No. 20-1175

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

VETERANS4YOU, INC.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

On appeal from the United States Court of Federal Claims
in case No. 1:19-cv-00931, Judge Lydia K. Griggsby

BRIEF FOR AMICUS CURIAE KINGDOMWARE TECHNOLOGIES, INC.

THOMAS G. SAUNDERS
MATTHEW E. VIGEANT
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 663-6000

Attorneys for Amicus Curiae Kingdomware Technologies, Inc.

January 31, 2020

CERTIFICATE OF INTEREST

Counsel for *Amicus Curiae* Kingdomware Technologies, Inc. certifies the following:

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

Kingdomware Technologies, Inc.

2. The names of the real party in interest represented by me is:

Not Applicable.

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

None.

4. The names of all law firms and the partners or associates that appeared for the party or *amicus* now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

All counsel are entering appearances contemporaneously with the filing of this brief.

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal:

None.

Dated: January 31, 2020

/s/ Thomas G. Saunders
THOMAS G. SAUNDERS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Page(s)

CONSTITUTIONAL STATUTORY PROVISIONS

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

Kingdomware Technologies, Inc. is a Maryland-based small business owned and operated by a service-disabled veteran. It offers a broad range of web, software, and database solutions, including mass-notification solutions. It was the plaintiff in *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969 (2016), the leading case on the interpretation of the "Rule of Two" in 38 U.S.C. § 8127(d). The proper resolution of this case is a matter of great concern to Kingdomware because of its involvement in the *Kingdomware* case and continuing interest in ensuring that small businesses owned by service-disabled veterans receive contracting opportunities with the VA.

SUMMARY OF THE ARGUMENT

In 2006, Congress mandated that the Department of Veterans Affairs "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." 38 U.S.C. § 8127(d). The Supreme

[1] All parties to this appeal have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Court held that the plain text of this provision "requires the Department to apply the Rule of Two to all contracting determinations and to award contracts to veteran-owned small businesses." *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016). The ruling by the Court of Federal Claims in this case circumvented that requirement by holding that the "printing mandate" in 44 U.S.C. § 501 allowed the Government Publishing Office ("GPO") to conduct an acquisition of cable gun locks, without restricting competition to service-disabled veteran-owned small businesses or veteran-owned small businesses, merely because the solicitation included a small amount of text in the form of a label and laminated wallet card.

The CFC's novel decision is legally flawed. First, the printing mandate does not apply to the solicitation here. The plain text and purpose of the printing mandate demonstrate that it covers only government publishing and procurements of written or graphic items, not unrelated products in which any printing is a minor or incidental portion of the overall item. Indeed, if the printing mandate were interpreted as broadly as the CFC did below, virtually no procurement would ever be subject to the contracting preference in 38 U.S.C. § 8127(d), since almost all products contain a label, instructions, warning, or some other form of writing.

Further, even if the printing mandate's text could be stretched to cover the solicitation, this Court should not adopt such a reading as a matter of constitutional

avoidance. As multiple administrations have concluded, the printing mandate raises serious constitutional questions because the GPO is part of the Legislative Branch, and thus the printing mandate violates the separation of powers by purporting to require agencies in the Executive Branch to execute their responsibilities through a legislative entity. The Office of Legal Counsel in the Department of Justice has explained that "[t]o the extent that 44 U.S.C. §§ 501 & 501 note require all executive branch printing and duplicating to be procured by or through the GPO, those statutes violate constitutional principles of separation of powers." *Involvement of the Gov't Printing Office in Exec. Branch Printing & Duplicating*, 20 Op. O.L.C. 214, 221 (1996) ("20 Op. O.L.C.").

The CFC's holding also undermines the important purposes of the requirement that the VA restrict competition to small businesses owned by service-disabled veterans. Congress enacted § 8127(d) in the midst of two wars, following failed attempts to increase contracting opportunities for service-disabled veteran-owned small businesses. The Court should not permit an expansive new loophole that allows the VA to avoid that mandate. Indeed, to the extent there is a conflict, § 8127(d) should take precedence as the later-enacted, agency-specific provision.

