No. 19-464

IN THE

Supreme Court of the United States

VETERANS CONTRACTING GROUP, INC.,
Petitioner,

v.

UNITED STATES,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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ARGUMENT

In opposing certiorari, the government only underscores why this Court's review is necessary. The government spends just a few paragraphs (at 8-9) trying to defend the Federal Circuit's actual holding: that the VA's decision to deny VCG's bid and cancel the solicitation was lawful. In doing so, the government parrots the Federal Circuit's sweeping logic, arguing that because the individual contracting officer did not know VCG's removal from the VetBiz database was unlawful at the time he rejected VCG's bid, the officer's decision was necessarily not arbitrary and capricious. But that myopic approach to arbitrary-and-capricious review—focusing on the subjective knowledge of an individual rather than the agency, and upholding agency action in isolation even though it was based entirely on an earlier, unlawful agency action—conflicts with the approach taken by other courts of appeals. Pet. 10-14.

That other courts of appeals disagree with the Federal Circuit's approach should come as no surprise. The logic of the decision below allows the administrative state to engage in a Kafkaesque shell game. As exemplified by the government's position in its opposition here, the Federal Circuit's decision empowers the government to shield unlawful agency conduct by refocusing review on the subjective knowledge of an individual agency employee, thereby allowing an agency to rely on concededly unlawful decisions to justify other agency decisions taken in direct reliance thereon.

Rather than seriously engaging with the sweeping and irrational implications of that approach, the government spends much of its opposition attempting to reframe this case as a dispute about the proper remedy for the VA's unlawful decision to remove VCG from

VetBiz in the first place. But those arguments ignore the Federal Circuit's actual holding. The decision below did not consider the question of remedy because it held that the VA's decision to cancel the solicitation was *lawful* and that no remedy was warranted. The government is thus simply wrong to suggest that this case raises a dispute about whether the Federal Circuit was required to set aside the cancellation "even if the cancellation itself was lawful." Opp. 7-8.

The government also suggests that certiorari should be denied because the factual record "fails to account for changes in the status of the roof repair due to the passage of time." Opp. 14. The government does not claim there have been such changes, despite bearing the burden to come forward with evidence. This is presumably because it knows that performance is not complete. But even if it were, the Court would still have jurisdiction under the cases the government itself cites. And failing that, the Federal Circuit's decision still could not stand because a finding of mootness would require vacatur under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

The Court should not allow the government's response to distract from the important legal question in this case. Certiorari is necessary to resolve the two splits identified in the petition (at 12-13) and to reinforce fundamental principles of administrative law.

I. THE PETITION PRESENTS AN IMPORTANT QUESTION THAT WARRANTS THE COURT'S REVIEW

A. The Federal Circuit's Decision Created Two Related Circuit Splits

The government claims (at 11) that the petition "does not identify" any circuit split. That is plainly incorrect.

1. The government offers no substantive response to the first circuit split identified in the petition. Contrary to the Federal Circuit's focus on the actions of an individual decision-maker taking into account only the individual's knowledge, other courts of appeals review the actions of the agency as a whole based on the information available to the entire agency. Pet. 10-12.

The government does not seriously dispute that a court's inquiry under the APA *should* focus on the agency's knowledge rather than the knowledge of the individual who effectuated the agency's position. The government does not even attempt to rebut most of the cases cited for that proposition. And for the one case it does discuss, the government does not dispute that the Fourth Circuit reviewed the actions of the Department of Agriculture *as a whole* rather than focusing on the subjective rationality of the individual agency employee who applied the agency's unlawful policy to the plaintiff. *Dalton* v. *United States*, 816 F.2d 971 (4th Cir. 1987).

