No. 19-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Department of Veterans Affairs (VA) is required by statute to award contracts based on competition limited to small businesses owned by service-disabled veterans when certain requirements are met. *See* 38 U.S.C. § 8127(d); *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969, 1976-1977 (2016). To compete for such contracts, a veteran-owned small business must be listed in a database maintained by the government. Shortly before the procurement at issue in this case, Veterans Contracting Group (VCG) was improperly removed from that database. There is no dispute that VCG's removal was unlawful, but the Federal Circuit held that the VA's decision to cancel the solicitation in reliance on VCG's absence from the database was not unlawful because the individual contracting officer making the recommendation to do so allegedly did not have subjective knowledge of the VA's underlying violation of the law.

The question presented is:

Whether agency action based on an earlier, unlawful act by the agency is shielded from judicial correction based on an individual employee's alleged lack of knowledge that the agency's earlier action was illegal.

CORPORATE DISCLOSURE STATEMENT

No parent or publicly held company owns 10% or more of petitioner Veterans Contracting Group, Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Veterans Contracting Group, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Federal Circuit affirming the judgment of the Court of Federal Claims (App. 1a-17a) is reported at 920 F.3d 801. The Federal Circuit's order denying panel rehearing and rehearing en banc (App. 67a-68a) is unreported. The opinion of the Court of Federal Claims on the parties' motions for judgment on the administrative record and granting a permanent injunction (App. 21a-44a) is reported at 135 Fed. Cl. 610. The opinion of the Court of Federal Claims grant-

ing a preliminary injunction (App. 45a-66a) is reported at 133 Fed. Cl. 613.

JURISDICTION

The Federal Circuit entered judgment on April 2, 2019, and denied a timely rehearing petition on July 9, 2019. App. 1a-17a, 67a-68a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Administrative Procedure Act (APA) provides in relevant part:

> The reviewing court shall—
>
> …
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law ….
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706.

INTRODUCTION

The Federal Circuit's decision in this case contravenes well-settled principles of administrative law. Over a dissent by Judge Dyk, that court held that a decision based on an earlier, unlawful agency action does not violate the Administrative Procedure Act (APA) unless the individual employee of the agency involved with the decision subjectively knew that the agency's

earlier action was unlawful. Such a rule improperly treats an agency and its employee as if they were separate entities, effectively engrafts a bad faith requirement into the APA, and "would insulate much agency action from effective review." App 15a.

This case arises out of a solicitation for bids for a roofing contract to be issued by the Department of Veterans Affairs. The VA is required to award contracts based on competition restricted to small businesses owned by service-disabled veterans when certain requirements are met. *See* 38 U.S.C. § 8127(d); *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969, 1976-1977 (2016). To compete for such contracts, a veteran-owned small business must be listed in a database known as VetBiz, which is maintained by the VA. Veterans Contracting Group (VCG) was properly listed in that database for years and submitted a bid for the roofing solicitation at issue here. But shortly before the VA opened and considered the sealed bids, the VA unlawfully removed VCG from VetBiz. Accordingly, when the bids were opened, the contracting officer did not consider VCG's bid and, due to the absence of that bid, the VA cancelled the solicitation.

There is no dispute that VCG's removal from VetBiz was unlawful, and the Federal Circuit acknowledged that the "'VA would likely have awarded the contract to VCG had it not erroneously removed VCG from the database.'" App. 10a-11a n.7. The Federal Circuit nonetheless upheld the VA's decision to cancel the solicitation rather than allow VCG to resubmit its contract proposal, reasoning that the VA's contracting officer did not know at the time of his decision that VCG's exclusion from the database was unlawful.

The Federal Circuit's decision creates a circuit split on two related issues. First, the Federal Circuit departed from the rulings of other circuits in holding that arbitrary-and-capricious review under the APA focuses on the reasonableness of an individual decision-maker's actions considering that individual's own knowledge, rather than on the reasonableness of the actions of the agency as a whole considering all information available to the agency. Second, the Federal Circuit departed from other courts of appeals by holding that when an agency employee bases a decision on an unlawful regulation, action, or policy, that decision cannot be challenged on the ground that the underlying regulation or policy was unlawful without proof that the employee making the decision knew of that illegality at the time.

