No. 14-916

In the Supreme Court of the United States

KINGDOMWARE TECHNOLOGIES, INC.,
Petitioner,

v.

UNITED STATES,
Respondent.

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

BRIEF OF *AMICUS CURIAE* STEVEN J. KOPRINCE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Federal Circuit erred by 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.

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INTEREST OF *AMICUS CURIAE*[1]

Steven J. Koprince ("Koprince") is the founder and managing partner of Koprince Law, LLC, a law firm focusing exclusively on federal government contracts law. Given his extensive work representing small businesses in federal government contracting, and his close study of the statutes, regulations, and case law affecting such businesses, Koprince is well-positioned to address the broader government contracting framework of which 38 U.S.C. § 8127(d) is a part.

Koprince is the author of *The Small-Business Guide to Government Contracts* (AMACOM Books 2012), which provides small government contractors with a "plain English" overview of key compliance issues in federal contracting. Koprince also writes and edits the blog *SmallGovCon*[2] where he and his colleagues have published more than 600 articles on government contracting legal matters, of interest to small contractors. Koprince's articles on federal contracting have appeared in many other industry and legal publications, including the *Public Contract Law Journal*, *The Federal Lawyer*, *The Procurement Lawyer*, *Law360*, *Set-Aside Alert*, and *Contract Management Magazine*.

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[1] Counsel for the parties have consented to the filing of this brief, and their consents have been lodged with the Clerk of the Court. No counsel for a party authored any portion of this brief, and no person other than amicus or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] *Available at* http://www.smallgovcon.com.

Koprince is a regular speaker at government contracting conferences, including the 2014 National Veterans Small Business Engagement, a conference for service-disabled veteran-owned small businesses ("SDVOSBs") and veteran-owned small businesses, ("VOSBs") sponsored by the U.S. Department of Veterans Affairs. Koprince is often asked to comment on legal developments in government contracting, and has been quoted by the *Washington Post*, *Fox Business News*, *NBC News*, *Bloomberg BNA*, and other news outlets. Koprince is a regular guest on Federal News Radio, a Washington, DC-based radio station devoted to coverage of federal government matters. Koprince is a graduate of Duke University and the Marshall-Wythe School of Law at the College of William & Mary.

INTRODUCTION AND SUMMARY OF ARGUMENT

When Congress passed the Veterans Benefits, Health Care, and Information Technology Act of 2006[3] (the "VA Act"), the bill's chief sponsor in the House of Representatives had this to say:

> I want to make it plain that the intent of this bill is to put veteran-owned businesses, especially service-disabled veteran-owned businesses, at the front of the line for set aside opportunities at the Department of Veterans Affairs. This is a small way for the nation to show its appreciation for not only the service these men and women have rendered to the

[3] Pub. L. 109-461, 120 Stat. 3403 (2006) (codified throughout 38 U.S.C.).

> nation, but also for their entrepreneurial spirit that drives our economy.

152 CONG. REC. H5,646 (daily ed. July 24, 2006) (statement of Hon. John Boozman).

Notwithstanding Congress' unambiguous intent, the Government now demands that veteran-owned businesses move to the back of the line. The Government claims that the veteran-owned business preferences set forth in the VA Act apply only if the VA has not met its internal goals for contracting with veteran-owned concerns. The Government's position not only harms the very veterans the VA is sworn to serve, but contradicts the language and intent of the VA Act.[4]

Viewed in context, the Government's position not only would require the VA to discontinue contracting preferences for veteran-owned businesses whenever the VA meets its goals, but would require the VA to prioritize *non-veteran* businesses over those owned by veterans. In fact, the VA would be required to prioritize certain non-veteran businesses even when the VA's goals for those categories of businesses were met. For this reason, the Government's position would place

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[4] This brief does not address matters that were fully explored by the dissenting judge in the underlying case. *See Kingdomware Tech., Inc. v. United States*, 754 F.3d 923 (Fed. Cir. 2012) (Reyna, J., dissenting). Amicus specifically concurs with the dissent that: (1) the VA Act clearly and unambiguously commands the VA to perform a "Rule of Two" analysis without regard to whether the VA's goals have been met; and (2) the phrase "for purposes of meeting the goals under subsection (a)" is prefatory, and does not vary the operative clause of 38 U.S.C. § 8127(d).

veteran-owned firms at a severe disadvantage in contracting with the VA—the exact opposite of the result Congress intended.

The Government's position also ignores the long history of government set-aside preferences for small businesses. The "Rule of Two" set forth in the VA Act is but the latest iteration of a small business preference mechanism that has existed since 1958. Small business preferences (including a mandatory "Rule of Two") were in place long before government-wide small business contracting goals were first established in 1988.

Historically, these goals have been a yardstick by which to measure the Government's success (or lack thereof) in using various tools, including the Rule of Two, to contract with small businesses. The goals serve an information-gathering function, but do not determine whether agencies must continue to use tools like the Rule of Two. In the one limited instance where Congress *did* tie achievement of goals to the use or non-use of a small business preference, Congress was explicit about the link between the goals and the preference. Had Congress intended to include such a link in the VA Act, Congress would have explicitly established that link using its prior legislation as a guide.

The Government's interpretation of the VA Act is also unnecessary to achieve the VA's stated aim. The Government suggests that the VA must make an "either/or" choice between applying veterans' preferences, on the one hand, and using the Federal Supply Schedule ("FSS"), on the other. Not so. Under statutory authority adopted in 2010, the VA may do

both by applying veterans' preferences to orders issued under the FSS. The VA's failure to adopt this obvious solution reveals that the true purpose behind the VA's anti-veteran interpretation of the VA Act is not to use the FSS, but to establish the broad ability to circumvent veteran-owned contractors in all manner of procurements.

