No. 2013-5042

United States Court of Appeals for the Federal Circuit

KINGDOMWARE TECHNOLOGIES, INC.,
PLAINTIFF-APPELLANT

v.

UNITED STATES, DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS
CASE NO. 12-CV-0173, JUDGE NANCY B. FIRESTONE

BRIEF FOR THE AMERICAN LEGION AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

GENE C. SCHAERR
EIMERIC REIG-PLESSIS
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5000
gschaerr@winston.com
ereigplessis@winston.com

Counsel for Amicus Curiae

CERTIFICATE OF INTEREST

Counsel for *Amicus Curiae* the American Legion certifies the following:

1. The full name of every party or amicus represented by me is:

The American Legion

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

N/A

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Winston & Strawn LLP: Gene C. Schaerr; Eimeric Reig-Plessis

Dated: SEPTEMBER 11, 2013

/s/ Gene C. Schaerr

GENE C. SCHAERR
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5000
gschaerr@winston.com

Counsel for Amicus Curiae
the American Legion

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GLOSSARY OF ABBREVIATIONS

Claims Court	United States Court of Federal Claims
FAR	Federal Acquisition Regulations, 48 C.F.R. Ch. 1
FSS	Federal Supply Schedule
GAO	Government Accountability Office
SDVOSB	Service-Disabled Veteran-Owned Small Business
VA	United States Department of Veterans Affairs
VOSB	Veteran-Owned Small Business (including SDVOSBs)
1999 Act	Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106-50, 113 Stat. 233
2003 Act	Veterans Benefits Act of 2003, Pub. L. No. 108-183, 117 Stat. 2651
2006 Act	Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, 120 Stat. 3403

INTEREST OF AMICUS*

This is a case of enormous importance to veterans throughout the Nation. That is why the American Legion, which was chartered by Congress in 1919 as a patriotic, mutual-help, wartime veterans' organization, seeks to participate.

Today, the American Legion is a veterans-oriented, community-service organization with nearly three million members. Among the many services the American Legion provides are assistance and representation of veterans in matters involving the Department of Veterans Affairs (the "VA"). Those include participating in appeals like this one to protect veterans' benefits; reporting on the impact of VA policies on veterans; and assisting service members in transitioning from the military to the civilian economy.

INTRODUCTION AND SUMMARY OF ARGUMENT

The statutory provision at issue in this case—38 U.S.C. § 8127(d)—was designed by Congress to assist veterans in making that very transition. In 2006, unsatisfied with two existing aspirational statutes, Congress directed that, so long as conditions undisputed in this appeal are met, the VA "*shall* award contracts on the

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* All parties have consented to the filing of this brief in accordance with Fed. R. App. Proc. 29(a) and Fed. Cir. R. 29(c). No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

basis of competition restricted to small business concerns owned and controlled by veterans." 38 U.S.C. § 8127(d) (emphasis added). Despite that explicit statutory command, the U.S. Court of Federal Claims has now held that Section 8127(d) is ambiguous, and that the VA's interpretation of it as *optional* is reasonable. But the word "shall" is not ambiguous: As this Court has recently reiterated, "'[s]hall' is 'mandatory' language," and "[n]othing in the language of the statute states or suggests that the word 'shall' does not mean exactly what it says." *Sharp Elecs. Corp. v. McHugh*, 707 F.3d 1367, 1373 (Fed. Cir. 2013) (quoting *Andersen Consulting v. United States*, 959 F.2d 929, 932 (Fed. Cir. 1992)); *Merck & Co. v. Hi-Tech Pharmacal Co.*, 482 F.3d 1317, 1322 (Fed. Cir. 2007).

To the contrary, Congress could not have drawn a clearer distinction between the statute's mandatory and permissive provisions: The immediately preceding subsection provides that the VA "*may* award" sole-source contracts in other circumstances. 38 U.S.C. § 8127(c) (emphasis added). But rather than give effect to Congress' unambiguous intent, the Claims Court constructed its own ambiguities that presume, in one way or another, that Congress did not really mean what it said. This is reversible error. *Fathauer v. United States*, 566 F.3d 1352, 1356-57 (Fed. Cir. 2009) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.") (citation omitted).

In fact, the historical context in which the 2006 Act was passed confirms that Congress meant exactly what it said. In 1999, it set an annual, government-wide goal that service-disabled veteran-owned small businesses ("SDVOSBs") receive at least 3 percent by value of all prime contract and subcontract awards. In 2003, to help agencies meet that goal, Congress provided that they "may" set aside procurements for such entities. Three years later, however, Congress decided that "may" was not enough. It borrowed nearly identical language from the 2003 Act—but changed it to *require* that the VA "shall" set aside procurements for all veteran-owned small businesses ("VOSBs"), including SDVOSBs. Thus, the VA's refusal to comply not only violates § 8127(d), but frustrates the purpose behind three separate statutes that reflect a "long standing policy of compensating veterans for their past contributions." *Regan v. Taxation with Representation* ("*TWR*"), 461 U.S. 540, 551 (1983).

This is thus far more than a dispute between the VA and Kingdomware: The Claims Court's decision empowers the VA to deny 2.5 million veteran-owned small businesses their statutory rights. Indeed, by awarding contracts to non-veteran businesses in violation of the 2006 Act, the VA diverts up to nearly $3 billion per year in government contracts away from veteran-owned small businesses. Unless this Court reverses the Claims Court, the business opportunities that Con-

gress sought to secure and expand for these veteran-owned small businesses through nearly 15 years of legislative efforts will remain unrealized.