Without this Court's intervention, review of agency actions within the jurisdiction of the Federal Circuit will be very different than review of other agency actions. The Federal Circuit's erroneous holding, moreover, undermines fundamental tenets of administrative law, including that review of agency actions looks to the decision-making processes and knowledge of all relevant agency actors and that agency action taken in reliance on a prior unlawful agency action is itself unlawful. The Federal Circuit's decision allows agencies to evade meaningful judicial review by withholding from the final decision-makers within the agency knowledge concerning preliminary decisions or factfinding.

The Court should grant certiorari to bring the Federal Circuit's application of the APA in line with that of other circuits.

STATEMENT

1. With limited exceptions, the VA is required to award contracts "on the basis of competition restricted to small business concerns owned and controlled by veterans." 38 U.S.C. § 8127(d); *Kingdomware*, 136 S. Ct. at 1976-1977. To be eligible to compete for those contracts, a veteran-owned small business must be certified in a database maintained by the Secretary of Veterans Affairs, known as "VetBiz." App. 2a; 38 U.S.C. § 8127(e), (f).

In the bidding process used by the VA, interested bidders submit bids under seal. 48 C.F.R. § 14.101(c). At a specified date and time, a VA contracting officer opens the sealed bids and reads them aloud. *Id.* § 14.402-1. Once the bids have been opened, "award must be made to that responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation." *Id.* § 14.404-1(a)(1).

2. VCG is a small construction contractor majority owned by Ronald Montano, a service-disabled veteran. The VA verified that VCG is a service-disabled-veteran-owned small business in 2013, and reaffirmed that status each year until 2017. App. 4a.

In June 2017, the VA issued a solicitation for a contract to replace roofing at a medical center in Northport, NY. App. 4a, 33a. Bidding was restricted to service-disabled-veteran-owned small businesses. App. 4a. Bids were due July 28, 2017. *Id.* VCG submitted a sealed bid for the contract.

On July 21, 2017, just a week before bids were due for the roofing contract, however, the VA removed VCG from the VetBiz database. App. 4a. Ordinarily,

businesses are provided with notice and an opportunity to respond before they are removed from VetBiz. *See* 38 C.F.R. § 74.22. The VA did not follow this process in removing VCG. Instead, the VA removed VCG without prior notice based on a Small Business Administration (SBA) ruling that, due to certain provisions relating to death or insolvency in VCG's corporate papers, Montano's majority ownership of VCG was not unconditional under the definition applied by the SBA for the purpose of procurements by agencies *other than the VA*. App. 2a-4a. The VA's own regulations did not apply that same definition, and the VA had rejected a similar challenge to VCG's eligibility as a service-disabled-veteran-owned small business in a near-contemporaneous proceeding. App. 3a; C.A.J.A. 86. In fact, the SBA decision acknowledged that the VA used different eligibility criteria for veteran-owned businesses, and distinguished the VA's rules because the SBA was considering VCG's eligibility to bid on a non-VA procurement. C.A.J.A. 56-57. The VA nonetheless relied on the SBA decision as the sole basis to remove VCG from the VetBiz database, without any independent analysis. C.A.J.A. 63-64

On July 26, 2017, VCG informed the VA that its removal from VetBiz was unlawful, noting in a letter that went to the contracting officer handling the roofing solicitation that the VA "had already determined" that "challenges to VCG's shareholder agreement were without merit." C.A.J.A. 81. VCG soon thereafter filed a bid protest in the Court of Federal Claims. *See* C.A.J.A. 83-92. VCG's complaint noted that the VA removed VCG from VetBiz "based solely on the negative SBA determination, despite the fact that [the VA] had found VCG eligible despite the same allegation three months prior." C.A.J.A. 87. The complaint asked

for a declaration that the VA "acted unreasonably and contrary to law and regulations." C.A.J.A. 89. VCG also asserted that it was "entitled to an injunction ordering [the VA] to (1) include VCG in the VetBiz database and (2) determine that VCG is eligible to compete[]" for the roofing solicitation. C.A.J.A. 90.