Finally, the VA's interpretation of the VA Act is not entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984) or similar authority. The VA's interpretation was developed in the course of litigation, and not in the exercise of the VA's rulemaking authority. In fact, the VA's own notice-and-comment rulemaking and regulations implementing the VA Act indicate that the VA believes the VA Act's veteran preferences to be mandatory.

ARGUMENT

I. THE VA'S LITIGATING POSITION WILL LEAD TO UNINTENDED RESULTS AT ODDS WITH CONGRESS' WILL

The sponsor of the House bill that became Section 8127[5] was unequivocal—the new law was intended to "put veteran-owned businesses, especially service-disabled veteran-owned businesses, at the front of the line for set aside opportunities at the Department of Veterans Affairs." 152 CONG. REC. H5,646 (daily ed. July 24, 2006 (statement of Hon. John Boozman); *see*

[5] The VA Act's veteran-owned contracting preferences are set forth in 38 U.S.C. section 8127. For ease of reference, this section is referred to as "Section 8127" throughout this amicus brief.

also H.R. REP. NO. 109-592 at 12 (2006) (H.R. 3082 would, among other things, "[p]rovide veteran and service-disabled, veteran-owned small business priority in VA contracting as well as priority among other 'set-aside' groups eligible for preferential treatment under the Small Business Act"). But under the Government's interpretation of the law, the VA would be required to *prioritize non-veteran small businesses* whenever the VA meets its veteran-owned goals. In other words, if the Government has its way, veteran-owned businesses will be forced to the back of the line.

At the Court of Federal Claims and again at the Federal Circuit, discussion of Section 8127 focused on two subsections: Subsection (a), which directs the VA to establish internal goals for veteran-owned contracting, and Subsection (d), which establishes the "Rule of Two." These two subsections, however, should not be read in a vacuum, but rather as a part of a unified whole consisting of all twelve subsections that comprise Section 8127. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S. Ct. 1291, 1301 (2000) (a court must interpret a statute "as a symmetrical and coherent regulatory scheme" and "fit, if possible, all parts into a harmonious whole"). Reading Section 8127 as a whole, it is evident that the Government's position would lead to results contrary to the will of Congress.

Subsection (a) directs the VA to establish goals for each fiscal year for contracting with SDVOSBs and VOSBs. *See* 38 U.S.C. § 8127(a)(1) (2012). 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 [SDVOSBs.]" *Id*.

Under current law, the Government-wide goal is that SDVOSBs receive no less than three percent of the total value of all prime contract awards. *See* 15 U.S.C. § 644(g)(1)(A)(ii) (2014). Thus, Subsection (a) directs the VA to establish an internal goal of no less than three percent of the total value of its prime contract awards.

Subsection (b) provides that the VA may make sole source awards of "certain small contracts" below the simplified acquisition threshold.[6] Subsection (b) reads:

> (b) Use of non-competitive 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.

38 U.S.C. § 8127(b) (emphasis added).

Subsection (c) allows sole source contracts to SDVOSBs and VOSBs in amounts up to $5 million. Subsection(c) states:

> (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

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[6] The simplified acquisition threshold is currently $150,000 for most acquisitions. 48 C.F.R. § 2.101.

> 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 –
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> (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 $5,000,0000; 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(c) (emphasis added).

Finally, subsection (d) provides the "Rule of Two":

> (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.

Id. § 8127(d) (emphasis added).

Thus, subsection (d) is one of three subsections providing different mechanisms for the VA to award contracts to veteran-owned companies. All three subsections include an identical prefatory phrase: "for purposes of meeting the goals under subsection (a)." If this phrase means, as the Government argues, that the Rule of Two under Subsection (d) becomes ineffective whenever the VA meets its goals, the sole source mechanisms provided in Subsections (b) and (c) must also become ineffective upon the VA's satisfaction of its goals because these subsections contain the same prefatory phrase. *See, e.g.*, *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232, 127 S. Ct. 2411, 2417 (2007) ("A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning.").

If subsections (b), (c), and (d) become ineffective whenever the VA meets its veteran-owned goals, the VA will be forced to prioritize certain non-veteran small businesses. Subsection (i) sets forth an "order of priority" for the VA's award of contracts to small businesses:

> (i) Priority for contracting preferences—Preferences for awarding contracts to small business concerns shall be applied in the following order of priority:
>
> (1) *Contracts awarded pursuant to subsection (b), (c), or (d)* to small business concerns owned

> and controlled by veterans with service-connected disabilities.
>
> (2) *Contracts awarded pursuant to subsection (b), (c), or (d)* to small business concerns owned and controlled by veterans that are not covered by paragraph (1).
>
> (3) Contracts awarded pursuant to—
>
> (A) section 8(A) of the Small Business Act (15 U.S.C. 637(a)); or
>
> (B) section 31 of such Act (15 U.S.C. 657a).
>
> (4) Contracts awarded pursuant to any other small business contracting preference.

38 U.S.C. § 8127(i) (emphasis added).

In this way, Section 8127(i) establishes a defined order of preference for VA small business procurements. SDVOSBs are to be given the highest priority, followed by veteran-owned small businesses ("VOSBs"). The third-highest priority is for participants in the U.S. Small Business Administration's 8(a) Business Development Program ("8(a) Program") and Historically Underutilized Business Zone ("HUBZone") program.[7] After these four categories of small

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[7] The 8(a) Business Development Program is an SBA-run program for small businesses owned and controlled by socially and economically disadvantaged individuals. *See generally* 13 C.F.R. pt. 124. Under the 8(a) Program's regulations, members of certain ethnic groups are presumed to be socially disadvantaged; veterans (including service-disabled veterans) are afforded no such presumption. *See* 13 C.F.R. § 124.103(b) (2013).

businesses, the VA may award small business contracts using "any other small business contracting preference." The FAR establishes three "other small business preferences": contracts with women-owned small businesses ("WOSBs"), *see* 48 C.F.R. § 19.1505 (2014); contracts with SDVOSBs under separate authority applicable to most other agencies, *see id.* §§ 19.1405–19.1406; and contracts with all small businesses—that is, SDVOSBs, 8(a) Program Participants, HUBZone Program Participants, WOSBs, and all other small businesses, *id*. § 19.1502.

