1 IN THE SUPREME COURT OF THE UNITED STATES

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3 KINGDOMWARE TECHNOLOGIES, :

4 INC., :

5 Petitioner : No. 14-916

6 v. :

7 UNITED STATES. :

8 - - - - - - - - - - - - - - - - - - x

9 Washington, D.C.

10 Monday, February 22, 2016

11

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States

14 at 10:06 a.m.

15 APPEARANCES:

16 THOMAS G. SAUNDERS, ESQ., Washington, D.C.; on behalf

17 of Petitioner.

18 ZACHARY D. TRIPP, ESQ., Assistant to the Solicitor

19 General, Department of Justice, Washington, D.C.; on

20 behalf of Respondent.

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1 P R O C E E D I N G S

2 (10:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument

4 first this morning in Case No. 14-916, Kingdomware

5 Technologies v. United States.

6 Mr. Saunders.

7 ORAL ARGUMENT OF THOMAS G. SAUNDERS

8 ON BEHALF OF THE PETITIONER

9 MR. SAUNDERS: Mr. Chief Justice, and may it

10 please the Court:

11 By its plain terms, the 2006 Veterans Act

12 requires the VA to consider veterans first under the

13 Rule of Two before awarding contracts to other

14 suppliers.

15 That mandate, which applies only to the VA

16 and reflects the agency's unique obligation to veterans,

17 contains no exception for the contracts formed when the

18 VA makes awards under the Federal Supply Schedule. And

19 the government's attempt to create such an exception

20 fares no better than its prior attempts to resist the

21 mandate.

22 Its semantic distinction between contracts

23 and orders conflicts with its own concession that an FSS

24 order is a contract in the ordinary sense. It

25 creates --

1 JUSTICE ALITO: Before you get too deeply
2 into the merits of the case, could you just tell us what
3 relief you could get at this point that's consistent
4 with the Tucker Act?
5 MR. SAUNDERS: We're seeking a declaratory
6 judgment that, with respect to these particular
7 procurements, the VA erred in failing to conduct market
8 research and -- and to apply the Rule of Two before
9 going straight to the FSS.
10 JUSTICE GINSBURG: On the ground that this
11 is capable of repetition yet evasive of review, is that
12 your -- your answer to the mootness?
13 MR. SAUNDERS: Absolutely. It's -- it's
14 recurred -- the same situation's recurred numerous
15 times. Even during the course of this litigation,
16 Kingdomware continues to be actively competing for these
17 contracts, and these contracts are of a short duration.
18 JUSTICE KENNEDY: What was the amount of
19 this contract?
20 MR. SAUNDERS: This contract was for a base
21 amount of $33,000.
22 JUSTICE ALITO: Isn't it strange to get a
23 declaratory judgment that something unlawful occurred in
24 the past but that no other relief is available for this
25 past violation of the law?

1 MR. SAUNDERS: Well, no other relief is
2 available solely because of the passage of time it has
3 taken for this case to work its way up to this Court.
4 And that's why the doctrine of capable of repetition yet
5 evading a view -- review is --
6 JUSTICE ALITO: What -- what I'm getting at
7 is: What good would such a declaratory judgment do?
8 MR. SAUNDERS: Well, once -- once the legal
9 rights, once the meaning of 8127(d) is established in
10 this case by that declaratory judgment, then going
11 forward, you would expect that the VA will comply with
12 this Court's interpretation of the law. And so it would
13 be a tremendous benefit to the veterans community going
14 forward from that declaration, from that elucidation of
15 the legal rights here.
16 JUSTICE SOTOMAYOR: You did -- your client
17 stipulated away the cost that it would have been
18 entitled to after winning before the GAO, correct?
19 MR. SAUNDERS: The --
20 JUSTICE SOTOMAYOR: So there was relief.
21 You just gave it away, essentially.
22 MR. SAUNDERS: Well, the -- the Tucker Act
23 doesn't allow for the protest costs, and so the -- the
24 relevant costs that might have been allowed would be bid
25 preparation costs.

1 But the very point of this case is there
2 wasn't an opportunity to bid. This isn't a situation in
3 which the opportunity was put out there and Kingdomware
4 was able to compete for it. It was -- it skipped
5 through the Rule of Two process required by 8127, went
6 straight to the Federal Supply Schedule, and the first
7 that Kingdomware ever learned of it was when the
8 announcement went up saying that the contract had been
9 awarded on the sole-source basis to someone else under
10 the Federal Supply Schedule.
11 So under the circumstances of this case,
12 where it's about the government going to a procedure it
13 shouldn't be going to first, there's no opportunity to
14 amass those bid protests.
15 JUSTICE SOTOMAYOR: Your client is still an
16 FSS vendor and is still competing for contact --
17 contracts that the --
18 MR. SAUNDERS: Yes.
19 JUSTICE SOTOMAYOR: Okay.
20 MR. SAUNDERS: And -- and our client -- he's
21 listed it in the FSS, but most importantly for this case
22 is a service-disabled veteran-owned small business and
23 continues to be listed in the VA's database, which
24 limits the eligibility for the Rule of Two here.
25 JUSTICE SOTOMAYOR: The government takes the

1 position that if we rule in your favor, that means that
2 we're doing away with, effectively, the FSS.
3 Is that your view?
4 MR. SAUNDERS: No. Absolutely not. The FSS
5 is still going to supply to a large number of
6 procurements. Congress, when it made this targeted
7 provision mandatory and focused on the VA, also said in
8 8127(e) that it only applies to the businesses that are
9 registered in the VA's database.
10 And it did that for two reasons: Number
11 one, as opposed to the self-certification procedures of
12 the Small Business Act, which are more open to abuse, it
13 wanted to prescreen and make sure these are the real
14 deal here in the database. And that also ensures that
15 the VA has this information at its fingertips.
16 Currently, there are about 7,000 people
17 listed in that database. There are going to be tons of
18 procurements for which the VA will simply consult its
19 own database and see that there is no veteran-owned
20 business that's eligible to do this.
21 JUSTICE SOTOMAYOR: Can it tell from that
22 database whether or not a particular vendor is a veteran
23 or a disabled veteran?
24 MR. SAUNDERS: Oh, absolutely. The -- the
25 database -- and this is one -- this is very clear -- the

1 VA has its own VA-specific database mandated by law that
2 is limited to veteran-owned and service-disabled,
3 veteran-owned small businesses. And the only people who
4 are eligible under 8127(e) for this preference are
5 people who are contained in that database.
6 JUSTICE SOTOMAYOR: Well, there's two
7 databases. There is general database and there is the
8 FSS database. Are we talking about the same one?
9 MR. SAUNDERS: No, we're talk -- we're
10 talking about a separate VA-specific database. And --
11 and so what's happening is the VA is gathering in this
12 information. It knows who the veteran-owned small
13 businesses are. And then, rather than consulting its
14 own database to see who they are, it's been going
15 straight to the FSS.
16 JUSTICE SOTOMAYOR: Which -- and then you
17 are wanting to do away with the FSS?
18 MR. SAUNDERS: No, not at all. Because --
19 JUSTICE SOTOMAYOR: So they go through the
20 FSS and find the veteran-owned businesses?
21 MR. SAUNDERS: Not -- not under this
22 mandate, because the -- the mandate here in the law is
23 tied to the VA's database. And people who are listed as
24 a veteran-owned small business under the FSS database
25 don't go through those same --

1 JUSTICE GINSBURG: Mr. Saunders, I think
2 that Justice Sotomayor's question is asking you to
3 address what happens if there's than urgent need. I
4 think you would concede it's a slower process if you
5 have to use the Rule of Two. And -- and suppose there
6 is an urgent need for a certain good or service.
7 MR. SAUNDERS: Well, two things: Number
8 one, the Rule of Two only applies when you have both
9 fair and reasonable price and best value to the
10 United States. So if there's truly an urgent need and
11 it's not going to be met by going through the Rule of
12 Two, then I think you have leeway within the best-value
13 determination.
14 CHIEF JUSTICE ROBERTS: Well, but that
15 strikes me as a -- a very thin protection.
16 Are -- these terms imply a lot of
17 discretion: What's fair? What's reasonable? What's
18 best value? The idea that that's going to operate as a
19 significant restraint on the requirement that the VA
20 locate veteran businesses seems a real stretch to me.
21 MR. SAUNDERS: But -- but the process
22 here -- I mean -- take you through the process of
23 applying the Rule of Two. It's limited to the universe
24 of the people in the database. So all the VA has to do
25 is fire up its own database and see who's out there.

