No. 23-

IN THE

Supreme Court of the United States

PETER VAN DERMARK,

Petitioner,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

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

DOMINICK HURLEY
WILMER CUTLER PICKERING
HALE AND DORR LLP
350 South Grand Ave.
Suite 2400
Los Angeles, CA 90071
(213) 443-5300

THOMAS G. SAUNDERS
Counsel of Record
GARY M. FOX
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 Pennsylvania Ave., NW
Washington, DC 20037
(202) 663-6000
thomas.saunders@wilmerhale.com

QUESTION PRESENTED

Each of two statutory provisions independently obligates the Secretary of the U.S. Department of Veterans Affairs (VA) to reimburse eligible veterans for out-of-pocket costs incurred while receiving emergency medical treatment. One statute provides that "[t]he Secretary shall … reimburse [eligible] veterans … for the customary and usual charges of emergency treatment." 38 U.S.C. § 1728(a). Another statute similarly provides that "the Secretary shall reimburse a veteran … for the reasonable value of emergency treatment furnished the veteran in a non-Department facility," provided that the eligibility criteria are met. *Id.* § 1725(a).

The VA nonetheless denied reimbursement to service-disabled veteran Peter Van Dermark because he received treatment for his medical emergencies while he was in Thailand. The Federal Circuit affirmed the denial of reimbursement, declaring without any basis in the statutory text that Sections 1728 and 1725 do not apply to emergency treatment obtained outside the United States. The Federal Circuit thus concluded that the specific commands in Sections 1728 and 1725 must yield to a more general statute providing that "the Secretary shall not furnish hospital or domiciliary care or medical services outside any State." 38 U.S.C. § 1724(a).

The question presented is whether eligible veterans are entitled to reimbursement of out-of-pocket costs incurred while receiving emergency treatment abroad based on the specific commands in 38 U.S.C. §§ 1728 & 1725.

PARTIES TO THE PROCEEDING

All parties are named in the caption.

CORPORATE DISCLOSURE STATEMENT

This proceeding does not involve any nongovernmental corporations.

DIRECTLY RELATED PROCEEDINGS

This petition arises from the following proceedings:

- *Van Dermark* v. *McDonough*, No. 2021-2225 (Fed. Cir. Jan. 23, 2023);
- *Van Dermark* v. *McDonough*, No. 19-2795 (Vet. App. June 1, 2021).

Counsel for Mr. Van Dermark is not aware of any other proceedings that are directly related to this case within the meaning of Rule 14.1(b)(iii).

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

U.S. Navy veteran Peter Van Dermark respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The Federal Circuit's opinion (App. 1a-24a) is reported at 57 F.4th 1374. The Federal Circuit's order denying rehearing (App. 57a-58a) is unreported. The opinion of the U.S. Court of Appeals for Veterans Claims and the accompanying dissent (App. 25a-46a) are reported at 34 Vet. App. 204. The opinion of the Board of Veterans' Appeals (App. 47a-56a) is unreported.

JURISDICTION

The Federal Circuit entered judgment on January 23, 2023. App. 1a. Mr. Van Dermark timely petitioned for panel rehearing and rehearing en banc, which the Federal Circuit denied on April 24, 2023. App. 58a. On July 7, 2023, the Chief Justice extended the deadline to file this petition for a writ of certiorari to and including August 22, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

One statutory provision at issue is titled "Reimbursement for emergency treatment." It states in relevant part:

> (a) General authority.—(1) Subject to subsections (c) and (d), the Secretary *shall reimburse* a veteran described in subsection (b) for the reasonable value of emergency treatment furnished the veteran in a non-Department facility.

38 U.S.C. § 1725(a) (emphasis added).[1]

Another statutory provision at issue is titled "Reimbursement of certain medical expenses." It states in relevant part:

> (a) The Secretary *shall*, under such regulations as the Secretary prescribes, *reimburse* veterans eligible for hospital care or medical services under this chapter for the customary and usual charges of emergency treatment (including travel and incidental expenses under the terms and conditions set forth in section 111 of this title) for which such veterans have made payment, from sources other than the Department, where such emergency treatment was rendered to such veterans in need thereof for any of the following:
>
> (1) An adjudicated service-connected disability.
>
> (2) A non-service-connected disability associated with and held to be aggravating a service-connected disability.
>
> (3) Any disability of a veteran if the veteran has a total disability permanent in nature from a service-connected disability.

---

[1] Unless otherwise indicated, this petition refers to the version of Section 1725 that was effective between February 1, 2010, and December 28, 2022, which covers the time when Mr. Van Dermark submitted his claims for reimbursement to the VA. App. 61a-66a. Subsequent amendments to the statute are irrelevant to the question presented in this case. *See* App. 67a-68a.

> (4) Any illness, injury, or dental condition of a veteran who—
>
> (A) is a participant in a vocational rehabilitation program (as defined in section 3101(9) of this title); and
>
> (B) is medically determined to have been in need of care or treatment to make possible the veteran's entrance into a course of training, or prevent interruption of a course of training, or hasten the return to a course of training which was interrupted because of such illness, injury, or dental condition.

38 U.S.C. § 1728(a) (emphases added).[2]

A third statutory provision at issue is titled "Hospital care, medical services, and nursing home care abroad." It states in relevant part:

> (a) Except as provided in subsections (b) and (c), the Secretary shall not furnish hospital or domiciliary care or medical services outside any State.

38 U.S.C. § 1724(a).[3]

---

[2] Similarly, this petition generally refers to the version of Section 1728 that was effective between October 10, 2008, and December 28, 2022, unless otherwise indicated. App. 69a-70a. Recent amendments to the statute have no bearing on the question presented in this case. *See* App. 71a-73a.

[3] This petition refers to the current version of Section 1724, which has been in effect since October 27, 2000. App. 59a-60a.

The appendix to this petition reproduces the relevant versions of all three statutory provisions in their entirety. App. 59a-73a.

