No. 14-916

In the Supreme Court of the United States

KINGDOMWARE TECHNOLOGIES, INC.,
PETITIONER

v.

UNITED STATES,
RESPONDENT

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

BRIEF FOR THE AMERICAN LEGION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

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

The question presented is:

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

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[*]

In a decision that eviscerates the rights of 2.5 million veteran-owned businesses to participate in an important government contract program, a divided panel of the Federal Circuit violated this Court's precedent and Congress's command that veterans "shall" participate in the program. That word was chosen carefully. It was enacted in a *third* revision by Congress directed specifically to the Department of Veterans Affairs (the "VA") after it failed to heed Congress's first two, merely permissive, enactments. Review is urgently needed because the majority's decision conflicts with two of this Court's critical canons of statutory construction—one of which is specially tailored to veterans. In the process, the majority below snuffed out the rights of veterans to contracts estimated at up to $10 billion per year.

Here is what happened. In the late 1990s, the number of federal contracts awarded to veterans languished at around one percent. After twice attempting to cajole all federal agencies to raise that number, Congress threw down the gauntlet to the VA, which it believed should "set the example." H.R. Rep. No. 109-592, at 16. So long as conditions concededly satisfied here are met, Congress instructed, the VA "shall award" contracts to veteran-owned small businesses. 38 U.S.C. §8127(d). As the dissent below emphasized, by using "shall," the statute "could not be

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[*] Pursuant to Rule 37.2(a), *amicus* provided timely notice of its intention to file this brief. All parties have consented. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, has made a monetary contribution intended to fund the preparation or submission of this brief. See R. 37.6.

clearer." Pet. App. 23a. Yet the majority overthrew that mandate by invoking its purpose statement—"for the purposes of meeting the goals" of the statute—which the majority thought gave the VA "discretion" to award contracts to *non*-veterans. Pet. App. 17a. According to the majority, if the purpose statement did not override the operative word "shall," the purpose would be "superfluous." Pet. 20a. The majority never explained how its approach did not render superfluous the operative word "shall." Pet. 25.

Further, as we will show in this brief, the majority's reasoning violates two controlling canons of statutory construction established by this Court. *First*, as explained below in Section I, it is a "basic rule[] of statutory construction" that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220-221, n.9 (1991). To be sure, the statute here is clear. "Shall" means shall. And the VA's own regulation squarely *favors* petitioner. Pet. 30-32. But even if the purpose clause created some doubt, and even in the face of a conflicting regulation by the VA, any "interpretive doubt" would have to "be resolved in the veteran's favor." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994); see also *Henderson ex rel. Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1205-1206 (2011) (same)). The majority ignored this.

Second, as the dissent showed, "a prefatory clause does not limit or expand the scope of the operative clause." Pet. 26a (citation omitted). Although the dissent relied for this point on *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), which involved the Constitution, this Court applies the principle to all "federal legislation." *Hawaii* v. *Office of Haw. Affairs*,

556 U.S. 163, 175 (2009). "As we recently explained in a different context, 'where the text of a clause itself indicates that it does not have operative effect, such as 'whereas' clauses in federal legislation * * * a court has no license to make it do what it was not designed to do." *Ibid.* (quoting *Heller*, 554 U.S. at 578 n.3). "Rather than focusing on the operative words," the majority here "directed its attention to the * * * clause[] that preface[s]" them, leading it to a "conclusion [that] is wrong." 556 U.S. at 175. In the process, the majority split with at least six other circuits, all of which hold that purpose language cannot control operative language. See Section II, *infra*.

Finally, review is needed because this case is nationally important. See Section III, *infra*. Left undisturbed, the decision below erases the rights of millions of veteran-owned businesses, robbing them of billions of dollars of contracts each year. That thwarts "[o]ur country['s] * * * long standing policy of compensating veterans," as they "have been obliged to drop their own affairs and take up the burdens of the nation." *Regan* v. *Taxation with Representation*, 461 U.S. 540, 550-551 (1983). Certiorari should be granted to protect the vital economic opportunities that Congress sought to secure three times.

