No. 14-916

In the Supreme Court of the United States

KINGDOMWARE TECHNOLOGIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 38 U.S.C. 8127(d) requires that the Department of Veterans Affairs set aside all acquisitions for small business concerns owned and controlled by veterans—without regard to the contracting goals that the Secretary has established pursuant to 38 U.S.C. 8127(a)—when Congress has directed that the Section 8127(d) set-aside procedures apply "for purposes of meeting the goals under subsection (a)."

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OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on June 3, 2014. A petition for rehearing was denied on September 10, 2014 (Pet. App. 73a-74a). On November 18, 2014, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 8, 2015. On December 29, 2014, the Chief Justice further extended the time to January 29, 2015, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. "The essence of the American economic system of private enterprise is free competition." Small Business Act of 1953, Pub. L. No. 83-163, Tit. II, § 202, 67 Stat. 232. Market competition is similarly essential to government contracting. Congress has directed the General Services Administration (GSA), the Department of Defense, and the National Aeronautics and Space Administration to issue "a single Government-wide procurement regulation," known as the Federal Acquisition Regulation (FAR). 41 U.S.C. 1303(a)(1). The FAR's overarching policy is to "obtain full and open competition" through the use of the "competitive procedures" that are "best suited under the circumstances of the procurement." 41 U.S.C. 3301(a)(1)-(2); see 48 C.F.R. 6.101(b).

Under the FAR, a traditional procurement from commercial sources involves publicly advertising requests for quotes, invitations for bids, or requests for proposals. See 48 C.F.R. Pts. 13, 14, 15. A contracting officer generally must prepare a solicitation, publicly advertise the opportunity, give vendors a reasonable time to respond, evaluate each offer, and ultimately award the contract. See *ibid.*; 48 C.F.R. 5.101-5.102, 5.201-5.207 (publication requirements).

For small-dollar contracts or repetitive supply requirements, however, the time and effort of such a solicitation would be wasteful and counterproductive. To provide agencies a "simplified process for obtaining commercial supplies and services at prices associated with volume buying," the GSA operates the Federal Supply Schedule (FSS) program, also known as the Multiple Awards Schedule program. 48 C.F.R. 8.402; see 41 U.S.C. 152(3). Contractors agree to

provide supplies and services "at stated prices for given periods of time." 48 C.F.R. 8.402(a). Suppliers publish a listing of the items offered, "as well as the pricing, terms, and conditions applicable to each item." *Sharp Elecs. Corp.* v. *McHugh*, 707 F.3d 1367, 1369 (Fed. Cir. 2013). The GSA has determined that FSS orders are fully competitive and that prices are "fair and reasonable," so that "ordering activities are not required to make a separate determination of fair and reasonable pricing." 48 C.F.R. 8.404(a) and (d). A contracting officer in turn can simply go to the FSS website, check listings, and place an order. See 48 C.F.R. 8.405-1(b)-(c). The FSS thus permits federal agencies to immediately order items or services at competitive prices, without incurring the overhead costs or delays that publicly advertised solicitations entail. The FSS is "the premier acquisition vehicle in government," accounting for ten percent of overall procurement spending. GSA, *For Vendors–Getting on Schedule* (Jan. 7, 2015), http://www.gsa.gov/portal/content/198473.[1]

2. The United States has also long used government contracting to promote small businesses in general, and specifically small businesses from historically underutilized business zones, small businesses owned by women, and small businesses owned by veterans who have service-connected disabilities. See, *e.g.*, 15 U.S.C. 631(a), 657a(b), 657f; 48 C.F.R. 19.201(a). It is federal policy that small businesses

[1] The GSA has delegated authority to the Department of Veterans Affairs (VA) to procure medical goods and services under a similar VA FSS program. 48 C.F.R. 38.000; see 48 C.F.R. Ch. 8. In this brief, the term "FSS" encompasses both the GSA FSS and the VA FSS.

should receive "a fair proportion of the total purchases and contracts * * * for the Government." 15 U.S.C. 631(a). Congress has directed the President to set government-wide goals (and each agency to set agency-wide goals) for procurement from small businesses, including in certain socioeconomic categories. 15 U.S.C. 644(g)(1)(A) and (B). The government-wide goal for procurement from service-disabled veteran-owned small businesses must be at least three percent. 15 U.S.C. 644(g)(1)(A)(ii).