INTRODUCTION

This case involves a conflict between two statutory provisions specifically obligating the VA to reimburse eligible veterans for emergency medical treatment (38 U.S.C. §§ 1728 & 1725) and a third provision setting a baseline rule that the VA cannot furnish medical care outside the United States (38 U.S.C. § 1724). Mr. Van Dermark twice received emergency treatment in Thailand, and he asked the VA to reimburse him for over $70,000 that he paid out of his own pocket. The VA denied his claims, and the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit affirmed the VA's denial. According to the courts below, although Sections 1728 and 1725 require the VA to reimburse eligible veterans for emergency treatment when a VA facility is not available, Section 1724 precludes the VA from covering the costs of emergency treatment received *outside the United States*. This purported reconciliation of the provisions rewrites Sections 1728 and 1725 and threatens the financial security of millions of veterans every time they set foot abroad.

The plain text of Sections 1728 and 1725 provides that the VA "shall" reimburse veterans for the cost of emergency medical treatment at non-federal facilities. Congress's clear purpose was to ensure that veterans have access to emergency treatment whenever they cannot reasonably make it to VA facilities. To the extent those clear commands conflict with Section 1724, the conflict should be resolved by the well-established principle that more specific statutory provisions govern over

more general ones. Sections 1728 and 1725 are more specific than Section 1724 in multiple ways. Notably, Sections 1728 and 1725 relate specifically to emergency treatment (not all types of medical care covered by Section 1724), and they involve only reimbursement (not other options for furnishing care within the meaning of Section 1724).

The presumption against implied repeals, which the Federal Circuit *sua sponte* invoked, does not change the calculus. The Federal Circuit's application of the presumption extended it far beyond its traditional use. And even if there were any doubt about the proper interpretation of Sections 1728 and 1725, the Federal Circuit should have applied the pro-veteran canon and resolved the doubt in favor of Mr. Van Dermark and other veterans.

The Federal Circuit's erroneous decision potentially affects millions of veterans who meet the qualifications for reimbursement under Sections 1728 and 1725. If this Court allows the Federal Circuit's decision to stand, eligible U.S. veterans who live or even just travel abroad may risk incurring tremendous amounts of medical debt for emergency treatment received abroad, even though the VA would cover those costs if the same emergency treatment had been received in the United States. Mr. Van Dermark and other veterans have already sacrificed a great deal for our country, and they should not be forced to risk sacrificing even more every time they step foot outside the country.

STATEMENT

A. Statutory Background

For many years, Section 1724 has generally prohibited the VA from furnishing medical care to veterans

outside the United States. Despite that baseline rule, Congress enacted Sections 1728 and 1725, which instruct that the VA *must* reimburse eligible veterans for out-of-pocket costs incurred while obtaining emergency treatment. Sections 1728 and 1725 apply whenever a VA facility is not reasonably available and include no limits on whether that emergency treatment is received domestically or abroad.

1. Section 1728

Section 1728's predecessor, 38 U.S.C. § 628, was enacted on August 2, 1973, when Congress passed the Veterans Health Care Expansion Act of 1973, Pub. L. No. 93-82, § 106(a), 87 Stat. 179, 183. Section 628 authorized the VA to "reimburse" certain eligible veterans for the "reasonable value" of "hospital care or medical services … (including necessary travel)" incurred during a "medical emergency" when "[VA] or other federal facilities were not feasibly available." 38 U.S.C. § 628(a)(1), (3) (1973). Reimbursement was available only when "such veterans … made payment[] from sources other than the [VA]." *Id.* § 628(a). On August 6, 1991, Section 628 was recodified as 38 U.S.C. § 1728, though the substance of the provision did not change. *See* Department of Veterans Affairs Codification Act, Pub. L. No. 102-83, § 5(a), 105 Stat. 378, 406 (1991).

Later, on October 10, 2008, Congress amended Section 1728 in a critical way: it replaced the permissive "may" in Section 1728(a) with mandatory language, providing that the VA "shall … reimburse" eligible veterans for the costs of emergency treatment. *See* Veterans' Mental Health and Other Care Improvements Act of 2008, Pub. L. No. 110-387, § 402(b)(1), 122 Stat. 4110, 4123. With this change, Congress directed that

reimbursement under Section 1728 is no longer a matter of VA discretion; it is now obligatory.

As relevant here, Section 1728 provides that the Secretary "shall … reimburse" eligible veterans "for the customary and usual charges of emergency treatment … for which such veterans have made payment, from sources other than the Department." 38 U.S.C. § 1728(a). The definition of "emergency treatment" is borrowed from Section 1725(h)(1), as described below. *Id.* § 1725(d). Under Section 1728, a veteran is eligible for reimbursement if "emergency treatment was rendered" to treat:

- an "adjudicated service-connected disability";
- a "non-service-connected disability associated with and held to be aggravating a service-connected disability";
- "[a]ny disability of a veteran if the veteran has a total disability permanent in nature from a service-connected disability"; or
- "[a]ny illness, injury, or dental condition" of veterans participating in a "vocational rehabilitation program" or who need the treatment for a "course of training."

Id. § 1728(a)(1)-(4). As an alternative to "reimbursing such veteran[s]," Section 1728(b) permits the VA to "make payment … directly" to "the hospital or other health facility furnishing the emergency treatment" or to "the person or organization making such expenditure on behalf of such veteran." *Id.* § 1728(b). Section 1728 includes no limitation based on whether emergency treatment is received abroad.

2. Section 1725

On November 30, 1999, Congress enacted the Veterans Millennium Health Care and Benefits Act, Pub. L. No. 106-117, 113 Stat. 1545 (1999). That act included Section 1725, which expanded the number of veterans who are eligible to be reimbursed for emergency treatment received at non-VA facilities. *See* Pub. L. No. 106-117, § 111(a), 113 Stat. 1545, 1553. Section 1725 is more inclusive than Section 1728 because Section 1725 covers VA healthcare participants without regard to whether their emergency treatment was received for service-connected disabilities or the other disabilities and conditions listed in Section 1728. *Compare* 38 U.S.C. § 1725(b), *with id.* § 1728(a)(1)-(4).