1 For the heartland --

2 JUSTICE KAGAN: How is it apparent that a

3 particular veteran's business can perform a particular

4 contract? I mean, what in the database shows you, yes,

5 this veteran's small business is capable of performing

6 this contract in a reasonably effective way?

7 MR. SAUNDERS: The -- because the database

8 has the North American Industry Classification System

9 codes, which are actually the same codes that correspond

10 to what's in the FSS.

11 And to the extent there is additional

12 information that's needed, it's very easy to contact the

13 veterans in those -- that database.

14 CHIEF JUSTICE ROBERTS: Counsel, could you

15 get back to your answer to my question?

16 MR. SAUNDERS: Oh. And -- and so there's --

17 for the heartland of -- of small-business contracting,

18 the -- are going to fall into the simplified acquisition

19 procedures under part 13 of the Federal Acquisition

20 Regulation. That's for services under $150,000. And

21 for procurement of goods, it's now up to $7 million.

22 And under that system, you have a greatly

23 streamlined process for the smallest contracts, micro

24 purchases. It's -- it's really just you make the

25 decision for the sort of lower tier of contracts,

1 certainly for anything under $25,000, all the -- all the
2 government's doing is placing a purchase order under the
3 simplified acquisition procedures.
4 There is a standard form. It's Form 1449.
5 It's a single sheet of paper. And that's the purchase
6 order that they place. And quite frankly, the form
7 looks almost identical to FSS Form 347 for how you place
8 the order.
9 So for the lower-level stuff, there is
10 already a procedure outside the FSS that's incredibly
11 streamlined. And as you begin to get to larger
12 dollar-valued contracts, the requirements of going
13 within the FSS begin to ramp up in terms of having to
14 seek price reductions. And also, if you think of how
15 the FSS operates in terms of services, you might be
16 listed on there for the GSA as someone who can provide
17 information technology, customized computer programming.
18 But to go to Justice Kagan's question about
19 how do you know can you actually do this work? That
20 same process plays out under the FSS. For the services,
21 yes, someone's listed as a custom computer programmer.
22 But the agency still has to issue a statement of work
23 saying this is what we actually need done. Here are our
24 requirements. It puts that out there with their request
25 for quotations that come in from the various FSS

1 suppliers.

2 Now, they will be constrained by, you know,

3 the prices that they listed before on the FSS, but it

4 still is an interactive process. It's not just firing

5 up the computer and -- and clicking --

6 JUSTICE GINSBURG: When is it -- what's

7 it --

8 JUSTICE KENNEDY: And I suppose there is

9 some system for the government to check to see whether

10 or not this person really has been offering this good,

11 has -- has a track record, because that goes with the

12 fair and reasonable price?

13 MR. SAUNDERS: Yes, absolutely. And they

14 can compare, you know, a broad -- when they're doing the

15 market research, they have a lot of flexibility to

16 compare here.

17 The other thing I will say is that there is

18 a broad grant of discretion to the VA in terms of what

19 it requires in the database. So if it finds that it

20 needs more information to make this law work up front

21 from the vendors, then it can require that. It can take

22 the effort that it spent resisting the mandate and put

23 it into making the mandate work within its existing --

24 JUSTICE BREYER: This is a case --

25 JUSTICE GINSBURG: You mentioned the best

1 value to the United States is one of the qualifications.
2 I understand fair and reasonable price. But
3 what is offer best value to the United States? What
4 does that add to the fair and reasonable price?
5 MR. SAUNDERS: Well, best value is designed
6 to go beyond price. It's -- it's really sort of the
7 totality of the circumstances. It lets the government
8 consider quality, its -- its needs. In this case it
9 would allow it to consider the urgency of a particular
10 procurement.
11 CHIEF JUSTICE ROBERTS: Well, the sort of
12 thing that there will be an awful lot of litigation
13 about, don't you think?
14 MR. SAUNDERS: Against a framework that has
15 been recognized, the discretion -- you know, there's
16 litigation within an APA framework in terms of arbitrary
17 and capricious review.
18 CHIEF JUSTICE ROBERTS: Well, you're putting
19 a lot more weight on that -- excuse me -- on that
20 provision if you prevail on your statutory
21 interpretation argument. And it seems to me that that
22 provision is inevitably going to lead to litigation.
23 How do you tell what's best? It's a combination of
24 price and quality. It's not any absolute that you can
25 identify, and you know, what's fair, what's reasonable.

1 I -- I think the businesses that you
2 represent would be litigating those terms -- it's hard
3 to say -- almost in every case.
4 MR. SAUNDERS: I -- given the -- the
5 standards for making that out, I don't think that you
6 would see rampant litigation in this area in terms of
7 the -- the squishiness of the time cuts in favor of the
8 government in that sense there.
9 JUSTICE KENNEDY: How do -- how do we know
10 how to evaluate your answer or the government's position
11 if the government comes and says, oh, this is just
12 unworkable, it's going to be difficult if we've never
13 been involved in government contracting? Are there
14 findings? Are there -- are there writings in law
15 reviews or what -- what do we look to, to determine the
16 empirical basis for your argument, or the lack of
17 empirical basis for your argument?
18 MR. SAUNDERS: I think it's looking to --
19 JUSTICE KENNEDY: Based on what we think is
20 going to happen?
21 MR. SAUNDERS: Well, no. It's looking to
22 the -- the authorities that exist on the face of the
23 statute, in terms of look at the simplified acquisition
24 procedures and how streamlined they can be, look at the
25 FSS procedures and how complicated and -- and -- they

1 can be as the dollar values ramp up.

2 JUSTICE GINSBURG: But there is no empirical

3 evidence because this is -- this is a new kind of

4 provision, this mandatory set-aside; isn't that true?

5 So we don't have any -- any logic. We don't have any

6 experience at all.

7 MR. SAUNDERS: We -- we don't have direct

8 experience with the mandatory provision like this

9 because it's been resisted for a decade and hasn't

10 gone --

11 JUSTICE SOTOMAYOR: Hasn't the SBA been

12 using it?

13 MR. SAUNDERS: Well, under the Small

14 Business Act, there were agencies that were doing

15 set-asides, and then it was made explicit that they

16 could do set-asides within the FSS. We also have been

17 dealing with situations for many years where you have

18 other preferences outside of the Small Business Act

19 framework in terms of Federal Prison Industries, the

20 AbilityOne Program for the blind and the severely

21 disabled that have always taken precedence over the FSS.

22 And it's not proved to be unworkable to give those

23 mandates mandatory effect without going to the FSS.