Instead of seriously engaging with the first circuit split identified in the petition, the government offers a single footnote downplaying that split because VCG supposedly "invited" a "subjective inquiry" in this case by arguing that the contracting officer acted pretextually. Opp. 9 n.4. But the government's attempt to ex-

plain away the split identified in the petition rewrites the Federal Circuit's decision. While the court certainly discussed pretext in the course of its analysis, *see* Pet. App. 8a-9a, it did not stop there. The Federal Circuit went on to hold that the contracting officer's decision was lawful because the officer did not know at the time that the agency's decision to remove VCG from VetBiz was unlawful. *See* Pet. App. 10a (a "contracting officer must act in consideration of circumstances as they exist at the time of his decision").[1]

The decision below thus makes clear that the Federal Circuit's arbitrary-and-capricious review focused only on the subjective rationality of the individual government actor, rather than the conduct of the agency as a whole. That holding squarely presents the first split identified in the petition and warrants this Court's review.

2. The government claims (at 11-12) that the Federal Circuit's decision cannot have created any split because the panel majority supposedly "disclaimed" Judge Dyk's accusation that the court's decision held that "an agency's decision based on an earlier, unlawful action is rational unless the agency official making the decision knew the earlier action was unlawful." But the majority's response to Judge Dyk's dissent only highlights the importance of the question presented in this petition.

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[1] Indeed, the government acknowledges as much elsewhere in its opposition. *See* Opp. 6 (recognizing that the Federal Circuit held that the contracting officer acted lawfully in reliance on the VA's decision to remove VCG from VetBiz, and then "also rejected petitioner's assertion that the contracting officer had acted pretextually").

In attempting to disclaim Judge Dyk's description of its holding, the majority pressed the same logic that the government relies on it its opposition—namely, that the contracting officer had no choice but to cancel the solicitation because he lacked authority to consider bids by someone not listed in VetBiz. Pet. App. 10a-11a n.7. But that ruling walked straight into a second circuit split. The panel was acknowledging that the contracting officer's decision flowed directly from the VA's earlier, unlawful decision to remove VCG from VetBiz. *See id.* (acknowledging that, but for the VA's removing VCG from VetBiz, the contracting officer "would likely have awarded the contract to VCG"). Yet the panel nevertheless refused to invalidate the contracting officer's decision solely because VCG's removal had not *yet* been found unlawful or set aside by a court at the time he made his decision. Pet. App. 10a ("That the Court of Federal Claims determined four months after cancellation that [the removal from VetBiz was unlawful] does not retroactively render his actions irrational."). That holding squarely presents the second split identified in the petition because it upholds an agency action that concededly flowed directly from an earlier, unlawful agency action.

Far from being a narrow holding, the logic of the Federal Circuit's decision sweeps well beyond this case. Individual employees of an agency likewise lack authority to deviate from agency regulations, but it would be absurd to say that action on the basis of an unlawful regulation is therefore shielded from review simply because the regulation had not yet been invalidated when the action was taken. Other courts of appeals have thus set aside agency actions premised on or flowing from earlier unlawful agency action. *See, e.g.*, *United States*

v. *Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977); *Dalton*, 816 F.2d at 973-975.

The distinction the government attempts to draw (at 13) between "direct application" of an invalid rule and reliance on an unlawful action by another agency employee is untenable. In *Nova Scotia*, the regulations were invalid because the *process* for adopting them was flawed. 568 F.2d at 252-253. The agency employees taking the enforcement action did not themselves directly violate those procedural rules; rather, the enforcement action was unlawful because *other parts* of the agency had not followed the proper procedures and the flawed *outcome* of their actions provided the basis for the enforcement action. *See also Dalton*, 816 F.2d at 973-975 (invalidating agency decision based on memorandum that was itself procedurally flawed). The same is true here. The decision to cancel the solicitation after opening the bids was based directly on VCG's unlawful removal from the database, and but for that unlawful action, the VA "would likely have awarded the contract to VCG." Pet. App. 11a n.7