STATEMENT OF THE CASE

This action began when Kingdomware filed a complaint against the United States asserting bid protest claims based on the VA's failure to follow the 2006 Act's set-aside provision for veteran-owned small businesses in awarding three procurement contracts to non-veteran companies. Because Kingdomware's claims turn on a question of statutory construction, the parties stipulated to the facts concerning one of the claims for purposes of summary judgment. The Claims Court denied Kingdomware's summary judgment motion and granted the government's cross-motion, holding that the 2006 Act did not require the VA to comply with the set-aside procedures of § 8127(d). A4-38.

FACTS

A proper understanding of the critically important issue presented in this case requires some familiarity with (a) Congress' longstanding policy of providing economic assistance to veterans; (b) Congress' longstanding efforts to accomplish that result through government contracts; and (c) the VA's refusal to follow the 2006 Act in which those efforts culminated.

A. Congress' longstanding policy of providing economic assistance to veterans

"The United States has long recognized an obligation to provide economic assistance to its military veterans." Paul Sherman, *Paved with Good Intentions: Obstacles to Meeting Federal Contracting Goals for Service-Disabled Veteran-Owned Small Businesses*, 36 Pub. Cont. L.J. 125, 126 (Fall 2006). Perhaps the earliest example is the Continental Congress' creation of veterans benefit packages during the Revolutionary War. *Id.* Since then, Congress has continued "assisting veterans in reentering the workforce and starting small businesses." *Id.*

After World War I, for instance, Congress passed the Vocational Rehabilitation Act of 1918, or the Smith-Sears Act. It created the Federal Board for Vocational Education to provide returning veterans with occupational training and monthly subsidies. Pub. L. No. 65-178, § 2, 40 Stat. 617-18. More famously, after World War II, Congress enacted the "G.I. Bill of Rights," or the Servicemen's Readjustment Act of 1944. Among other things, that Act created a VA-administered, guaranteed loan program for VOSBs. Pub. L. No. 78-346, 58 Stat. 284, 287-91.

The latter half of the twentieth century "saw [a] further expansion of available benefits, with a particular focus on easing the economic transition of veterans." Richard E. Levy, *Of Two Minds: Charitable and Social Insurance Models in the Veterans Benefits System*, 13-SPG Kan. J.L. & Pub. Pol'y 303, 314 (Spring 2004). Beginning with the Korean and Vietnam Wars, Congress passed several more "G.I.

Bills." These helped support the "enormous number" of servicemen returning from the Korean and Vietnam Wars, including many who were "mentally or physically disabled," thanks to "advances in medical and airlift technology" that saved the lives of many who might have died in previous wars. Andrea Gomes, *Coverage for Veterans with Post-Traumatic Stress Disorder: A Survey Through the Wars*, 19 Conn. Ins. L.J. 325, 348-49 (2013). These legislative efforts are especially pertinent today, as our nation's soldiers return home from similarly stressful wars in Afghanistan and Iraq.

B. Congress' efforts to increase the share of government contracts awarded to veteran-owned small businesses

One particularly important form of assistance to veterans is the veterans government-contract preference. The United States spends over $500 billion each year procuring goods and services from government contractors. The VA alone spent approximately $17.4 billion on procurements last fiscal year.[1]

1. Agencies, including the VA, have traditionally procured goods and services through full and open competition, consistent with the Federal Acquisition Regulations (the "FAR"). *See* 48 C.F.R. §§ 14.000-15.609. Under the Small

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[1] Small Business Administration, *SBA's Role in Government Contracting*, *available at* http://www.sba.gov/content/sba's-role-government-contracting; VA, *VA Supplier Relationship Management*, at 3 (Apr. 10, 2012), *available at* http://www.va.gov/oal/docs/business/conf/srmForumAtlantaGa_20120410_OpeningPresentation.pdf.

Business Act (15 U.S.C. §§ 631-657s), however, the FAR also include set-aside provisions for certain types of disadvantaged small businesses that take priority over other contractors. 48 C.F.R. §§ 19.000(a)(3), 19.203(c). Set-asides for small businesses are subject to the so-called "Rule of Two," which requires an agency to have a reasonable expectation that it will receive offers from at least two qualifying contractors and that the award will be for a fair market price. *Id.* § 19.502-2(b).

For certain routinely sought supplies, agencies can sometimes avoid the requirements of the FAR and the Small Business Act by purchasing directly from the Federal Supply Schedule ("FSS"), which holds government-wide contracts with typically large vendors, only a few of which are VOSBs. 48 C.F.R. §§ 8.402(a), 38.000. Agencies are generally directed to rely on the FSS, if possible, before seeking out commercial contractors "*except* … as otherwise provided by law." *Id.* § 8.002(a) (emphasis added). Annually, the VA sometimes procures up to 60 percent of its goods and services through the FSS. 74 Fed. Reg. 64619, 64624 (Dec. 8, 2009).