On July 28, 2017, the VA contracting officer opened bids for the roofing solicitation. App. 5a. VCG had submitted a bid close to the government's projected cost, but the contracting officer did not consider its bid because VCG was no longer listed in VetBiz. *Id.*; C.A.J.A. 78; *see* 38 U.S.C. § 8127(e) ("A small business concern may be awarded a contract … only if the small business concern and the veteran owner of the small business concern are listed in the database of veteran-owned businesses maintained by the Secretary[.]")." The next lowest responsive bid was 30% higher than the government's estimate. App. 5a. Since the VA deemed there to be no reasonable bids other than VCG's (whose bid was not considered), the contracting officer recommended cancelling and reposting the solicitation. *Id.*; *see* C.A.J.A. 79-80.

On August 22, 2017—just hours after the VA had finalized cancellation of the roofing solicitation—the Court of Federal Claims found that VCG was likely to succeed in demonstrating that its removal from VetBiz was arbitrary and capricious. App. 5a-6a. The court noted that "if the government has wrongfully prevented [VCG] from competing for a contract award that it should be eligible to receive, … the integrity of that procurement is compromised." App. 65a. The court issued a preliminary injunction setting aside the VA's July 21 decision and ordering the VA to restore VCG to VetBiz. App. 65a-66a. But because the VA was in the process of cancelling the roofing solicitation, the court

deemed VCG's claim as to that solicitation "moot." App. 66a n.11.

On December 21, 2017, the Court of Federal Claims made its injunction permanent, holding that it was "arbitrary for VA to mechanistically" remove VCG from VetBiz upon an SBA determination of ineligibility as a veteran-owned small business given the differences between the SBA and VA regulations concerning eligibility. App. 39a. However, the court upheld the VA's decision to cancel the roofing solicitation because the "contracting officer" who initiated the cancellation "looked only to the fact that [the VA] had removed [VCG] from the [VetBiz] database" and did not know that VCG's removal was arbitrary or unlawful. App. 42a.

3. VCG appealed to the Federal Circuit, which affirmed over Judge Dyk's dissent. The majority acknowledged that "cancellation after bids have been opened is generally disfavored," App. 9a, but held that the contracting officer did not violate the Administrative Procedure Act because he did not know the VA had improperly excluded VCG from the database. *Id.* The court reasoned that solicitations may be cancelled "if 'there is a compelling reason to reject all bids and cancel the invitation,'" *id.* (quoting 48 C.F.R. § 14.404-1(a)(1)), and "[a] compelling reason may exist when '[a]ll otherwise acceptable bids received are at unreasonable prices,'" *id.* (second alteration in original) (quoting 48 C.F.R. § 14.404-1(c)(6)). Therefore, because VCG was not listed in the VetBiz database when bidding closed and because bids from all other parties were at an unreasonable price, the Federal Circuit concluded that the contracting officer "had a compelling reason to request cancellation." *Id.*

The court thought it significant that the individual contracting officer did not know that the VA "had wrongfully removed VCG from VetBiz when he requested cancellation of the solicitation." App 9a. The Federal Circuit explained that "[a]t the time of his decision, the contracting officer was bound by" the VA's assertion that VCG had properly been removed from VetBiz "and had to presume the [VA] had acted lawfully." App. 10a. In other words, even though VCG's removal from the database was ultimately found to be unlawful, the Federal Circuit found that "the contracting officer had a rational basis to cancel the roof replacement solicitation" at the time that he did so. App. 11a.

