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Reasonable Interpretation, Unreasonable Results? How Mandated Government Set-Asides for Veteran-Owned Businesses Is a Win-Loss Proposition—Kingdomware Technologies, Inc. v. United States

Benjamin M. Kline

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REASONABLE INTERPRETATION, UNREASONABLE RESULTS? HOW MANDATED GOVERNMENT SET-ASIDES FOR VETERAN-OWNED BUSINESSES IS A WIN-LOSS PROPOSITION—*KINGDOMWARE TECHNOLOGIES, INC. V. UNITED STATES*

Benjamin M. Kline[†]

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I. INTRODUCTION

In *Kingdomware Technologies, Inc. v. United States*,¹ the United States Supreme Court unanimously overturned the United States Court of Appeals for the Federal Circuit,² as well as years of deference to Department of Veterans Affairs (VA) practices, holding that the VA *must* conduct market research to determine if at least two service-disabled veteran-owned small businesses (SDVOSBs) or veteran-owned small businesses (VOSBs) are capable of performing a proposed procurement contract before it issues a solicitation.³ The Court made this decision pursuant to the Veterans Benefits, Health Care, and Information Technology Act of 2006 (Veterans Act),⁴ which requires the VA to restrict its competitive bidding process if at least two businesses are found, even if the proposed procurement is to be made through the General Services Administration’s (GSA) Federal Supply Schedule program (FSS). This calculus is commonly referred to as the “Rule of Two.”⁵

1. *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969 (2016).

2. *Kingdomware Techs., Inc. v. United States*, 754 F.3d 923 (Fed. Cir. 2014), *rev’d and remanded*, 136 S. Ct. 1969.

3. *Kingdomware*, 136 S. Ct. at 1979.

4. 38 U.S.C. § 8127(d) (2012).

[A] contracting officer of the Department shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

Id.

5. For a detailed history of the Rule of Two, see *infra* Section II.C. The following abbreviations are used regularly throughout this Note: EDWOSBs (Economically Disadvantaged Women-Owned Small Businesses), FAR (Federal Acquisitions Requirements), FSS (Federal Supply Schedule), GOA (Government

If ever there was a chance for the judiciary to put “veterans first,”⁶ this was it. While the result is a huge win for business-owning veterans, who stand to reap significant monetary benefits,⁷ the *Kingdomware* holding will likely have much further-reaching negative effects on government contracting in general.⁸ The holding may also impede the efficiency of an already overburdened VA in particular.⁹ Perhaps most significantly, the *Kingdomware* decision may negatively affect other disadvantaged small business contractors.¹⁰ It is therefore imperative that Congress take steps to correct the problems that are likely to manifest in the coming years as a result of the Court’s decision and restore some semblance of equity to the VA’s contracting practices.

Accountability Office), GSA (General Services Administration), SBA (Small Business Act), SDVOSBs (Service-Disabled Veteran-Owned Small Businesses), VA (Department of Veteran’s Affairs), VOSBs (Veteran-Owned Small Businesses), and WOSBs (Women-Owned Small Businesses).

6. For an example of the legislature attempting to accomplish a similar result, see Leo Shane III, *Senators Push to Advance Sweeping Veterans Bill Before July 4*, MILITARY TIMES (June 23, 2016), <http://www.militarytimes.com/story/veterans/2016/06/23/senate-floor-push-veterans-first-act/86281538/>.

7. See Steven Koprince, *Victory! SDVOSBs Win in Kingdomware Supreme Court Decision*, SMALLGOVCON (June 16, 2016), <http://smallgovcon.com/service-disabled-veteran-owned-small-businesses/victory-sdvosbs-win-in-kingdomware-supreme-court-decision/> (“[T]he *Kingdomware* decision will prove a major boon to SDVOSBs and VOSBs, ultimately resulting in billions of extra dollars flowing to veteran-owned companies.”).

8. See *Beyond the Bench: Ramifications of the Supreme Court Kingdomware Decision: Hearing Before the S. Comm. on Small Bus. and Entrepreneurship*, 114th Cong. (2016) [hereinafter *Hearing*], <https://www.sbc.senate.gov/public/index.cfm/2016/6/beyond-the-bench-ramifications-of-the-supreme-court-kingdomware-decision> (statement of A. John Shoraka, Associate Administrator, Office of Government Contracting and Business Development, at 3–4).

9. Brief for the United States at 39, *Kingdomware Techs., Inc., v. United States*, 136 S. Ct. 1969 (2016) (No. 14-916), 2015 WL 5719745 (“The ability to place orders under the FSS is often essential to the VA’s effective and expeditious performance of its obligations to veterans.”).

10. *Hearing*, *supra* note 8 (statement of A. John Shoraka, Associate Administrator, Office of Government Contracting and Business Development, at 3) (“The limitation on the VA’s discretion to consider use of other small business programs when the rule of two can be met by service disabled veteran owned small businesses will likely affect the level of awards made by the VA to support WOSBs, 8(a) and SDBs, and HUBZone small businesses, all of which have experienced important positive upward trends in recent years.”).

This Note begins with an overview of the primary players in the decade-long fight over government contract set-asides, a discussion of the Rule of Two, the relevant law that spawned it, and the history behind it.¹¹ Next, the analysis moves to an in-depth exploration of the judicial progression of *Kingdomware* and the Court's reasoning.¹² Then, this Note outlines the potential wide-reaching effects of the *Kingdomware* holding with regard to veterans, the VA, other government agency contracts, and nonveteran small businesses.¹³ Although these effects are concerning, efforts of Congress can solve the outlined issues. This Note proposes such legislative remedies that would restore smooth and equitable VA contracting while still putting American veterans first.¹⁴ Finally, this Note concludes that the Court's legal analysis, while sound, creates several potential issues for the VA and other government agencies.¹⁵ If Congress does not act to rectify the situation, agencies may face inefficiencies and discrepancies in current contract set-aside practices that require legislative attention, and other disadvantaged small business contractors will likely see a substantial decrease in government-sourced opportunities.¹⁶

II. HISTORY

A. *The Federal Supply Schedule*

While government contracting in America is a big business that takes many forms, one common tool for government agencies is the Federal Supply Schedule. The Court explained that “[t]he Federal Supply Schedule (FSS) generally is a streamlined method for Government agencies to acquire certain supplies and services in bulk, such as office supplies or food equipment.”¹⁷ Prior to 1949, “government agencies entered procurement contracts and purchased supplies and services on an individual basis.”¹⁸ However, “[o]ver time, federal contracting became more centralized. The

11. See *infra* Part II.

12. See *infra* Part III.

13. See *infra* Section IV.A.

14. See *infra* Section IV.B.

15. See *infra* Sections IV.A.3, B.1.

16. See *infra* Part V.

17. *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1974 (2016) (citing 48 C.F.R. § 8.402(a) (2015)).

18. *Sharp Elecs. Corp. v. McHugh*, 707 F.3d 1367, 1369 (Fed. Cir. 2013).

Federal Property and Administrative Services Act of 1949 created the GSA to standardize federal procurement processes and procure, store, and distribute supplies to federal agencies.”¹⁹

Since its inception, the GSA has directed and managed the FSS²⁰ with the purpose of increasing efficiency in the procurement process for certain types of orders by having prenegotiated contracts between vendors and the GSA rather than conducting a bidding process for each individual order.²¹ Through the FSS, “[i]ndefinite delivery contracts are awarded to provide supplies and services at stated prices for given periods of time.”²²

Prior to the enactment of the Veterans Benefits, Health Care, and Information Technology Act of 2006,²³ the FSS was “utilized as a procurement method separate and apart from traditional procurement methods and set-aside provisions found elsewhere in the FAR [Federal Acquisitions Requirements].”²⁴ The VA has therefore relied on this historical understanding of the FSS and repeatedly asserted that the Rule of Two²⁵ does not apply to orders made through the FSS.²⁶ It is that very assertion that was overturned by the Supreme Court in *Kingdomware*. This Note will now briefly discuss the history of the VA and the ongoing tension between government agencies, the Government Accountability Office (GAO), SDVOSBs, and VOSBs that came to a head in *Kingdomware*.

19. *Id.* (citation omitted).

20. The FSS is established by 41 C.F.R. § 105-53.145. 41 C.F.R. § 105-53.145 (2016).

21. 48 C.F.R. § 8.402(a) (2016).

22. *Id.*

23. Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, §§ 502, 503, 120 Stat. 3403, 3431–36 (2006).

24. *Kingdomware Techs., Inc. v. United States*, 107 Fed. Cl. 226, 231 (2012), *aff'd*, 754 F.3d 923 (Fed. Cir. 2014), *rev'd and remanded*, 136 S. Ct. 1969 (2016); *see also* *K-Lak Corp. v. United States*, 98 Fed. Cl. 1, 2 n.3 (2011) (“The competition procedures in FAR Parts 13, 14, and 15 and the Small Business Program rules in FAR Part 19 do not apply to orders placed against and fully within the scope of existing FSS contracts.”).

25. *See infra* Section II.C.

26. *See Kingdomware Techs.*, B-406507, 2012 WL 1942256, at *1–2 (Comp. Gen. May 30, 2012); *Aldevra*, B-406205, 2012 WL 860813, at *3 (Comp. Gen. Mar. 14, 2012).

B. The Department of Veterans Affairs

For many, the VA is a largely unknown government agency, perhaps only recognized for scandals and administrative shortcomings that the media sporadically covers.²⁷ However, the VA is actually a behemoth government agency that has a storied history, enormous influence, and substantial resources. In fact, the VA is one of the oldest and largest government agencies, tracing its roots back to the American Revolution.²⁸ Since its early beginnings, the VA has continuously evolved and taken on increasing responsibility.