Unlike ordinary commercial contractors, FSS vendors pay an "Industrial Funding Fee" to the VA calculated as 0.05 percent of their contract awards. Donna Yesner et al., *Selling Medical Supplies and Services through the Department of Veterans Affairs Federal Supply Schedule Program*, 37 Pub. Cont. L.J. 489, 494 (2008). In turn, that fee finances the VA's "Supply Fund," which the VA uses to

offset the costs of administering the FSS. Some observers have suggested that the Supply Fund also benefits key VA employees, providing them with an incentive to choose FSS vendors over other contractors.[2]

2. The veterans government-contracting preference was first established in 1999, when Congress unanimously passed the Veterans Entrepreneurship and Small Business Development Act. Pub. L. No. 106-50, 113 Stat. 233 (the "1999 Act"). Among other things, the 1999 Act amended the Small Business Act to establish an annual, government-wide goal that at least 3 percent by value of government contracts be awarded to SDVOSBs. 15 U.S.C. § 644(g). The 1999 Act also requires certain federal subcontracting plans to promote the participation of other VOSBs. *Id.* § 637(d). Further, it requires agencies to create annual reports detailing the extent of SDVOSB participation, and to give "appropriate justifications" for any failure to meet the 3 percent goal. *Id.* § 644(h).

In enacting these provisions, Congress specifically found that it had previously "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." Pub. L. No. 106-50 § 101(3). Not a single mem-

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[2] *See* Hardy Stone, *The Saga of the VA Supply Fund*, Veterans Today (May 18, 2013), *available at* http://www.veteranstoday.com/2013/05/18/the-saga-of-the-va-supply-fund; SDVOSB Council, *VetLikeMe*, vol. 3, no. 3 (May-June 2012), *available at* https://www.sdvosb-council.org/files/VLM%20V3N3-final.pdf.

ber of Congress criticized the 1999 Act's intent, although some advocacy groups, including the American Legion, expressed concern that it did not go far enough. *See* Sherman, 36 Pub. Cont. L.J. at 130.

Indeed, as Kingdomware explains in its brief, it quickly became apparent that the 1999 Act was a failure, as government agencies—including the VA—met only a tiny fraction of the 3 percent goal. Br. 11. In fact, the percentage of contracts awarded to SDVOSBs *fell* from 0.22 percent to a mere 0.12 percent from 2001 to 2002. Sherman, 36 Pub. Cont. L.J. at 131. And only four agencies—responsible for a miniscule share of the federal government's budget—ever met the 3 percent goal between 1999 and 2003.

Congress responded to the 1999 Act's failure by passing the Veterans Benefits Act of 2003, Pub. L. No. 108-183, 117 Stat. 2651 (the "2003 Act"). The 2003 Act again amended the Small Business Act—this time to provide agencies with "direct mechanisms by which SDVOSBs could be given preference in procurements" in order to meet the 3 percent goal. Sherman, 36 Pub. Cont. L.J. at 133. Specifically, the 2003 Act provided that agencies "*may* award" sole source contracts to SDVOSBs for smaller procurements, and that they "*may* award" larger contracts based on competition restricted to SDVOSBs where the Rule of Two is satisfied. Pub. L. No. 108-183, § 308 (codified at 15 U.S.C. § 657f(a), (b)) (emphasis added).

Like the 1999 Act, however, the 2003 Act was a failure, with barely over half of 1 percent of government contracts awarded to SDVOSBs in 2005. Br. 12 (citing H.R. Rep. No. 109-592, at 15-16). Recognizing that "[t]he brave men and women of our armed forces deserve more than the Act has to offer in its present state," scholars began to wonder whether, "[c]ontinuing [with] the trend started with the 2003 amendments, [Congress] might amend the permissive language of the set aside and sole-sourcing regulations to make these practices *mandatory*." Sherman, 36 Pub. Cont. L.J. at 126, 135 & n.88 (noting use of "may" in the Small Business Act's implementing regulations, 48 C.F.R. §§ 19.1405, 19.1406) (emphasis added).

C. The 2006 Act and the VA's refusal to follow it

1. Congress enacts a *mandatory* set-aside for VOSBs

Frustrated with the failure of the 1999 and 2003 Acts, the House Committee on Veterans Affairs began drafting a new statute. *See* Br. 13 (citing H.R. Rep. No. 109-592, at 15-16). Rather than amend the Small Business Act again, the committee decided to create a separate law (i) with stronger, mandatory provisions, (ii) benefiting not only SDVOSBs but *all* VOSBs, and (iii) specifically directed to the VA, which "should set the example among government agencies for procurement with" VOSBs, including SDVOSBs. *Id.* The result was the Veterans Benefits,

Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, 120 Stat. 3403 (the "2006 Act").

Subject to certain exceptions not relevant here, the 2006 Act—unlike the 2003 Act—unambiguously *requires* the VA to set aside contracts for VOSBs whenever the Rule of Two is met:

> 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….

38 U.S.C. § 8127(d) (emphases added). By contrast, the referenced exceptions in subsections (b) and (c) are *discretionary*—providing that the VA "*may* use" other procedures or "*may* award" to other contractors where certain conditions apply (which, again, are not at issue here). *Id.* §§ 8127(b), (c) (emphasis added).