These opportunities could hardly be more important to the American Legion's three million members. Chartered by Congress in 1919, the American Legion is a community-service organization that routinely assists veterans in matters involving the VA. Among other services, the American Legion helps veterans transition to the civilian economy. This is the same critical transition that Congress sought to ease with the statutory rights here, which have now been destroyed by the VA and the majority below.

STATEMENT

1. This case involves three attempts by Congress to compel federal agencies to favor veterans in awarding government contracts. In its first attempt, the Veterans Entrepreneurship and Small Business Development Act (the "1999 Act"), Congress set an annual goal that at least three percent of contracts be awarded to service-disabled veteran-owned small businesses, and required that agencies falling short of this goal "justif[y]" their failure. 15 U.S.C. §644(g), (h). As Congress explained, it had "done too little to assist veterans, particularly service-disabled veterans, in playing a greater role in the economy * * * by forming and expanding small business enterprises." Pub. L. No. 106-50 §101(3). Although the vote was unanimous, some groups, including the American Legion, expressed concern that it did not go far enough. See P. Sherman, *Paved with Good Intentions: Obstacles to Meeting Federal Contracting Goals for Service-Disabled Veteran-Owned Small Businesses*, 36 Pub. Cont. L.J. 125, 130 (2006).

The American Legion proved to be right. It quickly became clear that the 1999 Act was a failure, as agencies fell far short of the three percent goal. Pet. App. 4a. In fact, from 2001 to 2002, the percentage of contracts awarded to service-disabled veteran-owned businesses *fell*—from 0.22 percent to a mere 0.12 percent. Sherman, *supra*, at 131.

2. In response to the 1999 Act's failure, Congress passed the Veterans Benefits Act of 2003 (the "2003 Act"), which gave agencies substantial flexibility to favor veterans. Under the 2003 Act, an agency "*may* award" a contract while restricting competition to service-disabled veteran-owned businesses. 15 U.S.C.

§657f(b) (emphasis added). The only stipulation was what is known as the "Rule of Two"—namely, that the agency have "a reasonable expectation that not less than 2 [such businesses] will submit offers and that the award can be made at a fair market price." *Ibid.* This flexible approach failed, too. By 2005, service-disabled veteran-owned businesses were receiving barely a half percent of contracts. Pet. App. 5a.

3. Determined to solve the problem, Congress went back to the drawing board in 2006, this time drafting a law (i) with mandatory provisions, (ii) benefiting all veteran-owned small businesses, and (iii) focusing on the VA, which should "set the example among government agencies." Pet. App. 5a-6a, 16a. The result was the Veterans Benefits, Health Care, and Information Technology Act of 2006 (the "2006 Act"). With certain exceptions, the 2006 Act requires the VA to award contracts to veteran-owned small businesses 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 [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 small business concerns owned and controlled by veterans will submit offers[.]

38 U.S.C. §8127(d) (emphasis added). By contrast, the exceptions in subsections (b) and (c) are discretionary, providing that the VA "*may* use" other procedures or "*may* award" contracts to other busi-

nesses (assuming certain conditions apply). *Id.* §§8127(b), (c) (emphasis added).

4. Despite the command that the VA "shall" set aside contracts where the Rule of Two is met, the VA refused. Between 2011 and 2012, the Government Accountability Office ("GAO") sustained 18 bid protests on the ground that the VA awarded contracts to non-veterans without considering whether veteran-owned small business could satisfy the Rule of Two. GAO Report to Congress, 2012 WL 5510908, at *1 (Comp. Gen. Nov. 13, 2012). In sustaining the protests, the GAO held that the law's set-aside is "unequivocal" and that "nothing in the [2006] Act * * * provides the agency with discretion" to defy it. *In re Aldevra*, 2011 WL 4826148, at *2 (Comp. Gen. Oct. 11, 2011). Undeterred, the VA announced that it would continue to treat the set-aside as optional. GAO Report to Congress, 2012 WL 5510908, at *4.