24 And you know, we've also cited -- you see in

25 our reply briefs -- sources saying -- and we have a

1 treatise that we've cited -- that's discussed the fact
2 that the simplified acquisition procedures for these low
3 value contracts are just as simple, if not in many ways,
4 simpler.
5 JUSTICE SOTOMAYOR: But you're not talking
6 about just the small value contracts. You want the
7 supply to all contracts, to all orders. So to tell me
8 that it works for the small ones is not answering the
9 questions of my colleagues. How much is it going to
10 complicate the big ones?
11 MR. SAUNDERS: Well, for the -- for the big
12 ones, the FSS itself is already complicated. It's
13 already ramping up in complexity as the contracts get
14 bigger.
15 And quite frankly, when we get to those
16 bigger dollar figures, the idea that if -- if a small
17 business is going to qualify for a contract that's above
18 $150,000, that we can't go through the procedures that
19 Congress mandated here, the VA can't even consult its
20 own database and see whether there's an eligible
21 supplier before going straight to the FSS I don't think
22 holds water in that sense.
23 And at the end of the day here, we're
24 looking at a mandate that was plain on its face in terms
25 of Congress saying shall award contracts, contracts

1 being an expansive, all-inclusive term here. And these
2 policy judgments are judgments that Congress made in
3 terms of the administrative feasibility of this when it
4 decided to move away from the failed Small Business Act
5 approach and go to the mandatory approach here.
6 JUSTICE BREYER: That's why I wondered --
7 I'm not certain how this works -- that I read the
8 statute. It says, "The department shall award contracts
9 on the basis of competition restricted to veterans. If,
10 if, if. Okay? Well, what wouldn't be awarded according
11 to veterans? I mean, what was surprising to me is that
12 the goal was to have 3 percent awarded to veterans.
13 But if I read this the way you read it,
14 everything will be awarded to veterans. I mean, maybe
15 not literally, but there are millions of veterans.
16 There are probably hundreds of thousands or millions of
17 veterans' businesses. So wouldn't everything be awarded
18 to veterans? What wouldn't be?
19 MR. SAUNDERS: No, not -- not at all.
20 JUSTICE BREYER: What wouldn't? That's what
21 I want you to address.
22 MR. SAUNDERS: The vast -- for the -- given
23 the limited number of veteran-owned small businesses
24 that are out there, and --
25 JUSTICE BREYER: How many are there?

1 MR. SAUNDERS: When -- when Congress was
2 going through the legislative history here, it was
3 hearing that maybe 15 percent of businesses. So
4 there --
5 JUSTICE BREYER: It may be 15 percent of
6 businesses, but the question is what does the Department
7 of Veterans Affairs buy? And my guess is they buy lots
8 of stuff. They buy household stuff, they buy paper
9 towels, they buy buildings, they buy all kinds of
10 things. And in respect to all the things they buy, if
11 you read this, a contract supplies to everything. I
12 guess they'll buy it all from veterans. Now, it's
13 just -- or 90 percent, I don't know. It's very
14 surprising to me that Congress would have wanted the
15 Veterans Administration to buy everything from veterans.
16 Now -- now, that's -- or nearly everything.
17 Now you explain to me -- I must be missing
18 something -- and -- and you explain to me what I'm
19 missing.
20 MR. SAUNDERS: First, the -- the fair and
21 reasonable price and best value requirement --
22 JUSTICE BREYER: No, no, I understand that.
23 I said they have certain qualifications, of course. Do
24 you think the veterans -- things aren't -- they have
25 reasonable prices. They -- they have -- they're

1 qualified. They do a fine job. Let's say it's
2 surprising that Congress would have wanted nearly
3 everything to be bought from veterans, that's all. And
4 where am I wrong?
5 MR. SAUNDERS: You're wrong in terms of
6 the -- the natural cap on the limit of businesses that
7 are out there, but where there is a veteran-owned small
8 business that can perform the requirement --
9 JUSTICE BREYER: I'm not saying they can't
10 perform.
11 MR. SAUNDERS: No, no. I'm saying --
12 JUSTICE BREYER: I want you to address what
13 you're calling this natural cap. You're saying to me
14 you're wrong, it doesn't mean everything, it means like
15 10 percent. Is that what you're saying? Or what --
16 what are you saying?
17 Explain what it is. I read it. I thought
18 it's everything. Now you explain why it isn't
19 everything or nearly everything. I mean, if you're not
20 a veteran, Congress wouldn't normally say you don't get
21 a leg up, but to shut you out entirely? I mean,
22 that's -- that's just my problem that I want you to
23 explain.
24 MR. SAUNDERS: It's -- it is everything, all
25 the contracts for which there is a veteran-owned small

1 business that can supply --

2 JUSTICE BREYER: Are you saying Congress

3 want -- just wanted everything that veterans can supply

4 to be supplied by veterans? And if I say, is that

5 everything, it's not 90 -- it's not a hundred percent,

6 probably not 99 percent, but it might be 80 percent. I

7 mean, I'm guessing. You tell me. You're the expert.

8 What percent is it when you win?

9 MR. SAUNDERS: When I win I don't think

10 we're going to be talking about numbers that high.

11 Congress in the legislative history was talking about 15

12 percent of the --

13 JUSTICE KENNEDY: I thought your answer

14 would be a hundred percent.

15 MR. SAUNDERS: I'm just saying as a

16 practical matter. In terms of what Congress --

17 JUSTICE SOTOMAYOR: What's the --

18 JUSTICE KENNEDY: What is your answer to

19 Justice Breyer? A hundred percent provided the

20 statutory requirements are satisfied?

21 MR. SAUNDERS: Yes; that is correct. When

22 there is a business --

23 JUSTICE KENNEDY: And we know how many

24 businesses there are because they registered under a

25 special procedure.

1 MR. SAUNDERS: Right. And so when there is
2 the business that's available, yes, it should be getting
3 all those opportunities. That's exactly what
4 Congress --
5 JUSTICE KAGAN: Well, what Justice -- what
6 -- Justice Breyer raised a question about the way this
7 statute is worded because it says, "For purposes of
8 meeting the goals." And the goals are very low; the
9 goals are 3 percent.
10 So it seems odd for a statute to say for
11 persons of meeting a 3-percent goal, you should do the
12 following, which will lead to 90 percent.
13 MR. SAUNDERS: Well, a few points, Justice
14 Kagan. First, the 3-percent goal was the
15 government-wide goal under the Small Business Act. This
16 provision for service-disabled veterans requires the VA
17 to set a higher goal.
18 JUSTICE KAGAN: How high?
19 MR. SAUNDERS: It doesn't -- it doesn't
20 require the specific number. It has to be higher than
21 3 percent. And we're talking about --
22 JUSTICE KAGAN: That could be four percent.
23 MR. SAUNDERS: It -- it could be, but we're
24 talking about a period in time when there have been
25 goals since 1999, discretionary authority since 2003.