2. The GAO sustains bid protests against the VA

Despite § 8127(d)'s mandate that the VA "shall" set aside contracts for VOSBs where the Rule of Two is met, the VA has consistently refused to do so. Since December 2011, the Government Accountability Office ("GAO") has sustained 18 bid protests from VOSB contractors—including Kingdomware—on the ground that the VA had procured supplies from the FSS without even considering

whether VOSBs could meet the Rule of Two. GAO Report to Congress, B-158766, 2012 WL 5510908, at *1 (Comp. Gen. Nov. 13, 2012).

In sustaining the protests, the GAO held that § 8127(d)'s mandatory set-aside is "unequivocal," and that "nothing in the [2006] Act … provides the agency with discretion" to procure supplies under the FSS where competition by VOSBs can satisfy the Rule of Two. *Matter of: Aldevra, B-405271 et al.*, 2011 CPD ¶ 183, 2011 WL 4826148, at *2 (Comp. Gen. Oct. 11, 2011). In a rare move, however, the VA publicly stated that it would disregard the GAO's decisions and continue using the FSS instead of § 8127(d)'s set-aside for VOSBs. GAO Report to Congress, 2012 WL 5510908, at *4.

3. The House Committee on Veteran's Affairs reacts to the VA's unlawful conduct

Alarmed by the VA's refusal to comply with the law, two subcommittees of the House Committee on Veterans' Affairs held a hearing in November 2011 and sharply criticized the VA for its unlawful overreliance on the FSS. Rep. Bill Johnson, Chairman of the Subcommittee on Oversight and Investigations, began by remarking that "[w]hen the VA cannot or chooses not to implement clearly written legislation, we have a problem. This is not rocket science." *Follow-up on the U.S. Department of Veterans Affairs Service-Disabled-Veteran-Owned Small Business Certification*, Hearing before the Subcommittee on Oversight and Investigation, Serial No. 112-35, 112th Congress (Nov. 30, 2011). He explained that § 8127(d)

"contains clear wording" and "straightforward language," and that "it is difficult to understand the VA's failure to correctly interpret this law." *Id.* Further, he emphasized that "[t]he word 'shall' has a very, very explicit meaning" and "does not leave much to interpretation." *Id.*

At the hearing, the VA argued (as it did in the Claims Court) that it does not need to follow § 8127(d) because it meets or exceeds both its own and the government-wide goals for VOSB and SDVOSB participation. Countering that argument, Rep. Marlin A. Stutzman (Chairman of the Subcommittee on Economic Opportunity) observed that "the process in achieving those numbers has been painful at best." *Id.* He also explained that meeting goals "is not the sole intent of Section 8127," which had also charged the VA with "picking up part of the slack for the rest of the Federal Government," including "the literally dozens of federal agencies who continue to fail miserably to meet even the three percent goal." *Id.*

4. The VA's failure to follow the law diverts billions of dollars from VOSBs

By purchasing from the FSS or from non-veteran commercial contractors without first examining whether VOSBs can satisfy the Rule of Two, the VA diverts enormous sums of money away from VOSBs—contrary to Congress' express intent. For example, in the last two years, the VA awarded a series of multi*billion* dollar contracts to non-veteran contractors for information technology services without even considering whether VOSBs were available. Jonathan T. Williams,

Veterans First? VA Should Give Vet Contracting Program Priority, 47-WTR Procurement Law. 1, 23 (Winter 2012). Moreover, in 2011, the VA refused to set aside a procurement for an SDVOSB where market research from the Small Business Administration had already demonstrated that it was required. *Id.*

These are far from isolated incidents. Last year, the VA used the FSS for $3.26 billion—over one-fifth—of its $16 billion in annual procurements. Kathleen Miller, *Dispute Simmers Between VA and Veteran-Owned Businesses*, Wash. Post, 2011 WLNR 23483727 (Nov. 14, 2011). Yet only 13 percent of those FSS purchases, worth $436 million, went to VOSBs. *Id.* Thus, as independent analysts have reported, the VA's illegal procurements from the FSS without first conducting market research potentially deprived VOSB contractors of up to nearly $3 *billion* in government contracts last year alone. *Id.*[3]

D. The Court of Federal Claims upholds the VA's lawless behavior

One of the VOSB contractors affected by the VA's refusal to comply with the 2006 Act is Kingdomware, an SDVOSB that develops and manages web, software, and database applications. In February 2012, the VA awarded a contract for

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[3] *See also* Tom Schoenberg & Kathleen Miller, *Veterans Agency Can Ignore Vets Status in Contract Awards*, Bloomberg (Nov. 29, 2012), *available at* www.bloomberg.com/news/2012-11-29/veterans-agency-can-ignore-vets-status-in-contract-awards.html; Kathleen Miller, *Veteran-Owned Suppliers May Gain $3 Billion from VA Griddle Fight*, Wash. Post. (Nov. 13, 2011), *available at* http://failover.washingtonpost.com/business/economy/veteran-owned-suppliers-may-gain-3-billion-from-va-griddle-fight/2011/11/09/gIQAyfG9IN_story.html.

an emergency notification system—a service Kingdomware provides—to a non-veteran FSS vendor. Kingdomware filed a bid protest with the GAO, arguing that § 8127(d) required the VA to first examine whether the contract should be set aside for VOSBs. The GAO agreed with Kingdomware, but the VA refused to follow the GAO's recommendations. A170-72. Unable to obtain relief on its successful bid protest, Kingdomware filed a complaint in the Claims Court. The parties stipulated to the facts and cross-moved for summary judgment on the meaning of § 8127(d).