Part 19 of the FAR includes procedures for limiting competition exclusively to small businesses when a contracting officer is procuring goods or services from commercial sources in the open market. See 48 C.F.R. 19.501(a) and (c). The principal set-aside mechanism is known as the "Rule of Two," which when applicable requires a contracting officer to set aside acquisitions for small business participation when there is a "reasonable expectation" that "[o]ffers will be obtained from at least two responsible small business concerns" and an "[a]ward will be made at fair market prices." 48 C.F.R. 19.502-2(b)(1)-(2). See *Adams & Assocs., Inc.* v. *United States,* 109 Fed. Cl. 340, 355 (2013); 48 C.F.R. 10.002 (establishing procedures for performing market research). If the contracting officer expects those events to occur, she will publicize a solicitation restricted to qualifying small businesses.

Part 19's small-business set-aside procedures "do not apply" to orders placed against FSS contracts. 48 C.F.R. 8.404(a), 19.502-1(b). And the FAR gives contracting officers discretion to decide whether to procure from the FSS rather than commercial sources in the open market. See 48 C.F.R. 8.002(a)(1)-(2), 8.004;

see Pet. App. 3a. A contracting officer thus can order from the FSS without performing market research to determine whether there is a "reasonable expectation" that setting aside the procurement for small businesses would lead to a fair market price, and without publicizing a solicitation if she has such an expectation.

3. In 2003, Congress strengthened efforts to support service-disabled veteran-owned small businesses. See Veterans Benefits Act of 2003 (2003 Act), Pub. L. No. 108-183, 117 Stat. 2651. First, Congress gave contracting officers discretion to set aside contracts of any size to service-disabled veteran-owned small businesses under the Rule of Two, *i.e.*, if the officer has a "reasonable expectation" that two or more such businesses will submit offers and that "the award can be made at a fair market price." 15 U.S.C. 657f(b). Second, Congress gave contracting officers discretion to award a sole-source contract of $5 million or less to such a business if the business is a "responsible contractor," the award "can be made at a fair and reasonable price," and the contracting officer does *not* have a reasonable expectation that the Rule of Two will be satisfied. 15 U.S.C. 657f(a)(1)-(3).

Despite those statutory changes, the government fell short of its goal that three percent of contracts be awarded to service-disabled veteran-owned small businesses. In 2005, for example, only 0.605% of contracting went to such businesses. See H.R. Rep. No. 592, 109th Cong., 2d Sess. 16 (2006) (House Report).

In 2006, Congress responded by enacting the Veterans Benefits, Health Care, and Information Technology Act of 2006 (2006 Act), Pub. L. No. 109-461, 120 Stat. 3403, which included a targeted procurement program exclusively for the Department of Veterans

Affairs (VA). See 38 U.S.C. 8127. In contrast to other agencies, which have goals for contracting with small businesses owned by veterans who are service-disabled, see 15 U.S.C. 644(g)(1)(A)(ii) and (B), the 2006 Act requires the Secretary of the VA also to establish a separate goal for contracting with any small business owned by a veteran, including a veteran without a service-connected disability, see 38 U.S.C. 8127(a)(1)(A) and (2); see also 38 U.S.C. 8127(*l*)(2) (defining "small business concern owned and controlled by veterans"). And whereas other agencies may set goals for contracting with service-disabled veteran-owned small businesses that are higher or lower than the government-wide goal of three percent, see 15 U.S.C. 644(g)(1)(A)(ii) and (B), the 2006 Act requires the Secretary of the VA to set a goal that is at least as high as the government-wide goal, see 38 U.S.C. 8127(a)(1)(B) and (3).

The 2006 Act also provides the VA unique tools for achieving the Secretary's goals. First, in contrast to other agencies, which can use set-aside procedures to restrict competition to small businesses owned by veterans who have a service-connected disability, see 15 U.S.C. 657f, the 2006 Act also enables the VA to restrict competition to small businesses owned by veterans who do not have service-connected disabilities, see 38 U.S.C. 8127(a)-(d).