5. One of the contractors affected by the VA's intransigence is petitioner, Kingdomware Technologies, a service-disabled veteran-owned small business. Pet. App. 2a. In 2012, the VA awarded a contract for an emergency notification system, a product offered by Kingdomware, to a non-veteran vendor. *Id.* at 9a-10a. Kingdomware filed a protest with the GAO, showing that §8127(d) required the VA to examine whether the contract should have been set aside for veteran-owned small businesses. *Ibid.*

The GAO agreed with Kingdomware, but the VA refused to follow the GAO's recommendations. *Id.* at 10a. Unable to obtain relief, Kingdomware filed a complaint in the U.S. Court of Federal Claims (*id.* at 11a), which found the statute "ambiguous" and deferred to the VA's interpretation as "reasonable" un-

der *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-844 (1984).

6. A divided panel of the Federal Circuit affirmed, but on a different ground. Unlike the Claims Court, the majority did not find §8127(d) ambiguous. Rather, it held that the statute's prefatory clause—"for purposes of meeting the goals under subsection (a)"—"unambiguously" grants the VA "discretion" to pass over veteran-owned small businesses when it decides that it can meet its goals. Pet. App. 15a, 17a-20a (Clevenger, J., joined by Prost, C.J.). According to the majority, if the purpose statement did *not* limit the operative clause (ordering that the VA "shall" prefer veterans), the purpose statement would be "superfluous." *Id.* at 20a.

In a forceful dissent, Judge Reyna showed that the "plain language of the 2006 Veterans Act unambiguously requires" the VA to award contracts to veteran-owned small businesses "in every acquisition" that meets the Rule of Two. *Id.* at 22a. Thus, the majority was wrong "[t]o override the [law's] clear imperative" by "rel[ying] on [its] prefatory language," because "a mandate * * * cannot be limited by its prologue." *Id.* at 26a.

REASONS FOR GRANTING THE PETITION

I. Review is warranted to establish that lower courts must adhere to this Court's "long applied" rule that statutes must be construed "for the benefit of the veteran."

The Court should grant review, first, because the decision below conflicts with this Court's "long applied * * * 'canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" *Henderson*, 131 S. Ct. at 1206

(2011) (Veterans' Judicial Review Act) (quoting *King*, 502 U.S. at 220-221 n.9). Under this canon, statutes are "always to be liberally construed to protect [veterans], who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943); *Coffy* v. *Republic Steel Corp.*, 447 U.S. 191, 196 (1980) (same). That is, courts must adopt "as liberal a construction for the benefit of the veteran as * * * [the statute] permits." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

A court's task "is to construe the separate provisions of the [statute] as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits." *Ibid.* Any "interpretive doubt" must "be resolved in the veteran's favor.'" *Gardner*, 513 U.S. at 118.

1. The decision below contradicts this "basic rule[] of statutory construction." *King*, 502 U.S. at 574 n.9. To be sure, the statute here yields no "interpretive doubt." *Gardner*, 513 U.S. at 118. As the dissent noted, the "plain language" of the statute "unambiguously requires" that the VA "shall award" contracts to veteran-owned small businesses "in every acquisition" that meets the Rule of Two. Pet. App. 22a-23a. As its only basis for rejecting that "plain meaning," the majority reasoned that §8127(d)'s "purpose" clause overrides its operative clause whenever the VA decides that it "has met the goals set under §8127(a)." *Id.* at 19a-20a. As petitioner shows, that "reading" runs squarely into the principle that "shall" is the language of command. Further, it runs into the black-letter rule that prefatory clauses must never override the plain meaning of operative claus-

es. *Infra* at 12-18. And still further, it collides with the very language of the surrounding statutory clauses, which likewise state the statute's purpose but use the contrasting word of permission: "may." Pet. 24-25.