By its plain language, the priority afforded SDVOSBs and VOSBs only applies to "[c]ontracts awarded pursuant to subsection (b), (c), or (d)." 38 U.S.C. § 8127(i)(1)–(2). If these subsections become ineffective whenever the VA meets its goals, as the Government's argument assumes, there can be no contracts awarded "pursuant to subsections (b), (c), or (d)." And if no contracts are awarded under these three subsections, participants in the 8(a) Program and HUBZone Program must be given the highest priority in VA small business contracting. Only after prioritizing 8(a) Program and HUBZone Program participants would the VA be entitled to set aside a contract for SDVOSBs, using the separate, government-wide authority under FAR subpart 19.14. *See* 48 C.F.R. § 19.14. SDVOSBs would be (at best)

Section 31 of the Small Business Act establishes the Historically Underutilized Business Zone ("HUBZone") program, which offers preferences to small businesses located in economically disadvantaged parts of the country. *See generally* 13 C.F.R. pt. 126. Veteran ownership (or lack thereof) is not a consideration for HUBZone status. *See* 13 C.F.R. § 126.200 (2013).

third in line for VA small business contracts, with no greater right to those contracts than WOSBs or "ordinary" small businesses. VOSBs would fare even worse because there is no "other small business contracting preference" in the FAR pursuant to which the VA can set aside a contract for VOSBs.

The illogic of the Government's position is magnified by the fact that the statutory preferences for 8(a) Program and HUBZone Program participants are *not* affected by whether the VA meets its contracting goals for those programs. The Small Business Act establishes government-wide goals of five percent for Small Disadvantaged Businesses (a category including 8(a) Program participants) and three percent for HUBZone Program participants. *See* 15 U.S.C. § 644(g). The VA exceeded its five percent goal for small disadvantaged businesses (including 8(a) Program participants) in every completed fiscal year after the VA Act was enacted. In fiscal years 2007 through 2014, the VA's awards to small disadvantaged businesses totaled 8.77%, 7.97%, 7.97%, 8.27%, 8.78%, 7.91%, and 7.92%, respectively. *See* Small Business Procurement Scorecards, SMALL BUS. ADMIN. (providing annual PDF scorecards going back to 2006).[8] The VA also met its HUBZone goals in fiscal year 2007. *See id.*

If Congress' intent was that the VA "move on" to the next-in-line subcategory of small business whenever a certain goal was met, Congress would have specified, in subsection (i), that 8(a) Program and HUBZone

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[8] *Available at* https://www.sba.gov/content/small-business-procurement-scorecards-0 (last visited Aug. 13, 2015).

Program participants would only receive their respective priorities so long as the VA failed to meet its goals for those programs. But Congress included no language even arguably imposing such a restriction anywhere in subsection (i) or elsewhere in Section 8127.[9] In fact, the legislative history of the VA Act confirms that Congress' intent was just the opposite. *See* H.R. REP. NO. 109-592, at 12 (Section 8127 would "[p]rovide veteran and service-disabled, veteran-owned small business priority in VA contracting as well as priority among other 'set-aside' groups eligible for preferential treatment under the Small Business Act").

Taken to its logical conclusion, the Government's position is that Congress intended that, when the VA meets its veteran-owned goals: (1) the VA Act's veteran-owned preferences become ineffective; (2) 8(a) and HUBZone small businesses are prioritized; (3) unlike the preferences afforded veteran-owned firms, the preferences afforded 8(a) and HUBZone firms remain effective even if (as has been the case for SDBs for seven consecutive fiscal years) the VA met its goals for those programs; and (4) VOSBs would be entitled to no procurement preferences at all (other than those afforded all small businesses).

Section 8127 was intended to move veteran-owned companies to the "front of the line" for VA procurements. H.R. REP. NO. 109-592 at 14-15 ("[T]he

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[9] If Congress intended the phrase "for purposes of meeting the goals" in the manner the VA advances, Congress likely would have included a phrase such as "for purposes of meeting the goals under 15 U.S.C. § 644(g)" in establishing priorities for 8(a) Program and HUBZone Program participants under subsection (i).

Committee believes that small businesses owned and controlled by veterans and service-disabled veterans should *routinely be granted the primary opportunity* to enter into VA procurement contracts . . . ." (emphasis added)). The Government's position subverts this purpose, by putting 8(a) Program and HUBZone Program participants at the front and kicking SDVOSBs and VOSBs to the rear. Plainly, this cannot be the result Congress intended. *See, e.g.*, *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970, 1979 (2015) (rejecting argument that "would lead to strange results that Congress is unlikely to have wanted"); *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 71, 102 S. Ct. 1534, 1538 (1982) (noting "[s]tatutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible"); *Skinner & Eddy Corp. v. United States*, 249 U.S. 557, 569, 39 S. Ct. 375, 379 (1919) ("Only compelling language could cause us to impute to Congress the intention to produce results so absurd . . . .").

II. THE GOVERNMENT'S POSITION IGNORES THE LONG HISTORY OF "RULES OF TWO" AND SMALL BUSINESS GOALS

The Government would have the Court believe that the "Rule of Two" and goal-setting provisions of Section 8127 were novel inventions, without any relevant history that might shed light on Congress' intent. Far from it.