The Claims Court granted the government's motion. It found the statute ambiguous and deferred to the VA's interpretation as reasonable. Confusing the set-aside mandate of § 8127(d) with the "Rule of Two" on which that mandate is conditioned, the Claims Court held that the "VA need not comply with the 'Rule of Two' under § 8127(d) of the [2006] Act before using the FSS to meet its procurement needs." A21.

Specifically, despite § 8127(d)'s clear mandate that the VA "*shall* award" contracts to VOSBs where the Rule of Two is met, the Claims Court found the statute ambiguous for three reasons. First, the phrase "shall award" is preceded by the clause, "for purposes of meeting the goals under subsection (a)." Second, the 2006 Act does not specifically mention the FSS. Third, the Claims Court found

that interpreting § 8127(d) as mandatory would conflict with statements in the legislative history. A30-32.

ARGUMENT

The issue in this appeal is whether § 8127(d) *requires* the VA to set aside contracts for VOSBs where the Rule of Two is met or, as the VA contends, merely *permits* it to do so. Contrary to the Claims Court's finding, as we show in Part I, there is no basis for deference to the VA's interpretation because § 8127(d) is not ambiguous. It provides that the VA "*shall* award" contracts based on competition restricted to VOSBs whenever the Rule of Two is met, and the Claims Court's attempts to manufacture ambiguity fail to overcome that clear statement of congressional intent. As we show in Part II, the Claims Court also erred by ignoring the evolution from permissive language in the 1999 and 2003 Acts, which failed to meaningfully increase veteran participation in government contracts, to mandatory language in the 2006 Act. And in Part III, we show why and how the Claims Court's decision will have devastating effects on veterans nationwide by diverting billions of dollars away from VOSBs.

I. The 2006 Act unambiguously directs that the VA "*shall*" set aside contracts for veteran-owned small businesses.

To determine whether an agency's interpretation of a statute is lawful, courts rely on the two-step analysis in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Under *Chevron*, a court first deter-

mines "whether Congress has directly spoken to the precise question at issue" and, if so, must "give effect to the unambiguously expressed intent of Congress." *Wilder v. Merit Sys. Protection Bd.*, 675 F.3d 1319, 1322 (Fed. Cir. 2012). Only if the statute is ambiguous can a court reach the second step, which asks whether the agency's interpretation is "reasonable." *Id.* Here the Court need not even reach this step because the statutory language easily satisfies step one.

A. This case begins and ends with *Chevron* step one.

The Claims Court erred in deferring to the VA's interpretation of the 2006 Act as reasonable under *Chevron*. "The rule of deference enunciated in *Chevron* is limited to situations in which statutory language has 'left a gap' or is ambiguous." *Miller v. Dep't of Army*, 987 F.2d 1552, 1555 (Fed. Cir. 1993). "Before granting an agency's statutory interpretation such great deference," a court must "carefully investigate the matter to determine whether Congress's purpose and intent on the question at issue is judicially ascertainable." *Timex V.I., Inc. v. United States*, 157 F.3d 879, 881-82 (Fed. Cir. 1998). A court that fails this task "abdicate[s] [its] duty" by leaving "statutory construction to an Article II agency, rather than accept the responsibility the Constitution imposes on Article III courts." *Id.*

1. *Chevron* step one "begin[s] … with the language of the statute itself." *Defenders of Wildlife, Earth Island Inst. v. Hogarth*, 330 F.3d 1358, 1366 (Fed. Cir. 2003). "Because a statute's text is Congress's final expression of its intent, if

the text answers the question, that is the end of the matter." *Timex*, 157 F.3d at 882. Indeed, for the statute at issue here, there is no need to go any further:

> 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…. [*i.e.*, where the "Rule of Two" is met].

38 U.S.C. § 8127(d) (emphases added). The central dispute between the parties here—and the central issue on which the decision below turns—is the meaning of the word "shall."

But that word is unambiguous. As the Supreme Court has long held, "shall" is "the language of command." *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935). When used in a statute, "shall" thus "creates an obligation impervious to ... discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998); *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (Congress' "use of a mandatory 'shall' ... impose[s] discretionless obligations"). This Court, too, has held many times that "[s]tatutory instructions using the terms 'shall'" must be "treated as mandatory language." *Gilda Indus., Inc. v. United States*, 446 F.3d 1271, 1282 (Fed. Cir. 2006); *Sharp Elecs.*, 707 F.3d at 1373 ("'Shall' is 'mandatory' language.").

With this mandatory language, Congress has "directly spoken to the precise question at issue"—*i.e.*, whether the VA *must* award contracts on the basis of com-

petition restricted to VOSBs where the Rule of Two is met, or whether that is simply a matter for the VA's discretion. Because the language "*shall* award" imposes a "discretionless obligation," *Lopez*, 531 U.S. at 241, there is no "ambiguity" as to whether the VA has discretion to choose FSS vendors over VOSBs when the Rule of Two is met—it does not. *Hi-Tech Pharmacal*, 482 F.3d at 1322 ("Nothing in the language of the statute states or suggests that the word 'shall' does not mean exactly what it says.… [W]e find the statutory language unambiguous.").