A hypothetical illustrates how far-reaching the consequences could be if the government were allowed to use its own unlawful action to justify depriving citizens of their statutory rights. Imagine that a person leaving government employment wants to extend his health insurance for a few months under COBRA, but that for some reason the person's name has been arbitrarily or unlawfully omitted from the list of departing government employees that an individual officer in the agency relies on to processes COBRA requests. The employee finds out and fights to get back in the database, even going to court and prevailing in the face of resistance by an unresponsive bureaucracy. But when the dust clears, the individual agency employee who

processes COBRA requests says it is too late because the employee was not in the database when the deadline passed. Under the panel and the government's reasoning, the former employee would be out of luck because "[n]othing about" the individual employee's "decision was arbitrary or capricious" when viewed in isolation. Opp. 9.

Even more alarmingly, the Federal Circuit's logic would apply no matter how egregious the agency's violation. For example, suppose a veteran-owned business were removed from VetBiz because of the owner's race. Then, when that decision was being challenged, a contracting officer disregarded the business's bid because it was not listed in VetBiz. Under the Federal Circuit's rule, the decision not to consider the business's bid would be lawful. VCG made this very point about outright discrimination in its petition, Pet. 19, and it speaks volumes that the government does not even attempt to deny it.

3. Finally, the government faults the petition (at 11) for not identifying a split on "a precise legal question, such as the scope of a contracting officer's authority." But that argument ignores the unique nature of the Federal Circuit. The Federal Circuit hears all appeals from the Court of Federal Claims, and its decisions set nationwide rules on subject matter within its exclusive jurisdiction. One would not expect to see a "precise" split in that context. The Federal Circuit's erroneous ruling will apply in all government contracting cases and in challenges to agency actions reviewable only by the Federal Circuit. *See* Pet. 14-15. That alone warrants review.

The conflict between the legal principles the Federal Circuit applied and what other courts of appeals

have done in analogous situations only strengthens the need for review. Pet. 10-14. Those cases, by nature of the Federal Circuit's jurisdiction, involve slightly different facts. But the rule that they apply is at odds with what the Federal Circuit did here, showing that the Federal Circuit has split with other courts of appeals on a fundamental question of administrative law.

B. The Government's Extensive Discussion Of Remedies And Discretion Is Irrelevant To The Question Presented

The government spends a significant portion of its opposition trying to transform the question presented into a narrow dispute about the appropriate remedy for the VA's unlawful decision to remove VCG from VetBiz in the first place. *See* Opp. 9-11, 12-14. The government points out that VCG already received bid preparation costs, reinstatement in the database, and an extension of its registration, *see id.* 13-14, and thus concludes that this case is merely about whether the Federal Circuit properly exercised its equitable discretion to deny VCG additional relief in the form of an injunction setting aside the VA's decision to cancel the bid. But the government's extensive discussion of the Federal Circuit's discretion in awarding equitable remedies bears no resemblance to what the Federal Circuit actually held in this case. The Federal Circuit did not decide this case as a matter of equitable discretion. To the contrary, it acknowledged that, in evaluating a bid protest, the court must "follow the [APA] and set aside the agency action 'if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Pet. App. 7a. The court then went on to evaluate the underlying merits of the agency's decision, ultimately holding that the VA's decision to deny VCG's bid and

cancel the solicitation in reliance on VCG's unlawful exclusion from VetBiz was lawful. The question presented in the petition challenges the legal predicate for that decision upholding the agency's action as lawful.

The government suggests (at 7-8, 9-11) that VCG might have raised an alternative theory of relief below or in the petition—that, "even if the cancellation itself was lawful, the [Court of Federal Claims] was required to set it aside in order to provide complete relief for a different unlawful agency action." But the petition is emphatically not asking this Court to consider what should have happened "even if the cancellation itself was lawful." Indeed, as the government recognizes, neither the briefing below nor the Federal Circuit's decision address the hypothetical theory the government now proposes. *See* Opp. 8 ("Petitioner's briefs before the panel did not assert [the theory] that vacatur of the cancellation was an essential element of relief for its earlier unlawful removal from VetBiz."); *id.* ("The panel majority likewise did not address that remedial issue."). The question presented here is whether the VA's cancellation was unlawful because it followed directly from an earlier unlawful agency action, just as any good faith agency action would be unlawful if solely based on an invalid regulation. As discussed above, that question warrants the Court's review. *Supra* 4-7.