On October 10, 2008, Congress amended Section 1725 (as it similarly amended Section 1728) so that the statute *requires*, and no longer merely permits, the VA to reimburse eligible veterans for the costs of emergency treatment. *See* Pub. L. No. 110-387, § 402(a)(1), 122 Stat. 4110, 4123 (striking "may reimburse" and inserting "shall reimburse"). As relevant here, Section 1725 provides that "the Secretary shall reimburse" an eligible veteran "for the reasonable value of emergency treatment furnished the veteran in a non-Department facility." 38 U.S.C. § 1725(a)(1).

The term "emergency treatment" is defined as "medical care or services furnished … when Department or other Federal facilities are not feasibly available" and "when such care or services are rendered" under circumstances in which "a prudent layperson reasonably expects that delay in seeking immediate medical attention would be hazardous to life or health." *Id.* § 1725(f)(1). Under Section 1725(a)(2), the VA is also authorized to make direct payments to hospitals rather than

reimbursing veterans. Like Section 1728, Section 1725 includes no limitation based on whether emergency treatment is received abroad.

3. Section 1724

Section 1724 has its roots in an Executive Order designed to divert resources from veterans to pay for the New Deal. Executive Order 6094 (Mar. 31, 1933); *see also* Economy Act, Pub. L. No. 73-2, 48 Stat. 2 (1933). Congress modified that provision in 1940, *see* Pub. L. No. 76-866, § 4, 54 Stat. 1193, 1195 (1940), and changed its structure and wording again in a 1958 act codifying VA statutes in Title 38, *see* Pub. L. No. 85-857, 72 Stat. 1105, 1144 (1958). One of those statutes was 38 U.S.C. § 624, which followed the same structure as Section 1724 and contained the essential language relevant here. Section 624 provided that, subject to certain exceptions, the VA "shall not furnish hospital or domiciliary care or medical services outside the continental limits of the United States." 38 U.S.C. § 624(a) (1958). Notwithstanding that provision, the VA was permitted to "furnish necessary hospital care and medical services" related to service-connected disabilities for veterans in the Philippines and for U.S. citizens "sojourning or residing abroad" who were injured during wartime. *Id.* § 624(b). The VA was also permitted to furnish care at its facility in Manila. *Id.* § 624(c).

Between 1958 and 1991, Section 624 remained mostly unmodified. On August 6, 1991, the provision was recodified as 38 U.S.C. § 1724. *See* Pub. L. No. 102-83, § 5(a), 105 Stat. 378, 406 (1991). Since then, Section 1724's only substantive change has been the addition of subsection (e), which provides an exception for outpatient clinics in the Philippines. *See* Pub. L. No. 106-377,

§ 1(a)(1), 114 Stat. 1441, 1441A-58 (2000).[4] As it currently stands, Section 1724 provides that "the Secretary shall not furnish hospital or domiciliary care or medical services outside any State." 38 U.S.C. § 1724(a). The term "State" is defined to mean "each of the several States, Territories, and possessions of the United States, the District of Columbia, and the Commonwealth of Puerto Rico." *Id.* § 101. Section 1724 does not explicitly refer to reimbursement for emergency treatment.

B. Mr. Van Dermark's Emergency Treatment

Mr. Van Dermark served in the Navy from 1963 to 1976. C.A. App. 1009, 1274. He was honorably discharged and eventually assigned a total disability rating based on individual unemployability. *Id.*

Mr. Van Dermark twice obtained emergency treatment while living in Thailand. First, in May 2016, Mr. Van Dermark experienced cardiac symptoms, and a medical evaluation revealed that he had an abdominal aortic aneurism. App. 30a. He was advised by his physician that he could not fly and urgently required surgery. *See* App. 49a; C.A. App. 1275. Because there are no VA hospitals in Thailand, Mr. Van Dermark underwent surgery at a non-VA hospital and incurred over $35,000 in costs for that treatment. App. 31a; C.A. App. 1297.

Second, in April 2018, Mr. Van Dermark again experienced cardiac problems and ultimately underwent coronary artery bypass graft surgery in Thailand. App.

[4] The exceptions involving the Philippines stem from its unique historical relationship with the United States, and the exceptions are not relevant in this case. *See* App. 9a-10a.

31a. He incurred approximately $33,000 in costs for that treatment. C.A. App. 1070.

C. Procedural History

1. The Denial of Mr. Van Dermark's Claims

Mr. Van Dermark filed claims for reimbursement for his out-of-pocket costs for both instances of emergency treatment. App. 31a. The VA denied both claims. *See* App. 48a-49a. Mr. Van Dermark appealed the decision to the Board of Veterans Appeals, asserting that both Section 1728 and Section 1725 independently entitle him to reimbursement for his emergency treatment. App. 50a. The Board again rejected his claims. App. 47a. It determined that Section 1724's prohibition on "furnishing" medical treatment abroad and its implementing regulation, 38 C.F.R. § 17.35, "are the appropriate statute and regulation in this case." App. 53a. The Board deemed Sections 1728 and 1725 "not applicable for services performed outside of the United States." *Id.*

2. The Split Decision of the Court of Appeals for Veterans Claims

In a split decision, the U.S. Court of Appeals for Veterans Claims (the Veterans Court) affirmed. App. 25a-46a. Like the Board, the majority of the Veterans Court concluded that the VA properly denied Mr. Van Dermark's claims for reimbursement under Section 1724's prohibition on "furnish[ing]" medical treatment abroad. App. 32a-44a. The majority examined the legislative history and found "[n]othing in sections 1725 or 1728" indicating that those provisions were "meant to alter VA's healthcare obligations outside the United States." App. 42a.

The majority relied on the presumption against extraterritoriality to limit the reach of Sections 1728 and 1725 without employing the relevant framework prescribed by this Court. *See* App. 42a-43a. As Judge Greenberg pointed out in dissent, the majority also improperly ignored the pro-veteran canon, under which "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." App. 45a (quoting *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 441 (2011)). Judge Greenberg noted that courts "should be interpreting statutes in a way that helps veterans, otherwise we diminish and minimize the purpose and role of the entire statutory scheme created by Congress specifically to favor veterans." App. 46a.