2. The word "shall" in § 8127(d) also contrasts starkly with subsections (b) and (c), which provide that the VA "*may* use" procedures and "*may* award" contracts where certain conditions are met. As the GAO observed, "this distinction provides further evidence of a congressional intent to require—rather than permit—SDVOSB or VOSB set-asides." *Matter of: Aldevra*, B-406205, 2012 CPD ¶ 112, 2012 WL 860813, at *4 (Comp. Gen. Mar. 14, 2012).

Indeed, the "close proximity" between "may" and "shall" indicates that "the contrast was not accidental or careless," and that each term has "a meaning distinct" from the other. *Air Line Pilots Ass'n, Int'l v. U.S. Airways Grp.*, 609 F.3d 338, 342 (4th 2010); *see also Grav v. United States*, 886 F.2d 1305, 1307 (Fed. Cir. 1989) ("Within the statute, Congress appears to use the two words 'shall' and 'may' to differentiate tasks … that were mandatory from those that were discretionary.").

Accordingly, because "the words of [the] statute are unambiguous," *Chevron*'s first step "is also the last: judicial inquiry is complete." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002); *see also Delverde, SrL v. United States*, 202 F.3d 1360, 1367 (Fed. Cir. 2000) ("Having determined that the meaning of the statute is clear, we need not give *Chevron* deference to [the agency's] interpretation…[, which] is in direct conflict with the language of the statute."). And where the Rule of Two is satisfied, the VA thus has no discretion *not* to award the contract to a VOSB.

B. Neither the VA nor the Claims Court may manufacture statutory ambiguity where none exists.

Despite Congress' unmistakable mandate that the VA "shall" set aside contracts for VOSBs, the Claims Court concluded that Congress did not *really* mean what it said—for three deeply flawed reasons.

First, the Claims Court held that "shall" cannot mean "shall" if the VA is meeting its goals for veteran participation, since that command is preceded by the clause: "for purposes of meeting the goals under subsection (a)." A30. However, "agencies cannot manufacture statutory ambiguity with semantics to enlarge their congressionally mandated border." *Tex. Pipeline Ass'n v. FERC*, 661 F.3d 258, 264 (5th Cir. 2011). And here, as the GAO correctly found, the phrase "for purposes of meeting the goals under subsection (a)," by its plain terms, merely "explains the *purpose* for the mandate … ; the phrase does *not* create an *exception* to

the mandate." *Matter of: Aldevra*, 2012 WL 860813, at *4 (emphasis added). Indeed, it is well established in both statutory and constitutional law that "a prefatory clause does not limit or expand the scope of the operative clause." *Dist. of Columbia v. Heller*, 554 U.S. 570, 578 & n.3 (2008) ("operative provisions should be given effect as operative provisions, and prologues as prologues").

Second, the Claims Court found that "the 2006 Act is silent as to the relationship between its set-aside provision and the FSS," which it saw as the "specific issue in this case." A30. But this holding improperly "manufactures an ambiguity from Congress' failure to *specifically* foreclose" the VA's use of the FSS—an approach that, if accepted, "would create an 'ambiguity' in almost all statutes." *Prestol Espinal v. Atty. Gen. of U.S.*, 653 F.3d 213, 220 (3d Cir. 2011) (emphasis added) ("'We defer to an agency's efforts to fill statutory gaps, not to create them.'") (citation omitted). Indeed, a statute is not "'ambiguous' merely because its authors did not have the forethought expressly to contradict any creative contortion that may later be constructed." *Moore v. Hannon Food Servs., Inc.*, 317 F.3d 489, 497 (5th Cir. 2003).

To the contrary, the statute's silence as to the FSS forecloses any possibility that the VA *can* choose it over a specific procurement method that Congress instructed "shall" be used—especially in light of the exceptions it *did* provide in §§ 8127(b) and (c). *Ventas, Inc. v. United States*, 381 F.3d 1156, 1161 (Fed. Cir.

2004) ("Where Congress includes certain exceptions in a statute, the maxim *expressio unius est exclusio alterius* presumes that those are the only exceptions Congress intended."). As the GAO correctly found, "nothing in the VA Act … provides the agency with discretion to conduct a procurement under FSS procedures without first determining whether the acquisition should be set aside for SDVOSB concerns." *Aldevra*, 2011 WL 4826148, at *2.[4]

Finally, the Claims Court reasoned that the Joint Explanatory Statement of the House and Senate conference committee accompanying the 2006 Act "undermines" the "mandatory set-aside interpretation" because it "states that VA contracting officers 'would retain the option to restrict competition to small businesses owned and controlled by veterans,'" and that "the Act was meant to give VA the 'tools' to meet its SDVOSB and VOSB set-aside goals." A32.

As the Supreme Court has made clear, however, courts may "not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994). Where, as here, a statute "contains a phrase that is unambiguous," it may not be "expanded or contracted by the statements of individual legislators or committees during the course of the enactment process." *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98-99 (1991); *see also Goldring v.*

[4] By contrast, the provision in the FAR that directs agencies to use the FSS "[e]xcept … as otherwise provided by law" expressly recognizes that other laws, such as the 2006 Act, can take precedence. 48 C.F.R. § 8.002.

Dist. of Columbia, 416 F.3d 70, 75 n.3 (D.C. Cir. 2005) (noting that Congress does not vote on the joint explanatory statement, which "thus has no force of law").[5]

Accordingly, none of the Claims Court's attempts to manufacture ambiguity in § 8127(d) can cloud Congress' clear mandate that the VA "shall" set aside contracts for VOSBs whenever the Rule of Two is met. Under *Chevron*, that unambiguous expression of congressional intent must prevail.