Second, in contrast to other agencies, which can enter into sole-source contracts only when the Rule of Two is not satisfied, see 15 U.S.C. 657f(a)(1), the 2006 Act empowers the VA to enter into sole-source contracts irrespective of whether that Rule is satisfied, see 38 U.S.C. 8127(b)-(c). Section 8127(b) provides that, "[f]or purposes of meeting the goals under sub-

section (a), and in accordance with this section," the VA may use non-competitive procedures to enter into a contract for an amount less than $150,000 with a veteran-owned small business concern. 38 U.S.C. 8127(b); 41 U.S.C. 134; 48 C.F.R. 2.101. And Section 8127(c) provides that, "[f]or purposes of meeting the goals under subsection (a), and in accordance with this section," the VA may enter into a sole-source contract anticipated to be between $150,000 and $5 million if the contracting officer determines that a veteran-owned small business concern is a "responsible source" and that "the contract award can be made at a fair and reasonable price that offers best value to the United States." 38 U.S.C. 8127(c).

Third, Section 8127(d) provides:

> 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, [the VA] 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 [such businesses] will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

38 U.S.C. 8127(d).

Fourth, whereas the FAR generally provides "no order of precedence" for other agencies when considering socioeconomic set-asides, 48 C.F.R. 19.203(a), the 2006 Act made veteran-owned small businesses the first priority for the VA. "In procuring goods and services pursuant to a contracting preference under this title or any other provision of law, the Secretary

shall give priority to a small business concern owned and controlled by veterans, if such business concern also meets the requirements of that contracting preference." 38 U.S.C. 8128(a). Congress also specified that service-disabled veteran-owned small business concerns get first priority, followed by other veteran-owned small business concerns, followed by other small business contracting preferences. 38 U.S.C. 8127(i). The Act does not address the FSS.

Since the 2006 Act went fully into effect, the Secretary has set goals of between 7% and 12%, and the VA has consistently exceeded them. Pet. App. 9a.[2]

4. The VA has promulgated regulations implementing the 2006 Act. See *VA Acquisition Regulation: Supporting Veteran-Owned and Service-Disabled Veteran-Owned Small Businesses*, 74 Fed. Reg. 64,619, 64,629 (Dec. 8, 2009). The regulations address the Act's goal-setting provision, see 48 C.F.R. 819.201, the purpose of the program, 48 C.F.R. 819.7001, and requirements for eligibility to participate, 48 C.F.R. 819.7003. The regulations also establish priorities among veteran-owned small business

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[2] Petitioner questions the VA's success in meeting the Secretary's goals, pointing to an audit that ended in May 2010 that found the VA's reported figures to be overstated because of problems in verifying eligibility for set-asides when businesses used subcontractors. See Pet. 32; VA, Office of Inspector Gen., *Audit of Veteran-Owned and Service-Disabled Veteran-Owned Small Business Programs* 3 (July 25, 2011), http://www.va.gov/oig/52/reports/2011/VAOIG-10-02436-234.pdf. Congress addressed that uncertainty in October 2010 by amending Section 8127(f) to impose additional subcontractor verification requirements. See Veterans Small Business Verification Act, Pub. L. No. 111-275, § 104, 124 Stat. 2867-2868. Since that amendment, the VA has continued to exceed its goals. See Pet. App. 9a.

preferences and other forms of small-business preferences. 48 C.F.R. 819.7004.

The regulations implementing Section 8127(d) provide:

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

48 C.F.R. 819.7005(a); see 48 C.F.R. 819.7006(a) (same for veteran-owned small businesses).

In the Federal Register notice publishing the final rule, the VA explained that it had rejected as unnecessary a proposed change that would have altered the regulation to state that it does not apply to FSS orders. 74 Fed. Reg. at 64,624. The VA stated that the regulation as written "does not apply to FSS task or delivery orders." *Ibid.* The "VA will continue to follow GSA guidance regarding applicability of 48 CFR part 19 of the FAR, Small Business Programs, which states that set-asides do not apply to FAR part 8 FSS acquisitions." *Ibid.*

The VA encourages veteran-owned small businesses to participate in the FSS program. Press Release, *Statement on VA Veteran-Owned Small Bus-*

iness Contract (Oct. 28, 2011), http://www.va.gov/opa/pressrel/pressrelease.cfm?id=2191.[3] "[I]n 2011, the VA used FSS contracts for 20% of its total spending, and 13% of these FSS expenditures went to [veteran-owned small businesses]." Pet. App. 4a.