1 And as of 2005, the government's progress towards its
2 3-percent goal was .6, six-tenths of 1 percent.
3 JUSTICE KAGAN: No, it sounds like the
4 government did very badly in meeting its goals. And you
5 can understand why Congress would have done something to
6 say the government -- and specifically the VA -- has to
7 do a lot better toward meeting its goals.
8 But the goals are still, you know, pretty
9 far down compared to what Justice Breyer was indicating
10 is the natural tendency of this system that you're
11 describing to produce -- you know, almost everything is
12 given to a veteran.
13 MR. SAUNDERS: Well, where there is a
14 veteran that's eligible. But even at the time that this
15 was done, the goals had always been a 3 percent
16 government-wide goal. Individual agencies were required
17 to set their goals based on the maximum practical
18 opportunity, and so even at the time going into this,
19 the VA had already set a higher goal. I believe it was
20 7 percent.
21 The goals that it had set under the statute
22 have been even higher than that. And the answer is,
23 yes, the government was expecting the VA -- this to be
24 an important mandate for the VA because this was tied to
25 the VA's unique obligation to help veteran-owned small

1 businesses rather than setting up --

2 CHIEF JUSTICE ROBERTS: You -- you mentioned

3 that the -- you've mentioned several times, I think,

4 that there has to be a veterans -- veteran-owned

5 business that's eligible as -- as -- but don't you think

6 there will be a lot more veteran-owned businesses if you

7 prevail? In other words, if everything is open to the

8 preference, as long as there is, you know, two that get

9 the preference, don't you think a lot more veterans --

10 won't it make a lot more sense for them to go into

11 business rather than some other line of work?

12 MR. SAUNDERS: It may well be. And Congress

13 would think that's fantastic. We're --

14 CHIEF JUSTICE ROBERTS: Well, you shouldn't

15 be telling us that the limitation is that there's only

16 so many veteran-owned businesses, because if you

17 prevail, there will be many times that.

18 MR. SAUNDERS: Yeah. And there could be,

19 and then that -- you know, this was enacted at a time in

20 2006 where we were facing incredible unemployment rate

21 among veterans. And so this is encouraging formation of

22 more veteran-owned small businesses.

23 JUSTICE BREYER: I see many good things.

24 People would enlist in the Armed Forces. They would

25 have careers assured after. It still surprises me, but

1 my question is not really aimed at you. It's aimed at
2 the other side, and you would have a chance to answer
3 this question.
4 I can understand. I accept your argument,
5 pretty much. I don't know why there would be any
6 exception to the SS -- the FSS, or whatever it's called.
7 But I was rather stopped by the lower
8 court's argument which they have given up, which is that
9 right in the statute, not in a preference, but right in
10 the statute it says, "For purposes of meeting the
11 goals," under Section A. That, I understand.
12 And then what you do is you'd have goals;
13 they should be tough goals, and -- and if you're way
14 ahead of the goals, then maybe you don't have to do it.
15 That was their argument. The government's given that
16 up.
17 So -- so I don't know what to do. I mean,
18 I'm going to ask them for help --
19 MR. SAUNDERS: But --
20 JUSTICE BREYER: -- and then -- the same --
21 MR. SAUNDERS: The government has given that
22 up because the stated purpose of setting those goals was
23 to increase contracting opportunities. And the House
24 report here was referring to tools to meet, if not
25 exceed, its contracting goals. The goals were never

1 intended to be ceilings here. And if, in retrospect, it
2 seems like there might be some mismatch between the
3 mandate and the goals, you have to remember that at this
4 time they were so far from meeting even the more modest
5 goals that Congress was thinking of this in mandatory
6 terms: We have to do everything we can here to ramp up
7 this obligation, because the old approaches, the
8 discretionary approaches aren't working.
9 And the idea that in doing that they would,
10 without saying anything to that effect in the statute,
11 leave an enormous loophole that lets the agency take up
12 to 60 percent of its procurements off the top and just
13 send them straight to the FSS doesn't jive, especially
14 when you remember that at the time that the agency was
15 missing its goals, those contracting goals counted not
16 just open market contracts, but FSS orders were being
17 counted. When the government was doing .6 against the
18 3 percent goal, that was both on the open market and on
19 the FSS. Congress was worried about that failure across
20 the board and enacted a mandatory provision.
21 CHIEF JUSTICE ROBERTS: Thank you, counsel.
22 Mr. Tripp.
23 ORAL ARGUMENT OF ZACHARY D. TRIPP
24 ON BEHALF OF THE RESPONDENT
25 MR. TRIPP: Mr. Chief Justice, and may it

1 please the Court:

2 The mandate here applies when the VA awards

3 wholly new contracts, not when it places orders under

4 old ones.

5 JUSTICE GINSBURG: Mr. Tripp, would you

6 preliminarily explain why the government walked away

7 from what was a winning position in the Federal circuit?

8 I mean, it's really odd. I read the Federal circuit

9 decision, and I expected to open the government brief

10 and say, yeah, the Federal circuit was right.

11 You're telling us the Federal circuit was

12 wrong.

13 MR. TRIPP: I just -- about the Federal

14 circuit's position, we think the Federal circuit's

15 rationale is right, so far as it goes, but that it's

16 incomplete. And so the Federal circuit has a complete

17 answer for why Petitioner's sort of maximalist position

18 is wrong, which is that if -- if this mandate applies in

19 100 percent of procurements, then the secretary's

20 discretion to set goals is pretty much wiped out, and

21 it's hard to even talk about them as goals at all. But

22 the fact that there needs to be discretion somewhere in

23 this scheme doesn't really answer where the discretion

24 needs to exist.

25 And the distinction that we're drawing --

1 first, I want to be clear about the distinction that
2 we're drawing. We're not saying that when you place an
3 order under a preexisting contract that that's not a
4 kind of contract; of course it is. We say that outright
5 in our brief. What we're saying is that when Congress
6 establishes a procedure that applies when an agency,
7 quote, awards contracts, that's naturally read to refer
8 to awarding wholly new contracts, not placing orders
9 under old ones.
10 JUSTICE ALITO: Your answer to Justice
11 Ginsburg is that the Federal circuit was actually right
12 even though you disagree with its reasoning. And isn't
13 the real answer to -- is the real answer to this
14 question that the -- the VA regulations don't say
15 anything about goals?
16 MR. TRIPP: But it's not only that the VA
17 regulations don't say anything about goals. It's that
18 the VA's regulations map up perfectly with the argument
19 that we're -- we're -- we're pressing here, which is
20 that this is a mandate that we apply in 100 percent of
21 procurements when we are awarding a wholly new contract.
22 We do it every single time under the regulations, but
23 those regulations never even come up. You never --
24 like, a contracting officer doesn't begin a procurement
25 by turning to part 1819.70 of the -- of the FAR.

1 There's like a 5,000-page document, right?
2 They can open up, march their way through,
3 place an FSS order under part -- part 8. And when you
4 place an order under a preexisting contract, the FAR is
5 crystal clear that you do not consider set-aside
6 requirements.
7 JUSTICE SOTOMAYOR: I don't quite --
8 MR. TRIPP: And so the argument we're
9 advancing here is foursquare with the way our
10 regulations actually work and what our practices have
11 been on the ground since 2009.
12 JUSTICE SOTOMAYOR: So why is it that you
13 call these order -- order contracts? I look at --
14 MR. TRIPP: Pardon?
15 JUSTICE SOTOMAYOR: I look at your history,
16 and you, yourself, the government itself, calls these
17 orders order contracts.
18 MR. TRIPP: An order is a kind of contract,
19 you know, under the --
20 JUSTICE SOTOMAYOR: It's not a kind. It is
21 a contract.
22 MR. TRIPP: Yeah. Yeah, it's a contract
23 under the --
24 JUSTICE SOTOMAYOR: So tell me what kind of
25 contract do you have, absent the order with the FSS

1 vendor?

2 MR. TRIPP: Oh, under the FSS, there's

3 already a government contract between the United States

4 and the vendor to supply an indefinite quantity of -- of

5 a certain category of products or services. And so

6 we're placing an order under those preexisting

7 contracts.