President Hoover created the modern VA in 1930 through a consolidation of several agencies that administered veteran benefits.²⁹ In 1930, the VA was charged with providing medical services for war veterans, disability compensation and allowances, life insurance, and retirement and pension payments.³⁰ At that point, it had an operating budget of \$786 million and was serving 4.6 million veterans.³¹ In the years since, the VA has been elevated to a cabinet level agency and has dramatically expanded its coverage and services. The agency now has an operating budget of over \$75 billion and serves nearly twenty-five million veterans.³² It is therefore evident that the VA has immense and wide-ranging influence as an agency.

Considering the amount of money spent by the agency annually and the huge number of veterans it services, the actions of the VA have immediate and life-changing effects that cannot be understated. While such a powerful government agency is not often told what it can and cannot do by anyone other than Congress or the President, the GAO recommended seventeen times that the VA reconsider its position regarding the Rule of Two, and the VA

27. For a small sampling of the various scandals that have plagued the VA, see Michael Pearson, *The VA's Troubled History*, CNN (May 30, 2014 12:40 PM), <http://www.cnn.com/2014/05/23/politics/va-scandals-timeline/>.

28. See generally U.S. DEP'T OF VETERANS AFFAIRS, VA HISTORY IN BRIEF, https://www.va.gov/opa/publications/archives/docs/history_in_brief.pdf (last visited Mar. 30, 2017).

29. *Id.* at 12.

30. *Id.*

31. *Id.* at 31.

32. U.S. DEP'T OF VETERANS AFFAIRS, DEPARTMENT OF VETERANS AFFAIRS FISCAL YEAR 2017 BUDGET REQUEST FACT SHEET (2017), <https://www.va.gov/budget/docs/summary/Fy2017-VAsBudgetFactSheet.pdf>.

repeatedly refused.³³ It is therefore important to understand what purpose the GAO serves and what exactly its recommendations to the VA mean in the context of *Kingdomware*.

C. *The Government Accountability Office*

The GAO, often referred to as the “congressional watchdog,” is an independent, nonpartisan agency that “investigates how the federal government spends taxpayer dollars.”³⁴ The GAO’s duty to oversee and investigate is expressed through its power to issue legal decisions and opinions regarding government agencies like the VA. Relevant here, these legal decisions and opinions sometimes manifest in the form of bid protest rulings.³⁵ These rulings, however, are not binding upon an agency; they are merely recommendations, which the agency can then choose to follow or disregard.³⁶ It is important to note that, despite the optional nature of these recommendations, “from 1997–2012, the GAO issued 5,703 merit decisions and sustained 1099 protests; during that period, an agency disregarded the GAO’s recommendation only ten times.”³⁷ In response to the VA’s position that it was not required to utilize the Rule of Two in instances nearly identical to those in *Kingdomware*, “the [GAO] . . . sustained more than seventeen protests,” and the VA refused to follow every one of them.³⁸

Although the VA was previously within its rights as an agency to disregard the GAO’s recommendations, this is no longer the case.

33. *Kingdomware Techs., Inc. v. United States*, 754 F.3d 923, 929 (Fed. Cir. 2014), *rev’d and remanded*, 136 S. Ct. 1969 (2016).

34. *About GAO*, GAO, <http://www.gao.gov/about/> (last visited Mar. 30, 2017).

35. *See id.*

36. *Kingdomware*, 754 F.3d at 936 (“Although agencies often follow GAO recommendations in bid protest decisions ‘given the GAO’s long experience and special expertise in such . . . matters,’ . . . these recommendations are not binding on an agency.” (quoting *CMS Contract Mgmt. Servs. v. Mass. Hous. Fin. Agency*, 745 F.3d 1379, 1384 (Fed. Cir. 2014), *cert denied sub nom. United States v. CMS Contract Mgmt. Servs.*, 135 S. Ct. 1842 (2015))); *see Honeywell, Inc. v. United States*, 870 F.2d 644, 648 (Fed. Cir. 1989) (stating that agencies are not compelled to follow recommendations from the Comptroller General).

37. *CMS*, 745 F.3d at 1384–85.

38. *Kingdomware*, 754 F.3d at 936; *see* Letter from Lynn H. Gibson, Gen. Couns. for the GAO, to Sen. Daniel K. Inouye, Cong. Committee Chairman, et al. (Nov. 13, 2012), <http://www.gao.gov/assets/650/649957.pdf>.

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The Rule of Two is the statutory provision at the core of the controversy in *Kingdomware*, and it is now mandatory.³⁹

D. *The Rule of Two*

The Rule of Two is a term commonly used to describe a particular statutory provision that establishes government procurement set-asides and restricts competitive bidding.⁴⁰ This standard, which first appeared within the FAR in 1984,⁴¹ requires a government contracting officer to conduct market research to determine if two or more contractors, who have been designated as disadvantaged concerns,⁴² are capable of fulfilling the contract in question. If such contractors are reasonably likely to bid, and they can complete the procurement at a fair and reasonable price that offers the best value to the United States, then the officer must restrict the bidding process to those contractors.⁴³ Although the FAR statement of purpose instructs that “[c]ontracting officers shall

39. *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1979 (2016) (“[W]e do not defer to the agency when the statute is unambiguous.”).

40. See generally Steven W. Feldman & Raymond Fioravanti, *Contract Dispute or Bid Protest? The Delex Systems Dilemma*, 39 PUB. CONT. L.J. 483 (2010).

41. 48 C.F.R. § 19.502-2(b) (2016).

The contracting officer shall set aside any acquisition over \$150,000 for small business participation when there is a reasonable expectation that—

(1) Offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns . . . ; and

(2) Award will be made at fair market prices.

Id. A substantially similar provision was previously included in the Defense Acquisition Regulation and the NASA Procurement Regulation. Federal Acquisition Regulation (FAR) “Rule of Two”; Requirements for Setting Aside Acquisitions for Small Business, 49 Fed. Reg. 40,135, 40,135 (Oct. 12, 1984).

42. These “concerns” include SDVOSBs; VOSBs; 8(a) small businesses, which encompasses socially and economically disadvantaged groups; EDWOSBs; WOSBs; HUBZone concerns; and local firms during a major disaster or emergency. See *Social Disadvantage Eligibility*, SMALL BUS. ADMIN., <https://www.sba.gov/contracting/government-contracting-programs/8a-business-development-program/eligibility-requirements/social-disadvantage-eligibility> (last visited Mar. 30, 2017); see also *Government Contracting Programs*, SMALL BUS. ADMIN., <https://www.sba.gov/contracting/government-contracting-programs> (last visited Mar. 30, 2017).

43. 48 C.F.R. § 19.502-2(b) (2016).

provide for full and open competition,”⁴⁴ this requirement is exempted by § 6.203.⁴⁵

The Rule of Two actually predates the FAR.⁴⁶ Leading up to the promulgation of the FAR, the Office of Federal Procurement Policy sought comments on the rule’s inclusion within the new regulation.⁴⁷ Years earlier, in an effort to encourage the utilization and growth of small businesses, Congress mandated certain annual goals within the Small Business Act (SBA).⁴⁸ As a benchmark, the original goal for an agency contracting with veteran small business concerns was “established at not less than 3 percent of the total value of all prime contract awards for each fiscal year.”⁴⁹ The inclusion of the Rule of Two, therefore, is a mechanism that serves to meet these goals.⁵⁰ The underlying controversy in *Kingdomware* hinged on just such a Rule of Two provision, which was included in the Veterans Act of 2006.⁵¹

44. 48 C.F.R. § 6.101(b) (2014).

45. 48 C.F.R. § 6.203(a) (2016).

46. Delex Sys., Inc., B-400403, 2008 WL 4570635, at *6 (Comp. Gen. Oct. 8, 2008).

47. Federal Acquisition Regulation (FAR) “Rule of Two”; Requirements for Setting Aside Acquisitions for Small Business, 49 Fed. Reg. 40,135, 40,135 (Oct. 12, 1984).

48. See 15 U.S.C. § 644(g)(1)(B) (2016).

Each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity for small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women to participate in the performance of contracts let by such agency.

Id.

49. *Id.* § 644(g)(1)(A)(i).

50. See 48 C.F.R. § 6.203(a) (“To fulfill the statutory requirements relating to small business concerns, contracting officers may set aside solicitations to allow only such business concerns to compete.”).

51. See 38 U.S.C. § 8127(d) (2012).

[A] contracting officer of the Department shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

Id.

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E. The Veterans Benefits, Health Care, and Information Technology Act of 2006

Congress enacted the Veterans Act of 2006 in response to the Federal Government's continuous failure to meet the annual goals for contracting with SDVOSBs,⁵² which were established seven years earlier in the Veterans Entrepreneurship and Small Business Development Act.⁵³ As noted, the Veterans Act of 2006 included the Rule of Two provision that later became the subject of the controversy in *Kingdomware*.⁵⁴ While the Rule of Two itself does not contain language limiting the application of set-asides to VA procurements made through non-FSS contracts, "[i]n finalizing its regulations meant to implement the Act, the [VA] stated in a preamble that § 8127's procedures 'do not apply to [Federal Supply Schedule] task or delivery orders.'"⁵⁵

The VA's position regarding the applicability of the Rule of Two to FSS procurements is one of the most critical aspects of the controversy underpinning *Kingdomware*. As previously stated, the VA was brought before the GAO on numerous bid protests regarding this very issue.⁵⁶ Two such GAO bid protest rulings, *Delex Systems*⁵⁷ and *Aldevra*,⁵⁸ are fundamental to understanding the tension and confusion that was building between United States agencies, specifically the VA and the GAO, and veteran-owned government contractors shortly before *Kingdomware*. This Note will now delve briefly into the relevant facts and issues presented by these two protests.

52. Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, §§ 502–03, 120 Stat. 3403, 3431–36 (2006).

53. 15 U.S.C. § 644(g)(1)(A)(ii); *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1973 (2016).

54. See *supra* notes 46–51 and accompanying text.

55. *Kingdomware*, 136 S. Ct. at 1974 (quoting VA Acquisition Regulation, 74 Fed. Reg. 64,619, 64,624 (2009)); see VA Acquisition Regulation, 74 Fed. Reg. at 64,626 (“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.”).

56. See *supra* notes 36–37 and accompanying text.

57. *Delex Sys., Inc.*, B-400403, 2008 WL 4570635 (Comp. Gen. Oct. 8, 2008).

58. *Aldevra*, B-405271 et al., 2011 WL 4826148 (Comp. Gen. Oct. 11, 2011).

F. Delex Systems and Aldevra Bid Protests

1. Delex Systems

The GAO decision in *Delex Systems* actually arose from a 2008 bid protest by Delex Systems, Inc. against the Navy, not the VA.⁵⁹ The protest that the GAO sustained, however, was nearly identical to the controversy in *Kingdomware*.⁶⁰

The threshold question in *Delex Systems* was whether the Navy was required to apply the set-aside provisions of § 19.502-2(b) of the FAR—the Rule of Two—when soliciting multiple-award procurements⁶¹ through the FSS.⁶² The Navy argued that its obligation to follow FAR § 19.5 was based solely on FAR § 6.203(c), which “requires contracting agencies to follow FAR Subpart 19.5.”⁶³ The Navy then pointed to FAR § 16.505(b)(1)(ii), which states that “the competition requirement in [FAR] Part 6 do[es] not apply to the ordering process.”⁶⁴ Therefore, if the Navy is not required to follow FAR Part 6, it would not be required to follow FAR Subpart 19.5, which in turn frees it from complying with the Rule of Two provision when placing orders through the FSS.⁶⁵ Additionally, the Navy asserted that Congress had “never indicated that the small business set-aside requirements apply to the placement of task and delivery orders, despite numerous opportunities to do so”; therefore,

59. *Delex Sys.*, 2008 WL 4570635, at *1.

60. Both *Delex Systems* and *Kingdomware* dealt with issues concerning the Rule of Two and a government agency’s refusal to limit the competitive bidding process with respect to procurements made through the FSS ordering process.

61. “A multiple-award contract is a type of indefinite-quantity contract which is awarded to several contractors from a single solicitation. Delivery of supplies, or performance of services, is then made via an individual delivery/task order placed with one of the contractors pursuant to procedures established in the contract.” U.S. DEP’T OF ENERGY, *Multiple-Award Contracts and Governmentwide Acquisition Contracts Including Delivery Orders and Task Orders*, in ACQUISITION GUIDE (2011), http://energy.gov/sites/prod/files/16.5_Multiple-Award_Contracts_and_Governmentwide_Acquisition_Contracts_Including_Delivery_Orders_and_Task_Orders_0.pdf.

62. *Delex Sys.*, 2008 WL 4570635, at *4.

63. *Id.*

64. *Id.*

65. *Id.*

the set-aside requirements do not apply to FSS ordering.⁶⁶ The GAO disagreed on all counts.⁶⁷

First, the GAO reminded the Navy that all of the provisions in question were statutory in nature and that each one was enacted in order to implement the requirements of other acts.⁶⁸ Next, the GAO poked a significant hole in the Navy's argument that § 16.505(b)(1)(ii) of the FAR carves out an exception for task and delivery orders through the FSS by allowing the agency to disregard Part 6 of the FAR and, by extension, the Rule of Two.⁶⁹ The GAO concluded that the Navy was "overread[ing] the provision," because "[w]hen an agency is placing task and delivery orders under multiple-award contracts, it cannot, by definition, hold a full and open competition as described by FAR Part 6."⁷⁰ It therefore stands to reason that, when reading FAR § 16.505(b)(1)(ii) literally, the provision stating that "[t]he competition requirements in Part 6 and the policies in Subpart 15.3 do not apply to the ordering process" means exactly what the plain language says: the competition requirements of Part 6 do not apply to ordering.⁷¹ In light of this seemingly unambiguous language, there was no reason to infer that "exemption from the requirements of full and open competition . . . can exempt agencies from the requirements of [the Rule of Two] when placing orders."⁷² Finally, the GAO pointed to § 816 of the National Defense Authorization Act for Fiscal Year 2006,⁷³ which "required the Secretary of Defense to issue guidance on the use of [the cascading set-aside clause] for assessing offers for contracts and task and delivery orders."⁷⁴ To the GAO, this provision was clear

66. *Id.* at *6.

67. *See id.* at *4–6 (disagreeing with both arguments).

68. *Id.* at *4–5.

69. *Id.* at *5.

70. *Id.*

71. *Id.*

72. *Id.*

73. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 816, 119 Stat. 3136, 3382 (codified at 10 U.S.C. § 2305).

74. *Delex Sys.*, 2008 WL 4570635, at *6; Pub. L. No. 109-163.

We note in particular that this enactment prescribes a prohibition on the use of such schemes unless a contracting officer has "conducted market research in accordance with part 10 of the Federal Acquisition Regulation in order to determine whether or not a sufficient number of qualified small businesses are available to justify limiting competition for the award of such contract or task or delivery order under applicable law

evidence that Congress had indeed “recognize[d] the possibility of limiting competition for task and delivery orders to small businesses when there is a sufficient number of small businesses to justify doing so.”⁷⁵ Based primarily on these conclusions, the GAO sustained Delex’s protest and recommended that the Navy reevaluate its practices in light of the decision.⁷⁶

While the GAO’s decision in *Delex Systems* was not binding upon the Navy, the Navy chose to follow the recommendation. This acceptance is in contrast with the VA’s decision to disregard the GAO’s recommendation in *Aldevra*, a decision that helped set the stage for the dispute in *Kingdomware*.

2. Aldevra

Aldevra was an SDVOSB concern that protested the VA’s issuance of solicitations for a tilting skillet/braising pan, three countertop electric griddles, and a food slicer in 2011.⁷⁷ Similar to the petitioner in *Delex Systems*, Aldevra claimed that a government agency, the VA, had failed to comply with the applicable statutes by not determining if the bidding for these procurements should be limited by the Rule of Two.⁷⁸ The GAO again sustained the protest.⁷⁹

The issue in *Aldevra* was identical to that in *Delex Systems*: “whether the [agency] is required to conduct market research to determine if the procurements should be set aside for [small business] concerns before using the FSS.”⁸⁰ The VA, however, came

and regulations.”

Delex Sys., 2008 WL 4570635, at *6 (quoting National Defense Authorization Act, § 816(b)(1)).

75. *Delex Sys.*, 2008 WL 4570635, at *6.

76. *Id.* Further adding to the confusion of this area of law, in 2014 the GAO actually overturned its decision in *Delex Systems*, citing a change in the statutory language of FAR § 19.502-4. See *Edmond Sci. Co.*, B-410179 et al., 2014 WL 6199127, at *6 n.10 (Comp. Gen. Nov. 12, 2014) (“[T]he holding in *Delex* has been superceded by the passage of section 1331 of the Small Business Jobs Act . . .”). For further discussion of this strange outcome, see Steven Koprince, *Task Orders: Small Business Set-Asides Not Required, Says GAO*, SMALLGOVCON (Nov. 25, 2014), <http://smallgovcon.com/gaobidprotests/task-orders-small-business-set-asides-not-required-says-gao/>.

77. *Aldevra*, B-405271 et al., 2011 WL 4826148, at *1 (Comp. Gen. Oct. 11, 2011).

78. *Id.*

79. *Id.*

80. *Id.*

prepared with a whole new set of arguments that the GAO rejected in turn.

First, the VA asserted that it had “discretion to determine whether to meet its requirements through the FSS before procuring from other sources—such as SDVOSBs or VOSBs.”⁸¹ Second, the VA claimed that FAR § 8.404(a) explicitly provided that FAR Part 19 was inapplicable to FSS acquisitions, including FAR subpart 19.14, which was “the only subpart of FAR part 19 that address[ed] set-asides for SDVOSBs.”⁸² Again, the GAO disagreed.⁸³

On the first point, the GAO concluded that there was no actual basis in the various statutes that provided the VA with discretion of the type it had asserted.⁸⁴ In fact, the plain language was “unequivocal” that it did not have such discretion.⁸⁵ On the second point, the GAO reminded the VA that FAR subpart 19.14 was meant to implement the statutory requirements of the Veterans Benefit Act of 2003.⁸⁶ FAR subpart 19.14 applies government-wide, whereas the Veterans Act of 2006 “applies only to VA procurements.”⁸⁷ While the language of the Veterans Benefit Act of 2003 was permissive with regard to applying the Rule of Two,⁸⁸ the 2006 Veterans Act had

81. *Id.* at *2.

82. *Id.* at *3.

83. *Id.* at *3–6.

84. *Id.* at *2.

85. *Id.*

We see nothing in the VA Act or the [Veterans Administration Acquisition Regulation] that provides the agency with discretion to conduct a procurement under FSS procedures without first determining whether the acquisition should be set aside for SDVOSBs. The provisions of both the VA Act and the VAAR are unequivocal; the VA “shall” award contracts on the basis of competition restricted to SDVOSBs where there is a reasonable expectation that two or more SDVOSBs will submit offers and award can be made at a fair and reasonable price.