5. In February 2012, the VA decided to procure an Emergency Notification Service for several VA medical centers. Pet. App. 9a, 50a. The contracting officer used the FSS and awarded the contract to a supplier that was not a veteran-owned small business. *Id.* at 9a-10a. The contract was for $33,824.10 for one year, with options to extend the contract for two more years. *Id.* at 50a-51a. The maximum amount of the contract, including options, was thus $101,472.30.

Petitioner is a certified service-disabled veteran-owned small business. Pet. App. 10a. On March 14, 2012, petitioner filed a bid protest with the Government Accountability Office (GAO). *Ibid.*; see 31 U.S.C. 3552(a) (GAO may hear bid protests). Petitioner alleged that the VA had violated Section 8127(d) by using the FSS without first conducting market research to determine whether two or more veteran-owned small businesses could fulfill the contract at a fair and reasonable price. Pet. App. 10a. Relying on its prior opinion in *Aldevra*, B-406205, 2012 CPD ¶ 112 (Comp. Gen. Mar. 14, 2012), the GAO

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[3] The VA also encourages FSS procurement from veteran-owned small businesses. For example, when a contracting officer uses the FSS and there are evaluation criteria in addition to price, the contracting officer must also include evaluation factors that provide additional consideration to veteran-owned small businesses (and businesses of any size that propose to subcontract with veteran-owned small businesses). See 48 C.F.R. 808.405-2, 815.304, 815.304-70.

sustained the protest and concluded that Section 8127(d) required the VA to follow Rule of Two procedures. Pet. App. 10a. As it had done in *Aldevra*, the VA advised petitioner that it would not follow the GAO's non-binding recommendation. *Ibid.*; see *Honeywell, Inc.* v. *United States*, 870 F.2d 644, 647-648 (Fed. Cir. 1989).

Petitioner filed a bid protest complaint in the United States Court of Federal Claims (CFC), which granted summary judgment to the government. Pet. App. 33a-71a; see 28 U.S.C. 1491(b)(1) (CFC jurisdiction). The CFC found that Section 8127(d) was ambiguous as to whether the VA could continue to use the FSS without first attempting a preferential set-aside pursuant to the Rule of Two. Pet. App. 56a-66a. To resolve the ambiguity, the court deferred to the VA's formal statement in the preamble to the regulations that it could continue to use the FSS without first attempting a Rule of Two set aside. *Id.* at 66a-71a (citing 74 Fed. Reg. at 64,624 and *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)).

6. The court of appeals affirmed. Pet. App. 1a-21a. Unlike the CFC, the court of appeals held that the statute unambiguously foreclosed petitioner's interpretation. The court explained that "[t]he statutory scheme as a whole links the Rule of Two mandate (denoted by the word 'shall') in subsection (d) to the goals set under subsection (a)." *Id.* at 20a. The court concluded that "[t]he mandate is, therefore, the required procedure for meeting these goals," *ibid.*, and that the VA "need not perform a * * * Rule of Two analysis for every contract, as long as the goals set under subsection (a) are met," *ibid.*

The court of appeals also found that requiring the VA to follow the Rule of Two procedure in all cases, without regard to whether the Secretary's goals had been achieved, would "read[] the words 'for purposes of meeting the goals under subsection (a)' out of the statute" and would "make[] the mandatory goal-setting statutory provision [in subsection (a)] unnecessary." Pet. App. 20a. The court explained that "[t]he correct reading of the statute according to its plain meaning puts the 'shall' in subsection (d) in harmonious context with the discretionary 'may' provisions of subsections (b) and (c)," and "assures that the goals of subsection (a) will be set by the Secretary, not the success or failure of the Rule of Two in the marketplace." *Ibid.*

Judge Reyna dissented. He concluded that the 2006 Act unambiguously requires the VA to apply Rule of Two procedures in every case, including FSS procurements, without regard to the Secretary's goals. Pet. App. 22a-32a.