Judge Dyk's dissent warned that the majority's decision "can only be achieved by treating the contracting officer and the preparer of the database as if they were separate entities." App. 13a-14a. But "[t]hey were not," Judge Dyk explained: "Both were part of the VA and acted as agents of the VA." App. 14a. Judge Dyk stressed that "[i]t should make no difference which individual within the VA committed the error," *id.*, and warned that under the majority's approach, "any agency decision based on an unlawful regulation would presumably be lawful, if, at the time, the agency official was unaware of the illegality," App. 15a. The court's decision, Judge Dyk explained, "effectively limits our review to whether the contracting officer acted in bad faith." *Id.* Judge Dyk further explained that the VA's decision to remove VCG from VetBiz "was unlawful from the beginning"—even before the Court of Federal Claims recognized it as such—and that any decision based on an unlawful agency action is itself unlawful. *Id.* Judge Dyk concluded that "where the agency commits an error that denies a bidder the opportunity to have its bid considered solely on the merits, the appro-

priate remedy must give the bidder that opportunity, placing it in the position it would have occupied but for the agency's error." App. 17a.

REASONS FOR GRANTING THE PETITION

I. THE FEDERAL CIRCUIT'S DECISION CREATED TWO RELATED CIRCUIT SPLITS

Bid protests are reviewed "pursuant to the standards" of the APA. 28 U.S.C. § 1491(b)(4). Accordingly, a court must grant relief if the agency action is found to be (as relevant here) "arbitrary, capricious, … or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Here, the Federal Circuit constrained its review of the VA's decision to cancel the roofing solicitation by focusing on the knowledge and actions of a single actor within the VA—the contracting officer—rather than the agency as a whole. That decision created two separate but related circuit splits.

1. First, the Federal Circuit has created a circuit split regarding whether a court reviewing a claim that agency action is arbitrary or capricious should examine the rationality of the actions of the individual decision-maker, given his or her individual knowledge, or of the agency as a whole, given the information available to the entire agency.

The Federal Circuit here asked whether the "*contracting officer*" had a "rational basis"—based on the information available to *him* at the time—"for cancelling the roof replacement solicitation." App. 9a (emphasis added). The court stated that the contracting officer "had to presume the [VA] had acted lawfully" in removing VCG from VetBiz, App. 10a, and "because VCG was not listed in the VetBiz database when bidding closed," the contracting officer acted reasonably in

not considering VCG's bid, App. 9a. The court therefore concluded that the contracting officer had "a compelling reason to request cancellation" of the roofing solicitation—and that doing so was not arbitrary or capricious—because the only remaining bids were significantly higher. *Id.*

The Federal Circuit's analysis thus looked only at the rationality of the contracting officer's decision to cancel the roofing solicitation, given his subjective knowledge. It refused to consider whether the VA acted arbitrarily or capriciously in removing VCG from VetBiz in the first place, even though the contracting officer would likely not have cancelled the solicitation but for that earlier agency action. Indeed, the Court of Federal Claims had found that removing VCG from VetBiz *was* arbitrary and capricious. But because the removal decision was not made by the same contracting officer who recommended canceling the solicitation, the court of appeals evidently thought it irrelevant to the court's review of the cancellation decision.

Other courts of appeals, in contrast, review the decision-making process of the agency as a whole, not only that of the final individual decision-maker at the agency, in arbitrary-and-capricious review. That is because all the knowledge of and actions by any agency actor are imputed to the agency itself (or the head of the agency). As the Seventh Circuit has put it, "[f]inal responsibility for rendering a decision lies in the agency itself, not with subordinate hearing officers, and it is [that agency] decision that [a court] review[s]." *St. Francis Hosp. Ctr.* v. *Heckler*, 714 F.2d 872, 874 (7th Cir. 1983) (per curiam); *see also, e.g.*, *Gulf Restoration Network* v. *United States Dep't of Transp.*, 452 F.3d 362, 366 n.1 (5th Cir. 2006) ("Because the Secretary remains ultimately responsible …, the opinion will refer

to actions by the Maritime Administrator and the Coast Guard [pursuant to delegated authority] as actions by the Secretary."); *Doane* v. *Espy*, 26 F.3d 783, 785 (7th Cir. 1994) ("The Secretary of Agriculture is the official responsible for administering the Act. As such, he is ultimately responsible for determinations made by" offices within the Department of Agriculture and subordinate officials); *Johnson* v. *United States*, 206 F.2d 806, 809 (9th Cir. 1953) (the Secretary of the Interior "must shoulder the ultimate responsibility for" ministerial acts performed by his subordinates).