Id.

86. *Id.* at *5; see FAR § 19.1402.

87. *Aldevra*, 2011 WL 4826148, at *3; see 38 U.S.C. §§ 8127–28 (2006); *Angelica Textile Servs., Inc. v. United States*, 95 Fed. Cl. 208, 222 (2010).

88. *Aldevra*, 2011 WL 4826148, at *4 (quoting 15 U.S.C. § 657f(b) (2006)) (“In accordance with this section, a contracting officer *may* award contracts on the basis of competition restricted to small business concerns owned and controlled by service-disabled veterans if the contracting officer has a reasonable expectation that not less than 2 small business concerns owned and controlled by service-disabled veterans will submit offers and that the award can be made at a fair market price.” (emphasis added)).

mandatory language that required the VA to apply the Rule of Two.⁸⁹ Therefore, the VA's argument on this point was invalid, because the FAR language exempting the FSS did not apply to the statute at issue in the protest.⁹⁰

Consistent with this reasoning, the GAO recommended that the VA cancel the solicitations in question, conduct the proper market research analysis as required by the Rule of Two, and resolicit the procurements consistent with that analysis.⁹¹ The VA refused to follow this recommendation.⁹² It was this exact behavior by the VA, of refusing to accept the recommendations of the GAO, which led to the facts in *Kingdomware* now explored in detail.

III. THE *KINGDOMWARE TECHNOLOGIES, INC. v. UNITED STATES* DECISION

A. *Facts and Procedure*

In early 2012, the VA initiated procurement activity in order to install an Emergency Notification Service at four of its medical centers.⁹³ To that end, the VA solicited a price quotation from a nonveteran-owned business through the FSS.⁹⁴ Finding the price favorable, the VA accepted the terms and entered into an agreement with that business.⁹⁵ Kingdomware challenged the award, and it had standing as a company owned by an Army veteran who was permanently disabled by an injury he sustained while serving in Operation Desert Storm.⁹⁶

89. *Id.*

90. *Id.*

91. *Id.*

92. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-162SP, GAO BID PROTEST ANNUAL REPORT TO THE CONGRESS FOR FISCAL YEAR 2012 (2012), <http://www.gao.gov/assets/650/649957.pdf>.

93. *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1974 (2016).

94. *Id.*

95. *Id.* at 1974–75.

96. Amy Howe, *Opinion Analysis: Unanimous Court Hands Victory to Veterans in Contracting Dispute*, SCOTUSBLOG (June 16, 2016 3:27 PM), <http://www.scotusblog.com/2016/06/opinion-analysis-unanimous-court-hands-victory-to-veterans-in-contracting-dispute/>.

1. *The GAO Bid Protest*

In this challenge, argued in front of the GAO, Kingdomware contended, as Aldevra had before it,⁹⁷ that the VA was barred from awarding the procurement until it had conducted market research into the ability of SDVOSBs to perform the contract as required by § 8127's Rule of Two.⁹⁸ The GAO's nonbinding determination was "that the [VA's] failure to employ the Rule of Two was unlawful," and the agency therefore "recommended that the [VA] conduct market research to determine whether there were two veteran-owned businesses that could fulfill the procurement."⁹⁹ The VA declined to follow the GAO's ruling,¹⁰⁰ reiterating its position that the Rule of Two did not apply to FSS procurements.¹⁰¹

2. *The Federal Court of Claims Ruling*

With no further recourse to be had through the GAO, Kingdomware filed suit in the Court of Federal Claims, seeking

97. See Aldevra, B-406205, 2012 WL 860813, at *1 (Comp. Gen. Mar. 14, 2012).

98. Kingdomware Techs., B-406507, 2012 WL 1942256 (Comp. Gen. May 30, 2012).

99. Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969, 1975 (2016).

Consistent with our decision in *Aldevra* . . . we conclude that the VA Act required the agency to consider whether this acquisition should have been set aside for SDVOSB (or VOSB) concerns. Further, on the record presented, it appears that such set-aside should have occurred. Accordingly, we sustain Kingdomware's protest.

Kingdomware., 2012 WL 1942256, at *2.

100. "GAO decisions are not binding authority, but may be 'instructive in the area of bid protests.'" Kingdomware Techs., Inc. v. United States, 107 Fed. Cl. 226, 244 n.2 (2012) (citing Centech Grp., Inc. v. United States, 554 F.3d 1029, 1038 n.4 (Fed. Cir. 2009)), *aff'd*, 754 F.3d 923 (Fed. Cir. 2014), *rev'd and remanded*, 136 S. Ct. 1969.

The Competition in Contracting Act ("CICA") grants the Comptroller General of GAO authority in a bid protest (1) to determine whether a contracting agency's solicitation or award of contract is in violation of a procurement statute or regulation, and (2) to recommend that the agency take corrective action if the agency did not comply with the statute or regulation.

Jacobs Tech. Inc. v. United States, 100 Fed. Cl. 186, 196 n.21 (2011) (citing 31 U.S.C. § 3554(b)(1)).

101. *Kingdomware*, 2012 WL 1942256, at *2; see *Aldevra*, 2012 WL 860813, at *2.

declaratory and injunctive relief.¹⁰² Instead, relying on the statutory interpretation framework established in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹⁰³ the Court of Federal Claims granted summary judgment to the VA.¹⁰⁴

Using the *Chevron* framework, the Court of Federal Claims first found ambiguity in § 8127(d).¹⁰⁵ Moving to the second step in the *Chevron* analysis, the court then declared that the VA's interpretation (that the Veterans Act did not apply to the FSS) was reasonable and worthy of deference.¹⁰⁶ The court made its decision at least in part due to the VA's consistent interpretation, which "reflects a uniform approach on the part of the agency."¹⁰⁷ Additionally, the court held that the VA's interpretation was "not directly in conflict with the Act . . . , which [is] silent on the role of the FSS in meeting the goals set by the Secretary," or "with the legislative history of the Act, which expresses the intent that VA retain 'options' to award contracts to SDVOSBs and VOSBs."¹⁰⁸ The court affirmed "that VA would 'exercise reasonable judgment' in meeting the Act's set-aside goals alongside VA's other small business goal obligations."¹⁰⁹ Finally, the

102. *Kingdomware*, 136 S. Ct. at 1975.

103. 467 U.S. 837 (1984).

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. . . . If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842–43.

104. *Kingdomware*, 107 Fed. Cl. at 244.

105. *Id.* at 241 ("[T]he goal-setting nature of the statute clouds the clarity plaintiff would attribute to the phrase 'shall award' in subsection (d) of the Act, and renders the Act ambiguous as to its application to other procurement vehicles, such as the FSS.").

106. *Id.*

107. *Id.* at 243–44 (citing *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001)).

108. *Id.*

109. *Id.* at 244 (describing the contracting guidelines that the legislation provides for the VA).

VA would be allowed to award non-competitive contracts to small businesses owned and controlled by veterans when the amount of the

court concluded, “VA’s interpretation is consistent with the traditional relationship between set-asides and the FSS found in the FAR”¹¹⁰

3. *The Federal Circuit Majority Opinion*

Kingdomware then appealed to the Federal Circuit, which in turn affirmed the lower court’s ruling by a divided panel.¹¹¹ The majority agreed with the lower court that the proper analysis was to follow the two-step framework of *Chevron* regarding statutory interpretation.¹¹² This time, however, the review ended at the first step; the court held that Congress was not silent.¹¹³ In fact, it *did* speak directly to the question, and since it perceived “no ambiguity in § 8127,” that was, according to *Chevron*, “the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”¹¹⁴

The majority was not persuaded by Kingdomware’s argument that the statutory change in language from “may” to “shall” between the 2003 and 2006 versions of § 8127(d) of the Veterans Act implicated “the canon of construction that a change in legislative language generally gives rise to a presumption that Congress

contract is below the simplified acquisition threshold as defined in section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. s 403). Further, contracting officers would be allowed, but not required, to award sole source contracts to small businesses owned and controlled by veterans to meet the annual goal set by the Secretary for contracts above the simplified acquisition threshold but below \$5,000,000. *Contracting 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 owned by veterans will submit offers for the contract including all contracts exceeding \$5,000,000.

Id. at 240 (quoting 152 CONG. REC. S11609, S11615 (daily ed. Dec. 8, 2006) (Joint Explanatory Statement as read into the record)).

110. *Id.* at 244.

111. *Kingdomware Techs., Inc. v. United States*, 754 F.3d 923, 934 (Fed. Cir. 2014), *rev’d and remanded*, 136 S. Ct. 1969 (2016).

112. *See id.* at 930 (“Here, since there are no factual or mixed factual and legal issues, and the only question is one of statutory construction, we apply the *Chevron* standard.”).

113. *See id.* at 931.