ARGUMENT

I. THE TEXT AND PURPOSE OF THE PRINTING MANDATE DEMONSTRATE THAT IT DOES NOT APPLY TO A SOLICITATION FOR CABLE GUN LOCKS

The CFC incorrectly determined that the printing mandate in 44 U.S.C. § 501 applied to the VA's acquisition of suicide prevention cable gun locks. The statute's plain text and purpose demonstrate that the statute applies only to procurements of written or graphic products, not wrap-around cable gun locks and keys.

A. The Printing Mandate's Text Only Governs Procurements Of Published Written Or Graphic Materials

Statutory construction "begins, as always, with the statutory text." *United States v. Gonzales*, 520 U.S. 1, 4 (1997); *Kingdomware*, 136 S. Ct. at 1976. "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *see also Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 400 F.3d 1352, 1362 (Fed. Cir. 2005) (courts examine the plain text and employ traditional tools of statutory construction to determine whether a statute has a clear meaning). Here, the plain meaning of the text and the surrounding context both indicate that the printing mandate is not as expansive as the CFC believed.

The language of the printing mandate originated in an 1895 Act stating that "[a]ll ***printing, binding, and blank books*** for the Senate or House of Representatives

and for the Executive and Judicial Departments shall be done at the Government Printing Office, except in cases otherwise provided by law." Act of Jan. 12, 1895, ch. 23, § 87, 28 Stat. 601, 622.[2] The current printing mandate states that:

> All ***printing, binding, and blank-book work*** for Congress, the Executive Office, the Judiciary, other than the Supreme Court of the United States, and every executive department, independent office and establishment of the Government, shall be done at the Government Publishing Office, except—
>
> > (1) classes of work the Joint Committee on Printing considers to be urgent or necessary to have done elsewhere; and
> >
> > (2) printing in field printing plants operated by an executive department, independent office or establishment, and the procurement of printing by an executive department, independent office or establishment from allotments for contract field printing, if approved by the Joint Committee on Printing.
>
> Printing or binding may be done at the Government Publishing Office only when authorized by law.

44 U.S.C. § 501.

Congress reiterated in 1992 that "the executive branch" shall expend funds "for the procurement of any ***printing related to the production of Government publications (including printed forms)***, unless such procurement is by or through the Government Printing Office." Legislative Branch Appropriations Act of 1993, Pub. L. No. 102-392, § 207(a)(1), 106 Stat. 1703, 1719 (1992). Congress later specified that "[a]s used in this section, the term 'printing' includes the processes of

---

[2] In this brief, all emphasis is added unless otherwise indicated.

composition, platemaking, presswork, duplicating, silk screen processes, binding, microform, and the end items of such processes." Legislative Branch Appropriations Act of 1995, Pub. L. No. 103-283, § 207, 108 Stat. 1423, 1440 (1994). The relevant Legislative Branch Appropriations Acts are often referred to as "Section 207" or "§ 501 note" because they are uncodified but have been reprinted as a note to § 501 in the United States Code.

The plain language of § 501 makes clear that the printing mandate applies only to the production of written materials in the traditional sense, not goods such as cable gun locks and keys. "Printing" means "the process, business, or art of producing printed matter[;] … printed text[;] … all the copies of a book or other publication printed at one time[;] … a form of writing in which letters resemble printed letter[.]" *Collins English Dictionary* 1579 (12th ed. 2014); *see also Walker and Webster Combined in a Dictionary of the English Language* 355 (1877) (defining "printing" as "[t]he art or practice of impressing characters or figures; typography").