8 JUSTICE SOTOMAYOR: How difficult is it for

9 you to take the database that you have with respect to

10 what are veteran-owned businesses. Take that database,

11 look at it, look at what it is you need, a stapler, and

12 see if -- how many vendors on that list supply staplers,

13 and then check that against the FSS?

14 MR. TRIPP: It -- it --

15 JUSTICE SOTOMAYOR: If there's no veteran

16 that matches the FSS list, then you go to the FSS.

17 What's the problem with that --

18 MR. TRIPP: If I could take a step back and

19 explain why this is so important to the VA.

20 The thing that we're most troubled by is

21 that Petitioner's position would block us from being

22 able to place orders under preexisting contracts. The

23 whole point of the contract --

24 JUSTICE SOTOMAYOR: No. You didn't listen

25 to me.

1 You go to your veteran-owned list; you're
2 looking for staplers. You find five veteran-owned
3 businesses on your list that sell staplers, but you want
4 to -- you need an FSS supplier, because you don't want
5 to negotiate a new contract. You don't want to do all
6 that hard work. You check whether there are two or more
7 of those five on the FSS list.
8 MR. TRIPP: All right. So you're saying if
9 we were going to use the Rule of Two to choose among FSS
10 vendors who are already qualified --
11 JUSTICE SOTOMAYOR: Exactly. Exactly.
12 MR. TRIPP: -- the first point about that is
13 that Petitioner would lose. They are not a qualified
14 vendor.
15 JUSTICE SOTOMAYOR: I don't care about the
16 merits of whether it wins or loses. I'm talking about
17 the legal issue.
18 What is so difficult about that?
19 MR. TRIPP: Yeah. A couple points about
20 that.
21 The -- that would significantly narrow our
22 practical concerns. Our practical concerns are mostly
23 driven by -- by -- by the interpretation that we would
24 not be able to place orders under preexisting contracts
25 at all. We do this 85,000 times a year.

1 JUSTICE SOTOMAYOR: I don't -- I don't --
2 MR. TRIPP: You know, this is very important
3 to us. And so in our -- our first position about that
4 is that we just don't think that Congress did that.
5 This statute is materially identical in its wording to
6 five earlier statutes, none of which have ever been
7 interpreted that way. When Congress wanted to address
8 this --
9 JUSTICE SOTOMAYOR: Except the FBA has
10 interpreted this contrary to you; so has the GAO.
11 MR. TRIPP: The FBA -- the FBA took that
12 position, and the FAR counsel, which represents the
13 entire procurement policy of a broad, pan-executive
14 branch procurement agency, rejected it. So it said that
15 it was going to be unworkable, and that it was unclear
16 whether it would offer us a --
17 JUSTICE KAGAN: Mr. Tripp, I guess I'm not
18 sure I understand. I mean, I understand your policy
19 concerns and -- and the way you think this will damage
20 procurement practices. But the statute just seems
21 pretty clear. Once you say that this is a contract,
22 what you've said in your brief and right now. And once
23 you say that, it just -- the statute says, "A
24 contracting officer of the department shall award
25 contracts on the basis of competition restricted to

1 veterans' small businesses." So that seems to kind of
2 answer the case, whatever the policy identifications
3 are.
4 MR. TRIPP: Well, I -- I think the basic
5 problem with that is if you take that sort of -- just
6 like sort of one element understanding of contract
7 and -- and blow it through --
8 JUSTICE KAGAN: Well, it's your own
9 understanding of contract. You just said this is --
10 MR. TRIPP: No, no.
11 JUSTICE KAGAN: -- contract.
12 MR. TRIPP: But -- but the problem is that
13 there's many Federal procurement statutes that apply
14 when the -- when the Federal government, quote, "awards
15 contracts." That's what five prior small business
16 contracting preference statutes say. They apply when
17 there are either awards contracts, award contract
18 opportunities, or reserves contracts. And -- and the
19 two most basic statutes in the area --
20 JUSTICE KAGAN: But as I understand it, all
21 of those contracts have a "may" in there.
22 MR. TRIPP: No.
23 JUSTICE KAGAN: Or almost all of them do.
24 MR. TRIPP: Well, one of them has always had
25 a "shall." One had "shall for 13 years." But if I

1 could get to another --

2 JUSTICE KAGAN: Yeah, but -- but most of

3 them have a "may." But here you have -- and -- and the

4 "shall"s, the one or two that there are, have really

5 never been adjudicated by -- certainly by this Court.

6 MR. TRIPP: Right.

7 JUSTICE KAGAN: So the question is, well,

8 there we are. We are, you know, for the first time

9 deciding what this language means, and this language

10 means that you shall award contracts on the basis of

11 this restricted competition. And you say this is a

12 contract, so you know, end of case.

13 MR. TRIPP: Well, so a couple points.

14 The -- the very basic statutes that govern sealed

15 bidding and negotiated bidding, the most heavyweight

16 procedures for awarding a new contract, they both say

17 that the government shall award a contract under those

18 procedures. And if you extend those to the FSS, that

19 would totally break.

20 The whole point of entering into these kinds

21 of contracts upfront is that you don't have to do that

22 again and again. And when a local VA hospital needs to

23 order like stents or wheelchairs or an ultrasound

24 machine --

25 JUSTICE SOTOMAYOR: But I don't understand

1 your policy argument. Why is it so tough for you to --
2 to get those things from an FSS -- from an FSS vendor if
3 it's a veteran? I mean --
4 MR. TRIPP: Well, I mean, we often do.
5 We're -- we're currently --
6 JUSTICE SOTOMAYOR: This year --
7 MR. TRIPP: We're currently exceeding our
8 goals on -- if you look only at our FSS spending at --
9 JUSTICE KENNEDY: But the question -- I
10 think the question is, it's -- it's a matter of just --
11 MR. TRIPP: Yeah.
12 JUSTICE KENNEDY: -- pushing a second button
13 on the computer.
14 MR. TRIPP: No, it's not. It's --
15 JUSTICE KENNEDY: First of all, I want to
16 see what -- what's the FSS -- FSS, and then I want to
17 see if there are any veterans-owned businesses that
18 provide that service or that product on the FSS. push
19 two buttons. That's it.
20 MR. TRIPP: Yeah. I think that -- the
21 practical, sort of, front end of how difficult -- if we
22 are -- if we're talking about using the Rule of Two to
23 choose among qualified FSS vendors, how difficult is it
24 to do that, the upfront cost is not that big. The --
25 the bigger concern, practical concern that we would have

1 is the litigation risk that that would expose.
2 Right now, our choice of whether to do a
3 set-aside when choosing among FSS vendors, that is
4 committed to agency discretion by law because when
5 Congress addressed this point head-on in 644(r), it said
6 that agencies may, at their discretion, do this.
7 But if suddenly the Rule of Two applies in
8 every case, then in every case a disappointed bidder can
9 come in and say, oh, no, you've misapplied the Rule of
10 Two. You should have thought that they --
11 CHIEF JUSTICE ROBERTS: Well, in every case
12 there has to be -- we're dealing with small --
13 veteran-owned small businesses. The examples you gave,
14 stents, wheelchairs, ultrasound machines, are there many
15 small businesses that provide ultrasound machines?
16 MR. TRIPP: I guess I -- I don't know about
17 ultrasound machines, but we've bought things like --
18 CHIEF JUSTICE ROBERTS: There are expensive,
19 big things that you expect you have to be a big company
20 to provide, like an ultrasound machine, or you mentioned
21 stents.
22 Now maybe if they're commodities, then to
23 provide fair price and best value, it also would help to
24 be a big business as opposed to a small business. Let
25 me -- I -- I can't imagine the small business is going