114. *Id.* (quoting *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

intended to change the meaning of the law.”¹¹⁵ In fact, the panel reasoned, Kingdomware was unreasonable in its interpretation of the Act.¹¹⁶ On the one hand it was assigning “dispositive weight to the command term ‘shall,’” but on the other it was ignoring the “additional statutory language stating that this mandate [was] ‘for purposes of meeting the goals under subsection (a).’”¹¹⁷ After all, the panel reasoned, Congress had enacted the statute “out of frustration with the failure of agencies Government-wide to achieve the aspirational goals of 3% for SDVOSBs.”¹¹⁸ Since interpreting these prefatory words as mere “surplusage” would violate “a bedrock principle of statutory interpretation” and would lead to illogical outcomes, the panel reasoned that the words must be given meaning.¹¹⁹ If the panel ruled against the VA it would be requiring the agency “to conduct a Rule of Two analysis for every contract irrespective of the goals set under subsection (a),” making the goal provision itself “superfluous.”¹²⁰

The panel acknowledged the VA’s argument that interpreting the statutory language as mandatory would not only create inefficiencies for the agency, but also undermine the purpose of the Act by preventing the VA from meeting its goals with regard to other small businesses—an outcome apparently conflicting with the legislators’ anticipated outcome.¹²¹ Therefore, the panel held that the VA “need not perform a VOSB Rule of Two analysis for every contract, as long as the goals set under subsection (a) are met.”¹²²

Despite the Federal Circuit’s incorrect application of the canons of statutory interpretation, the reasoning was not completely off base. As the panel predicted, the VA must now grapple with the very

115. *Id.* at 931–34.

116. *Id.* at 933.

117. *Id.*

118. *Id.* at 934.

119. *Id.* at 933 (citing *Qi-Zhuo v. Meissner*, 70 F.3d 136, 139 (D.C. Cir. 1995)).

120. *Id.*

121. *Id.* at 934 (“Congress anticipated that with the contracting tools provided in § 8127, the VA would be able to ‘meet, if not exceed’ its contracting goals, . . . while at the same time fulfilling the goals it has set for other small business entities.” (citation omitted)). “The goals for veteran and service-disabled veteran owned businesses are not in any way intended to prevent attainment of other set-aside goals.” *Id.* (quoting 152 CONG. REC. S11609–03, S11616).

122. *Id.*

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real outcomes resulting from the Supreme Court's ruling in *Kingdomware*.¹²³

4. *The Federal Circuit Dissent*

Judge Reyna, the lone dissent throughout the entire legal progression of *Kingdomware*, argued for a much stricter textual analysis than that of the Federal Circuit majority.¹²⁴ Rather than trying to ascertain the intent of Congress, or “choosing our preferred interpretation from among a range of potentially plausible, but likely inaccurate, interpretations of a statute,” Judge Reyna argued that the court should find in favor of Kingdomware using a plain language approach.¹²⁵ In fact, Judge Reyna posited, “[t]he statutory provision at issue could not be clearer. It provides that contracting officers ‘shall award contracts’ on the basis of restricted competition whenever the contracting officer has a reasonable expectation that the Rule of Two will be satisfied.”¹²⁶

Judge Reyna proceeded to scold the majority for acting as policy maker and, in doing so, losing sight of its “duty to enforce the proper interpretation of the statute regardless of [their] policy views.”¹²⁷ As Kingdomware had unsuccessfully argued, the use of “shall award” in § 8127(d) is mandatory language when compared to the discretionary language of “may use” and “may award” present in §§ 8127(b) and (c).¹²⁸ Judge Reyna found that “when the same statute uses both ‘may’ and ‘shall,’ the normal inference is that each is used in its usual sense and that the former is permissive, the latter mandatory.”¹²⁹

Judge Reyna then took note of the majority's total disregard for the GAO's construction of the statute and its numerous recommendations that the VA comply with § 8127(d).¹³⁰ He went on

123. See *infra* Sections IV.A.3–4.

124. *Kingdomware*, 754 F.3d at 934–35 (Reyna, J., dissenting).

125. *Id.* (“The plain language of the 2006 Veterans Act unambiguously requires VA contracting officers to conduct a Rule of Two analysis in every acquisition and does not exempt task or delivery orders under the [FSS].”).

126. *Id.* at 935.

127. *Id.*

128. *Id.*

129. *Id.* at 936 (citing *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947); *Ky., Educ. Cabinet, Dep't for the Blind v. United States*, 424 F.3d 1222, 1227 (Fed. Cir. 2005)).

130. *Kingdomware*, 754 F.3d at 936; see U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 92, at 5.

to explain how the words that served as the foundation for the majority's arguments—"for purposes of meeting the goals under subsection (a)"—are prefatory in nature, and it was therefore inappropriate to construe them as having any limiting effect on the operative clause.¹³¹ Additionally, he contended that the majority's fear that a mandatory Rule of Two provision would "obviate the goal-setting provision" was misguided since the goals are merely "aspirations, not destinations."¹³² These arguments are logically sound and represent a win for statutory interpretation.¹³³

B. Justice Thomas's Opinion

Justice Thomas expressed his approval for Reyna's dissent by echoing his textual arguments. In a unanimous 8-0 opinion, the Supreme Court reversed the Court of Appeals for the Federal Circuit's decision and remanded the case for further proceedings consistent with that result.¹³⁴ In a surprisingly non-contentious ruling, given the lower court rulings and the decade long battle between the VA and disadvantaged concerns both in court and in front of the GAO, Justice Thomas, speaking for the entire Court, held "that § 8127(d) unambiguously requires the [VA] to use the Rule of Two before contracting under the competitive procedures."¹³⁵

The Court borrowed many of Judge Reyna's arguments in his lower court dissent to explain its reasoning. First, the Court agreed with the Federal Circuit panel's overall finding that § 8127(d) is unambiguous.¹³⁶ However, that is where the two opinions diverge. The Court adopted a narrow interpretation of the text, reiterating Judge Reyna's position that "Congress' use of the word 'shall' demonstrates that § 8127(d) mandates the use of the Rule of Two in all contracting before using competitive procedures. Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement."¹³⁷ This refreshingly straightforward

131. *Kingdomware*, 754 F.3d at 936–38.

132. *Id.* at 938, 940.

133. *See infra* Section IV.A.1.

134. *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1979 (2016).

135. *Id.* at 1976.

136. *Id.*

137. *Id.* at 1977.

interpretation of the plain meaning of the statutory provision makes the lower court's reasoning look like it was grasping at straws.

Following this logic, Justice Thomas went on to point out another flaw in the Federal Circuit panel's analysis. While the lower court focused on the prefatory language, "[f]or the purpose of meeting the goals under [§ 8127(a)]," it failed to address the presence of the exact same phrase in the two subparts that utilize the permissive "may."¹³⁸ Justice Thomas illustrated that "[i]f the Federal Circuit's understanding of § 8127(d)'s prefatory clause were correct, then §§ 8127(b) and (c), which also contain [the same clause], would cease to apply once the [VA] meets the Secretary's goal, and the [VA] would be required to return to competitive bidding."¹³⁹ This type of disparate result could not be allowed to stand.

The Court also addressed the argument of the lower court and the VA that the Court should defer to the agency based on the framework in *Chevron*.¹⁴⁰ This argument fails because *Chevron*'s deference is only required when a statute is ambiguous, which this one is not.¹⁴¹ In this way, the Court circumvented the *Chevron* framework and concluded that the VA was not deserving of judicial deference in this case.

In ruling that the statute must be applied based on its plain meaning, as amended by the legislature, rather than based on some hypothetical legislative intent that must be ascertained through extensive investigation and assumptions, the Court came to the correct legal conclusion. This sensible reading of the statute is truly a win for statutory interpretation, and collaterally for VOSBs as well, but the consequences of making the right decision will perhaps be much more problematic than the Court would like to admit.¹⁴²

IV. CONSEQUENCES OF *KINGDOMWARE* AND AFFIRMATIVE SOLUTIONS

To understand the consequences of *Kingdomware*, it is helpful to tally the winners and losers. While the Supreme Court was correct in its interpretation of the relevant statutes and its application of controlling legal precedent, representing a huge win for veterans, its ruling in *Kingdomware* will have negative consequences far beyond

138. *Id.*

139. *Id.* at 1978.

140. *Id.* at 1979.

141. *Id.* at 1978.

142. *See infra* Section IV.B.1.

the surface-level victory for one disadvantaged concern. This Note will explain how the Court's mandate creates chaos and inefficiencies across governmental agencies, which must now scramble to adjust their own practices or face litigation. This decision will have potentially devastating effects on nonveteran disadvantaged concerns that stand to lose government contracts as a result. In conclusion, this Note briefly examines the legislative intent behind the Veteran's Act and proposes a statutory change consistent with that intent that could solve some of the issues outlined.

A. *The Winners and Losers of Kingdomware*

1. *A Win for Statutory Interpretation*

With the passing of the late Justice Scalia, Justice Thomas is now the leading originalist on the Supreme Court and has proven himself to be something of a textual crusader during his twenty-five years on the bench.¹⁴³ In fact, Justice Thomas may be the Supreme Court Justice who most often relies on the canons of statutory construction in his decisions.¹⁴⁴ Therefore, it is certainly fitting that Justice Thomas authored the majority opinion in *Kingdomware*—a clear win for the canons.

In *Kingdomware*, Justice Thomas stayed true to his prior rulings when he relied on the unambiguous plain meaning of § 8127's text.¹⁴⁵ Although “[c]anons of construction need not be

143. See Judge H. Brent McKnight, *The Emerging Contours of Justice Thomas's Textualism*, 12 REGENT U. L. REV. 365, 365–66 (2000); Hon. David B. Sentelle, *Remarks—Justice Thomas, the Person*, 4 N.Y.U. J.L. & LIBERTY 482, 490–91 (2009); Ralph Rossum, *Understanding Clarence Thomas: The Jurisprudence of Constitutional Restoration*, L. & LIBERTY (Apr. 1, 2014), <http://www.libertylawsite.org/liberty-forum/understanding-clarence-thomas-the-jurisprudence-of-constitutional-restoration/>.