Moreover, the word "printing" must be read in the context of the language that surrounds it. Since 1895, the printing mandate has referred to "printing, binding, and blank-book work." "Binding," as relevant here, refers to "anything that binds; … the cover of a book." *Webster's Common School Dictionary* 31 (1892); *see also Collins English Dictionary* 204 (12th ed. 2014) ("anything that binds or fastens[;]

… the covering within which the pages of a book are bound"). "Blank-book work" refers to the creation of books with blank pages or forms, such as ledgers and address books. *American Dictionary of Printing and Bookmaking* 47-48 (1894) (definition of blank-books); *see also Webster's Third New International Dictionary* 230 (2002) ("a book of mostly blank pages or of printed forms").

This context and common sense make clear that not every act of reducing written work to tangible form, labeling material, or providing written information constitutes the type of "printing" that triggers the printing mandate in 44 U.S.C. § 501. The statute instead focuses on the production of formal government publications (e.g., books, pamphlets, forms) and blank books. Indeed, divorcing the words of the statute from their original understanding would lead to absurd results. This Court, for example, does not violate federal law every time it prints a case from Westlaw, posts hearing lists, or labels files. For the printing mandate to apply, the printing must be a more formal publication and printing must be the predominate activity.

The CFC relied on a flawed reading of the Legislative Branch Appropriations Acts to ignore these limits. The CFC reasoned that "the imprinted gun locks and wallet cards … fall within the printing mandate" because Congress has "broadly defined 'printing' to mean 'the processes of composition, platemaking, presswork, duplicating, silk screen processes, binding, microform, and the end items of such

processes.'" Appx13 (quoting Legislative Branch Appropriations Act of 1995). There are several errors in this analysis.

First, the Legislative Branch Appropriations Act of 1995 did not purport to amend the printing mandate in 44 U.S.C. § 501. To the contrary, it amended only the appropriations language in Section 207 of the Legislative Branch Appropriations Act of 1993. *See* 108 Stat. at 1440 ("Section 207(a) of the Legislative Appropriations Act, 1993 (Public Law 102-392) is amended …"). Thus, when the Legislative Branch Appropriations Act of 1995 said "***[a]s used in this section***, the term 'printing' includes …," it was providing a definition solely for Section 207 of the Legislative Branch Appropriations Act.

This is significant because the Legislative Branch Appropriations Act contains a critical limitation never discussed by the CFC. Specifically, the mandate in the Legislative Branch Appropriations Act refers solely to "the procurement of any printing ***related to the production of Government publications (including printed forms)***." 106 Stat. at 1719. By no stretch of the imagination could the label and printed wallet card in the solicitation—let alone the cable gun locks and keys—be considered "Government publications." At the time Congress enacted the Legislative Branch Appropriations Act of 1993, the term "Government publication" was defined in Title 44 to mean "informational matter which is published ***as an individual document*** at Government expense, or as required by law." 44 U.S.C.

§ 1901; *see also* Act of Oct. 22, 1968, Pub. L. 90-620, 82 Stat. 1238, 1283. Further, with a few exceptions not relevant here, the law requires that "Government publications … be made available to depository libraries," 44 U.S.C. § 1902, and that agencies order extra copies for that purpose, *id*. § 1903. There is no indication that the labeled cable locks or wallet cards will be deposited in this manner—for the obvious reason that they are not "Government publications."

Second, assuming the definition of "printing" in the Legislative Branch Appropriations Act applied, it would only reinforce the fact that the printing mandate does not apply to the type of solicitation at issue here. All of the actions mentioned—composition, platemaking, presswork, silk screen processes, binding, and microform—are steps or outcomes from the process of publishing written or graphic works, such as pamphlets, books, journals, or other government records.[3] Further, since every specific action listed prior to the general term "end items" has to do with the steps or act of publishing written or graphic works, any "end items" must be related to such works. Under the canon of "ejusdem generis," where general words follow specific words in statutory enumeration, general words are construed to embrace only objects similar in nature to those objects enumerated by preceding

[3] For example, "presswork" is "the operation, management, or product of a printing press … the branch of printing concerned with the actual transfer of ink from printing surface to paper[.]" *Webster's Third New International Dictionary*, 1796 (2002).

specific words. *See*, *e.g.*, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-115 (2001).