1 to make a stent that is going to be at the same price
2 and same quality as some --
3 MR. TRIPP: No, but we do a lot of --
4 CHIEF JUSTICE ROBERTS: -- pharmaceutical
5 company.
6 MR. TRIPP: I mean, 13 percent of our FSS
7 dollars go to small businesses, and a lot of it are for
8 things like professional staffing, right? So we hire
9 temporary nurses and psychiatrists, cardiologists,
10 things like that, through --
11 CHIEF JUSTICE ROBERTS: 13 percent of your
12 acquisitions?
13 MR. TRIPP: Of our FSS -- when we're
14 spending on the FSS, 13 --
15 CHIEF JUSTICE ROBERTS: Okay. So I should
16 discount your parade of horribles argument by 87
17 percent. It's really not as horrible as it sounds.
18 MR. TRIPP: Our concern isn't placing an
19 order. We're happy -- we're happy. One of our --
20 we're -- we're -- like this statute has had enormous
21 effect on our procurement. We're happy to help
22 veteran-owned small businesses, but it's only one of our
23 priorities, right? Our number one agency priority is
24 caring for veterans.
25 And so our concern is that if you -- if you

1 apply this with this wooden mandate across the board in
2 every case, that it would seriously impair our ability
3 to deliver the quality care that we're trying to
4 deliver.
5 JUSTICE BREYER: Is this the case? Do I
6 understand this? Am I -- there are three parts to this.
7 Question one in my mind, is it the case that they lose
8 because the agency does not have to apply veterans only
9 where they way exceeded their goal?
10 The answer to that in the opinion would say,
11 we do not reach that question for there are no
12 regulations that suggest that the agency has tried to
13 take that approach. Am I right so far?
14 MR. TRIPP: That has tried to take the
15 approach of saying that we drop it if we're way over --
16 JUSTICE KENNEDY: Correct.
17 MR. TRIPP: Yeah, right. Okay.
18 JUSTICE BREYER: All right. Then we reach
19 question two, left one open.
20 Question 2 is do they have to choose the
21 Rule of Two in the FSS? And there are two parts to
22 that. The first part is suppose two veterans qualified
23 are already on the FSS list. And there we might say,
24 yes, you do in respect to them. Or we might say, no,
25 you don't. But if we say yes, you do, at least we

1 don't, in your opinion, wreck the system. All right.
2 Then we get to Step 3. There is no veteran
3 on the FSS. Now what do we do? And there your argument
4 is that, look, everyone on the FSS is a person who has
5 entered into a contract, which contract says that when
6 called upon for further supply, they will give it. Am I
7 right?
8 MR. TRIPP: Yes.
9 JUSTICE BREYER: So, therefore, it is that
10 contract, not the contract within the contract that
11 they're talking about. And were we to say the contrary,
12 we would have to take an architect who has 40,000 pages
13 of things he's going to do, and we change the sentence
14 on page 389 to read 300 rather than 400, and we say
15 that's a new contract, or something like that. I'm
16 trying to make an argument for you. It's not a contract
17 within a contract, it is contract to which this refer.
18 Am I way off base or is that what you're trying to say?
19 MR. TRIPP: I think that's --
20 JUSTICE BREYER: And don't just say it is
21 because you think I'd agree with it, please.
22 (Laughter.)
23 MR. TRIPP: I -- I don't think that's
24 exactly what we're trying to say. And -- and it's a
25 little hard to know --

1 JUSTICE BREYER: All right. Well, if it
2 isn't that, look, these people on the FSS list have
3 already entered into a contract, this is just
4 implementing the contract that they've already entered
5 into. If you're not saying that, then how in heaven's
6 name do you get out of his argument?
7 MR. TRIPP: We're saying that when we place
8 an order under a preexisting contract, that that is not
9 awarding a new -- awarding a contract within the meaning
10 of these procurement statutes.
11 There have been -- I -- I really do want to
12 emphasize the historical context that's built up over
13 decades about the understanding of this phrase,
14 "throughout Federal procurement law," right? There's
15 five prior statutes on exactly this same subject, and
16 every one of them has been interpreted by the FAR to be
17 categorically inapplicable when placing orders under
18 preexisting contracts.
19 And the -- one of the things that's very
20 troubling about their position is that if you say, well,
21 we want to read a lot into this special provision,
22 8127(d), it was intended to help veterans, but there's
23 nothing special about the language. It's almost
24 identical to the language of the HUBZone preference that
25 was in place from 1997 to 2000 that had -- that had --

1 sorry, 1997 to 2010 that had exactly the same shall
2 award a contract opportunity. I mean, it was very
3 powerful. And that the whole -- the whole time since
4 1978, Congress has had a provision in place saying that
5 each contract in a small dollar range shall be reserved
6 exclusively for -- for small businesses.
7 And if you --
8 JUSTICE GINSBURG: Mr. Tripp, this is an --
9 an overarching problem. The -- the argument which you
10 state very well is very complex. The Federal circuit
11 had a really simple take on it, and all of these
12 regulations and provisions that you are mentioning
13 didn't figure at all in -- in the Federal circuit's
14 opinion. So you're putting us in the position of being
15 a court of first view in a rather dense area. This --
16 this Court usually doesn't do that. It likes to know
17 what --
18 MR. TRIPP: Right.
19 JUSTICE GINSBURG: -- other judges have
20 thought about it.
21 MR. TRIPP: Yes, I -- and I -- I totally
22 understand that concern. And, you know, obviously, our
23 first-line position is that we're right for the reasons
24 that we say in our brief. This traces through all of
25 the Federal procurement statutes. It wouldn't upset

1 the -- the way things work in this area of the law, and
2 we think we're also entitled to Chevron deference. And
3 for that reason, we think you could affirm.
4 But we also said in your mootness briefing
5 that we think it would be fair to send this back to the
6 lower courts to consider these arguments in the first
7 instance --
8 CHIEF JUSTICE ROBERTS: Consider --
9 MR. TRIPP: -- we -- we recognize that.
10 CHIEF JUSTICE ROBERTS: Consider the
11 argument, or consider mootness?
12 MR. TRIPP: Consider both. But --
13 JUSTICE KENNEDY: What -- what factors does
14 the secretary look to when the secretary sets goals?
15 Because I'm going back to the argument about for
16 purposes of meeting the goals.
17 MR. TRIPP: I mean, the --
18 JUSTICE KENNEDY: What -- what -- what
19 standards does the Congress impose on the secretary when
20 the secretary sets the goals?
21 MR. TRIPP: It -- it -- the goals are
22 committed to his discretion, except for that the goal --
23 the minimum goal needs to be at least 3 percent. The
24 goals since the statute has gone into effect have been
25 in the range of 10 percent and 12 percent. And I want

1 to emphasize the --

2 JUSTICE KENNEDY: What does he --

3 MR. TRIPP: -- the night-and-day impact.

4 JUSTICE KENNEDY: What does he consider in

5 deciding whether to go 5, 10, 15? The risk of

6 litigation? The higher the goal is? Or --

7 MR. TRIPP: No, I -- no, I think -- I guess,

8 I -- I would -- I would have to -- to speculate on that,

9 but I think it's more the sort of practical reality of

10 what seems like a -- a goal, something that we

11 could push forward that's attainable, but -- but not

12 unrealistic. And -- and I --

13 JUSTICE KENNEDY: Well, if the discretion is

14 that broad, then it seems to me that maybe the Federal

15 circuit was wrong, that these goals are simply

16 aspirational. But that doesn't have any real effect on

17 the operation of the statute.