In *Dalton* v. *United States*, 816 F.2d 971 (4th Cir. 1987), for example, the Fourth Circuit looked broadly to the actions of the Department of Agriculture rather than the action of an individual Unit Supervisor when reviewing the disqualification of a grocery store from the food stamp program, *id.* at 973-974. The Unit Supervisor had disqualified the grocery store in reliance on a memorandum from the Deputy Administrator for the Family Nutrition Program, which stated that program participants were not eligible for a civil monetary penalty in lieu of disqualification if they had previously been sanctioned. *Id.* at 973. The Unit Supervisor as an individual clearly acted rationally in following the direction that came from above. But the Fourth Circuit did not confine its review to the rationality of the decision-making of the specific Unit Supervisor. *Id.* at 973-974. Rather, the court examined the actions of the entire agency, and because it found the Deputy Administrator's memorandum to be "without any reasoned explanation," *id.* at 974, it reversed the action of the Unit Supervisor who had relied on that memorandum, *id.* at 975.

2. The Federal Circuit's decision also created a second, related, circuit split concerning whether an

agency action that is required only by an earlier agency action should be set aside when the earlier agency action is deemed unlawful.

The Federal Circuit here acknowledged that the VA's removal of VCG from VetBiz was unlawful. *See* App. 10a (noting that "the Court of Federal Claims determined … that the [VA] had not acted lawfully" in removing VCG from the database). The Federal Circuit also acknowledged that, but for the VA's removing VCG from VetBiz, the contracting officer would likely not have canceled the roofing solicitation but rather "would likely have awarded the contract to VCG." App. 10a-11a n.7 (quotation marks omitted). Nonetheless, the court held that the contracting officer's decision to cancel the solicitation could not be set aside because it was required by the VA's action in removing VCG from VetBiz—an action that had not *yet* been found unlawful or set aside by a court. App. 10a & n.7. In other words, even though the VA acted unlawfully in removing VCG from VetBiz, any subsequent agency actions that flowed from that unlawful removal—while the removal was in effect—were deemed valid.

Other courts of appeals, in contrast, set aside agency actions premised on or flowing from earlier unlawful agency actions. For example, in *United States* v. *Nova Scotia Food Products Corp.*, 568 F.2d 240 (2d Cir. 1977), the Food and Drug Administration had sought to enjoin Nova Scotia Food Products from processing hot smoked whitefish except in accordance with the agency's time-temperature-salinity regulations, *id.* at 242-243. There was no dispute that Nova Scotia did not comply with those regulations. Nonetheless, the Second Circuit reversed an injunction against Nova Scotia because it found that the regulations were arbitrary and had been promulgated without the required proce-

dures. *See id.* at 252-253. The Second Circuit thus halted an enforcement action that relied on an earlier agency action (the promulgation of regulations) because that earlier action was unlawful.

Similarly, in the *Dalton* case discussed above, the Fourth Circuit invalidated the agency decision disqualifying a grocery store from participating in the food stamp program, even though that decision was required by a memorandum from the Deputy Administrator of the program, because that memorandum was itself unlawful. 816 F.2d at 973-975.

Under the Federal Circuit's approach, the outcomes in both of these cases would have been different. In *Nova Scotia Food Products*, the whitefish-processing regulations might have been invalidated prospectively, but any enforcement action that relied on those regulations before they were invalidated would have been upheld as a rational consequence of the regulations. And in *Dalton*, the Deputy Administrator's memorandum requiring disqualification for noncompliant program participants who had previously been sanctioned would have been deemed unlawful, but disqualification decisions already made in reliance on that memorandum would have escaped invalidation.