But even assuming that the statute's purpose statement created some "interpretive doubt" (which was the holding of the Claims Court), any such doubt must be resolved "in the beneficiaries' favor." *Henderson*, 131 S. Ct. at 1206. The failure of the majority even to mention that obligation was inexcusable.

Notably, in the court below, the government's only answer to the pro-veterans canon was that it "relate[s] to providing veterans' benefits to veterans, not small business set-asides." C.A. Fed. No. 2013-5042, Appellee's Br. 22 n.3. The government never explained why mandatory preferences for veteran-owned *businesses* did not constitute "benefits to veterans." Nor did it offer any principled reason why the canon should not apply here. And there is none, as the set-asides here exist, as do *all* veterans' benefits, to assist those "who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone*, 319 U.S. at 575. The petition should be granted for this reason alone.

2. It is no answer to say that the majority's "interpretation" was "continuously and consistently" preferred by the VA. Pet. App. 8a. For one thing, as petitioner showed, the VA's own regulation commands using the Rule of Two. Pet. 30-32. But even if the VA's regulation allowed flexibility, the pro-veteran canon would still control.

That is the lesson of *Gardner*, in which a veteran began suffering pain after receiving surgery at a VA

medical facility. 513 U.S. at 116. He sought disability benefits under a statute providing compensation for "'an injury or an aggravation of an injury' that occurs 'as the result of hospitalization, medical or surgical treatment'" that is not attributable to the veteran's "willful misconduct." 38 U.S.C. §1151 (1994). Even though the veteran had committed no willful misconduct, the VA denied his claim, citing its own regulation interpreting the statute implicitly to cover only injuries arising from the VA's own "fault-or-accident." 513 U.S. at 117 & n.2.

In a unanimous decision, this Court held that the VA's interpretation "flies against the plain language of the statutory text." *Id.* at 122. In so holding, the Court rejected the VA's "attempt[] to reveal a fault requirement implicit in the text" on the ground "that fault inheres in the concept of compensable 'injury.'" *Id.* at 117. While acknowledging that "'injury' can of course carry a fault connotation," the Court noted that "it just as certainly need not do so." *Ibid.* Thus, "[t]he most * * * that the [VA] could claim on the basis of th[e] term ['injury'] is the existence of an ambiguity." *Ibid.* And although the VA could not "plausibly make even this claim" given the statute's "clear answer against" it, this Court emphasized that any "ambiguity" would be resolved by "the rule that interpretive doubt is to be resolved in the veteran's favor." *Id.* at 118, 120.

This is an *a fortiori* case under *Gardner*. "Despite the absence from the statutory language of so much as a word about [discretion] on the part of the VA," the majority below adopted a contrived "interpretation[] in attempting to reveal" a grant of discretion "implicit in" the statute's purpose clause. *Id.* at 117. Yet given the operative clause's command that the

VA "shall award" contracts to veterans (38 U.S.C. §8127(d)), "no such inference can be drawn" (513 U.S. at 117). Even if it could, however, "[t]he most" the VA "could claim on the basis of th[e] [purpose clause] is the existence of an ambiguity"—which must "be resolved in the veteran's favor." *Id.* at 117-118. Yet the majority did not even mention *Gardner*—much less *Henderson*, *King*, *Boone*, *Coffy*, or *Fishgold*. Review is needed to underscore that the Federal Circuit, which has exclusive jurisdiction under the 2006 Act (Pet. 33-34), may not simply ignore this crucial, dispositive principle of statutory construction.

3. Nor is the pro-veteran cannon a mere technicality. It reflects our Nation's collective dedication to care for those who put their lives at risk for the country, a commitment expressed in Congress's labors to strengthen the laws preferring veterans no fewer than three times. *Infra* at 21-22. Simply put, the pro-veteran canon is an expression by the courts of "special solicitude for the veterans' cause." *Shinseki* v. *Sanders*, 556 U.S. 396, 412 (2009). As "[v]eterans have been obliged to drop their own affairs and take up the burdens of the nation," Congress "has a long standing policy of compensating veterans for their past contributions by providing them with numerous advantages." *Regan*, 461 U.S. at 550-551. As the pro-veterans canon shows, so have the federal courts.