18 MR. TRIPP: Well, they have a huge impact on

19 the way that we actually procure, right?

20 This has had -- I mean, the statute --

21 before the statute was enacted, we were falling short of

22 even the 3 percent goal. Now the goals are in the range

23 of 10 to 12 -- 10 to 12 percent, and in most years we're

24 crushing these goals, right? We're beating them, even

25 on the FSS, where we're -- we're not applying the Rule

1 of Two.

2 But we're doing two other very important

3 things for veterans. We put a thumb on the scale when

4 we're considering offers that were submitted within the

5 FSS by veterans. And we also do set-asides under

6 644(r), the statute where Congress spoke very directly

7 to this and said that we may, at our discretion, set

8 aside orders placed against multiple-award schedule

9 contracts. We do those set-asides, and the -- and the

10 results have been very dramatic.

11 CHIEF JUSTICE ROBERTS: When -- I'm sorry.

12 When you say you're crushing the goals, that means

13 you're meeting them?

14 (Laughter.)

15 MR. TRIPP: We're -- sorry. Sorry.

16 We're -- we're far exceeding them. In -- in

17 many years we're -- we're nearly doubling them. And I

18 think this is something that we -- we have -- this has

19 had a huge impact on -- on our operations. I think we

20 think it's had a big impact on the veterans' community.

21 But the -- the -- our concern is that if you

22 take this sort of mechanical Rule of Two and apply it,

23 especially in the -- sort of the blocking interpretation

24 that Petitioner has been -- been pressing, that we would

25 not be able to place an order at all.

1 JUSTICE SOTOMAYOR: Could you please --
2 JUSTICE ALITO: Could you explain --
3 JUSTICE SOTOMAYOR: -- explain to me --
4 JUSTICE ALITO: Could you -- could you
5 explain why the FS -- use of the FSS was important with
6 respect to this particular contract? You provide
7 examples of the VA's ordering standard commodities like
8 a stent, or pencils, or something like that. But this
9 was -- my understanding -- maybe this is not right --
10 this was a custom service that you were seeking, and --
11 MR. TRIPP: Yes.
12 JUSTICE ALITO: -- what you did was to
13 solicit a quote from a single contractor.
14 So how does that fit in with the arguments
15 you're making about the need to use the FSS?
16 MR. TRIPP: It -- it sort of -- two things
17 about this. The -- the -- this is a somewhat unusual
18 bid because -- there -- there is not explanation in the
19 record because -- because this case was just litigated
20 on the agreed facts about the procedure.
21 The much more common -- the -- the VA orders
22 a lot of services on the FSS. It's like one of the
23 major ways that people -- that agencies purchase
24 services. And the -- the standard way of doing it,
25 it's -- it's -- you know, it's not like Amazon.com, but

1 you can go on to a website, drill down, see all the
2 vendors who -- who are already prequalified to provide
3 that kind of service. And the standard way that you
4 would do this is that you would request -- request
5 quotes from at least three of them, and then consider
6 them when they come in.
7 And when you request -- request the quote
8 from them, even if you request it from three or four of
9 them, every vendor on the schedule who is preapproved
10 will -- will see that it's open and can submit an offer,
11 and then -- and then the -- the agency would consider
12 all the offers that were given to it, and it picks the
13 one that offers the best value.
14 So that's how it would work if we were doing
15 something like hiring a temporary psychiatrist at a --
16 at a new -- at a new -- expanding a medical center in
17 Des Moines or something.
18 JUSTICE KAGAN: One of the amicus briefs
19 suggests that the VA is now doing increasingly complex
20 procurements by way of the FSS. That we have it in our
21 heads that this is all about, you know, staples and
22 paperclips, but that, in fact, the FSS is being used to
23 do things that would previously have been done on the
24 open market.
25 MR. TRIPP: I -- I -- I -- well, first, I

1 want to emphasize that the VA's primary use of this,
2 again -- this is not -- I'm not talking about staples
3 and paperclips. We're talking about, you know, the --
4 the medical-related stuff, the, you know, wheelchairs,
5 stents, all that -- temporary staffing services.
6 But yes, a lot of the FSS -- even for more
7 complex procurement, the FSS is still substantially
8 easier. And the FSS, you tend to already be sort of
9 aggregating the government's buying power. And so the
10 pricing is -- the idea of the -- of the FSS is that it's
11 both easier to do and that the price will ordinarily be
12 lower.
13 And so -- I mean, the -- the agency wouldn't
14 be going into the FSS if the agency didn't think that
15 that was the -- the best approach. And in fact,
16 whenever the procurement is over half a million dollars,
17 I believe, the FAR requires the contracting officer to
18 make an affirmative, express determination on exactly
19 that point: That -- that going through the FSS is going
20 to provide the best value for us overall.
21 And I -- and just to respond to Petitioner's
22 effort to put a lot of weight onto the best-value
23 language in the -- in the Rule of Two, I'm a little
24 confused by that because -- exactly because when --
25 whenever the agency is placing an order under the FSS,

1 under the FAR, that -- that the -- the contracting
2 officer is making a determination that that order is the
3 best value. So I -- I guess I just -- I -- I feel like
4 that -- that may just collapse on its own weight. I
5 don't -- I don't quite understand where that argument
6 goes.
7 JUSTICE KAGAN: Mr. Tripp, can -- can I ask,
8 what effect would this statute really have on your view?
9 As I understand it, the government does have to use the
10 Rule of Two on all open-market purchases; is that right?
11 MR. TRIPP: Under the statute, our
12 regulations implemented it, yes.
13 JUSTICE KAGAN: Above, like, a very low
14 threshold? Is it 3,500, something like that?
15 MR. TRIPP: Yes. Right, right.
16 JUSTICE KAGAN: So -- so if you're right,
17 what did this statute actually accomplish? In other
18 words, you already have to use the Rule of Two for
19 open-market purchases, or almost all of them.
20 MR. TRIPP: Oh, right.
21 JUSTICE KAGAN: What does the statute do?
22 MR. TRIPP: Yes. It -- so 8127(d) has a --
23 has a huge effect, because under the -- just the -- sort
24 of the regular FAR, you just have to do a set-aside for
25 small businesses, right? That's -- that's sort of norm

1 under the -- under the Rule of Two.

2 But under 8127(d), this required to -- to

3 restrict competition only to veteran-owned small

4 businesses who are in our database. So this is a far

5 more --

6 JUSTICE KENNEDY: Who --

7 MR. TRIPP: Only in our -- who are verified

8 as veteran-owned in our database.

9 So this is a far more powerful preference

10 than the -- than -- than the ordinary preference in --

11 in the FAR, or even when you take that and you couple it

12 with section 8128, which they mention in the brief,

13 which gets at, again, just sort of putting a -- a bit of

14 a thumb on the scale. Restricting competition is a very

15 powerful thing, and it has a huge effect.

16 So again, I think, I just want to emphasize

17 at -- at closing that our -- our major concern is with

18 Petitioner's sort of blocking interpretation that would

19 prevent us from -- from placing orders at all, even when

20 we have them in place, and even when we could place

21 orders with another veteran-owned small business.

22 JUSTICE SOTOMAYOR: And you still haven't

23 answered my question fully.

