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

SUPPLEMENTAL REPLY BRIEF FOR PETITIONER

LAUREN B. FLETCHER
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

JASON D. HIRSCH
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

THOMAS G. SAUNDERS
Counsel of Record
SETH P. WAXMAN
AMY K. WIGMORE
GREGORY H. PETKOFF
AMANDA L. MAJOR
JOSEPH GAY
MATTHEW GUARNIERI
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
thomas.saunders@wilmerhale.com

ARGUMENT

The parties agree on the answers to both questions the Court directed them to address. First, the three specific contracts at issue in petitioner's amended complaint were fully performed by May 2013. Pet. Supp. Br. 2-5; U.S. Supp. Br. 2-4. Second, the case is not moot because the dispute between the parties about the proper application of 38 U.S.C. § 8127(d) is capable of repetition, while evading review. Pet. Supp. Br. 5-12; U.S. Supp. Br. 7-14. This Court's continuing jurisdiction over the case follows straightforwardly from settled precedent and the undisputed facts of the case.

Under those circumstances, there is no basis to entertain the government's alternative suggestion that the Court might remand to address mootness. *Contra* U.S. Supp. Br. 14-16. The government does not identify any further factual development that would be necessary or helpful in addressing mootness, nor any reason to think the Federal Circuit's views on mootness would assist the Court. Indeed, Kingdomware already "argued below that the case was not moot, on the ground that 'this continuing dispute is likely to evade review because such short contract terms do not provide sufficient time for the matter to be litigated fully.'" *Id.* 15 (quoting Pet. C.A. Br. 54). The fact that the "government did not contest the Federal Circuit's jurisdiction" (*id.*) and the Federal Circuit expressly concluded that it had jurisdiction without thinking the mootness issue warranted further discussion (Pet. App. 13a) reinforces that the question is not a close call.[1]

---

[1] Although this Court has cautioned that judicial silence on jurisdictional issues "has no *precedential* effect," *Lewis* v. *Casey*, 518 U.S. 343, 352 n.2 (1996) (emphasis added), the Federal Circuit's silence on the mootness question here should not be mistaken for a

Since the parties agree that the case is not moot and the parties' shared conclusion on this point is dictated by precedent, it appears that the true objective of the government's alternative suggestion is to secure a remand that would permit the Federal Circuit "to reconsider the merits of petitioner's challenge … in light of the briefing in this Court." U.S. Supp. Br. 15. In other words, what the government actually seeks in its alternative suggestion is an opportunity to try to "wash out … disadvantageous positions it has embraced below." *Lawrence ex rel. Lawrence* v. *Chater*, 516 U.S. 163, 187 (1996) (Scalia, J., dissenting). That tactic should be rejected. The decision below is wrong and should be reversed on the merits, not merely vacated.

If the government is dissatisfied with the current posture of the case, it has no one to blame but itself. The panel majority did not invent its erroneous interpretation of § 8127(d) out of whole cloth. It was *the government* that urged the court to hold that § 8127(d)'s "for purposes of meeting the goals" clause has operative effect and renders § 8127(d)'s "shall award" language discretionary, not mandatory. *E.g.*, Resp. C.A. Br. 21 (arguing that "a mandatory set-aside

---

failure to consider the issue. Courts routinely decline to produce written opinions on aspects of a case that have been considered but do not require discussion. *E.g.*, *Bernklau* v. *Principi*, 291 F.3d 795, 801 (Fed. Cir. 2002) (courts need not issue "'a full written opinion on every issue raised'"); *United States* v. *Dyess*, 730 F.3d 354, 360 (4th Cir. 2013) ("There is no requirement that a court specifically discuss every issue raised[.]"); *United States* v. *Patel*, 879 F.2d 292, 295 (7th Cir. 1989) ("the reviewing court is not obliged to devote scarce judicial resources to a written discussion" of "every issue raised by the appeal"). Here, the Federal Circuit majority held that it "ha[d] jurisdiction over the appeal" (Pet. App. 13a) after Kingdomware briefed the mootness issue. A remand to repeat that exercise would not be an efficient use of judicial resources.

[would] conflict with the goal-setting provision of the statute," and that the only "rational interpretation … is that [VA] contracting officers retain the discretion to determine which procurements to set aside as needed to meet the Secretary's goals"). Likewise, it was *the government* that opposed Kingdomware's petition for rehearing en banc (and later its petition for a writ of certiorari) after the court of appeals adopted the government's "goals"-based interpretation.[2]

This Court has, on occasion, vacated and remanded for reconsideration in light of a confession of error by the Solicitor General—a practice that has been "the subject of substantial disagreement" among Members of the Court. Shapiro et al., *Supreme Court Practice* 347 (10th ed. 2013); *see, e.g.*, *Nunez* v. *United States*, 128 S. Ct. 2990, 2990-2991 (2008) (Scalia, J., dissenting); *Alvarado* v. *United States*, 497 U.S. 543, 545-546 (1990) (Rehnquist, C.J., dissenting). But what the government suggests as an alternative here would be several steps beyond that: a remand to address a mootness question that neither party disputes and that is not a close call, so that the government may attempt to persuade the court of appeals to substitute a new and equally flawed rationale for the one the government previously persuaded it to adopt.

---

[2] Contrary to the government's suggestion (at 15), the Court of Federal Claims did not "focus[] on" the latest iteration of the government's argument, *i.e.*, that Federal Supply Schedule orders are not "contracts." That court instead adopted what was then the government's alternative argument, holding that § 8127(d) is ambiguous based on the statute's "goal-setting provisions." Pet. App. 62a. It then deferred to the preamble to the VA's rulemaking (*id.* 69a-71a), which does not rely on any putative distinction between contracts and orders (Reply Br. 18-19), and which does not warrant any form of deference (Pet. Br. 48-52).

Veterans continue to suffer irreparable harm each day that § 8127(d) is not applied as written. Remanding the case so that the government can pursue a new litigation strategy as part of a do-over in the Federal Circuit would only prolong that harm. The case is not moot because it squarely meets the "capable of repetition, yet evading review" standard. The Court should exercise jurisdiction and reverse the judgment below on the merits.

CONCLUSION

Petitioner respectfully requests that the Court restore this case to the argument calendar, hold that the case is not moot, and reverse the judgment below.

Respectfully submitted.

LAUREN B. FLETCHER
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

JASON D. HIRSCH
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

THOMAS G. SAUNDERS
Counsel of Record
SETH P. WAXMAN
AMY K. WIGMORE
GREGORY H. PETKOFF
AMANDA L. MAJOR
JOSEPH GAY
MATTHEW GUARNIERI
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
thomas.saunders@wilmerhale.com

DECEMBER 2015