3. The Federal Circuit's Incomplete Decision

The Federal Circuit affirmed the denial of Mr. Van Dermark's claims. Primarily focusing on "the scope of the phrase 'furnish hospital … care or medical services' in § 1724(a)," App. 6a, the Federal Circuit held that the phrase "shall not furnish" in Section 1724(a) should be interpreted broadly to prohibit the VA from reimbursing veterans for the costs of emergency treatment received abroad, App. 10a-22a. The court then proceeded to hold that the "shall reimburse" commands in Sections 1728 and 1725 do not override Section 1724's general prohibition. App. 22a-23a. The court briefly remarked that implied repeals are disfavored, and it purported to "harmonize" the three provisions by declaring that Sections 1728 and 1725 do not obligate the VA to reimburse veterans for the costs of emergency treatment received abroad. *Id.* But beyond stating that "there is no mention of treatment abroad," App. 24a, the Federal Circuit never analyzed the text, history, structure, or purpose

of Sections 1728 and 1725 to see whether those provisions are properly limited to domestic emergencies, *see* App. 22a-24a.

Mr. Van Dermark sought rehearing, which the Federal Circuit denied. App. 57a-58a.

REASONS FOR GRANTING THE PETITION

I. THE FEDERAL CIRCUIT'S DECISION MISINTERPRETS CONGRESS'S COMMANDS TO THE VA

The Federal Circuit misapplied fundamental canons of construction to reach a result that harms veterans, contrary to the plain text of Sections 1728 and 1725 and contrary to Congress's intent in enacting those statutes.

A. The Decision Conflicts With The Text Of Sections 1728 And 1725

Neither the text of Section 1728 nor the text of Section 1725 limits the VA's obligation to reimburse veterans for emergency treatment to only *domestic* treatment. The Federal Circuit erred by importing a domestic-emergency requirement into both statutory provisions.

Section 1728 states that the Secretary "*shall* … reimburse" eligible veterans "for the customary and usual charges of emergency treatment … for which such veterans have made payment, from sources other than the Department." 38 U.S.C. § 1728(a) (emphasis added). The text of Section 1728 is carefully crafted to expressly indicate the circumstances in which it applies, as well as potential limitations on reimbursement. None of the express limitations concerns whether the emergency treatment is received domestically, and importing an additional limitation into the statute would be improper. *E.g.*, *Law* v. *Siegel*, 571 U.S. 415, 424 (2014) ("The Code's

meticulous … enumeration of exemptions and exceptions to those exemptions confirms that courts are not authorized to create additional exceptions.").[5]

More specifically, a veteran is entitled to reimbursement under Section 1728 only if the veteran meets any of four enumerated conditions set out in subsections (a)(1) through (a)(4). For example, a veteran such as Mr. Van Dermark is entitled to reimbursement if the veteran "has a total disability permanent in nature from a service-connected disability." 38 U.S.C. § 1728(a)(3). A veteran also qualifies if the veteran is "a participant in a vocational rehabilitation program" and needs treatment "to make possible the veteran's entrance into a course of training." *Id.* § 1728(a)(4). Subsections (a)(1) through (a)(4) do not contain any geographic limitation.

Entitlement to reimbursement under Section 1728 is also functionally limited by the statute's definition of "emergency treatment" in Section 1725. *See* 38 U.S.C. § 1728(c) ("[T]he term 'emergency treatment' has the meaning given such term in section 1725(f)(1)[.]"). Section 1725 defines "emergency treatment" with careful specificity to encompass only "care or services [that are] rendered in a medical emergency of such nature that a prudent layperson reasonably expects that delay in seeking immediate medical attention would be

---

[5] *See also TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions … additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."); *Jama* v. *Immigration & Customs Enf't*, 543 U.S. 335, 341 (2005) (courts "do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and [a court's] reluctance [should be] even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest").

hazardous to life or health." *Id.* § 1725(f)(1)(B). It also accounts for a veteran's location by stating that it applies "when Department or other Federal facilities are not feasibly available and an attempt to use them beforehand would not be reasonable." *Id.* § 1725(f)(1)(A). The definition of "emergency treatment" does not limit the reach of the statute to emergency treatment administered domestically. By its plain terms, Section 1728 applies to emergency treatment whenever a veteran cannot reach a VA facility or another federal facility.

Similarly, Section 1725 is broadly directed to assisting veterans who become liable for expenses from emergency treatment received in a non-VA facility. It states that "the Secretary *shall* reimburse a veteran" who meets certain criteria "for the reasonable value of emergency treatment furnished the veteran in a non-Department facility." 38 U.S.C. § 1725(a) (emphasis added). This statutory command is not accompanied by any exception for emergency treatment supplied abroad. Nor is there anything in the text of Section 1725 that would imply such an exception. Again, importing a foreign-treatment exception would be improper. *See Siegel*, 571 U.S. at 424; *TRW*, 534 U.S. at 28; *Jama*, 543 U.S. at 341.

Section 1725 lists two "[e]ligibility" requirements: (1) the veteran must be "an individual who is an active Department health-care participant," and (2) the veteran must be "personally liable for emergency treatment furnished the veteran in a non-Department facility." 38 U.S.C. § 1725(b)(1). Each requirement is further defined with detailed specificity. For example, a veteran is an "active Department health-care participant" only if the veteran is "enrolled in the health care system established under section 1705(a) of [Title 38]." *Id.* § 1725(b)(2)(A). Moreover, a veteran is "personally

liable for emergency treatment" only if the veteran "has no other contractual or legal recourse against a third party that would … extinguish such liability," *id.* § 1725(b)(3)(C), and "is not eligible for reimbursement … under section 1728," *id.* § 1725(b)(3)(D). Neither eligibility requirement is defined to depend in any way on whether the emergency treatment was received abroad.

In addition to these eligibility criteria, Section 1725 expressly enumerates several "[l]imitations on reimbursement." 38 U.S.C. § 1725(c). For instance, the VA may provide reimbursement under Section 1725 only after the veteran has "exhausted without success all claims and remedies reasonably available" to cover payment for the emergency treatment. *Id.* § 1725(c)(2). The VA is directed to "establish the maximum amount payable" for reimbursing a veteran, *id.* § 1725(c)(1)(A), and where a veteran has recourse against a third party for part of the medical expenses at issue, the VA's reimbursement is limited to "the amount by which the costs … exceed the amount payable or paid by the third party," *id.* § 1725(c)(4)(A). None of the explicit "[l]imitations on reimbursement" include any condition concerning the location of the emergency treatment. *See id.* § 1725(c)(1)-(c)(4).