"The justification for providing a special benefit for veterans," moreover, "has been recognized throughout the history of our country." *Hooper* v. *Bernalillo Cnty. Assessor*, 472 U.S. 612, 626 (1985) (Stevens, J., joined by Rehnquist, J., and O'Connor, J., dissenting). Aside from "expressing * * * gratitude for services that often entail hardship, hazard, and separation from family and friends, and that may be

vital to the continued security of our Nation"—which "itself [is] an adequate justification"—this Court and Congress alike have recognized "that military service typically disrupts the normal progress of civilian employment." *Ibid.*

That indisputable fact "justifies * * * benefits-employment preferences," like the one at issue here, which are designed "to facilitate the reentry into civilian society." *Ibid.* As scholars have recognized, that policy dates back to "the Revolutionary War," when "the Continental Congress" first established "veterans benefit packages." Sherman, *supra*, at 126. Since then, Congress has "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." *Ibid.*

In short, both the statute here and this Court's pro-veteran canon stem from these time-honored national policies. The court ignored this "solicitude of Congress for veterans," which "is of long standing." *Henderson*, 131 S. Ct. at 1205 (quotations omitted). The petition should be granted.

II. In conflict with at least six other circuits, and this Court's post-*Heller* decision in *Hawaii* v. *Office of Hawaiian Affairs*, the majority held that prefatory clauses must trump operative language or become "surplusage."

In addition to overlooking the pro-veteran canon, the majority conspicuously ignored the bedrock interpretive principle, emphasized by the dissent, that "a prefatory clause does not limit or expand the scope of the operative clause." Pet. 26a (citation omitted). Instead, the majority held the exact opposite—namely,

that if the purpose statement did *not* limit the scope of the operative clause, the purpose statement would be "unnecessary," "surplusage," and "superfluous." Pet. App. 19a-20a. In so doing, the majority set aside this Court's instructions and split with at least six circuits that have addressed this fundamental question of statutory interpretation. Review is needed to bring the Federal Circuit back into alignment.

1. As noted, the statute here commands that, when conditions satisfied here are met, the VA "shall award" contracts to veteran-owned small businesses. 38 U.S.C. §8127(d). That should have been the end of the matter. "[S]hall" is "the language of command" (*Escoe* v. *Zerbst*, 295 U.S. 490, 493 (1935)), and it "creates an obligation impervious to * * * discretion" (*Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998); accord, *e.g.*, *Lopez* v. *Davis*, 531 U.S. 230, 241 (2001) (Congress's "use of a mandatory 'shall' * * * impose[s] discretionless obligations")).

Unable to deny that "shall" is "mandatory language," the majority read "shall" out of the statute. The court limited "shall" to situations where "the VA has decided," in its unbounded discretion, that it is "necessary" to "'meet[] the [VA's] goals'"—the "'purpose[]'" articulated in the statute's introductory clause. Pet. App. 17a (quoting 38 U.S.C. §8127(d)). According to the majority, this reading was required because "each word in a statute should be given effect." Pet. App. 19a. As the majority reasoned, interpreting "shall" as "shall" "assigns no substantive meaning" to statute's stated "goals"; rather, "this goal-setting provision is itself made superfluous." Pet. App. 20a. "Because [petitioner's] plain meaning interpretation * * * reads the words 'for

purposes of meeting the goals[’] * * * out of the statute and makes the mandatory goal-setting statutory provision unnecessary, it cannot stand." *Ibid.*

2. In so holding, the majority inverted the proper approach to interpreting purpose statements, as laid down by this Court. To be sure, there is a "general rule that every clause in a statute must have effect." *Heller*, 554 U.S. at 578 n.3. "But where the text of a clause itself indicates that it does not have operative effect, * * * a court has no license to make it do what it was not designed to do." *Ibid.* For that reason, it is a "settled principle of law" that a statute's "prefatory clause does not limit * * * the scope of the operative clause." *Id.* at 578 & n.3 (quotations omitted). Put simply, "operative provisions should be given effect as operative provisions, and prologues as prologues." *Ibid.* This is true whether the purpose appears in a preamble or, as here, in an internal purpose statement. See *id.*; Pet. 26 n.6.