144. See James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 45–46 (2005).

145. Compare *Kingdomware*, 136 S. Ct. at 1976–77, with *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (“[C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” (Thomas, J., writing for the majority) (citations omitted)).

conclusive,”¹⁴⁶ the Court has stated that the plain meaning of a statute “necessarily contains the best evidence of Congress’ . . . intent.”¹⁴⁷ Looking no further than the plain meaning of § 8127’s text is consistent with the Court’s precedent and reinforces important principles of statutory interpretation.

In focusing on the statutory language, the Court avoided falling into the same trap as the lower courts in *Kingdomware*.¹⁴⁸ Those courts expended significant energy rummaging about in congressional testimony in search of other potential or intended meanings that were ultimately incorrect.¹⁴⁹

2. A Win for Veterans

The mandate in *Kingdomware* is an indisputable win for SDVOSBs and VOSBs across America.¹⁵⁰ As a direct result of the Court’s ruling, VOSBs stand to receive an enormous volume of new VA contracts—opportunities that will reap extreme monetary benefits.¹⁵¹ If other government agencies follow suit by mandating

146. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001).

147. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).

148. *See supra* notes 97–100 and accompanying text.

149. *See* Brief of Members of Congress as Amici Curiae in Support of Petitioner at 10–11, *Kingdomware*, 136 S. Ct. 1969 (No. 14-916), 2015 WL 5026167 (“The VA and the Federal Circuit have both cited to a single line in the legislative history that they claim shows that the change from ‘may’ to ‘shall’ was intended to refer to the VA’s goals, not the Veterans Rule of Two analysis However, that reference to ‘goals’ has been taken out of context.”).

150. A mere perusal of the amicus curiae briefs filed in support of *Kingdomware* show that veterans organizations across the spectrum view the Court’s holding to be a victory for veterans. *See, e.g.*, Brief for the Am. Legion as Amicus Curiae Supporting Petitioner, *Kingdomware*, 136 S. Ct. 1969 (No. 14-916), 2015 WL 5026168; Brief for Ir. and Afg. Veterans of Am. as Amicus Curiae in Support of Petitioner, *Kingdomware*, 136 S. Ct. 1969 (No. 14-916), 2015 WL 5026170; Brief of Amici Curiae Nat’l Veteran Small Bus. Coal. et al. in Support of Petitioner, *Kingdomware*, 136 S. Ct. 1969 (No. 14-916), 2015 WL 5026169; Brief of Amici Curiae Paralyzed Veterans of Am., Viet. Veterans Ass’n, The Military Officers Ass’n of Am. & The Nat’l Veterans Legal Servs. Program in Support of Petitioner, *Kingdomware*, 136 S. Ct. 1969 (No. 14-916), 2015 WL 5093217.

151. As recently as 2015, the “Total Small Business Eligible Dollars” for the VA was over \$20 billion. Prior to the decision in *Kingdomware*, VOSBs accounted for 18.6% of this total, VOSBs accounted for 16.8%, small disadvantaged businesses accounted for 7.4%, WOSBs accounted for nearly 3%, HUBZone businesses accounted for 1.6%, and 8(a) businesses accounted for .2%, leaving the lion’s share for other small businesses. *Small Business Goaling Report, Fiscal Year: 2015*, FED. PROCUREMENT DATA SYS.—NEXT GENERATION, <https://www.fpds.gov/downloads>

Rule of Two analysis for all of their procurement contracts, either voluntarily or through litigation, as some are proposing,¹⁵² VOSBs could see their businesses grow exponentially.¹⁵³ In light of the newly mandated priority of VOSBs in VA procurement, there is also a push for expanded efforts to train and develop VOSBs in order to meet the huge business demands that will inevitably follow the Court's decision—an added benefit for small businesses that have previously struggled to attain large contracts due to their lack of training.¹⁵⁴ This type of training could go a long way towards dispelling the view held by some of the VA's contracting officers that a small business is less capable than a larger business of completing a contract to the VA's satisfaction, a belief that has led some of these officers to favor large contractors over smaller ones.¹⁵⁵ Finally, the *Kingdomware*

/top_requests/FPDSNG_SB_Goaling_FY_2015.pdf (last visited Mar. 30, 2017). Post-*Kingdomware*, VOSBs and SDVOSBs stand to receive a large portion of the nearly \$13 billion in VA contracts that are currently awarded to other parties. *Id.*

152. See *Hearing*, supra note 8 (statement of Michael Phipps, Managing Director, The Millennium Group Int'l LLC, at 1) ("The case also validated the Congressional practice of enhanced agency-specific Service Disabled Veteran Owned Small Business (SDVOSB) set-aside goal measures to supplement the Small Business Act. This shows other agencies the importance of implementing internal policies where buyers cannot stop looking for SDVOSB's even after they meet their SDVOSB goals. The Committee should direct all agencies to implement such policies.").

153. Total small business eligible dollars across government agencies topped \$352 billion in 2015. See *Small Business Goaling Report, Fiscal Year: 2015*, supra note 151.

154. See *Hearing*, supra note 8 (statement of Michael Phipps, Managing Director, The Millennium Group Int'l LLC, at 3–6) ("[T]he Senate Small Business Committee should consider the research conducted by Professor Max Kidalov and his co-author Jennifer Lee The research highlights the need to create a growth pathway from low-dollar simplified acquisitions to more complex buys. The research also demonstrates that contracting officers have trouble deciding on when to use discretionary SDVOSB set-asides. For this reason, the research recommends a Business Development Program for SDVOSB's, agency-specific or government-wide." (citing MAX V. KIDALOV & JENNIFER L. LEE, AN OPEN DOOR AND A LEG UP: INCREASING SERVICE-DISABLED VETERAN-OWNED SMALL BUSINESS PARTICIPATION IN DEFENSE, NAVY, AND MARINE CORPS CONTRACTING THROUGH SIMPLIFIED ACQUISITIONS (2015), <http://calhoun.nps.edu/bitstream/handle/10945/47473/NPS-GSBPP-15-004.pdf?sequence=1&isAllowed=y>)).

155. See *Hearing*, supra note 8 (statement of Thomas J. Leney, Executive Director, Department of Veterans Affairs Office of Small and Disadvantaged Business Utilization, at 2) ("In addition, contracting officers and their program office customers need to have confidence that VOSBs can execute the contracts awarded to them. VA wants our contractors to be successful without unnecessary delays, higher costs, and added risks to VA's mission. This is one reason why some

mandate forces the VA to at last embrace its duty to put “veterans first,” as Congress intended.¹⁵⁶

These outcomes are overwhelmingly positive for VOSBs, and they support the somewhat obvious conclusion that veterans are the biggest winners in *Kingdomware*. On the other hand, not all of the results flowing from the Court’s ruling in *Kingdomware* are positive. It stands to reason that if there are winners, then there must be losers as well, and this case is no different.

3. *A Loss for Efficiency*

Governmental inefficiency is one negative consequence of the Court’s mandate in *Kingdomware*. Despite claims to the contrary by veterans,¹⁵⁷ interested parties,¹⁵⁸ and the Court,¹⁵⁹ the *Kingdomware* decision will undoubtedly result in inefficiencies and confusion for

personnel may perceive large business contractors as a safer choice, because they believe large firms’ internal quality assurance programs will mitigate these risks. In this view, small businesses may look like a riskier choice.”).

156. See Brief of Members of Congress as Amici Curiae in Support of Petitioner, *supra* note 149, at 1 (“[T]he House Committee on Veterans’ Affairs and . . . the Subcommittee on Economic Opportunity . . . spearheaded the effort to ensure that veteran-owned small businesses would be *first* in line to compete for government contracts.” (emphasis added)).

157. See *Hearing, supra* note 8 (statement of LaTonya Barton, Employee, Business Operations, Kingdomware Technologies, Inc., at 3) (“By working with veterans, the VA can achieve the important objectives of the law while still maintaining an efficient procurement process. For example, the VA can already streamline the process for smaller contracts through existing authority to make sole source or noncompetitive awards.”).

158. See Brief of Amici Curiae Nat’l Veteran Small Bus. Coal. et al. in Support of Petitioner, *supra* note 150, at 21 (“Respecting Congress’s choice and upholding the statutory rights of veterans does not mean that VA purchasing will grind to a halt . . .”).

159. See *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1978–79 (2016) (“The Department maintains that FSS orders are only for simplified acquisitions, and that using the Rule of Two for these purchases will hamper mundane purchases But . . . the Department may continue to purchase items that cost less than the simplified acquisition threshold (currently \$150,000) through the FSS, if the Department procures them from a veteran-owned small business.” (citations omitted)).

the VA, as well as other government agencies,¹⁶⁰ which must scramble to implement the newly minted mandate.¹⁶¹

To its credit, the VA has seemingly taken this added burden in stride,¹⁶² perhaps cognizant of the negative perception of its stubborn refusal to accept the ultimately correct recommendations of the GAO¹⁶³ or perhaps resigned to the binding judgment of the highest Court in the land.¹⁶⁴ Regardless of its motivation, the VA and other agencies are forced to accept the Court's ruling and must now forge ahead the best they can. To that end, the VA has already issued an internal policy memo apprising its employees of the changes that are to flow from the *Kingdomware* ruling and the possible effects the mandate will have on daily operations.¹⁶⁵

Despite these changes, there are still more administrative issues that the Court did not specifically address in its decision. The most

160. See *Hearing, supra* note 8 (statement of A. John Shoraka, Associate Administrator, Office of Government Contracting and Business Development, at 4) (“Since the *Kingdomware* decision is silent on the construction of the Small Business Act, it is unclear what impact the ruling has beyond VA and its use of the VA statute. SBA will be conferring with the Department of Justice, the SBPAC, GSA (as managers of the Federal Supply Schedules), the Federal Acquisition Regulatory Council, and others to discuss if any changes to regulations are needed.”).