Apart from the enumerated exceptions in Section 1725, Congress meant what it said: "the Secretary *shall reimburse* a veteran … for the reasonable value of emergency treatment furnished the veteran in a non-Department facility"—that is, *any* non-VA facility, foreign or domestic. 38 U.S.C. § 1725(a) (emphasis added). Like the plain text of Section 1728, the plain text of Section 1725 applies to emergency treatment received abroad.

Congress amended Sections 1728 and 1725 in 2008 to use the mandatory "shall," not the permissive "may."

See Pub. L. No. 110-387, § 402(a)(1) & (b)(1), 122 Stat. 4110, 4123 (2008). Those amendments leave the VA with no discretion to decline reimbursement for the costs of qualifying emergency treatment. *See SAS Inst., Inc.* v. *Iancu*, 138 S. Ct. 1348, 1351 (2018) ("The word 'shall' generally imposes a nondiscretionary duty[.]"); *Kingdomware Techs., Inc.* v. *United States*, 579 U.S. 162, 171 (2016) ("[T]he word 'shall' usually connotes a requirement."). Congress thus made clear that the VA has an obligation to reimburse veterans under Sections 1728 and 1725 and that those provisions are agnostic as to whether veterans are inside or outside the United States when they receive emergency treatment.

B. The Decision Also Conflicts With The History And Purpose Of Sections 1728 And 1725

The statutory history and purpose reinforce that when Congress enacted Sections 1728 and 1725 and later made both provisions mandatory, it wanted to benefit eligible U.S. veterans regardless of the country in which they receive emergency treatment. When Congress enacted the predecessor to Section 1728, a House Report explained that the VA should interpret its "authority … to permit reimbursement after expenditures had been made in an emergency situation *where no VA hospital or clinic is accessible*." H.R. Rep. No. 93-368, at 14 (1973) (emphasis added). Accordingly, that provision reflected the legislative purpose that veterans should not be denied reimbursement based on whether they receive emergency treatment domestically or abroad. That provision was enacted precisely because Congress expected veterans to need emergency treatment in places where the federal government's pre-established medical infrastructure does not reach.

As discussed above, Congress later removed the VA's discretion by changing "may" to "shall" and "mak[ing] reimbursement for emergency care received at non-VA facilities *mandatory* for eligible veterans." 154 Cong. Rec. S10439, S10442 (daily ed. Oct. 2, 2008) (joint explanatory statement) (emphasis added). This change demonstrates Congress's continuing conviction that "[i]t is crucial that *all* veterans have access to emergency care." *Id.* at S10439 (emphasis added).

Likewise, when Congress first enacted Section 1725, legislators voiced their concern for veterans who were "financially devastated" after "medical emergencies … require[d] them to seek care from the closest available health care facility" but they were left without reimbursement. 145 Cong. Rec. H8392, H8400 (daily ed. Sept. 21, 1999). Legislators believed that "[t]he VA should not abandon these veterans when they have a health care emergency." *Id.*; *see also id.* at H8407 ("Veterans … during a health care crisis have been told by VA staff to go to the closest health care facility for treatment, but once the bills came, the VA refused to reimburse them. It seems unconscionable that VA would abandon these veterans during their greatest health care crises, but … it happens."). Sharing these concerns, the Committee on Veterans' Affairs stated in another House report that eligible veterans "should not incur extraordinary costs in medical emergencies where a VA facility is not reasonably accessible." H.R. Rep. No. 106-237, at 38 (1999). The solution was Section 1725, which "makes sure that veterans are reimbursed for emergency care *no matter where* they get that treatment." 145 Cong. Rec. at H8403 (emphasis added).

The Federal Circuit's decision ignores that the commands in Sections 1728 and 1725 are not qualified based on the country where emergency treatment is received,

and the decision defeats the very purpose of those provisions, which is to ensure that veterans are not denied reimbursement for emergency treatment when they cannot make it to VA facilities.

C. The Decision Misapplies The Presumption Against Implied Repeals To Rewrite Sections 1728 And 1725 Without A Full Analysis

Not only did the Federal Circuit incorrectly limit Sections 1728 and 1725, but it did so without conducting a full statutory analysis to demonstrate that the provisions are fairly read to cover only domestic emergencies. The court below devoted 16 pages of its 24-page opinion to analyzing whether the word "furnish" in Section 1724(a) prohibits reimbursing veterans who incur out-of-pocket costs while obtaining medical care abroad. App. 6a-22a. This wide-ranging discussion relied on a variety of sources, including legislative history from decades after the operative statutory language was enacted. App. 15a-16a. In contrast, after determining that "furnish" in Section 1724(a) encompasses reimbursement, the Federal Circuit simply noted that implied repeals are disfavored and "harmonized" Sections 1728 and 1725 in a single paragraph by declaring that because "there is no mention of treatment abroad," Sections 1728 and 1725 "do not apply to treatment abroad when such treatment is outside the limited authorization of § 1724 to furnish such treatment." App. 24a. The court conducted no further analysis of Sections 1728 and 1725 to determine whether they can fairly take the meaning that it ascribed to them.

As a preliminary matter, the VA never invoked the presumption against implied repeals in its brief. *See generally* VA C.A. Br. Nor did the VA raise the presumption against implied repeals at oral argument. The

Federal Circuit should not have focused its analysis for two of the three relevant statutory provisions on an issue that was never briefed. *See, e.g.*, *United States* v. *Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) ("In our adversarial system of adjudication, we follow the principle of party presentation," under which "'we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.'" (quoting *Greenlaw* v. *United States*, 554 U.S. 237, 243 (2008))). The Federal Circuit did not identify any reason why it was departing from the parties' framing of the issues, and there was no good reason for it to do so.