ARGUMENT

The Federal Circuit correctly resolved the question presented here. Under petitioner's interpretation of the governing statute, the VA could not purchase a griddle or food slicer through the FSS without first performing market research to determine whether competition could appropriately be restricted to veteran-owned small business concerns. The court of appeals correctly rejected that inefficient and wasteful approach. Section 8127's text, structure, context, and history confirm that the provision establishes mandatory procedures for the VA to use "for purposes of meeting the [Secretary's] goals" for veteran-owned small businesses. 38 U.S.C. 8127(d).

Congress did not require the VA to use those procedures without regard to the Secretary's goals. Further review is not warranted.

1. a. The court of appeals correctly held that Section 8127 establishes mandatory procedures for the VA to use when restricting competition *for purposes of meeting the Secretary's goals*. It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citation omitted). Courts must not be guided by a single word, sentence, or member of a sentence, but must "look to the provisions of the whole law." *Gade* v. *National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 99 (1992) (citation omitted).

Section 8127(a)(1) provides that, "[i]n order to increase contracting opportunities for small business concerns owned and controlled by veterans" and service-disabled veterans, the Secretary "shall * * * establish" contracting goals for veteran-owned small business concerns generally, and for service-disabled veteran-owned small business concerns in particular. 38 U.S.C. 8127(a)(1)-(3). A "goal" is "the end toward which effort or ambition is directed: aim, purpose." *Webster's Third New International Dictionary* 972 (1993). By defining those contracting objectives as "goals" and placing the goal-setting requirements first, Congress indicated that the "end toward which effort or ambition is directed" is for the VA to contract with small businesses owned by veterans (and service-disabled veterans) at or above the percentage rates the Secretary seeks to achieve.

Section 8127's next three subsections provide tools for VA contracting officers to meet the Secretary's goals. Subsections (b) and (c) both provide that, "[f]or purposes of meeting the goals under subsection (a), and in accordance with this section," the VA "may" use non-competitive procedures to enter into contracts for amounts below certain dollar thresholds. 38 U.S.C. 8127(b) and (c). Subsection (d) uses the same structure, with two modifications. While Subsections (b) and (c) apply only to contracts below certain dollar amounts, Subsection (d) applies to contracts of any amount, "[e]xcept" as provided in Subsections (b) and (c). 38 U.S.C. 8127(d). And while Subsections (b) and (c) are optional ("may use" and "may award"), Subsection (d) is mandatory ("shall award"). *Ibid.* As the court of appeals correctly held (Pet. App. 20a), Section 8127(d) thus establishes the "mandatory * * * procedure" the VA must follow whenever it is contracting "for purposes of meeting the [Secretary's] goals," unless the contract falls below certain dollar thresholds, in which case the VA also has discretion to enter into a non-competitive contract pursuant to Subsection (b) or (c). The effect of the statutory directive that the Secretary must set goals, coupled with its mandate that preferential set-asides be followed "for purposes of meeting the [Secretary's] goals," is to make achievement of the Secretary's goals mandatory. See *id.* at 20a-21a (Section 8127 "changed what had been a 'may' to a 'shall' in terms of goals.").

b. By contrast, reading Section 8127 to establish mandatory procedures that the VA must follow whenever it attempts to purchase anything, regardless of the Secretary's goals, would render much of the statute meaningless and its structure bizarre. First, as

the court of appeals recognized, this reading would render the "goals" clauses in Subsections (b), (c), and (d) meaningless, since it would require the VA to give the same preferences for veteran-owned small businesses whether or not those goals have been achieved. Pet. App. 19a-20a. Second, and for essentially the same reason, Section 8127(a)'s "goal-setting provision is itself made superfluous" under petitioner's reading of the statute. *Id.* at 20a. It would be particularly odd for Congress to make setting and meeting "goals" the statute's centerpiece—and to reiterate in three consecutive subsections that the VA use certain set-aside procedures "for purposes of meeting the [Secretary's] goals"—if the VA must always attempt a preferential set-aside even after those goals have been met or exceeded.