II. UNLESS THE COURT GRANTS CERTIORARI, THESE CIRCUIT SPLITS WILL LEAD TO UNWARRANTED DISCREPANCIES IN THE APPLICATION OF ADMINISTRATIVE LAW

Unless this Court grants certiorari to resolve these circuit splits, the Federal Circuit will review cases under the APA differently than other courts of appeals. Given the nature of the Federal Circuit's jurisdiction, this will lead to discrepancies in the scope of judicial review applied to the actions of different agencies or in

certain types of cases. For example, government contracting decisions, decisions of the Patent and Trademark Office, decisions of the Merit Systems Protection Board, and decisions regarding veterans' benefits—review of which is within the exclusive jurisdiction of the Federal Circuit—will be reviewed differently than other agency actions. Specifically, review of these decisions will focus on whether the individual decision-maker acted rationally given his or her subjective knowledge, rather than whether the agency as a whole acted rationally. And to the extent the Federal Circuit finds regulations governing these kinds of decisions unlawful, it will do so only prospectively, denying relief to any petitioner who was harmed because a government employee applied the unlawful regulation in good faith.

The Administrative Procedure Act was intended to "introduce greater uniformity of procedure and standardization of administrative practice among the diverse agencies." *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 41 (1950). Permitting the Federal Circuit to apply the APA differently would substantially undermine that objective. The Court should grant certiorari to restore a uniform understanding of how to apply the APA to situations in which an agency relies on its own earlier, unlawful action, including situations in which the individual officer making a decision is allegedly not aware of the illegality.

III. THE FEDERAL CIRCUIT'S DECISION IS ERRONEOUS AND WOULD UNDERMINE FUNDAMENTAL PRINCIPLES OF ADMINISTRATIVE LAW

The Federal Circuit's decision in this case is contrary to fundamental tenets of administrative law and the Administrative Procedure Act. The decision would substantially weaken the protections of the APA, insu-

lating much agency decision-making from review and leaving many parties injured by unlawful administrative actions without remedy. Even apart from the circuit splits created, the magnitude of this deviation from settled principles, especially in a court with national jurisdiction like the Federal Circuit, warrants review to restore a proper understanding of the law.

A. The Federal Circuit's Decision Is Erroneous

1. The Federal Circuit's narrow focus on the knowledge of an individual contracting officer cannot be reconciled with Section 706 of the APA, which requires a reviewing court to consider whether "*agency* action" is arbitrary, capricious, or unlawful. 5 U.S.C. § 706(2)(A) (emphasis added). The statute's focus on "agency" action directs courts to review the lawfulness of and reasoning underlying the actions of the "agency" as a whole, not the action of whichever individual agency employee is the final decision-maker. Other sections of the APA are in accord, creating a cause of action for "[a] person suffering legal wrong because of *agency* action" and providing for judicial review "*thereof*." *Id.* § 702 (emphasis added). And the APA waives the United States' sovereign immunity for certain actions against "*an agency or* an officer or employee thereof." *Id.* (emphasis added); *see also id.* § 704 ("*Agency* action made reviewable by statute and final *agency* action for which there is no other adequate remedy in a court are subject to judicial review." (emphases added)).

In explaining the scope of review required by the APA, this Court has explained that courts should look to whether "the *agency* has relied on factors which Congress has not intended it to consider," whether a decision "runs counter to the evidence before the *agency*," and whether a decision is so "implausible" that it

cannot be ascribed to "the product of *agency* expertise." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (emphases added); *see also* Modjeska, *Administrative Law Practice and Procedure* § 6:11 (2019 update) (judicial review focuses "upon the full administrative record which was before the *agency* at the time of decision." (emphasis added)). Although "an agency decision" may "reflect[] the thought processes of numerous persons," "[t]he decision becomes one of the institution," Stein & Mitchell, 5 *Administrative Law* § 38.01 (2019), and must be evaluated in light of the evidence before the entire agency. *See NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975) ("[W]hen adopted, the reasoning [of an agency employee] becomes that of the agency and becomes *its* responsibility to defend.").