Regardless, the Federal Circuit's truncated analysis misapplies the presumption against implied repeals. The presumption does not give courts license to rewrite a statute to avoid a conflict with another. As this Court has explained, it generally reads statutes that are arguably in tension with each other "to give effect to each," but only if it "can do so while preserving their sense and purpose." *Watt* v. *Alaska*, 451 U.S. 259, 267 (1981); *see also Puerto Rico* v. *Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 130 (2016) ("[O]ur constitutional structure does not permit this Court to 'rewrite the statute that Congress has enacted.'" (quoting *Dodd* v. *United States*, 545 U.S. 353, 359 (2005))).

As its name suggests, the presumption against implied repeals is merely a presumption against "too easily finding irreconcilable conflicts." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1624 (2018). It still requires courts to use traditional tools of construction to determine whether the statute supports a narrower interpretation. *Id.* at 1624-1629; *see also Posades* v. *National City Bank of N.Y.*, 296 U.S. 497, 504 (1936) ("[W]hether a statute is repealed by a later one … is a question of legislative

intent to be ascertained by the application of the accepted rules for ascertaining that intention.").

The cases cited by the Federal Circuit illustrate that the presumption against implied repeals does not mandate the outcome reached by the court below. In *Epic Systems*, this Court did not end its analysis after invoking the presumption, as the Federal Circuit did. Rather, the Court discussed the text, structure, and history of the statute at length to show that the National Labor Relations Act's use of a catch-all term in a list otherwise focused on union organizing and collective bargaining did not displace the Federal Arbitration Act on the issue of class arbitration. *Epic Sys.*, 138 S. Ct. at 1624-1629.

Likewise, in *Morton* v. *Mancari*, 417 U.S. 535, 547-550 (1974), this Court carefully demonstrated that Congress did not intend the Equal Employment Opportunity Act of 1972 to displace the Bureau of Indian Affairs' hiring preferences for Native American employees. For example, the Court discussed the "longstanding federal policy of providing a unique legal status to Indians," Congress's reaffirmance of prior preferences and enactment of new Native American preferences in 1972, the specificity of the preferences compared with the 1972 Act, and the aligned purposes of "furthering Indian self-government" and "alleviating minority discrimination." *Id.* at 548-551. In contrast, the Federal Circuit gave short shrift to Congress's intent behind Sections 1728 and 1725, even though those provisions were intended to help veterans who are too far away from VA facilities when they need emergency treatment.

Similarly, in *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528 (1995), after invoking the presumption against implied repeals, this Court

extensively explained why the Carriage of Goods by Sea Act's prohibition on contracts that lessen "liability for loss or damage" did not preclude enforcement of a foreign arbitration clause. *Id.* at 533-539. By contrast, the Federal Circuit's explanation of the interplay between Sections 1724, 1725, and 1728 was far from extensive, limiting its analysis to less than two pages. App. 23a-24a.

Finally, in *United States* v. *Fausto*, 484 U.S. 439, 441-443 (1988), the Court avoided a conflict by interpreting the *earlier* statute, holding that later-enacted procedures in the Civil Service Reform Act of 1978 effectively narrowed the term "appropriate authority under applicable law" in the Back Pay Act. *Id.* at 452-455. *Fausto* suggests the approach that the Federal Circuit should have followed in this case, *i.e.*, adopting a plausibly narrow interpretation of the earlier-enacted Section 1724 based on Congress's more specific commands in Sections 1728 and 1725 while leaving all three provisions operative.

None of the cases cited in the Federal Circuit's decision dispensed with the need for a full statutory analysis or used the presumption against implied repeals to override statutory language comparable to the clear commands in Sections 1728 and 1725 that the VA "shall reimburse" veterans for emergency treatment.

The Federal Circuit's decision reflects a fundamental misunderstanding of the presumption against implied repeals. The presumption more commonly applies when earlier- and later-enacted statutes are only tangentially related, such as when they are part of different statutory schemes codified in different titles of the U.S. Code. *See, e.g.*, *Epic Sys.*, 138 S. Ct. at 1624-1625 (provision in Title 29 did not impliedly repeal provision in Title 9); *Hui* v.

Castaneda, 559 U.S. 799, 809-810 (2010) (provision in Title 28 did not impliedly repeal provision in Title 42); *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 664 (2007) (provision in Title 16 did not impliedly repeal provision in Title 33); *Mancari*, 417 U.S. at 551 (provision in Title 42 did not impliedly repeal provision in Title 25). This pattern aligns with courts' "[r]espect for Congress as drafter," *Epic Sys.*, 138 S. Ct. at 1624, as the implied repeal of an earlier statute by a later statute is especially tenuous when Congress was legislating in separate fields on different occasions.

The Federal Circuit's decision glosses over another trend in this Court's cases about the presumption against implied repeals: the presumption has more force when there is an earlier, more specific statute and a later, more general statute. *Hui*, 559 U.S. at 809 (rejecting an interpretation that "would effect an implied repeal of [a] more specific provision"); *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976) ("It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum."); *see also National Ass'n of Home Builders*, 551 U.S. at 664 (law listing nine criteria for the transfer of permitting authority was not implicitly repealed by law promoting protection of endangered species); *Mancari*, 417 U.S. at 551 (law establishing employment preferences for tribal members was not implicitly repealed by law prohibiting anti-discrimination in federal employment).