Suicide prevention cable gunlocks are clearly not written or graphic published materials. The solicitation specified that the gunlocks were to comprise a 15-inch heavy-duty cable and a key-activated nickel-plated padlock mechanism that could be used on virtually any handgun, rifle, or shotgun. Appx4-5; *see also* Compl. ¶ 6. The cable, keys, and lock are not printed materials, and indeed, the CFC acknowledged as much. *See* Appx13 (differentiating between the "the printing and the non-printing components for the Solicitation"). That alone should have prevented the VA from applying the printing mandate to the entire solicitation.

Further, the small amount of labeling and information provided did not transform the overall product into a printed object. The CFC considered it irrelevant that "only a small percentage of the cost of the contract will involve printing services" because "the purpose of the Solicitation is to help prevent suicides among Veterans" and "the information to be printed on the gunlocks and wallet cards are an essential element of the contract." Appx13 n.4. But that reasoning would allow the printing mandate to swallow most government contracts for goods with an informational component or logo. Here, the predominate item was the cable lock, which was designed to prevent suicide by physically restricting a veteran's ability to fire the weapon. The accompanying information was valuable, but it did not

transform the cable lock into "printing" within the meaning of the statute. To hold otherwise would let the tail wag the dog.

B. The Purpose Of The Printing Mandate Is To Increase The Efficiency And Speed Of Publishing Written And Related Materials

The purpose of the printing mandate underscores the inappropriateness of applying it in this case. The printing mandate was enacted by Congress to increase the efficiency and lower the cost of government publishing operations, not to be a catch-all provision encapsulating the procurement of items with minor, incidental writing.

The GPO's origins lie in the Constitution's requirement that "[e]ach house shall keep a Journal of its Proceedings, and from time to time publish the same[.]" U.S. Const. art. I, § 5, cl. 3. In 1860, Congress created the GPO, which was "conceptualized as a more expeditious and less partisan alternative to the existing contract system of public printing." 20 Op. O.L.C. at 216. The original purpose for creating the GPO was thus to increase the efficiency and decrease the cost of publishing written federal works, such as required records and journals. *See also*, *e.g.*, Act of Mar. 1, 1919, Pub. L. No. 65-314, § 11, 40 Stat. 1213, 1270 (under the printing mandate, the Joint Committee on Printing is required to "remedy any neglect, delay, duplication, or waste in the public printing and binding and the distribution of Government publications"); 95 Cong. Rec. 7777 (June 15, 1949).

This purpose can be realized when the GPO procures items incidental to traditional printing, such as paper, ink, and binding materials. Those items are used for a variety of publications across the government, and thus a centralized process can achieve economies of scale and leverage the government's purchasing power. The procurement through the GPO of labeled cable gun locks, or other goods not typically associated with printing, does not further this central purpose.

II. THE CANON OF CONSTITUTIONAL AVOIDANCE MANDATES THAT THE COURT FIND THE PRINTING MANDATE INAPPLICABLE TO THE SOLICITATION

Even if the Court finds the text and purpose of the printing mandate to be ambiguous, the Court should still construe the printing mandate narrowly under the doctrine of constitutional avoidance. That is because, as the Office of Legal Counsel ("OLC") and other components of the Executive Branch have argued across multiple administrations, the printing mandate is likely unconstitutional as applied to the Executive and Judicial Branches.

A. Under The Canon Of Constitutional Avoidance, Courts Should Avoid Addressing The Constitutionality Of Statutes If Possible

Under the canon of constitutional avoidance, when the constitutionality of a Congressional Act is drawn into question, a court must ascertain whether a construction is possible which avoids determining the statute's constitutionality. *See Bond v. United States*, 572 U.S. 844, 855 (2014) ("it is 'a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court

will not decide a constitutional question if there is some other ground upon which to dispose of the case.'"); *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). The canon "allows courts to avoid the decision of constitutional questions. It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). The canon is "thus a means of giving effect to congressional intent, not of subverting it." *Id*. at 382. A court's duty is "not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations." *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers AFL-CIO*, 413 U.S. 548, 571 (1973).