In order to encourage contracting with small businesses, the Government has used set aside requirements similar to the VA Act's "Rule of Two"

since 1958; actual "rules of two" have been a part of the contracting landscape since 1979. These set aside preferences were in effect long before the Government first adopted a small business goals system in 1978 and a government-wide goals system in 1988. Since their creation, these goals have served an information-gathering function; agencies must continue to apply the set aside rules regardless of whether they meet their goals. Congress was presumably well-aware of this longstanding history when it adopted the VA Act. *See, e.g.*, *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184–85, 108 S. Ct. 1704, 1712 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."). Congress was also presumably well-aware of the one very limited instance in which it *did* establish a link between agencies' goals and the use of set aside preferences—and did so in painstakingly explicit terms.

The Small Business Act provided that the Government should ensure that a "fair proportion" of government contracts be awarded to small businesses. *See* Small Bus. Act of 1958, Pub. L. 85-536, § 2, 72 Stat. 384, 384 (1958). The Department of Defense ("DoD") subsequently adopted regulations specifying that certain procurements would be "set aside for the exclusive participation of small business concerns." *J.H. Rutter Rex Mfg. Co. v. United States*, 706 F.2d 702, 705 (5th Cir. 1983). The DoD's regulations provided that such set asides would occur if "(i) offers will be obtained from a significant number of responsible small business concerns and (ii) awards will be made at reasonable prices." *Id.* In 1979, the DoD amended subpart (i) to require set asides when offers were reasonably expected from "at least two responsible

small business concerns." *Id.* In this way, the first "rule of two" was born.

When the DoD's procurement regulations were merged into the new FAR, the rule of two moved into the FAR, as well. Today, the FAR's small business rule of two is very similar to the DoD's 1979 regulation:

> The contracting officer shall set aside any acquisition over $150,000 for small business participation when there is a reasonable expectation that—(1) Offers will be obtained from at least two responsible small business concerns . . .; and (2) Award will be made at fair market prices.

48 C.F.R. § 19.502-2(b) (2014).[10]

The FAR's small business rule of two is a regulatory creation to implement the Small Business Act's command that small businesses receive a "fair proportion" of government contracts. *See* Small Bus. Act § 2, 72 Stat. at 384. But although the rule of two began with a regulation, Congress subsequently modeled several statutory provisions on the regulatory rule of two.

Congress created the HUBZone Program in the Small Business Reauthorization Act of 1997. *See* Pub. L. 105-135, §§ 601–07, 111 Stat. 2592, 2627–36 (1997).

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[10] Separate authority requires the contracting officer to set aside acquisitions between $3,000 and $150,000 for small businesses "unless the contracting officer determines there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery." *Id.* § 19.502-2(a).

The statute required agencies to set aside contracts for HUBZone Program participants when a "rule of two" was met:

> Notwithstanding any other provision of law . . . a contract opportunity shall be awarded pursuant to this section on the basis of competition restricted to HUBZone small business concerns if the contracting officer has a reasonable expectation that not less than 2 qualified HUBZone small business concerns will submit offers and that the award can be made at a fair market price . . . .

Id. § 31, 111 Stat. at 2629.[11]

In the Veterans Benefits Act of 2003, Congress gave agencies the authority to restrict competitions to SDVOSBs provided that a "rule of two" was satisfied:

> In accordance with this section, a contracting officer may award contracts on the basis of competition restricted to small business concerns owned and controlled by service-disabled veterans if the contracting officer has a reasonable expectation that not less than 2 small business concerns owned and controlled by service-disabled veterans will submit offers and

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[11] In 2010, the Federal Circuit held that this statute required agencies to set aside contracts for HUBZone Program participants whenever the "rule of two" was satisfied. *See DGR Assocs., Inc. v. United States*, 94 Fed. Cl. 189 (2010). Congress then amended the statute to make the rule discretionary instead of mandatory. *See* 15 U.S.C. § 657a(b)(2)(B) (2010); 48 C.F.R. § 19.1305(b) (2014).

> that the award can be made at a fair market price.

Pub. L. 108-183, § 36, 117 Stat. 2651, 2663 (2003); *see also* 15 U.S.C. § 657f(b) (2012); 48 C.F.R. § 19.1405(b) (2014).

Congress has established similar "rules of two" for 8(a) Program Participants and WOSBs. *See* 15 U.S.C. §§ 637(a)(1)(D), 637(m)(2) (2014). All five of these "rules of two"—small business, HUBZone, 8(a), SDVOSB, and WOSB—were in effect when Congress adopted the VA Act.[12]

As Congress was establishing various "rules of two," it also adopted several goals statutes. "[I]n 1978, Congress amended [the Small Business Act] to require the head of each federal agency to establish goals for the participation of small business concerns in the procurement of contracts of more than $10,000." *J.H. Rutter Rex Mfg.*, 706 F.2d at 706. In 1988, Congress adopted a government-wide small business goals requirement. *See* Bus. Opp. Dev. Reform Act of 1988, Pub. L. 100-656, § 502, 102 Stat. 3853, 3881 (1988).

The initial 20% small business goal was subsequently increased to 23%, and statutory goals for small disadvantaged businesses (5%), HUBZone Program Participants (3%), SDVOSBs (3%), and WOSBs (3%) were added. *See* 15 U.S.C. § 644(g)(1)(A)

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[12] A sixth "rule of two" is set out in the regulations of the Bureau of Indian Affairs and requires that the BIA set aside acquisitions for Indian Economic Enterprises ("IEEs"). *See* 48 C.F.R. § 1480.504-1 (2013). There are no statutory or regulatory goals for IEE contracting.

(2014). All five goals were in effect when the VA Act was adopted. None of the five goals had anything to do with whether an agency was required to apply any of the "rules of two."