This case involves an earlier, more general statute and a later, more specific statute, which makes the presumption against implied repeals less salient. *E.g.*, *United States* v. *Estate of Romani*, 523 U.S. 517, 530 (1998) ("[I]t does not seem appropriate to view the issue

in this case as whether the [later, more specific statute] has implicitly amended or repealed the [earlier, more general] statute. Instead, we think the proper inquiry is how best to harmonize the impact of the two statutes[.]"); *see also D.B.* v. *Cardall*, 826 F.3d 721, 736 n.12 (4th Cir. 2016) (explaining that "the presumption against implied repeals ha[d] no application" because the later, more specific statute "carved out an exception to [the] application" of the earlier, more general statute).[6]

D. The Decision Improperly Elevates A General Prohibition Over More Specific Commands

Faced with a conflict between Sections 1728 and 1725, on the one hand, and Section 1724, on the other hand, the Federal Circuit should have resolved the conflict based on the longstanding principle that a more specific statute governs over a more general one. *See, e.g.*, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction

---

[6] Just as the presumption against implied repeals does not apply, the presumption against extraterritoriality poses no problem in this case. At the second step of this Court's two-step extraterritoriality framework, courts identify "the focus of congressional concern underlying the provision" and then "ask whether the conduct relevant to that focus occurred in United States territory." *Abitron Austria GmbH* v. *Hetronic Int'l, Inc.*, 143 S. Ct. 2522, 2528 (2023) (emphasis omitted) (cleaned up). Sections 1728 and 1725 are directed to a U.S. official overseeing the reimbursement of U.S. veterans with funds from the U.S. treasury. Those provisions focus on domestic actions by the VA, and they seek to vindicate a fundamentally domestic interest: compensating U.S. veterans for their service to the Nation. Accordingly, this case involves a domestic application of Sections 1728 and 1725. Notably, the VA has not identified *any* case in which the presumption against extraterritoriality has limited a veterans-benefits statute or any other statute conferring benefits. *See* Pet. C.A. Reply Br. 15, 19.

that the specific governs the general[.]"); *HCSC Laundry* v. *United States*, 450 U.S. 1, 6 (1981) ("[I]t is a basic principle of statutory construction that a specific statute … controls over a general provision … particularly when the two are interrelated and closely positioned[.]"). Courts give effect to more specific provisions because they better reflect Congress's intent with respect to the particular issues covered by the provisions. *See* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 187 (2012).

Sections 1728 and 1725 are more specific than Section 1724 in multiple ways. First, Section 1724 is the more general provision because it concerns a more general category of care, whereas Sections 1728 and 1725 concern a more specific subset of care within that category. In relevant part, Section 1724(a) prohibits the furnishing of "hospital or domiciliary care or medical services," which is a generalized category. Meanwhile, Sections 1728 and 1725 apply more specifically to a narrow type of medical services: "emergency treatment." 38 U.S.C. §§ 1725(a)(1) & 1728(a). The fact that "emergency treatment" is a narrower subcategory of "medical services" is confirmed by the text of Sections 1728 and 1725, which define "emergency treatment" as a subset of "medical care or services" satisfying several specific, narrowing criteria (*e.g.*, that "such care or services are rendered in a medical emergency of such nature that a prudent layperson reasonably expects that delay in seeking immediate medical attention would be hazardous to life or health"). *Id.* § 1725(f)(1)(B); *see also id.* § 1728(c) (incorporating by reference the definition of "emergency treatment" in Section 1725(f)(1)). When the scope of a provision is subsumed within the scope of another provision, the latter provision is necessarily the broader one. *See, e.g.*, *RadLAX Gateway Hotel, LLC* v.

Amalgated Bank, 566 U.S. 639, 646 (2012) (comparing scopes of two clauses in bankruptcy statute); *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 756-758 (1961) (statute governing interest on tax refunds was more general than statute governing interest on tax refunds attributable to carry-back provisions).

Second, Sections 1728 and 1725 are more specific than Section 1724 with respect to the VA's actions. Under the Federal Circuit's interpretation of "furnish," Section 1724 applies to a wide range of VA actions, including the direct provision of care, advance arrangements for providing care (perhaps through contracts with third parties), and reimbursement for care.[7] Sections 1728 and 1725 concern only reimbursement, which is a subset of the actions encompassed by Section 1724 under the Federal Circuit's interpretation. Thus, Sections 1728 and 1725 are necessarily more specific. *See RadLAX*, 566 U.S. at 646; *Bulova*, 365 U.S. at 756-758.

Third, Sections 1728 and 1725 are more specific than Section 1724 in terms of their geographic reach. Section 1724 applies indiscriminately outside the United States (except for some limited exceptions involving the Philippines and Canada), while Congress more precisely defined the scope of Sections 1728 and 1725 based on whether federal facilities "are not feasibly available and an attempt to use them beforehand would not be reasonable." 38 U.S.C. § 1725(f)(1)(A). Thus, whether inside or outside the United States, veterans who are close to a VA facility or other federal facility will not necessarily

[7] Before this Court, Mr. Van Dermark is not challenging the Federal Circuit's broad interpretation of "furnish" in Section 1724 to encompass reimbursement. That issue is ultimately irrelevant because even under the Federal Circuit's broad interpretation, Sections 1728 and 1725 still govern.

be eligible for reimbursement, while veterans who are farther from such a facility will be.

Numerous cases demonstrate this Court's directive that a later, more specific enactment governs over an earlier, more general one because the more specific one better reflects Congress's intent. Take, for example, *Romani*. In that case, this Court confronted: (1) the longstanding federal "priority statute," under which a federal claim "'shall be paid first' when a decedent's estate cannot pay all of its debts," 523 U.S. at 519 (quoting 31 U.S.C. § 3713(a)); and (2) a more recent provision of the Tax Lien Act, under which a "federal tax lien 'shall not be valid' against judgment lien creditors until a prescribed notice has been given," *id.* at 520 (quoting 26 U.S.C. § 6323(a)). The Court held that the Tax Lien Act governs, emphasizing that it is both "the later statute" and "the more specific statute"; that "its provisions are comprehensive, reflecting an obvious attempt to accommodate" Congress's strong policy preferences; and that it "represents Congress's detailed judgment" on the relevant subject matter. *Id.* at 532.

Under the same logic, Sections 1728 and 1725 should control over Section 1724. Sections 1728 and 1725 were enacted well after Section 1724. *Compare* Pub. L. No. 85-857, 72 Stat. 1105 (1958) (predecessor to Section 1724), *with* Pub. L. No. 93-82, § 106(a), 87 Stat. 179 (1973) (predecessor to Section 1728); Pub. L. No. 106-117, § 111(a), 113 Stat. 1545 (1999) (Section 1725). Sections 1728 and 1725 are more specific than Section 1724 in multiple respects. *See supra* pp. 25-26. Sections 1728 and 1725 are also more comprehensive than Section 1724 given their detailed eligibility criteria, limitations, and definitions. *See supra* Section I.A. Sections 1728 and 1725 therefore indicate "Congress's detailed judgment"

on how the VA should handle veterans who need emergency treatment. *See Romani*, 523 U.S. at 532.