B. The Court Must Construe The Printing Mandate Narrowly

The CFC's application of the printing mandate in this case improperly allowed the GPO, as a Legislative Branch entity, to control the means and method of procuring goods for the VA, an Executive Branch agency. Such interference runs afoul of the Constitutional separation of powers. *See Morrison v. Olson*, 487 U.S. 654, 693 (1988) ("Time and again we have reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches …. We have not hesitated to invalidate provisions of law which violate this principle.").

To prevent Congressional encroachment beyond its sphere, "the Constitution imposes two basic and related constraints on the Congress." *Metropolitan Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274 (1991). First, Congress "may not 'invest itself or its Members with either executive power or judicial power.'" *Metropolitan Washington Airports Auth.*, 501 U.S. at 274; *see also id.* at 275 ("To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws" which the "structure of the Constitution does not permit[.]" (quoting *Bowsher v. Synar*, 478 U.S. 714, 726 (1986)). Second, "when it exercises its legislative power, [Congress] must follow the 'single, finely wrought and exhaustively considered, procedures' specified in Article I." *Metropolitan Washington Airports Auth.*, 501 U.S. at 274 (quoting *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 950 (1983); *see also id.* at 274 ("Congress cannot exercise its legislative power to enact laws without following the bicameral and presentment procedures specified in Article I.").

The printing mandate is unconstitutional because it violates both separation of powers requirements: (1) the GPO is an arm of Congress that, under the printing mandate, executes non-legislative duties; and (2) a congressional committee has authority to control the GPO without going through the normal legislative process. 20 Op. O.L.C. at 221-227. Thus "[t]o the extent that 44 U.S.C. §§ 501 & 501 note

require all executive branch printing and duplicating to be procured by or through the GPO, those statutes violate constitutional principles of separation of powers." *Id*. at 221.[4]

"The GPO, since its inception, has been conceptualized as a congressional entity." 20 Op. O.L.C. at 223; *see also Thompson v. Sawyer*, 678 F.2d 257, 264 (D.C. Cir. 1982) ("The Government Printing Office is a unit of the legislative branch employing workers in the competitive service."); *To the Pub. Printer, U.S. Gov't Printing Office*, 36 Comp. Gen. 163, 165 (Aug. 24, 1956) ("It has been recognized that the Government Printing Office is under the Legislative Branch of the Government."). Although the President appoints the Director of the GPO, 44 U.S.C. § 301, the GPO is recognized as an arm of Congress because it is "beholden to Congress in several significant respects," 20 Op. O.L.C. at 223. Most notably, the statute creates a Joint Committee on Printing composed of members of Congress, 44 U.S.C. § 101, and empowers the Committee to "use any measures it considers necessary to remedy neglect, delay, duplication, or waste in the public printing and binding and the distribution of Government publications," *id*. § 103. "The

[4] *See also Constitutionality of Proposed Regulations of Joint Comm. on Printing*, 8 Op. O.L.C. 42 (1984); *Gen. Servs. Admin. Printing Operations*, 17 Op. O.L.C. 54 (1993); *Gov't Printing Office Involvement in Exec. Branch Printing*, 20 Op. O.L.C. 282 (1996); *Application of 44 U.S.C. § 1903 to Procurement of Printing of Gov't Publications*, 26 Op. O.L.C. 104 (2002).

Congressional Joint Committee on Printing" thus "retains supervisory control over a host of GPO's functions." *Applicability of Post-Employment Restrictions on Dealings with Gov't to Former Employees of the Gov't Printing Office*, 9 Op. O.L.C. 55, 57 (1985). As such, "the GPO is subject to the sort of control that Congress may not exercise over an actor that performs non-legislative functions." 20 Op. O.L.C. at 224.