The Fifth Circuit has held that an agency's success in meeting its goals (or lack thereof) does not affect the agency's obligation to apply the small business rule of two. In *J.H. Rutter Rex Manufacturing*, the appellant (a large business) argued that the small business rule of two impermissibly limited competition for federal contracts. The appellant contended, in part, that the small business goals created additional pressure on agencies to award contracts to small businesses. Rejecting the appellant's argument, the Fifth Circuit wrote:

> Finally, we briefly consider the appellant's challenge to the goal practices of the government. The goals are not the creation of the administrative agencies but are a specific direction of Congress. We concur with the district court that "[t]he goals do not determine which contracts will be set aside; the goals set are sometimes not attained. Their function is rather to gauge the effectiveness of the small business program."

J.H. Rutter Rex Mfg., 706 F.2d at 711-12 (quoting *J.H. Rutter Rex Mfg. Co., Inc. v. United States*, 534 F. Supp. 331, 340 (E.D. La. 1982) (citations omitted).[13]

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[13] In a further discussion of the effect of the small business goals, the Fifth Circuit wrote that "the goals do not as a matter of law have any impact on set aside decisions." *Id.* at 705.

Interpreting the small business "rule of two," the U.S. Government Accountability Office ("GAO") has rejected the very argument that the Government makes here: namely, that an agency's success in meeting its goal renders a set aside requirement ineffective. In *Library Systems & Services/Internet Systems, Inc.*, B-244432, 91-2 CPD ¶ 337 (Comp. Gen. Oct. 16, 1991), a small business challenged the decision of the Department of Labor ("DOL") to issue a solicitation on an unrestricted basis. The protester contended that the solicitation should have been set aside for small businesses pursuant to the "rule of two" set forth in FAR 19.502-2(b). The DOL defended the protest by arguing, *inter alia*, that it need not apply the rule of two because "it has exceeded its small business goals[.]" *Library Sys. & Servs.*, B-244432 at 3.

GAO rejected the DOL's position and sustained the protest, writing that the FAR "specifically prohibits DOL from declining to set aside this acquisition based on the agency's history of meeting its set aside goals." *Id.* at 4. The FAR provides, in relevant part:

> None of the following is, in itself, sufficient cause for not setting aside an acquisition:
>
> (a) A large percentage of previous contracts for the required item(s) has been placed with small business concerns.

48 C.F.R. § 19.502-6.

The United States District Court for the District of Hawaii reached a similar conclusion in *Contract Management, Inc. v. Rumsfeld*, 291 F. Supp. 2d 1166 (D. Haw. 2003). In that case, the plaintiff challenged the then-mandatory set aside preference for HUBZone

Program participants, arguing, in part, that mandatory HUBZone set asides were inconsistent with a low three percent goal. Disagreeing with this contention, the court wrote that the HUBZone goals "are minimum targets rather than caps." *Id.* at 1175. The court concluded "[i]f the HUBZone Program becomes so successful that it threatens the ability of other small businesses to meet their goals, Congress is free to amend the statute." *Id.* at 1176.

In sum, when Congress passed the VA Act, it presumably was aware that: (1) mandatory small business set aside preferences have been in effect since 1958 and a mandatory "rule of two" since 1979; (2) the set aside preferences long predate the adoption of small business goals; (3) courts and GAO have held that an agency's achievement of its goals does not permit the agency to avoid the small business preference; (4) Congress itself has adopted discretionary "rules of two" for 8(a) Program participants, HUBZone Program participants, SDVOSBs and WOSBs; and (5) none of these "rules of two" are linked to an agency's achievement (or lack thereof) of its goals. Given its presumed knowledge of this legislation and history, Congress would have been explicit had it intended to condition the application of Section 8127(d)'s "Rule of Two" upon the VA's failure to meet its goals under subsection (a).

This is exactly what Congress did in 1988, when it created a limited test program called the Small Business Competitiveness Demonstration Program ("CompDemo" Program). The CompDemo Program was intended to "provide for the testing of innovative procurement methods and procedures." Bus. Opp. Dev.

Reform Act of 1988, Pub. L. 100-656, § 711(a), 102 Stat. 3853, 3889 (1988).

The CompDemo Program designated four industries (construction (excluding dredging); refuse systems and related services; architectural and engineering services (including surveying and mapping); and non-nuclear ship repair), then required agencies to set very high "enhanced goals" for small business awards in these four industries: "[e]ach participating agency shall establish an annual small business participation goal that is 40 percent of the dollar value of the contract awards for each of the designated industry groups." *Id.* § 712(a), 102 Stat. at 3890.

The CompDemo Program required the participating agencies to track achievement of their goals on a quarterly basis. *See id.* § 712(d)(1), 102 Stat. at 3891. Agencies were to issue solicitations on an unrestricted basis "if the participating agency has attained its small business participation goal" of forty percent. *Id.* § 713(a), 102 Stat. at 3892. However, if the agency failed to attain its forty percent goal, it was required to set aside its solicitations for small business:

> RESTRICTED COMPETITION.—If a participating agency has failed to attain its small business participation goal under section 712(a), subsequent contracting opportunities, which are in excess of the reserve thresholds specified pursuant to section 712(b) shall be solicited through a competition restricted to eligible small business concerns pursuant to section 15(a) of the Small Business Act (15 U.S.C. 644(a)) to the extent necessary for such agency to attain its goal. Such modifications in the participating

> agency's solicitation practices shall be made as soon as practicable, but not later than the beginning of the quarter following completion of the review made pursuant to [the quarterly review] indicating that changes to solicitation practices are required. Such participating agency shall [issue unrestricted solicitations] upon determining that its contract awards to small business concerns meet the required goals.

Id. § 713(b), 102 Stat. at 3892.

The CompDemo statute left nothing to chance. It unambiguously provided that the set aside preferences would be required "[i]f a participating agency has failed to attain" its goals. *Id.* The statute also answered obvious practical questions about how and when contracting officers were to determine whether the set-aside requirements were "on" or "off."