Nor does this principle merely control when interpreting the Constitution, as in *Heller*. Just a year after *Heller*, this Court applied the same principle to a congressional joint resolution, which it referred to as a "statute." *Hawaii*, 556 U.S. at 173. In that case, the question was whether Congress "recognized that the native Hawaiian people ha[d] unrelinquished claims over [certain] lands." *Id.* at 172. As did the Federal Circuit here, the Hawaii Supreme court held that the answer was "clear[]" "[b]ased on a plain reading" of the statute's purpose clauses. *Id.* at 175.

Relying on *Heller*, this Court rejected this reasoning: "As we recently explained in a different context, 'where the text of a clause itself indicates that it does not have operative effect, such as 'whereas' clauses in

federal legislation * * * a court has no license to make it do what it was not designed to do." *Ibid.* (quoting *Heller*, 554 U.S. at 578 n.3). "Rather than focusing on the operative words of the law," the lower court in *Hawaii* "directed its attention to the * * * clause[] that preface[s]" them, leading it to a "conclusion [that] is wrong." *Ibid.*

So too here. As did the Hawaii Supreme Court, the majority ignored that the VA's duties "depend[] entirely on the meaning of the statute's operative provision"—and "not on" any perceived legislative purpose that may or may not "fall within the prefatory clause." *Scialabba* v. *Cuellar de Osorio*, 134 S. Ct. 2191, 2215 n.3 (2014) (Roberts, C.J., joined by Scalia, J., concurring in the judgment). This is hornbook law. As a leading treatise has noted, clauses that merely "supply reasons" cannot "confer power or determine rights" and thus "may not be used to create ambiguity" about "the scope or effect of a statute." *Sutherland Statutes & Statutory Constr.* §§ 20:3, 20:12, 47.4 (7th ed. 2013). No matter how "narrow[]," preambles "shall not restrain" a statute's command. T. Sedgwick, *A Treatise on the Rules which Govern the Interpretation and Construction of Statutory and Constitutional Law* 43 (2d ed. 1874).

Although emphasized by Judge Reyna in dissent (Pet. App. 26a), the majority below did not even mention the time-honored principle that preambles "cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous." *Yazoo & M.V.R. Co.* v. *Thomas*, 132 U.S. 174, 188 (1889). But as this Court recently underscored, "[a]gencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always give effect to the

unambiguously expressed intent of Congress." *Util. Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2445 (2014) (quotations omitted). Here, "the need to rewrite clear provisions of the statute should have alerted [the VA] that it had taken a wrong interpretive turn." *Id.* at 2446. Review is necessary to make that clear.

3. Review is also needed because the decision below splits with at least six other circuits and the GAO, which historically has received respect in government contracting decisions.

To begin with, the D.C. Circuit has long held that "[a] preamble * * * is not an operative part of the statute and it does not enlarge or confer powers on administrative agencies or officers." *Ass'n of Am. R.R.* v. *Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977). "Where," as here, "the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by language in the preamble." *Ibid.* Relying on *Costle*, the Fourth Circuit followed suit: "The 'preamble no doubt contributes to a general understanding of a statute, but it is not an operative part of the statute and it does not enlarge or confer powers on administrative agencies or officers. Where the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by language in the preamble. The operative provisions of statutes are those which prescribe rights and duties and otherwise declare the legislative will.'" *Jurgensen* v. *Fairfax Cnty., Va.*, 745 F.2d 868, 885 (4th Cir. 1984) (quoting *Costle*, 562 F.2d at 1316).