Petitioner argues (Pet. 27) that the Secretary's goals provide "backstop[s]" and would encourage the VA to use the non-competitive procedures in Subsections (b) or (c) if the Rule of Two "falls short." But people ordinarily describe "backstops" as "backstops" rather than as "goals." This reading also does not explain Congress's choice to include the same "goals" clause in Subsection (d), which petitioner argues must be followed every time Subsections (b) and (c) are inapplicable, including for all contracts of more than $5 million. See 38 U.S.C. 8127(b), (c), and (d). If Congress had mandated that the VA follow Subsection (d) in every such case, there would be no need for further encouragement.

c. Petitioner's interpretation of Section 8127 would also produce significant waste and inefficiency. For example, the VA has already faced bid protests based on petitioner's interpretation of Section 8127 when the

VA used the FSS to buy "two griddles and one food slicer," see *Aldevra*, B-405271 et al., 2011 CPD ¶ 183 (Comp. Gen. Oct. 11, 2011) (*Aldevra I*), and to purchase one "ice maker/dispenser," see *Aldevra*, B-406205, 2012 CPD ¶ 112 (Comp. Gen. Mar. 14, 2012) (*Aldevra II*). See also Pet. 16-19, 31 (citing *Aldevra I* and *Aldevra II*). Today, a contracting officer can simply open the FSS website, check the listings, and place an order for such an item. See 48 C.F.R. 8.405-1(b)-(c). But on petitioner's view, a contracting officer could not utilize the FSS without first performing market research to assess whether two or more veteran-owned small businesses can provide a griddle at a fair and reasonable price. This would be markedly less efficient than the FSS and could also create harmful delay.

For contracts of less than $5 million, contracting officers may also use non-competitive procedures to enter into sole-source contracts. See 38 U.S.C. 8127(b)-(c). But entering into contracts without competition raises unique risks, and contracting officers accordingly must follow certain procedures before doing so. A contracting officer must "synopsize" the opportunity, which generally requires publicizing it in advance. See 48 C.F.R. 819.7007(a)(2), 819.7008(a)(2); see also 48 C.F.R. 5.201(b), 5.203. She must make a determination that the recipient is "a responsible contractor with respect to performance" and that the "award can be made at a fair and reasonable price." See 48 C.F.R. 819.7007(a)(3)-(4), 819.7008(a)(3)-(4). And she must justify (and, depending on the amount, obtain approval of) the choice to enter into a contract without competition. See 48 C.F.R. 6.303-1, 6.303-2, 6.304, 806.304. Subsections (b) and (c) thus are no

substitute for the FSS and do not remedy the efficiency problems that petitioner's approach would entail.

2. a. Petitioner argues (Pet. 23-25) that the court of appeals' interpretation makes "shall award" in Subsection (d) permissive, and thus eliminates the distinction between "shall" in Subsection (d) and "may" in Subsections (b) and (c). But the court of appeals recognized that the word "shall" is mandatory, and it distinguished that command from the discretionary language of Subsections (b) and (c). The court stated that Subsection (d) imposes a "mandate (denoted by the word 'shall')," and that the Rule of Two procedure is "the required procedure for meeting" the Secretary's goals. Pet. App. 20a. It further explained that Subsections (b) and (c) are "discretionary" even when the VA is acting "for purposes of meeting the [Secretary's] goals" and the contract is small enough that these procedures can be used. *Ibid.* The court's reading of Subsection (d) "according to its plain meaning" thus puts that provision in "harmonious context with the discretionary 'may' provisions of subsections (b) and (c), and assures that the goals of subsection (a) will be set by the Secretary, not the success or failure of the Rule of Two in the marketplace." *Ibid.*

b. Petitioner and its amici also argue that, by construing Section 8127(d)'s Rule of Two mandate to apply only "for purposes of meeting the [Secretary's] goals," the court of appeals "violate[d] the axiom that prefatory clauses do not constrain or enlarge operative clauses." See Pet. 25-28; Am. Legion Amicus Br. 17-18. That characterization begs the question of *whether* the "goals" clause is prefatory or operative. A clause is prefatory "where the text of a clause itself

indicates that it does not have operative effect, such as 'whereas' clauses in federal legislation or the Constitution's preamble." *District of Columbia* v. *Heller*, 554 U.S. 570, 578 n.3 (2008); see 1A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction* § 20:3, at 122 (7th ed. 2009) (*Sutherland*) ("The preamble to a statute is a prefatory explanation or statement, often commencing with the word 'whereas,' which purports to state the reason or occasion for making a law or to explain in general terms the policy of the enactment.").