As the CompDemo statute demonstrates, Congress knows how to explicitly draw a link between an agency's achievement of its goals and the use of a set aside preference. In sharp contrast to the CompDemo statute, Section 8127 includes no explicit link between the VA's goals and the "Rule of Two." Unlike in the CompDemo statute, Congress has not stated that the set aside preferences become ineffective if the VA attains its goals, nor has Congress addressed how and when contracting officers would determine whether the Rule of Two applies to a particular solicitation.

The CompDemo statute also indicates that Congress realized that it was breaking from longstanding practice by establishing a cause/effect relationship between an agency's goals and the small business set

aside preferences. The CompDemo program itself was a "test" program intended to be effective only for a limited period of time.[14] *Id.* § 711(c), 102 Stat. at 3890. And even within the already-narrow confines of its test, Congress narrowly tailored the CompDemo program to apply only to certain industries, and even then only when an agency had achieved a specific "enhanced" goal set forth in the statute. The goal, in turn, was lofty: forty percent, or double the twenty percent government-wide goal then in effect.

Section 8127 is no "test." It broadly applies to all VA acquisitions, not a limited subset of industries. The specific goal is not set by Congress, but left to the VA's discretion—and may be as low as the three percent government-wide goal.

Had Congress intended to deviate from longstanding practice regarding how agencies use goals, it likely would have acted cautiously and deliberately, as was the case with the CompDemo program. Moreover, Congress likely would have identified a specific "enhanced" veteran-owned goal for the VA to meet before the Rule of Two became ineffective, rather than allowing the VA to avoid the veteran preferences merely by meeting the government-wide goal.

Congress did not act in a vacuum when it adopted Section 8127. Rather, Section 8127 was just the latest in a long series of statutory and regulatory small

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[14] The CompDemo program was originally intended to be conducted over a four-year period. The program was later extended, but eventually was repealed by the Small Business Jobs Act of 2010. Pub. L. 111-240, § 1335, 124 Stat. 2505, 2543 (2010).

business preferences and goal-setting. Aware of the history and pertinent law, Congress undoubtedly intended Section 8127 to act like the other laws in this field: with no "cause/effect" relationship between the VA's aspirational goals, on the one hand, and mandatory set aside requirements, on the other. *See, e.g.*, *Norwich & N.Y. Transp. Co. v. Wright*, 80 U.S. 104, 120 (1871) ("[T]he act of Congress seems to have been drawn with direct reference to all these previous laws, and with them before us, its language seems to be not difficult of construction."); *see also United States v. Am. Trucking Ass'ns., Inc.*, 310 U.S. 534, 544, 60 S. Ct. 1059, 1064 (1940) ("A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, 'excepting as a different purpose is plainly shown.'").

III. THE GOVERNMENT'S POSITION IS UNNECESSARY TO MEET THE VA'S STATED AIM

The Government suggests that its interpretation of Section 8127 is necessary to enable the VA to use the FSS to procure goods and services. The Government's position is, at best, outdated. Under statutory authority adopted in 2010, the VA can prioritize veteran-owned businesses when it uses the FSS. The VA's failure to apply this 2010 authority suggests that the VA's true purpose is not to use the FSS for administrative convenience, but to avoid contracting with veteran-owned small businesses whenever the VA so desires.

By way of background, the Government buys goods and services in many different ways. For example, for certain services (often construction) the Government may use a traditional sealed bidding process. This

process, which is set forth under FAR Part 14, *see* 48 C.F.R. §§ 14.000–14.105 (2014), calls for contractors to submit their bids by a particular date and time; the bids are then publicly opened and read aloud to determine the winner. For other contracting actions, the Government may engage in "contracting by negotiation," under FAR Part 15, *see id.* §§ 15.000–15.609, in which the Government may engage in discussions with offerors and allow revised proposals. Under FAR Part 13, certain less-costly, less-complex goods and services may be procured using a streamlined set of rules known as the Simplified Acquisition Procedures. *See id.* §§ 13.000–13.501.

Another way the Government buys goods and services is through the FSS. The FSS is a Government-wide vehicle under which the General Services Administration ("GSA") establishes long-term contracts with multiple contractors to provide a variety of goods and services. *See GSA Schedule*, U.S. GEN. SERVS. ADMIN.[15] Each FSS contract is awarded to multiple vendors, all of whom will offer similar products or services. *Id.* For example, offerors under Schedule 03FAC provide Facilities Maintenance and Management, whereas offerors under Schedule 71 provide Furniture. *See Schedule List*, U.S. GEN. SERVS. ADMIN.[16] A benefit of the FSS is its relative ease and administrative convenience.

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[15] *Available at* http://gsa.federalschedules.com/gsa-schedule/ (last visited Aug. 17, 2015).

[16] *Available at* http://www.gsaelibrary.gsa.gov/ElibMain/scheduleList.do (last visited Aug. 17, 2015).

Individual contractors negotiate their underlying FSS contracts with the GSA. *See GSA Schedule, supra.* Once a contractor receives an FSS contract, the contractor is "On Schedule," and is authorized to sell the particular products or services available under that particular FSS contract. The receipt of an FSS contract does not mean that the contractor will successfully sell products or services to the Government; the FSS contract is merely a "hunting license" that enables the contractor to be among those considered for FSS purchases under a particular Schedule. *Id.*

When an agency wishes to procure goods or services using the FSS, the agency places an "order" against the contractor's Schedule contract. Different levels of competition are required depending on the value of the acquisition. *See* 48 C.F.R. § 8.405-1 (2013). For orders exceeding the simplified acquisition threshold (currently $150,000 for most goods and services), the ordering agency must compete the order among multiple Schedule holders. *See id*. § 8.405-1(d).