161. *Id.* (statement of Thomas J. Leney, Executive Director, Department of Veterans Affairs Office of Small and Disadvantaged Business Utilization, at 1) (“[W]e have already taken action to address the Court’s recent decision. For example, we have modified VA’s Procurement Review Policy, issued by my office, to require the review of all procurements not set aside for VOSBs. We have also directed VA’s contracting officers to review all active procurements to determine whether VOSBs were appropriately considered in the market research.”).

162. See *id.* at 1–2. (“VA will comply immediately with the Court’s decision [T]he Court’s decision is an opportunity for VA to improve our best practices.”).

163. See *id.* (statement of LaTonya Barton, Employee, Business Operations, Kingdomware Technologies, Inc., at 3) (“It is time for the VA to stop looking for loopholes and to redirect that energy into making the mandate work.”).

164. See *id.* (statement of Thomas J. Leney, Executive Director, Department of Veterans Affairs Office of Small and Disadvantaged Business Utilization, at 1) (“While VA’s previous policy was found to be consistent with the law by two subordinate Federal courts, *Kingdomware* represents a correction of our understanding of the Veterans First mandate.”).

165. See U.S. DEP’T OF VETERANS AFFAIRS, VA’S APPROACH TO VETERANS FIRST CONTRACTING POST-KINGDOMWARE (Sept. 19, 2016), <http://www.va.gov/osdbu/docs/vets-first-post-kingdomware-briefing-09-19-2016-v2.pdf> (arguing that impacts of the *Kingdomware* decision include the administrative burden from updating policies, training personnel, and addressing a backlog of requests due to increased work load; an increase in the amount of verification applications; and increased significance of the vendor information pages).

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obvious of these issues is the Court's lack of direction as to what kind of market analysis the VA is required to perform under the Rule of Two.¹⁶⁶ Based on its track record when it comes to discretionary decisions, the VA is not positioned to make this type of determination on its own. Therefore, the sole avenues for resolving this lack of direction are litigation or a legislative action. Legislative action is almost certainly the less contentious and more cost-effective resolution. In fact, this Note will later offer a proposed legislative action that will include a directive on this topic.¹⁶⁷

The VA has been fighting this mandate for nearly ten years. Based on the potential administrative burdens outlined in this section, it will continue to be a wrench in the gears of an already malfunctioning government machine.¹⁶⁸

4. *A Loss for Equity*

Another negative consequence of the Court's decision in *Kingdomware* is the required prioritization of veteran interests over those of every other disadvantaged concern. Since the VA must now consider VOSBs in virtually all procurement situations, it is likely that the increase in VOSB contracts will mean few, if any, contracts will be awarded to other disadvantaged concerns, such as WOSBs and HUBZone contractors.¹⁶⁹ It is a shame that beneficial change for America's veterans comes at the expense of several other historically disadvantaged groups of business owners, such as women and racial minorities. Ironically, supporters of *Kingdomware* have presented arguments in favor of a mandated priority for VOSBs, while simultaneously failing to see that the same arguments are now true of other disadvantaged concerns—some with even less market share.¹⁷⁰

166. See *Hearing, supra* note 8 (statement of Jonathan T. Williams, Partner, PiliroMazza PLLC, at 3) (“The Supreme Court explicitly declined to address how extensive the VA’s market research must be to satisfy its obligations under the Vets First mandate. Does the VA need to look only at FSS contract holders to determine if the Rule of Two is satisfied? Or, does the VA need to look outside FSS contract holders? The Supreme Court did not say, so Congress should step in with legislation to answer this question.”).

167. See *infra* Section IV.B.2.

168. See *supra* note 27 and accompanying text.

169. See *supra* note 10 and accompanying text.

170. See *Hearing, supra* note 8 (statement of LaTonya Barton, Employee, Business Operations, Kingdomware Technologies, Inc., at 2) (“[B]illions of dollars

Taking food out of the mouth of one disadvantaged concern to feed another does not seem equitable in the least, but that is the potential result of *Kingdomware*. Adding insult to injury, research shows that the new financial boon for VOSBs may not be shared equitably among all veteran contractors, meaning that some small nonveteran concerns will likely lose contracts to large repeat players.¹⁷¹ This outcome undermines the very purpose of § 8127, which is to encourage veterans and other disadvantaged concerns to pursue entrepreneurial and innovative endeavors in the form of small business government contracting.

It is, however, possible to avoid some of these negative consequences of the Court's decision in *Kingdomware* while simultaneously promoting the positive ones. This Note will now propose two legislative actions that aim to accomplish just that.

B. Proposed Legislative Action

1. Reforms for Procurements Going Forward

One of the negative consequences of *Kingdomware* is the potential for inefficiencies and confusion between government agencies that must now try to understand the Court's ruling as it applies to them while also grappling with increased workloads created by newly mandated market analysis and extra training to ensure compliance with the changes.¹⁷²

Specifically, the VA will now face a huge influx of new applications to its vendor programs that must be processed, in addition to market research analysis that must be completed for each and every procurement in order to satisfy the Rule of Two.¹⁷³

have been steered away from veterans trying to establish and grow their businesses and feed their families. Many veterans are now out of business, some even having contemplated suicide, because there were no opportunities to contract with the VA.”).

171. See *Hearing, supra* note 8 (statement of Michael Phipps, Managing Director, The Millennium Group Int'l LLC, at 4) (“The research conclusively demonstrates that the current SDVOSB Program supports a dwindling number of established firms. This is because the SDVOSB Program as currently designed is not effectively aligned to increase broad-based participation of SDVOSB firms as contractors.”); KIDALOV & LEE, *supra* note 154, at 90 (“The alumni population of the SDVOSB Program . . . receiving New Awards has been dwindling over the recent years.”).

172. See *supra* Section IV.A.3.

173. See *Hearing, supra* note 8 (statement of Michael Phipps, Managing Director, The Millennium Group Int'l LLC, at 4–5, 7).

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Although it is not uncommon for new legislation or Supreme Court rulings to create additional work for government agencies, rarely are those agencies already struggling to meet their existing duties as is the case with the VA. It is therefore unsurprising that the agency cited inefficiency concerns while it argued so vehemently against the imposition of Rule of Two analysis on FSS orders.¹⁷⁴

Other agencies, such as the SBA, are also concerned about what the Court's mandate means for them.¹⁷⁵ SBA is, however, not the only agency that should be concerned. As shown in *Delex Systems*,¹⁷⁶ numerous government agencies deal in one way or another with contract set-asides and the Rule of Two. These agencies include the Department of Defense, the Department of Justice, the GSA, and NASA, amongst others.¹⁷⁷

To simplify the procurement process for government agencies and avoid the costly litigation that is likely to come if nothing is done soon,¹⁷⁸ this Note proposes that Congress enact legislation to consolidate the FSS programs run by the VA and SBA. This action should resolve several issues that practitioners are witnessing as a result of the current inconsistencies between the two programs.¹⁷⁹

174. Brief for the United States, *supra* note 9, at 15 (“Petitioner’s interpretation of Section 8127 would also produce significant waste and inefficiency.”).

175. See *Hearing*, *supra* note 8 (statement of A. John Shoraka, Associate Administrator, Office of Government Contracting and Business Development, at 4).

176. See *supra* Section II.E.1.

177. See *Small Business Goaling Report, Fiscal Year: 2015*, *supra* note 151.

178. See Damien C. Specht & Rachael K. Plymale, *Feature Comment: Kingdomware: Broader than SCOTUS Intended?*, 58 No. 26 GOV’T CONTRACTOR 1, 4 (“Whether the decision will lead to expansion of small business set-asides under GSA’s FSS is yet to be seen, but it has already been the topic of congressional hearings, and may soon be the topic of litigation.”).

179. See *Hearing*, *supra* note 8 (statement of Jonathan T. Williams, Partner, PilieroMazza PLLC, at 3) (“The *Kingdomware* ruling is also another opportunity to ponder the wisdom of having two federal government procurement programs for VOSBs. The two programs, one run by the VA and the other by the SBA, are very similar but are not identical. Inconsistencies between the two programs have led to confusion and inefficiencies for the veteran contracting community and federal agencies. As an example, we represented one VOSB that was proposed for debarment by SBA because of the company’s ownership structure, which did not comply with the SBA’s VOSB rules but did satisfy the VA’s VOSB rules. Additionally, VOSBs have been forced to file bid protests with the GAO because of procuring officials who have applied the VA’s verification requirements to non-VA procurements. Contracting officers have sent SDVOSB protests on a non-VA contract to the VA, instead of the SBA. VA contracting officers have failed to forward size protests to the SBA, even though the SBA is the agency exclusively authorized

This Note also proposes that Congress ensure agency compliance with its intent to put veterans first by issuing guidance to all the involved agencies, explaining how *Kingdomware* applies to them and whether or not the Rule of Two is mandatory for that agency.¹⁸⁰ If significant administrative burdens will be created due to these new mandates, then Congress should supply the agencies with the resources necessary to enact the procedures. Veterans will not benefit if granting them first priority for government contracts only mires the contracting agencies in administrative backlog, especially when the VA is already dealing with vast inefficiencies in the procurement process.¹⁸¹ These straightforward adjustments to the current contracting regime should result in a more efficient government and one that better serves its veterans.