Here, the "goals" clause is operative. The "goals" clauses in Subsections (b), (c), and (d) do not contain the telltale "whereas" language. They are not part of a statement of congressional findings or purpose. And they are not part of a prologue or preamble, as Subsections (b), (c), and (d) do not appear at the start of the statute. See *Black's Law Dictionary* 1365 (10th ed. 2014) (defining "preamble" as "[a]n introductory statement * * * explaining [a] document's basis and objective"); *Sutherland* § 20:3, at 125 ("The preamble customarily precedes the enacting clause in the text of a bill, and consequently is frequently understood not to be part of the law.").

Indeed, the "goals" clause in Subsection (d) does not even appear at the start of that fourth subsection. Rather, it appears between an operative clause that limits the scope of the Rule of Two mandate ("[e]xcept as provided in subsections (b) and (c)") and another operative clause that further limits the scope of the mandate ("in accordance with this section"). 38 U.S.C. 8127(d). The natural inference is that the "goals" clause also imposes operative limits on the scope of the mandate, just like the two clauses it is sandwiched

between. Cf. *Logan* v. *United States*, 552 U.S. 23, 31 (2007) ("Words in a list are generally known by the company they keep.").

To the extent Section 8127 contains any prefatory clause, it can be found in its usual place: At the beginning of the statute. In Subsection (a)(1), Congress stated, "In order to increase contracting opportunities for small business concerns owned and controlled by veterans and small business concerns owned and controlled by veterans with service-connected disabilities, the Secretary shall" establish certain goals. 38 U.S.C. 8127(a)(1). It would be strange for Congress, after including a statement of purpose at the beginning of a statute, to repeat itself without any operative effect in each of the next three subsections—and stranger still when those three subsections are otherwise entirely operative. Petitioner and its amici identify no judicial decision finding a clause to be prefatory under similar circumstances. See *Heller*, 554 U.S. at 578 n.3 (introductory clause of constitutional amendment); *Hawaii* v. *Office of Hawaiian Affairs*, 556 U.S. 163, 168 (2009) ("whereas" clauses in preamble); *Yazoo & Miss. Valley R.R.* v. *Thomas*, 132 U.S. 174 (1889) (same); *Jurgensen* v. *Fairfax Cnty.*, 745 F.2d 868, 885 (4th Cir. 1984) (preamble); *Parish Oil Co.* v. *Dillon Cos.*, 523 F.3d 1244, 1249-1251 (10th Cir. 2008) (introductory clause of statute); *City of Joliet, Ill.* v. *New W., L.P.*, 562 F.3d 830, 837 (7th Cir. 2009) (statement of findings and purpose), cert. denied, 559 U.S. 936 (2010); *Association of Am. R.R.s* v. *Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977) (same); *National Wildlife Fed'n* v. *Marsh*, 721 F.2d 767, 773 (11th Cir. 1983) (same); *Florentine* v. *Church of Our Lady of Mt.*

Carmel, 340 F.2d 239, 241-242 & n.3 (2d Cir. 1965) (same).

c. The legislative history further undercuts petitioner's contention that Section 8127 imposes mandatory procedures that apply to all VA procurement efforts. The 2006 Act reflects a compromise between the House and Senate Committees on Veterans' Affairs, which issued a Joint Explanatory Statement setting forth their shared intent. See 152 Cong. Rec. 23,510 (2006). The Committees explained that "[c]ontracting officers would *retain the option* to restrict competition to small businesses owned and controlled by veterans if the contracting officer has an expectation that two or more such businesses * * * will submit offers for the contract including all contracts exceeding $5,000,000." *Id.* at 23,515 (emphasis added); see H.R. 3082, 109th Cong., 2d Sess., § 101 (2006). "The Committees anticipate[d] that acquisition officials will *exercise reasonable judgment* when attempting to meet the several set-aside goals including giving 'preference' to veteran or service-disabled veteran-owned businesses." 152 Cong. Rec. at 23,515 (emphasis added). Those statements are incompatible with petitioner's view that the VA must always first follow Section 8127's procedures for restricting competition and thus can never simply utilize the FSS, no matter how reasonable that would be.[4]