II. The Claims Court further erred by ignoring the previous statutes that led to the 2006 Act as well as Congress' longstanding policy in support of veterans.

A. The 2006 Act is the logical culmination and result of over a decade of failed efforts to increase veteran participation in procurements.

The Claims Court also erred by overlooking the progression of legislation that led to the 2006 Act—a logical progression that confirms the plain reading of the statute articulated above. Indeed, the mandatory language of the 2006 Act was a direct response to the unmitigated failure of two *aspirational* and *permissive* statutes that preceded it:

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[5] "[O]nly the most extraordinary showing of contrary intentions" in legislative history—in "'rare and exceptional circumstances'"—can possibly "justify a limitation on the 'plain meaning' of the statutory language." *Garcia v. United States*, 469 U.S. 70, 75 (1984). Here, the Joint Explanatory Statement does not even come close to meeting that standard, especially considering Kingdomware's far more logical explanation that the phrase "contracting officers 'would retain the option to restrict competition'" simply refers to §§ 8127(b) and (c), which create optional exceptions to § 8127(d) where certain criteria are met. Br. 44-45.

In the 1999 Act, Congress established a government-wide goal that at least 3 percent of contracts by value be awarded to SDVOSBs every year. 15 U.S.C. § 644(g); *see supra* at 8. In creating the 3 percent goal, Congress unanimously found that it had "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." Pub. L. No. 106-50 § 101(3). Despite these intentions, however, it quickly became apparent that the 1999 Act was a failure, as government agencies—the VA included—consistently failed to meet more than a tiny fraction of the 3 percent goal. Br. 11.

Congress reacted to the 1999 Act's failure by passing the 2003 Act, which purported to give agencies the necessary tools to meet the 3 percent goal. *See supra* at 9. Specifically, the 2003 Act provided that agencies "*may* award" government contracts based on competition restricted to SDVOSBs where the Rule of Two applies. 15 U.S.C. § 657f(a), (b).

Again, however, Congress' efforts failed, as the federal government struggled to award even half of 1 percent to SDVOSBs. Br. 12 (citing H.R. Rep. No. 109-592, at 15-16). Scholars soon began to wonder whether, "[c]ontinuing [with] the trend started with the 2003 amendments, [Congress] might amend the permissive language of the set aside and sole-sourcing regulations to make these practices *mandatory*." Sherman, 36 Pub. Cont. L.J. at 135 (emphasis added).

In 2006, Congress did just that. It borrowed nearly identical language from the permissive 2003 Act for its new statute and changed the word "may" to "shall":

- **2003 Act:** "[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 the Rule of Two is met. 15 U.S.C. § 657f(b).

- **2006 Act:** "[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 the Rule of Two is met. 38 U.S.C. § 8127(d).

It is undisputed that the only two other differences between these clauses—the limitation to "service-disabled" veterans in the 2003 Act and to "the Department [of Veterans Affairs]" in the 2006 Act—should be given effect. Yet, despite Congress' unambiguous shift from a discretionary choice to a mandate—in a progression of statutory reinforcements each designed to further *increase* veterans' participation in government procurements—the Claims Court found Congress' intent unclear. That too requires reversal. *Cf. United States v. Rodgers*, 461 U.S. 677, 706 (1983) ("discerning Congress's intent" from the "crucial fact" that "the predecessor statute … used the word 'shall' rather than the word 'may'").

B. Reflecting a national tradition of recognizing veterans for their sacrifices, interpretative doubts are resolved in favor of veterans.

Yet another reason the Court of Claims erred in manufacturing ambiguity in an unambiguous statute is Congress' longstanding "special solicitude for the veterans' cause." *Shinseki v. Sanders*, 556 U.S. 396, 412 (2009). Indeed, recognizing

that "[v]eterans have been obliged to drop their own affairs and take up the burdens of the nation," "[o]ur country has a long standing policy of compensating veterans for their past contributions by providing them with numerous advantages." *TWR*, 461 U.S. at 550-51 (citations and internal quotation marks omitted). In particular, Congress "has long recognized an obligation to provide economic assistance to its military veterans," much of which has "focused on assisting veterans in reentering the workforce and starting small businesses." Sherman, 36 Pub. Cont. L.J. at 126.[6]

In light of Congress' venerable tradition of recognizing and rewarding veterans for their service, "veterans' 'legislation is to be liberally construed for the benefit of [veterans,] who left private life to serve their country in its hour of great need.'" *Burden v. Shinseki*, --- F.3d ---, 2013 WL 3601220, at *5 (Fed. Cir. July 16, 2013) (quoting *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946)). As this Court has suggested, that canon of construction "modif[ies] the traditional *Chevron* analysis" by requiring "'interpretative doubt … to be re-

[6] *See also* Nichole A. Best, 42 Pub. Cont. L.J. 347, 350 (2013) ("The Government has long recognized the sacrifice and service of veterans by assisting them in reintegrating and succeeding in civilian life."); Jack Greenberg, *Edited Comments on Understanding Affirmative Action*, 1995 Ann. Surv. Am. L. 367, 367 (1995) (noting that "the community as a whole endorses veterans' preferences, and the programs are not very controversial," because "they compensate people who have sacrificed for their country—some who have sacrificed significantly, some who have merely given up time in which they might have been in civilian pursuits").

solved in the veteran's favor.'" *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 692 (Fed. Cir. 2000) (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994)).