By focusing on the subjective knowledge of the contracting officer, the Federal Circuit abdicated its duty under the APA to consider whether the "*agency* action" was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (emphasis added). This error is particularly egregious because VA regulations confirm that the cancellation decision belongs to the agency: Solicitations may be cancelled after bids have been opened only when "*the agency head* determines in writing" that specific criteria are met. 48 C.F.R. § 14.404-1(c) (emphasis added). Thus, the contracting officer acts only as an agent of the VA, and the VA remains responsible for his decisions. That is why here the cancellation of the roofing solicitation did not take effect until the regional head of contracting activity approved it. *See* C.A.J.A. 80. VCG's suit challenged the *VA's* decision to cancel the roofing solicitation, not merely the action of an individual VA contracting officer. The Federal Circuit

should have reviewed that decision by considering the knowledge and reasoning of the agency as a whole.

2. The Federal Circuit also erred in ruling that an agency action cannot be arbitrary or capricious or otherwise contrary to law if it is required by a prior agency decision, even if that prior agency decision is later held to be itself unlawful. The APA permits review of "preliminary" or "intermediate" agency actions "on the review of the final agency action." 5 U.S.C. § 704. The Federal Circuit's decision turns this provision on its head by permitting review *only* of the preliminary or intermediate agency action, and not permitting review of—or the granting of relief for—subsequent agency actions premised on the earlier action.

This Court explained in *State Farm* that an agency action is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider." 463 U.S. at 43. Certainly, Congress did not intend an agency to take action based on an earlier arbitrary, capricious, or unlawful decision. Yet that is exactly what the VA did here—cancelling the roofing solicitation because the earlier unlawful decision to remove VCG from VetBiz excluded the contractor who had made the most reasonable bid. As Judge Dyk pointed out, by the majority's logic, "any agency decision based on an unlawful regulation would presumably be lawful, if, at the time, the agency official was unaware of the illegality." App. 15a.

B. The Federal Circuit's Decision Improperly Allows Agencies To Rely On Their Own Unlawful Acts, With Far-Reaching Consequences

The Federal Circuit's approach creates a major new loophole in the APA. It treats agencies like a col-

lection of individuals and effectively requires proof of individual knowledge or bad faith before the agency can be held accountable. App. 15a (Dyk, J., dissenting) ("[T]he majority effectively limits our review to whether the contracting officer acted in bad faith.").

The repercussions are likely to be far reaching for veteran-owned businesses. Under the Federal Circuit's approach, no matter how egregious the reason for excluding a veteran-owned small business from VetBiz, any contracting decisions in reliance on that exclusion could not be challenged unless the contracting officer knew of the underlying violation. For example, if a veteran-owned small business was removed because a VA official disapproved of a political position taken by its owner, or even if the process was tainted by outright racial bias or other prejudice, the precedent established here would require upholding any contracting decision based on that unlawful exclusion unless the contracting office had actual knowledge of the violation.

Moreover, the Federal Circuit's logic extends far beyond the VA or government contracting. Any agency with a two-tier decision-making process can now look to this decision as support for the proposition that reliance on an earlier, unlawful decision is permitted as long as knowledge within the agency is siloed. This creates perverse incentives for agencies to discourage information sharing among offices and employees because subjective ignorance will be a defense to arbitrary-and-capricious claims. For example, an agency could have one group of employees make factual findings and provide those findings to a separate individual to make an enforcement or regulatory decision. Under the Federal Circuit's decision, a reviewing court could inquire whether the final decision-maker reached a rational conclusion from the factual findings he or she was

provided, but it could not invalidate the final agency action because the factual findings themselves were arbitrary or capricious.

The Federal Circuit's decision unduly constrains court review of agency action and will undermine public confidence in agency action. The Court should grant certiorari to resolve the circuit split and confirm the scope of courts' oversight of agency decision-making.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2019