3. While the Federal Circuit viewed the VA's interpretation of Section 8127 as unambiguously cor-

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[4] Petitioner also relies (Pet. 14, 29) on a statement that veteran-owned small businesses "should routinely be granted the primary opportunity to enter into VA procurement contracts." House Report 14-15. But petitioner's position is that veteran-owned small businesses should *always* be granted the "primary opportunity."

rect, the CFC found that the statute neither requires nor precludes the VA's approach. Under either view of the matter, the judgment below is correct and does not warrant further review because the VA determined, after notice-and-comment rulemaking, that the agency may continue to use the FSS without regard to the Rule of Two. See 74 Fed. Reg. at 64,624 (the Rule of Two mandate "does not apply to FSS task or delivery orders"); *ibid.* ("VA will continue to follow GSA guidance regarding applicability of 48 CFR part 19 of the FAR, Small Business Programs, which states that set-asides do not apply to * * * FSS acquisitions."). That conclusion warrants deference under *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984), as an interpretation of Section 8127, or under *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997), and *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), as an interpretation of the VA's own regulations. And, as the CFC concluded, the VA's position would also warrant deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). See Pet. App. 69a.[5]

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[5] The American Legion argues that the court of appeals failed to apply the longstanding canon that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." Am. Legion Amicus Br. 2 (quoting *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991)). But Section 8127 is not a benefits statute; it is a government-contracting statute. Neither petitioner here nor any of the judges below relied upon the canon of interpretation that the American Legion invokes, and we are aware of no precedent extending the canon into the context of government contracting. In any event, that canon would not alter the result here because the court of appeals held that Section 8127(d) unambiguously foreclosed petitioner's position, and the

Petitioner argues (Pet. 15, 30-31) that, under the VA regulations implementing Section 8127, the agency's duty to follow the Rule of Two procedure is not limited by Section 8127(d)'s "goals" clause. That argument reflects a misunderstanding of the regulatory scheme. The VA's regulations implementing Section 8127 are codified in the subchapter of the VA's FAR regulations that is devoted to "socioeconomic programs." See 48 C.F.R. Ch. 8, Subchap. D. Nothing in that subchapter provides that socioeconomic set-asides must be attempted in all cases. Nor do those regulations depart from the longstanding principles that contracting officers have discretion to use the FSS rather than procure from commercial sources in the open market, and that FSS procurements are exempt from set-aside requirements. See pp. 4-5, *supra*.

The regulations implementing Section 8127(d) provide:

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

48 C.F.R. 819.7005(a); see 48 C.F.R. 819.7006(a) (same for veteran-owned small businesses). The first sentence's direction that contracting officers "shall consider [service-disabled veteran-owned small business]

VA's interpretation of Section 8127(d) and its own regulations would warrant deference.

set-asides before considering [veteran-owned small business] set-asides" indicates that, like the "shall award" command in Section 8127(d), the "shall set-aside" command in the VA's regulations applies in the context of open-market acquisitions when the VA is "considering * * * set-asides." *Ibid.* Accordingly, the "shall set-aside" requirement does not apply when the VA is ordering from the FSS and is not considering set-asides. When quoting these regulations, however, petitioner omits the first sentence, see Pet. 15, which changes the regulations' tenor.

4. Petitioner argues (Pet. 34-36) that this case is important because, under petitioner's reading, Section 8127 would require the VA to use preferential set-asides in billions of dollars of additional procurement efforts. But that simply describes the dramatic impact of petitioner's merits position that Section 8127 establishes mandatory procedures governing *all* VA procurement efforts, rather than all procurements "for purposes of meeting the [Secretary's] goals," as Congress provided in Subsections (b), (c), and (d). The fact that petitioner's interpretation would dramatically change law and practice, such as by preventing the VA from using the FSS to order a griddle as expeditiously as possible, indicates not that further review is warranted, but that the court of appeals' judgment is correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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