Thus, even assuming there is any plausible doubt that Congress' intent was clear when it passed the 2006 Act (and there is not), the Court should resolve any such doubt in favor of veterans. *See Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 330 F.3d 1345, 1350 (Fed. Cir. 2003). And for that same reason, it was error for the Court of Claims to work so hard to find ambiguity in a statute that is clear.

III. Left uncorrected, the Claims Court's flawed interpretation of the 2006 Act will have devastating effects on veteran-owned small businesses.

Nor is there any doubt that the Court of Claims' construction will have a devastating effect on veterans nationwide. There are nearly 2.5 *million* VOSBs registered today that could be denied a contracting opportunity because the VA refuses to follow the law.[7] Indeed, between December 2011 and November 2012 alone, the GAO found that the VA violated the 2006 Act's mandatory set-aside provision 18 times. GAO Report to Congress, 2012 WL 5510908, at *1. Moreover, in the past two years, the VA has awarded a series of multi*billion* dollar con-

[7] Small Business Administration, *Veteran-owned Businesses and their Owners—Data from the Census Bureau's Survey of Business Owners*, at 1 (March 2012), *available at* http://www.sba.gov/sites/default/files/393tot.pdf.

tracts to non-veteran contractors without even considering whether VOSBs were available. Williams, 47-WTR Procurement Law. at 23.

As these examples show, the lost opportunities for VOSBs are enormous. Indeed, according to data compiled by Bloomberg Government, the VA's failure to follow the 2006 Act diverted up to nearly $3 billion worth of government contracts away from VOSBs last year alone. Miller, 2011 WLNR 23483727. This loss can be directly traced to the VA's illegal reliance on the FSS at a time when there are almost 2.5 million VOSBs ready to compete under the Rule of Two. The FSS, which holds contracts with typically large, government-wide contractors, is notorious for having few VOSBs. As a result, 87 percent of the VA's FSS acquisitions last year were from *non*-veteran contractors. *Id.*; *see also supra* at 14 n.3.

What is perhaps most frustrating for veterans is that it is not clear *why* the VA, which is itself supposed to be protecting veterans' interests, would prefer to use the FSS rather than the veterans set-aside mandated by the 2006 Act. Perhaps key VA employees are benefitting from the VA's Supply Fund, which in turn is funded by FSS contractors alone. *See supra* at 7-8. We simply do not know. But whatever the reason, the VA's duty is to adhere to the plain terms of the 2006 Act.

* * *

In sum, the Claims Court's holding erroneously disregards the unambiguous language of the 2006 Act, which commands that the VA "shall" award government

contracts to VOSBs wherever the Rule of Two is met. In deferring to the VA's contrary interpretation, the Claims Court ignored the legislative advances that led to the 2006 Act, as well as Congress' broader tradition of advancing the veteran's cause. This Court's action is urgently needed to stop the VA from diverting billions of dollars in government contracts away from VOSBs—a practice that not only violates the letter of the law but frustrates "[o]ur country's long standing policy of compensating veterans for their past contributions." *TWR*, 461 U.S. at 551

CONCLUSION

The Claims Court's judgment should be reversed and remanded for entry of summary judgment for Kingdomware.

Respectfully submitted,

/s/ Gene C. Schaerr

GENE C. SCHAERR
EIMERIC REIG-PLESSIS
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5000
gschaerr@winston.com
ereigplessis@winston.com

Counsel for Amicus Curiae

SEPTEMBER 11, 2013

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing *Brief for the American Legion as* Amicus Curiae were caused to be served on counsel listed below by the CM/ECF system:

AMY K. WIGMORE
GREGORY H. PETKOFF
AMANDA L. MAJOR
JOSEPH GAY
CARLA J. WEISS
Wilmer Cutler Pickering
Hale and Dorr LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

LAUREN B. FLETCHER
Wilmer Cutler Pickering
Hale and Dorr LLP
60 State Street
Boston, Massachusetts 02109

Counsel for Plaintiff-Appellant
Kingdomware Technologies, Inc.

ROBERT C. BIGLER
Department of Justice, Civil Division,
Commercial Litigation Branch
P.O. Box 480
Ben Franklin Station
Washington, D.C. 20044

Counsel for Defendant-Appellee
the United States of America

Dated: SEPTEMBER 11, 2013

/s/ Gene C. Schaerr
GENE C. SCHAERR
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5000
gschaerr@winston.com

Counsel for the American Legion as
Amicus Curiae

CERTIFICATE OF COMPLIANCE

I, Eimeric Reig-Plessis, counsel for the American Legion as *Amicus Curiae*, certify pursuant to Fed. R. App. P. 32(a)(7) and Federal Circuit Rule 32(b) that this brief contains 6,868 words, as counted by Microsoft Word 2010. The text of the brief and footnotes are in 14-point Times New Roman font.

Dated: SEPTEMBER 11, 2013

/s/ Eimeric Reig-Plessis

EIMERIC REIG-PLESSIS
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5000
ereigplessis@winston.com

Counsel for the American Legion as
Amicus Curiae