Likewise, the Tenth Circuit emphasizes that, even where a statute's "operative language" is "internally

and irreconcilably inconsistent with the purpose * * * stated in its introductory clause" (and here it is not), it is still improper for a court to "depart[] from [its] literal meaning." *Parish Oil Co.* v. *Dillon Cos.*, 523 F.3d 1244, 1249, 1253 (10th Cir. 2008). Similarly, the Eleventh Circuit teaches that "[p]reambles to statutes do not impose substantive rights, duties or obligations"; and a statement of "the primary *goal* of the statute" does not alter the scope of a "requirement [that] is statutorily imposed." *Nat'l Wildlife Found.* v. *Marsh*, 721 F.2d 767, 773 (11th Cir. 1983). In the Second Circuit's words, "what is clear from the text" of a statute "cannot be obscured by reliance on the ambiguous general purpose clause." *Florentine* v. *Church of Our Lady of Mt. Carmel*, 340 F.2d 239, 241 (2d Cir. 1965). "The latter must accede to the operative text." *Id.* at 241-242.

Ultimately, as the Seventh Circuit has observed, what is at stake is nothing less than the separation of powers. Here, by "rely[ing] on [a] purpose clause[], rather than the concrete rules that [Congress] selected to achieve the stated ends," two unelected judges "bec[a]me effective lawmakers, bypassing the give-and-take of the legislative process." *City of Joliet, Ill.* v. *New West, L.P.*, 562 F.3d 830, 837 (7th Cir. 2009). As the dissent below noted, by "relying entirely on prefatory language to second-guess Congress['s]" plain command, the majority "depart[ed] from [its] duty to enforce the proper interpretation of the statute regardless of [its] policy views." Pet. App. 22a.

Following these six circuits, the GAO likewise understood—and reaffirmed in 18 bid protests—that the phrase "for purposes of meeting the goals under subsection (a)" merely "explains the purpose for the

mandate"; it "does not create an exception to the mandate." *In re Aldevra*, 2012 WL 860813, at *4 (Comp. Gen. Mar. 14, 2012). Accordingly, "nothing in the [2006] Act * * * provides the [VA] with discretion" to award a contract "without first determining whether the acquisition should be set aside" for veterans. *Aldevra*, 2011 WL 4826148, at *2.

The majority's decision to side with the VA over the GAO was noteworthy because, in light of "the GAO's long experience and special expertise," its findings in "bid protest matters" have long been "give[n] due weight and deference," such that "an agency's decision to disregard a GAO recommendation is exceedingly rare." *CMS Contract Mgmt. Servs.* v. *United States*, 745 F.3d 1379, 1384 (Fed. Cir. 2014) (quotations omitted). As the dissent noted, in 15 years, agencies have declined to follow the GAO only 10 times out of 1,099. Pet. 25a.

In sum, review is needed to align the decision below not only with the precedent of this Court and other circuits, but also with the sound analysis of the GAO.

III. The decision below is nationally important because it imperils billions of dollars of benefits Congress intended for veterans.

Review is also needed because the decision below imperils a statutory benefit worth billions of dollars per year, which Congress has tried to establish three times. Members of the American Legion can no longer reasonably turn to Congress for help because the VA is ignoring Congress. And now that the Federal Circuit has sided with the VA, veterans are stymied because, as noted, only the Federal Circuit can hear appeals under the statute here. Pet. 33-34. Thus,

the petition presents an important question of federal law (R. 10(c)), which only this Court can resolve.

A. The VA's persistent refusal to obey Congress's command diverts from veterans up to $10 billion every year.

As official government reports show, the decision below empowers the VA to deny the statutory rights of nearly 2.5 million veteran-owned small businesses.[1] Indeed, as noted, 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. Ultimately, the GAO decided that it would "no longer consider protests based only on the argument that the VA must consider setting aside procurements for [veterans]" because the "decision in [this case], together with the VA's position on the meaning of th[e] statute, effectively means that protesters who continue to pursue these arguments will be unable to obtain meaningful relief." *Kingdomware Techs.—Reconsideration*, 2012 WL 6463498, at *2 (Comp. Gen. Dec. 13, 2012).