If an agency buys goods or services using the FSS, the agency is not required to follow the ordinary small business set-aside procedures set forth in FAR Part 19. *See id*. § 8.404(a) ("[FAR] Parts 13 . . . 14, 15, and 19 . . . do not apply to [Blanket Purchase Agreements] or orders placed against Federal Supply Schedules Contracts[.]"). However, pursuant to the Small Business Jobs Act of 2010, agencies are permitted, as a matter of discretion, to set aside FSS orders for small businesses, SDVOSBs, 8(a) Program participants, HUBZone Program participants, and WOSBs. *See* Pub. L. 111-240, § 1331, 124 Stat. 2505, 2541 (2010); *see also* 48 C.F.R. § 8.405-5(a)(1) (2013) (reflecting same).

In this case, the Government suggests that the VA must choose, in each procurement, between using the FSS, on the one hand, and conducting a set aside for veteran-owned companies, on the other. This is simply not so.

When the VA Act was adopted, Schedule orders could not be set aside for small businesses or socioeconomic subcategories of small businesses. Indeed, in its rulemaking implementing the VA Act, the VA wrote that it "has no authority to include [SDVOSB and VOSB] set-aside procedures for FSS orders under this rule" because "FSS contracts are governed by policy developed by GSA, which has determined that set-asides do not apply to FSS orders." VA Acquisition Regulation: Supporting VOSB's and SDVOSB's, 74 Fed. Reg. 64624 (Dec. 8, 2009).

That changed in 2010 with the enactment of the Small Business Jobs Act. The VA can now achieve the aim it says it seeks—use of the FSS—while fully complying with Section 8127 by setting aside FSS orders for SDVOSBs.[17] 48 C.F.R. § 8.405-5(a)(1). The VA's refusal to apply this authority demonstrates that the VA's true aim is not merely to use the FSS, but to use it to avoid the preferences established in Section 8127—for all types of procurements.

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[17] GAO has held that it is permissible under Section 8127(d) for the VA to conduct market research among FSS vendors to determine whether there are two or more FSS vendors capable of meeting a requirement. *See Crosstown Courier Serv., Inc.*, B-406336, 2012 CPD ¶ 146 (Comp. Gen. Apr. 23, 2012). But if the market research reveals that there are not at least two SDVOSB FSS vendors reasonably expected to submit offers at fair and reasonable prices, the VA cannot proceed with an FSS acquisition. *See id.*

IV. THE VA'S CURRENT INTERPRETATION OF SECTION 8127 IS NOT ENTITLED TO DEFERENCE

The Government may contend that the VA's interpretation of the VA Act is entitled to so-called *Chevron* deference. But no deference is owed the VA's interpretation, which was developed in the midst of litigation when the VA's original interpretation was rejected by GAO. The VA's current interpretation (that is, that the veteran preferences in Subsection (d) become ineffective whenever the VA meets its goals in Subsection (a)) is not reflected in the VA's notice-and-comment rulemaking, regulations, or any other setting in which the VA exercises its rulemaking function.

In *Aldevra*, B-405271 *et al.*, 2011 CPD ¶ 183 (Comp. Gen. Oct. 11, 2011) ("*Aldevra I*"), GAO considered an SDVOSB's challenge to the VA's decision to procure products using the FSS without first determining whether two or more SDVOSBs could be reasonably expected to submit offers.

Opposing the protest, the VA argued that FSS procurements—and FSS procurements alone—were exempt from the statutory Rule of Two. The VA's argument rested on FAR 8.404(a) and a comment in the VA's rulemaking adopting its SDVOSB and VOSB set-aside regulations, in which the VA had stated that the Rule of Two "does not apply to FSS task or delivery orders." *Id.* at 4 (citing VA Acquisition Regulation: Supporting VOSB's and SDVOSB's, 74 Fed. Reg. 64625 (Dec. 8, 2009)).

The VA's litigation position in *Aldevra I*, and in "several other protests currently pending" at the time,

was much different than it is now: the VA limited its argument to its contention that it could use the FSS in lieu of using the "Rule of Two" to determine if a SDVOSB or VOSB set aside was required. GAO rebuffed the VA's argument, and found that:

> [T]he exception in the FAR that permits agencies to award task and delivery orders under the FSS without required to government-wide small business programs—including the SDVOSB set-aside program created by the 2003 statute (and implemented by FAR subpart 19.14)—does not govern, or apply to, the SDVOSB set-aside program created by the Veterans Benefits, Health Care, and Information Technology Act of 2006.

Id.

Following this loss,[18] the VA modified its legal argument in subsequent cases. In *Aldevra*, B-406205, 2012 CPD ¶ 112 (Comp. Gen. Mar. 14, 2012) ("*Aldevra II*"), the VA faced a similar protest by the same SDVOSB. This time, the VA tried a new argument: that the prefatory language "for purpose of meeting the goals under subsection (a))" should be interpreted to mean "that the 'VA may consider its current

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[18] Though the VA lost *Aldevra I*, it refused to implement GAO's recommendation; such refusals are rare. In fiscal year 2014, for example, GAO sustained 72 protests; in only one of those 72 cases did the responsible agency refuse to implement GAO's recommendation. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-256SP, *GAO Bid Protest Report to Congress for Fiscal Year 2014* (Nov. 18, 2014), *available at* http://gao.gov/products/GAO-15-256SP.

achievements vis-à-vis attaining the Secretary's SDVOSB/VOSB contracting goals in deciding to do restricted competitions." *Id.* at 4–5.

GAO noted that the VA had not previously made this argument, despite multiple opportunities to do so:

> [A]lthough the agency has defended numerous protests before our Office involving precisely this issue, this is the first time that the agency has raised these arguments. Thus, until this protest, the agency had not suggested that the phrase "for purposes of meeting the goals under subsection (a)" as it appears in 38 U.S.C. § 8127(d) grants the agency discretion to decide that in some procurements the mandate in the statute will apply, and in other procurements it will not.