24 If we limit that to preexisting orders where

25 there is two or more veterans --

1 MR. TRIPP: Yes. And I -- and -- and --
2 JUSTICE SOTOMAYOR: -- on the same practical
3 consequences.
4 MR. TRIPP: The -- the practical
5 consequences are much narrower. I have -- but I have a
6 lot of trouble seeing how you limit that to this statute
7 when the language of this statute is materially
8 identical to --
9 JUSTICE SOTOMAYOR: Like we limit everything
10 else. Once we say what we think, Congress then decides
11 what it's going to do in the future.
12 MR. TRIPP: Are -- are they --
13 JUSTICE SOTOMAYOR: Right now, there are no
14 statutes like that.
15 MR. TRIPP: No, no, no. There is -- there
16 is five others on -- on the exact subject of
17 small-business contracting preferences, and especially
18 644(j), which applies across the government and says
19 that each contract --
20 JUSTICE SOTOMAYOR: The Small Business
21 Administration has read it the way Kingdomware --
22 MR. TRIPP: No, that -- but that was
23 decisively rejected by the FAR counsel, the
24 government-wide body that considered this. They said it
25 was unworkable, and it was unclear that it was going to

1 have a significant upside. Congress responded to the
2 FAR council by enacting 644(r) and establishing a
3 procedure to do that, but making it discretionary in all
4 cases.
5 And if you extend the Rule of Two mandate
6 there, first of all, it would expose us to lots of
7 litigation. But I -- I -- again, I don't see how you
8 restrict that to this statute and not all the other
9 ones.
10 JUSTICE KENNEDY: Do -- do you know what
11 proportion of the VA's annual purchases are under the
12 FSS?
13 MR. TRIPP: By dollar?
14 JUSTICE KENNEDY: Yes. Is it 5 percent,
15 or --
16 MR. TRIPP: I think it's about 20 percent.
17 JUSTICE KENNEDY: 20?
18 MR. TRIPP: About 20 percent, yes.
19 JUSTICE GINSBURG: What was the 60 percent?
20 There was a 60 percent figure.
21 MR. TRIPP: The -- the 60 percent is by
22 transaction volume. You know, a lot of the FSS orders
23 tend to be relatively small dollar order. So there's a
24 lot more of them, but they don't add up to as many
25 dollars.

1 JUSTICE KENNEDY: I see.

2 JUSTICE KAGAN: What are the kinds of things

3 that aren't done under the FSS? Like, what's the

4 remaining 80?

5 MR. TRIPP: Well, you know, a big part of

6 that are orders that we do under other contracts. So --

7 so, right, we spend $4 billion a year ordering

8 pharmaceuticals under a preexisting contract. And -- I

9 mean, if we couldn't do that, that would be really,

10 really devastating to our just basic operations.

11 CHIEF JUSTICE ROBERTS: Well, how -- do you

12 know how many veteran-owned businesses would be able to

13 offer the best value on pharmaceuticals to the VA?

14 MR. TRIPP: No. What I'm -- what I'm --

15 if -- I think actually if the question is just, you

16 know, to -- if -- if a small business needed to deliver

17 some penicillin to a -- a local hospital for an

18 individual order by a local hospital, I don't know,

19 maybe a veteran-owned small business could do that.

20 What we've done is to -- is -- as --

21 actually, as Congress directed us in Section 8125, they

22 required us to buy these things on national contracts or

23 on the FSS, and so that's what we've done. And so we

24 strategically source all of our pharmaceutical

25 purchases, or almost all of them, through this one

1 contract where we can get them in a matter of minutes.
2 We can place the order and we can get it delivered the
3 next day.
4 If there's no further questions.
5 CHIEF JUSTICE ROBERTS: Thank you, counsel.
6 Mr. Saunders, four minutes.
7 MR. SAUNDERS: Thank you.
8 REBUTTAL ARGUMENT OF THOMAS G. SAUNDERS
9 ON BEHALF OF THE PETITIONER
10 MR. SAUNDERS: Thank you.
11 This case should begin and end for this
12 Court with the concession that in the ordinary sense of
13 the term, an order under the FSS is a contract.
14 Congress chose sweeping language here in acting its
15 mandate, and that language encompasses FSS orders. And
16 to the extent there are, you know, changes that would
17 need to be made or other policy considerations, those
18 can be made by Congress in the future. But the policy
19 consideration it made is -- is embodied in the statutory
20 language it chose.
21 Now, the idea that we're going to come back
22 and limit this based on a specialized meaning of the
23 word "contract," we should remember that that argument
24 is not one that appeared in this case until the
25 government's merits brief in this Court.

1 If it's a settled background interpretation
2 that -- that Congress was incorporating that limitation
3 into the Act, you think it would have occurred to them
4 in the last decade, the carve-outs for the Small
5 Business Act exceptions were never justified based on
6 providing a narrower meaning of the word "contract," and
7 on their face were expressly limited to the Small
8 Business Act, the provision that applied to part 19 of
9 the FAR implementing the Small Business Act.
10 Well, to the extent there's an exception for
11 the Small Business Act, well, Congress came in here is
12 it rejected the Small Business Act approach. Rather
13 than continuing to tinker within the framework of the
14 Small Business Act where this exception applied, it said
15 we're taking this mandate out of the Small Business Act,
16 we're going to narrow it, it's not going to be a
17 government-wide mandate, but we're going to apply it
18 specifically to the VA in light of its unique
19 obligations and set the VA up as the driver of
20 procurement in this area; have it set the example for
21 the rest of the government.
22 Congress was making -- balancing these
23 policy considerations. It wasn't going to be blundering
24 into something that was administratively unworkable.
25 And if you -- the dire consequences that we're hearing

1 today really stood any chance of coming to pass, I don't
2 think that you would have the American Legion, the Iraq
3 and Afghanistan veterans, 41 members of Congress, who
4 care deeply about veterans issues, supporting
5 Kingdomware's position in this case.
6 The reality is if the government's only
7 doing 20 percent of its procurements from FSS, you're
8 already talking about a broad mandate. And then with
9 respect to those existing ones, you have to have a
10 business that is eligible, it has to appear in the
11 database, and it has to be able to offer a fair and
12 reasonable price and best value.
13 And as the -- the Chief Justice discussed
14 for some of these big order commodity contracts, that
15 it's going to be a difficult fight for the -- for the
16 drugs that are being offered here, there's a statutory
17 provision that says that the government acquires its
18 drugs at 76 percent of the average price that
19 wholesalers pay to the manufacturers. So take the
20 average price that anyone else in the world can get from
21 the manufacturer and do a big discount on top of that.
22 Those are tough terms to beat.
23 And so I think that there's going to be --
24 you know, the reality here is not the dire consequences
25 that you're seeing, and the policy judgment is for

1 Congress. And believe me, if anything in this mandate
2 enforced as written is going to hurt veterans in any
3 way, then you can expect Congress will act swiftly to
4 correct that problem.
5 But none of this supports the sweeping
6 carve-out that the government is saying that it doesn't
7 even have to look at its own database. It doesn't have
8 to consider a single veteran-owned small business, no
9 matter how competitive it would be, because it can go
10 straight to the Federal suppliers.
11 JUSTICE KENNEDY: What response do you have
12 to judge -- Justice Ginsburg's question that really
13 you're making us a court of first impression here?
14 Shouldn't we send this back?
15 MR. SAUNDERS: I don't think we should
16 because the meaning of "contract," this is a straight-up
17 question of law. And the reality is that the veterans
18 who are waiting for this law to be enforced as written
19 have already waited a decade. And for -- to send it
20 back and have additional delay on a pure question of law
21 based on a new argument that the government's making for
22 the first time here sets a very bad precedent.
23 CHIEF JUSTICE ROBERTS: Thank you, counsel.
24 The case is submitted.
25 (Whereupon, at 11:04 a.m., the case in the

1 above-entitled matter was submitted.)

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