The lost opportunities for veterans are enormous. For example, the VA "faced substantial criticism" after it "made multiple awards to nonveteran offerors on an unrestricted basis"—in violation of the 2006 Act—for a single "multibillion dollar" procurement. J.T. Williams, *Veterans First? VA Should Give Vet Contracting Program Priority*, 47-WTR Procurement

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

Law. 1, 23 (2012). Nor was this unusual. As it did in this case, the VA routinely procures goods and services directly through the Federal Supply Schedule ("FSS")—a network of large, government-wide contractors with notoriously few veteran-owned small businesses—before even considering whether to apply the Rule of Two.

In just one 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 a mere 13 percent of those FSS purchases—worth $436 million—went to veteran-owned small businesses. *Ibid.* Thus, the VA's unlawful procurements from the FSS without first conducting market research potentially deprived veteran-owned small-business contractors of up to nearly $3 billion in government contracts in a single year alone. *Ibid.* Indeed, according to the VA itself, up to *60 percent* of $18 billion in annual procurements use the FSS—in which case veterans are being deprived of competing for contracts totaling $10 billion. Pet. 35.

This loss can be traced directly to the VA's illegal reliance on the FSS at a time when almost 2.5 million veteran-owned small businesses stand ready to compete with FSS vendors. Review is needed to stop the VA from funneling billions of dollars in contracting opportunities away from veterans.

B. Confirming this case's national importance, Congress strove to overcome the VA's recalcitrance by strengthening the law *three times.*

Finally, the importance of this case is powerfully underscored by Congress's decision to address the issues here three times. For years, agencies failed to heed earlier statutes, which were merely aspirational. *Supra* at 4-5. "Continuing the trend started with" those statutes, and focusing on the VA, Congress thus "amend[ed] the permissive language of the set aside" provisions for veterans "to make these practices mandatory." Sherman, *supra*, at 135. Consider the contrasting language:

- **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) (emphasis added).
- **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) (emphasis added).

"The evolution of these statutory provisions supplies further evidence that Congress intended" the 2006 Act to be mandatory. *Russello* v. *United States*, 464 U.S. 16, 23 (1983). Nobody disputes that the only other two 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. In comparing "the predecessor statute" to the 2006 Act, the majority below likewise should have "discern[ed] Congress's intent" from the "crucial fact" that it "used the word 'shall' rather than the word 'may.'" *United States* v. *Rodgers*, 461 U.S. 677, 706 (1983).

Instead, the majority concluded that Congress had enacted yet another "discretion[ary]" law (Pet. App. 17a), ignoring that "a change in phraseology" in statutory language "creates a presumption of a change in intent" (*Crawford* v. *Burke*, 195 U.S. 176, 190 (1904)). But "Congress would not have used such different language * * * without thereby intending a change of meaning." *Ibid.* Review is needed because this was Congress's third attempt to assist veterans; yet the VA continues to resist the congressional will. Now that the Federal Circuit has sided with the VA, veterans have no other recourse but this Court.

CONCLUSION

What is perhaps most frustrating for veterans is that it is not clear *why* the VA—an agency specifically created to *protect* their interests—is treating the 2006 Act's mandatory set-aside as optional. Regardless, in following the VA's lead, the Federal Circuit majority ignored the plain language of the 2006 Act, Congress's labors that led to that language, and our Nation's tradition of advancing the veteran's cause. It also ignored this Court's binding precedent favoring veterans in statutory interpretation, and split with at least six other Circuits on the significance of prefatory clauses. In so doing, the majority enabled the VA to deprive veterans of billions of dollars in vital contracting opportunities.

For all of these reasons, and those stated by the petitioner and the forceful dissent below, the petition for certiorari should be granted.

Respectfully submitted.

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