Id. at 5.[19]

The VA's goal-based interpretation advanced in *Aldevra II* is much broader than the agency's own initial position. In *Aldevra I*, the VA argued that it could disregard the Rule of Two when, in an appropriate case, it decides to procure goods and services using the FSS. It expanded its position considerably in *Aldvera II*, by asserting that it may disregard the statutory preferences entirely whenever the agency's own internal goals are met. *Id.* at 4-5

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[19] GAO rejected the VA's goal-based argument, writing that the prefatory phrase "explains the purpose for the mandate, which is to meet the goals established under subsection (a); however, the phrase does not create an exception to the mandate." *Id.*

(noting the incongruity in the arguments advanced by the VA).

The VA's new position is a marked expansion: it covers all forms of procurements (sealed bids, negotiated contracts, simplified acquisitions, and so on. It also covers the many items that cannot be purchased from the FSS—most notably, construction services. With its network of hospitals and other facilities, the VA has requested almost $1.7 billion in new budgetary authority in its 2016 budget for construction projects alone. *See* DEPT. OF VETERANS AFFAIRS, FY 2016 Budget Submission, Budget in Brief, vol. 4 p. 1-1.[20] Under the argument the VA advanced in *Aldevra I*, these contracts would be subject to the Rule of Two. Under the broad new interpretation the VA developed for *Aldevra II (*and that the Government advances in this Court), veterans would be afforded no preferences for these (or any other) VA contracts, unless the VA failed to meet its goals.

The VA's broad new position was developed in the course of litigation when the agency's initial position failed to persuade GAO. As a product of litigation, the position is not entitled to deference. *See, e.g.*, *Brown v. Georgetown Hosp.*, 488 U.S. 204, 213, 109 S. Ct. 468, 474 (1988) ("deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate").

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[20] *Available at* http://www.va.gov/budget/docs/summary/Fy2016-VolumeIV-ConstructionLongRangeCapitalPlanAndAppendix.pdf (last visited Aug. 17, 2015).

The VA's notice-and-comment rulemakings make no mention of a link between the Rule of Two and the VA's achievement of its goals. On August 20, 2008, the VA issued a proposed rule to implement portions of the VA Act, including Section 8127. In the proposed rule, the VA stated that the VA Act had created a "unique procurement program among Federal Agencies." VA Acquisition Regulation: Supporting VOSB's and SDVOSB's, 73 Fed. Reg. 49142 (Aug. 20, 2008). Under this new program, "[t]he law requires the Secretary to give priority to a small business concern owned and controlled by veterans." *Id.*

The VA stated that its proposed rule would:

> Require set-asides for SDVOSBs or VOSBs above the simplified acquisition threshold when the contracting officer has a reasonable expectation that two or more eligible SDVOSBs or VOSBs will submit offers and that the award can be made at a fair and reasonable price that offers the best value to the United States.

Id.

The VA issued a final rule on December 8, 2009. *See* VA Acquisition Regulation: Supporting VOSBs and SDVOSBs, 74 Fed. Reg. 64619 (Dec. 8, 2009). In the final rule, the VA noted that "[s]ince the effective date of section 8127, VA has met its SDVOSB and VOSB goals as established by the Secretary of Veterans Affairs." *Id.* at 64623. The VA could have, at this time, explained that because it reached its goals, the Rule of Two was ineffective, the VA did not do so. But instead, the VA reiterated that under the contracting program created by the VA Act "VA is required to give priority

in contracting to small businesses owned and controlled by veterans . . . ." *Id.* at 64622.

The only exception from the Rule of Two identified in the VA's rulemakings was for FSS contracts. In a statement foreshadowing its position in *Aldevra I*, the VA cited FAR 8.404 and wrote that "VA will continue to follow GSA guidance regarding applicability of 48 CFR part 19 of the FAR . . . which states that set-asides do not apply to FAR part 8 FSS acquisitions." *Id.* at 64624.

Once again, the VA could have stated that it was free to award contracts under the FSS (or any other vehicle) whenever its internal SDVOSB and VOSB goals are met. But it did not.

As suggested by the 2008 and 2009 rulemakings, the procurement regulations the VA adopted to implement the VA Act broadly mandate the use of the Rule of Two—and say nothing about the VA's goals. The VA Acquisition Regulation ("VAAR") provides, in relevant part:

> (a) The contracting officer shall consider SDVOSB set-asides before considering VOSB 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 SDVOSB concerns upon a reasonable expectation that,
>
> (1) Offers will be received from two or more eligible SDVOSB concerns; and

(2) Award will be made at a fair and reasonable price.

48 C.F.R. § 819.7005(a) (2009).

The VAAR only provides three exceptions to the set-aside mandate; none of the exceptions have anything to do with the FSS or the VA's internal goals. Instead, the three regulations, *see id.* §§ 813.106, 819.7007, 819.7008, authorize VA contracting officers to award sole source contracts to SDVOSBs and VOSBs under certain circumstances. These exceptions are mandated by the VA Act, which permits the VA to award sole source contracts to SDVOSBs and VOSBs. *See* 38 U.S.C. § 8127(c).

The VAAR is clear and unambiguous—the Rule of Two must be followed unless an SDVOSB or VOSB sole source award is appropriate. The Government's position in this Court is at odds with the VA's own regulations.

CONCLUSION

Congress passed the VA Act to require the VA to prioritize veteran-owned firms in contracting. The plain language of Section 8127(d), the statutory context, and longstanding history of similar laws all confirm that Congress did not intend to allow the VA to wriggle out of its special relationship with the heroes it serves merely because the VA achieves a veteran-owned contracting goal as low as three percent.

If the VA wishes to use the FSS as a matter of administrative convenience, it may take advantage of the special set aside authority authorized by the Small Business Jobs Act of 2010, and apply veteran-owned

preferences to its FSS orders. But if the VA simply wishes to tell veteran-owned firms to move to the back of the contracting line, it should not be able to do so. It is up to this Court to instruct the VA that it must put veterans first.

Respectfully submitted.

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