2. *Changes to 38 U.S.C. § 8127*

Besides making a sweeping change to synchronize procurement practices across agencies, Congress could improve the Rule of Two provision, contained within § 8127(d), that was at issue in *Kingdomware*. Although the Court made clear that the Rule of Two must be applied by the VA in all its procurement processes, as previously discussed, that ruling will have several unsavory consequences¹⁸² that could be avoided through a legislative action.

to decide size status. And VOSBs that participate in SBA's VOSB program may seek review of eligibility determinations before an administrative law judge at SBA's Office of Hearings and Appeals, but VOSBs participating in the VA's program cannot. There are other differences between the programs, all of which unnecessarily add to the veteran's compliance burden and complicate the mission of increasing federal spending on VOSBs.").

180. This Note finds no issue with Congress choosing to hold some agencies, such as the VA, to a different standard with regard to contract set-asides for specific disadvantaged concerns. However, if Congress has designs as to which agencies should be required to conduct Rule of Two analysis, this intent must be made explicitly clear, especially in statutory language, to avoid potential inefficiency or litigation.

181. Press Release, Representative Mike Coffman, Coffman Legislation Streamlines, Modernizes VA Procurement Process (Jun. 15, 2016), <https://coffman.house.gov/media-center/press-releases/coffman-legislation-streamlines-modernizes-va-procurement-process> (quoting Colorado Rep. Mike Coffman) ("The VA has wasted billions of dollars due to bureaucratic incompetence and an inability to follow existing procurement rules.").

182. See *supra* Sections IV.A.3–4.

Importantly, any legislative action should preserve the intent of Congress, which has been clarified by some of the key legislators who supported the original statute and made it law.¹⁸³ It is also critical to avoid the mistakes of the Federal Circuit, which “found that the VA did not have to use the Vets First mandate when it had satisfied its VOSB goals.”¹⁸⁴ This Note submits that there is at least one way to satisfy both requirements. The proposed action would be threefold.

First, Congress could raise the aspirational goal for VA procurements through VOSBs and SDOSBs to a level more closely tied to the “ceiling,” rather than the “floor.”¹⁸⁵ Instead of an agency contracting goal of 3%, perhaps 30% is more palatable and ensures a strong commitment to veterans by the agency designed to serve them. According to the members of Congress who filed briefs on behalf of Kingdomware, the Legislature “wanted the VA not just to meet, but to *exceed* its goals.”¹⁸⁶ It is unlikely, however, that this would be true of a goal as lofty as 30% of a \$20 billion VA contracting budget. It certainly would be illogical to expect the entire VA budget, or even half, to be awarded to VOSBs. Otherwise, why would Congress not mandate that all VA contracts go to veterans?

Additionally, it may be the opinion of some congressional members that there is a “strong interest in maximizing veterans’ business opportunities and in supporting small business . . . [that] does not disappear and reappear depending on whether the VA has met self-imposed annual goals,”¹⁸⁷ but perhaps Congress should create equitable opportunities for other disadvantaged concerns that stand to lose their livelihoods to veterans.¹⁸⁸ Perhaps Congress would feel more confident that the VA was putting veterans first if the agency was required to meet a lofty 30% goal, as this Note proposes. Surely, at ten times the original goal set in 2003, the VA

183. See Brief of Members of Congress as Amici Curiae in Support of Petitioner, *supra* note 149, at 6–12.

184. See *Hearing*, *supra* note 8 (statement of Jonathan T. Williams, Partner, PilieroMazza PLLC, at 3) (“The Federal Circuit essentially viewed the VOSB goals as a ceiling, rather than a floor, which could have been a dangerous precedent for all small business programs. Indeed, the small business contracting goals are the bare minimum Congress expects from federal agencies.”).

185. See *id.*

186. Brief of Members of Congress as Amici Curiae in Support of Petitioner, *supra* note 149, at 10.

187. *Id.* at 14.

188. See *supra* Section IV.A.4.

could not be accused of neglecting the brave men and women who sacrifice so much for their country.

Second, Congress could institute quarterly accounting of the agency's progress in attaining this goal. The issue of whether a single contracting officer could know if the agency's goals had or had not been attained at any given moment was raised at multiple levels of the *Kingdomware* decision.¹⁸⁹ However, the Court itself never determined if this type of on-the-fly calculation was possible; it simply determined that it was unnecessary given the prefatory nature of the goal language.¹⁹⁰ It seems likely, however, that a VA-wide contracting calculation could be made at the end of each fiscal quarter. Surely, with all the reports that the VA is already required to produce,¹⁹¹

189. *Kingdomware Techs., Inc. v. United States*, 754 F.3d 923, 937 (Fed. Cir. 2014), *rev'd and remanded*, 136 S. Ct. 1969 (2016).

[T]here is no evidence in the record to show that VA contracting officers rely on, or have access to, these types of data in making contracting decisions, and the GAO has explicitly held that an agency's belief it has satisfied its small business goals does not affect its obligation to conduct a Rule of Two analysis.

Id.

Congress was well aware that this would be an impossible task for the VA, which does not keep track of its actual procurement spending or the distribution of that spending in real-time. Although the VA must report most contracts to the Federal Procurement Data System ("FPDS") within three business days of the contract award, *see* 48 C.F.R. § 4.604(b)(2), the FPDS data does not have to be certified as complete and accurate until 120 days *after* the fiscal year ends, *id.* § 4.604(c). Additionally, while the VA must measure the extent of participation by small businesses for each fiscal year, the VA does not have to report that data to the Small Business Administration ("SBA") until the *end of the fiscal year*, *see id.* § 19.202-5(b), and, in fact, these reports often take *half* of the following fiscal year to compile, *see* Press Release, SBA, *SBA Announces Results of 2014 Small Business Federal Procurement Scorecard*, U.S. Small Bus. Admin. (June 24, 2015), <http://tinyurl.com/pm7wszt> (announcing, six months behind schedule, the small business results for fiscal year 2014).

Brief of Members of Congress as Amici Curiae in Support of Petitioner, *supra* note 149, at 18–19.

190. *Kingdomware*, 136 S. Ct. at 1979 ("We hold that the Rule of Two contracting procedures in § 8127(d) are not limited to those contracts necessary to fulfill the Secretary's goals under § 8127(a).").

191. *See Contractor Reporting Requirements*, GSA VENDOR SUPPORT CTR., <https://vsc.gsa.gov/administration/crr.cfm> (last visited Mar. 30, 2017) ("The Department of Veterans Affairs (VA) National Acquisition Center negotiates, awards, and administers Federal Supply Schedule (FSS) contracts for various

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data collection and analysis of this type would not be a substantial burden. In the interest of equity, Congress could mandate timely reporting practices and provide the resources necessary to accomplish such a task. Moreover, meeting this goal of 30% need not be tied to exact annual spending. Instead, it could be an estimate based on the projected costs of the total procurement contracts for that quarter compared with the amount that was awarded to VOSBs.

It hardly appears likely that the VA has any malicious intent or interest in excluding veteran small-business owners from the agency's contracting process. Therefore, Congress should trust the VA to make a good faith evaluation of whether or not it has met the 30% goal in a given quarter before it determines the necessary set-aside practices for the next quarter.

Third, Congress could declare that the VA would be required to consider all other disadvantaged concerns on equal footing with veteran-owned businesses for a quarter when the percentage of SDVOSBs and VOSBs used in contracts is above the 30% threshold. In this way, if the VA were to meet its aspirational goal for one quarter, the statute would allow other disadvantaged concerns a chance to reap the benefits of the Rule of Two and provide them access to the VA's large budget. Then, at the beginning of the next quarter, the VA would be required to again put "veterans first" if the VA had not satisfied its 30% goal. The balance of VA contracting would therefore be stilted in favor of veterans, but the agency would have the ability to tilt the scales in favor of other disadvantaged concerns who would also benefit from government contracting opportunities once veterans had taken their share.

While this system of accounting may appear convoluted, it is surely a more equitable solution than to simply hand the lion's share of a \$20 billion government budget to SDVOSBs and VOSBs at the cost of all other disadvantaged groups. Additionally, this plan would not completely tie the agency's hands. The VA would still retain its discretion to find the "best value" for the United States¹⁹² but would be prevented from "abandon[ing] any interest in fostering veteran-owned businesses until the start of the next fiscal [quarter]."¹⁹³

healthcare-related products and services. All VA managed FSS contract holders are required to report contract sales on a quarterly basis.").

192. 38 U.S.C. § 8127(d) (2012).

193. Brief of Members of Congress as Amici Curiae in Support of Petitioner, *supra* note 149, at 7.

V. CONCLUSION

The Court in *Kingdomware* came to the correct legal conclusion based on the principles of statutory interpretation, but strict reading of the relevant text upends the status quo and is likely to lead to unsavory results for the VA, other contracting government agencies, and nonveteran-owned contractors. Outcomes will include inefficiencies, discrepancies in practice across government agencies, and loss of opportunities for other disadvantaged groups. These problems may require corrective action from either Congress or the government agencies in question, as evidenced by congressional testimony and agency memoranda.¹⁹⁴ While *Kingdomware* is cause for celebration among veterans and narrow constructionists, it may create a headache for the United States government, because it presents consequences beyond what even the eminent legal minds of the Court had envisioned. It is imperative that Congress take corrective action to smooth out the inefficiencies and restore equity to government contracting practices. Otherwise, government agencies ranging from the Department of Justice to the SBA will be hauled into court to face more contentious litigation in the near future. Congress may be hesitant to act, and litigation can take years. Therefore, in all likelihood it will be some time before *Kingdomware*'s exact implications are realized.¹⁹⁵

194. *See supra* Section IV.B.

195. *Id.*

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