The case the government relies (at 10) on for the proposition that "courts in bid-protest suits enjoy their traditional equitable discretion" actually undermines the government's position. *PGBA*, *LLC* v. *United State*s, 389 F.3d 1219 (Fed. Cir. 2004), considered whether a provision of the Administrative Dispute Resolution Act of 1996 ("ADRA") incorporates the APA's requirement that challenged government action must be "set aside" if it is found to be arbitrary and ca-

pricious. *See id.* at 1224. The Federal Circuit held that the ADRA, *unlike the APA*, gives the Court of Federal Claims discretion to decide whether to issue injunctive relief. *Id.* at 1226-1227. *PGBA* thus reinforces that where (as here) a court reviews a bid protest under the APA, it must set aside the challenged agency action if it is found to be arbitrary, capricious, or otherwise unlawful.

II. THE CASE IS NOT MOOT

The government's argument that the petition should be denied because the record does not indicate whether there have been changes in the status of the roofing repair contract inverts the parties' obligations. As this Court has held, "[i]f a party to an appeal suggests that the controversy has, since the rendering of judgment below, become moot, *that party* bears the burden of coming forward with the subsequent events that have produced that alleged result." *Cardinal Chem. Co.* v. *Morton Int'l, Inc.*, 508 U.S. 83, 98 (1993) (emphasis added). The government points to no evidence that the status of the roof repair project has changed. This is presumably because it knows that more than a year remains on the contract. *See* https://www.usaspending.gov/#/award/CONT_AWD_36C24218C0115_3600_-NONE-_-NONE-.

Even if the government had demonstrated that the status of the roof repair had changed in a manner precluding the injunctive relief VCG seeks, review of the Federal Circuit's opinion still would be appropriate. The government cites *Kingdomware Technologies, Inc.* v. *United States*, 136 S. Ct. 1969 (2016), but it in fact demonstrates that review is not precluded. In *Kingdomware*, this Court recognized that there was "no live controversy in the ordinary sense … because no court

is now capable of granting the relief the petitioner seeks." *Id.* at 1975. The Court nevertheless reviewed the bid protest on the merits, reasoning that the issue was likely to recur "in circumstances where the period of contract performance is too short to allow full judicial review before performance is complete." *Id.* at 1976.

VCG challenges more than a particular decision on a particular contract; it challenges the legal position that an agency can unlawfully exclude a contractor from qualifying to bid for a contract and then lawfully cancel the contract for lack of eligible bids. As a frequent bidder for government contracts, VCG has previously had its eligibility challenged by disappointed adversaries, and there is a reasonable possibility that it will again be temporarily removed from VetBiz while eligibility issues are litigated. VCG therefore may be excluded from contracts that it should be allowed to bid on—and those contracts in turn may be completed before the judicial process can be completed. *See Kingdomware*, 136 S. Ct. at 1976 (recognizing "an exception to the mootness doctrine for a controversy that is capable of repetition, yet evading review." (internal quotation marks omitted)). This matter therefore would not be moot even if the project status had changed.

In any event, if there were legitimate concerns about mootness, the proper course would not be to deny the petition. The long-established practice of this Court in such circumstances is "to reverse or vacate the judgment below and remand with a direction to dismiss." *Munsingwear*, 340 U.S. at 39. In the alternative, the Court would need to remand for the Federal Circuit to address mootness.

CONCLUSION

The petition should be granted. In the alternative, the decision below should be vacated.

Respectfully submitted.

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