Despite being an arm of Congress, the GPO conducts executive functions when applying the printing mandate to the other branches of government. Under the printing mandate, the GPO has "exclusive control of virtually all the printing work of the executive branch" since "Congress has forbidden the executive branch to expend funds on printing that is not procured by or through the GPO." 20 Op. O.L.C. at 224-225. While Congress has the power to create entities to assist it in the performance of its legislative functions, "when Congress dictates that all executive branch printing and duplicating must be procured by or through the GPO … the GPO necessarily acts outside the legislative sphere" and in the Executive's. *Id.* at 225. Compounding the problem, this control over Executive functions is not exercised by Congress as a whole. Congress has delegated its authority to the Joint Committee on Printing and empowered it to take action without bicameralism and presentment. *E.g.*, 44 U.S.C. § 103.

The GPO's unusual structure and interference in Executive functions have prompted multiple Administrations to express concern over the constitutionality of the printing mandate. The OLC opinion signed by Walter Dellinger in 1996 contains the most detailed analysis. It concludes that "[b]ecause the GPO is subject to congressional control and because the GPO performs executive functions … the language in 44 U.S.C. §§ 501 & 501 note requiring the executive branch to procure all of its printing by or through the GPO is unconstitutional." 20 Op. O.L.C. at 226. In fact, when signing the Legislative Branch Appropriations Act of 1995, President Clinton issued a signing statement noting that role of "the Government Printing Office in executive branch printing" "raises serious constitutional concerns" and declaring that he would "interpret the amendments to the public printing provisions in a manner that minimizes the potential constitutional deficiencies in the Act." Statement on Signing the Legislative Branch Appropriations Act of 1995, 30 Weekly Compilation of Presidential Documents 1541, 1542 (July 29, 1994).

An earlier OLC opinion drafted by Ted Olson during the Reagan Administration expressed related concerns. It concluded that "§ 501 improperly seeks to delegate legislative power to the JCP [Joint Committee on Printing] in abrogation of the constitutional requirements of bicameral passage and presentment." 8 Op. O.L.C. at 51.

Similarly, Mitch Daniels, the Director of the Office of Management and Budget in the Administration of George W. Bush, sent a memorandum to the heads of all Executive Branch departments and agencies reiterating that "the Department of Justice's Office of Legal Counsel issued an opinion concluding that Congress ***could not*** constitutionally obligate Executive Branch departments and agencies to utilize GPO." Memorandum from Mitchell E. Daniels, Jr., to Heads of Executive Departments and Agencies (May 3, 2002), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2002/m02-07.pdf (emphasis in original).

Given these serious constitutional concerns, the Court should interpret the printing mandate narrowly and hold that it does not apply to the procurement in this case.

III. PUBLIC POLICY COUNSELS THAT THE COURT FIND THE PRINTING MANDATE INAPPLICABLE HERE

Restricting the printing mandate to its proper orbit is also important in light of the critical interests served by the "Rule of Two" in 38 U.S.C. § 8127(d). Section 8127(d) marked the culmination of a long effort to improve contracting opportunities for veteran-owned small businesses. In 1999, Congress enacted the Veterans Entrepreneurship and Small Business Development Act as an acknowledgment that "[t]he United States ha[d] done too little to assist veterans, particularly service-disabled veterans, in playing a greater role in the economy of the United States by forming and expanding small business enterprises." Pub. L. No. 106-50, § 101(3),

113 Stat. 233, 234. The 1999 law required that each agency set annual goals for contracting with service-disabled veteran-owned small businesses. *Id.* § 502, 113 Stat. at 247-248 (amending 15 U.S.C. § 644(g)). Unfortunately, this effort proved unsuccessful, as the government fell far below the modest 3% government-wide goal set by the 1999 law.

In 2003, Congress responded by amending the Small Business Act to create discretionary, government-wide contracting preferences in favor of service-disabled veterans. Pub. L. No. 108-183, § 308, 117 Stat. 2651, 2662 ("2003 Veterans Act"). The 2003 Veterans Act permitted contracting officers to set aside certain smaller contracts for small businesses owned by service-disabled veterans. 15 U.S.C. § 657f(a) ("sole source" awards). The Act also authorized a discretionary form of the Rule of Two, under which a contracting officer "may award contracts on the basis of competition restricted to" service-disabled veteran-owned small businesses when at least two such businesses will submit offers and "the award can be made at a fairmarket price." *Id*. § 657f(b).

