.001.

section (d) to the goals set under subsection (a)," after soliciting and receiving extra-record statistics from the agency purporting to show that it had consistently exceeded its goals. Pet. App. 9a, 20a; JA56. At the time the government submitted those statistics, an internal audit had already found that the figures the government provided were overstated as to at least 2010 and likely other years. *Supra* n.2. Accurately counted, the VA may well have missed its goals.

The integrity of the VA's reported success in meeting its goals was further undermined by congressional testimony after the decision below. The VA's senior procurement official testified to Congress in 2015 that "VA small-business goal accomplishments have been and continue to be overstated" and that the VA has "duped the veteran-owned business community" by inflating its purported annual achievements. Jan R. Frye, VA Deputy Ass't Sec'y for Acquisition & Logistics, *Statement to the Subcomm. on Oversight & Investigations of the H. Comm. on Veterans' Affairs* 2 (May 14, 2015); *see also* Rein & Wax-Thibodeaux, *Official: VA Improperly Spent $6 Billion on Care*, Wash. Post, May 14, 2015, at A3 (describing Frye's account of a "culture of 'lawlessness and chaos'" and orders placed from supply contracts "for higher prices … 'indiscriminately and not in accordance' with acquisition laws").

The recent revelations are not the first time Congress has learned of apparently intentional efforts by the VA to avoid small business set-asides. In 2008, Congress passed the Veterans' Benefits Improvement Act in part to stop perceived efforts by the VA to evade the 2006 Veterans Act by delegating purchasing authority to agents. Pub. L. No. 110-389, § 806, 122 Stat. 4145, 4189 (2008); *supra* p.18. The statute now requires that agents contracting on the VA's behalf agree

"to the maximum extent feasible" to comply with the agency's small business obligations. 38 U.S.C. § 8127(j).

Whether this troubled history was the result of deliberate misconduct or mere accident, it illustrates why Congress did *not* tie the operative force of § 8127(d) to the annual goals the agency sets under § 8127(a). Indeed, questions about the reliability of the VA's data arose at the hearings on the 2006 Veterans Act. *E.g.*, *A Proposed Amendment to H.R. 3082 [et al.]: Hearing before the Subcomm. on Econ. Opportunity of the H. Comm. on Veterans' Affairs*, 109th Cong. 41 (2006) (statement of John K. Lopez, Association for Service Disabled Veterans). The agency's reported progress in meeting its goals will always be at best imprecise, given the complexities of accounting for billions of dollars of procurements. And transforming the goals into the ceiling at which the Rule of Two ceases to be mandatory will create incentives for the agency to overstate its annual progress and may give operative effect to mistaken statistics.

At a minimum, the inaccuracies in the VA's data revealed by the 2010 audit and the recent congressional testimony preclude affirming the judgment below. The Federal Circuit held that the Rule of Two is not mandatory "as long as the goals … are met." Pet. App. 20a. That interpretation should be rejected. If it is not, the Court should remand for additional factfinding on whether the agency has failed to meet its annual goals, which would cause application of the Rule of Two in § 8127(d) to be mandatory even under the Federal Circuit's flawed construction.

* * *

America's veterans have made tremendous sacrifices for their country. A mandatory Rule of Two for

veteran-owned small businesses when contracting with the VA is a small but significant measure of respect and gratitude for that sacrifice. The government's contrary position contradicts the text of § 8127(d), defies congressional policy, and disserves the nation's veterans.

CONCLUSION

The judgment of the Federal Circuit should be reversed.

Respectfully submitted.

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