In 2006, Congress "remain[ed] frustrated" by the limited progress achieved under the 2003 Veterans Act, noting that "only 0.605 percent" of government contracts had been awarded to service-disabled veteran-owned small businesses in 2005. H.R. Rep. No. 109-592, at 15-16 (2006). The 2006 Veterans Act—entitled the Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub.

L. No. 109-461, 120 Stat. 3403—was a direct response to these failures. It recognized that the VA had a special mission to serve veterans and should "set the example among government agencies for procurement with veteran and service-disabled veteran-owned small businesses." H.R. Rep. No. 109-592, at 16. Thus, while leaving the 2003 Veterans Act in place for the rest of the government, the 2006 Veterans Act enacted VA-specific provisions that substantially tightened the VA's mandate to contract with veteran-owned small businesses. Most notably, Congress mandated that the VA "shall"—not merely "may"—use the Rule of Two to award contracts. Congress then came back two years later to plug another loophole by providing that if the VA procures goods or services through another government agency, it must ensure compliance with the Rule of Two "to the maximum extent feasible." 38 U.S.C. § 8127(i)(1).

This Court has already recognized that as the later-enacted, agency-specific provision, § 8127(d) takes precedence over the earlier, government-wide mandate to procure certain goods through the AbilityOne program under the Javits-Wagner-O'Day Act. *PDS Consultants, Inc. v. United States*, 907 F.3d 1345, 1358-1360 (Fed. Cir. 2018), *cert. denied* 2020 WL 129560 (U.S. Jan. 13, 2020). To the extent there is a conflict with the printing mandate, the same reasoning should apply.[5]

[5] *PDS Consultants* also makes clear that § 8127(d) takes precedence over Part 8 of the Federal Acquisition Regulation. *PDS Consultants*, 907 F.3d at 1360 ("Even if a regulation could ever overrule a clear statutory mandate, the FAR does

The VA is the one and only agency where small businesses owned by service-disabled veterans are entitled to stand first in line for contracting opportunities. This is no accident given the VA's special mission "[t]o fulfill President Lincoln's promise 'To care for him who shall have borne the battle.'" U.S. Department of Veterans Affairs, *About VA*, https://www.va.gov/landing2_about.htm. Section 8127 was passed at a time when the United States was actively fighting two wars and veterans returning to civilian life faced high unemployment rates. The careful balance struck by Congress sought to ensure that "small businesses owned and controlled by veterans and service-disabled veterans should routinely be granted the primary opportunity to enter into VA procurement contracts." H.R. Rep. No. 109-592, at 14-15. The CFC's decision rips a hole in that protection for the brave warriors who sacrificed to serve the United States.

not purport to do so with respect to § 8127(d). FAR Part 8 begins by stating, '[e]xcept ... as otherwise provided by law' …").

CONCLUSION

For the foregoing reasons, the decision of the Court of Federal Claims should be reversed.

Respectfully submitted,

/s/ Thomas G. Saunders

THOMAS G. SAUNDERS
MATTHEW E. VIGEANT
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

Attorneys for Amicus Curiae Kingdomware Technologies, Inc.

January 31, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Circuit Rule 32(a)(7)(B)(i) and Fed. R. App. P. 29(a)(5).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 4,903 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Thomas G. Saunders
THOMAS G. SAUNDERS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 663-6000

January 31, 2020

CERTIFICATE OF SERVICE

I hereby certify that, on this 31st day of January, 2020, I filed the foregoing Brief for Amicus Curiae Kingdomware Technologies, Inc. with the Clerk of the United States Court of Appeals for the Federal Circuit via the CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

/s/ Thomas G. Saunders
THOMAS G. SAUNDERS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 663-6000