The specific/general canon applies with particular force when Congress enacts later, more specific statutes to address deficiencies caused by earlier, more general statutes. *E.g.*, *Romani*, 523 U.S. at 532 (later, more specific statute "reflect[ed] an obvious attempt to accommodate … strong policy objections"); *see also Hinck* v. *United States*, 550 U.S. 501, 506 (2007) ("We are … guided by our past recognition that when Congress enacts a specific remedy when no remedy was previously recognized, or when previous remedies were problematic, the remedy provided is generally regarded as exclusive." (quotation marks omitted)). That is the case here: Congress enacted Sections 1728 and 1725 because the pre-existing regime for veterans benefits, including Section 1724, insufficiently protected veterans who had medical emergencies too far away from VA facilities. *See supra* Section I.B. The Federal Circuit should have given such remedial provisions their greatest possible import. *See, e.g.*, *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 782 (1952) (when "legislation is largely remedial," it "calls for liberal interpretation" in the beneficiaries' favor).

This case is a paradigmatic case in which a later-enacted and more specific statutory provision results in a limited exception to an earlier, more general statutory provision. Given the specificity of Sections 1728 and 1725, there was no need for the Federal Circuit to reach the issue of a potential implied repeal, as Sections 1728 and 1725 are properly understood as limited exceptions to the general prohibition in Section 1724. *See, e.g.*, *RadLAX*, 566 U.S. at 645 ("To eliminate the contradiction, the specific provision is construed as an exception to the general one."); *Townsend* v. *Little*, 109 U.S. 504,

512 (1883) (referring to "the well-settled rule, that general and specific provisions, in apparent contradiction … may subsist together," with "the specific qualifying and supplying exceptions to the general").

Sections 1728 and 1725 control whenever a veteran seeks reimbursement for out-of-pocket costs for emergency treatment, regardless of where that emergency treatment was received. The rest of the time, Section 1724 still operates to prohibit the VA from furnishing non-emergency care outside the United States. That interpretation preserves the basic purposes and effects of all three statutory provisions. *See Radzanower*, 426 U.S. at 156 (interpreting specific statutory provision so that its "purposes … will obviously be served" without "unduly interfer[ing]" with the more general statutory provision).

E. The Decision Ignores That Sections 1728 And 1725 Should Be Construed In Favor Of Veterans

As explained above, Sections 1728 and 1725 unambiguously obligate the VA to reimburse veterans for their out-of-pocket costs for emergency treatment, regardless of whether veterans receive that treatment domestically or abroad. However, if there were any doubt about the meaning of Sections 1728 and 1725 and their interaction with Section 1724, that doubt should have been resolved by applying the well-established principle that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 441 (2011); *see also Brown* v. *Gardner*, 513 U.S. 115, 118 (1994) (acknowledging "the rule that interpretive doubt is to be resolved in the veteran's favor"); *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946)

("[L]egislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need.").

The Federal Circuit concluded that the pro-veteran canon does not apply to Section 1724 because a broader or narrower reading of "furnish" might "benefit some veterans at the expense of others," and the court "lack[ed] information to compare magnitudes." App. 12a. But that concern is specific to the interpretation of Section 1724(b) and is not implicated by application of the pro-veteran canon to the interpretation of Sections 1728 and 1725 or their interaction with Section 1724(a). For those provisions, application of the canon would only help veterans by placing a thumb on the scale in favor of reimbursement for emergency treatment when veterans cannot reasonably make it to VA facilities. It was improper for the Federal Circuit to declare that Sections 1728 and 1725 "do not apply to treatment abroad" without considering whether the pro-veteran canon supports a broader interpretation. App. 24a.

II. THIS COURT SHOULD ADDRESS A VITALLY IMPORTANT QUESTION THAT POTENTIALLY AFFECTS MILLIONS OF U.S. VETERANS

The Federal Circuit's cramped interpretation of Sections 1728 and 1725 governs all veterans who are eligible for reimbursement under those provisions. The Federal Circuit is the only Article III court of appeals with jurisdiction over VA determinations of veterans benefits. 38 U.S.C. § 7292(c). Thus, there is no opportunity for a circuit split on the question presented here to develop in the lower courts. *See* Ridgway, *Toward a Less Adversarial Relationship Between* Chevron *and* Gardner, 9 U. Mass. L. Rev. 388, 402 n.90 (2014) ("As the Federal Circuit has exclusive jurisdiction to review

[Veterans Court] decisions, it is not possible for a circuit split to develop."). The Federal Circuit's interpretation will govern unless and until it is reversed by this Court.

Accordingly, even without a circuit split, this Court has not hesitated to grant certiorari when a case implicates an important question of statutory interpretation affecting U.S. veterans. *E.g.*, *Arellano* v. *McDonough*, 143 S. Ct. 543, 547 (2023) (the Court granted certiorari to resolve "the better interpretation of the statute," which governed the calculation of effective dates for veterans benefits). The Court should do the same once again in this case, particularly given the magnitude of its reach.

The consequences of the Federal Circuit's decision will be felt most acutely by eligible veterans who, like Mr. Van Dermark, have chosen to reside abroad.[8] Indeed, over 18,000 veterans participating in the VA healthcare program live abroad. *See* Kupper, *Overseas Expat: Many Military Families Choose to Live Abroad Permanently*, Military Families (Mar. 3, 2023), https://tinyurl.com/mvmn52y5. There are many good reasons why veterans may choose to live overseas. Some veterans may marry spouses born in other countries, as Mr. Van Dermark did. Some may wish to live closer to family members residing abroad. Others may have a sense of adventure inspired by their military service and desire to live in a new location. Sections 1728 and 1725 do not draw any distinction between U.S. veterans living abroad and other U.S. veterans, so veterans living abroad should not be treated any differently.

---

[8] After Mr. Van Dermark received his emergency surgeries in Thailand, he chose to return to the United States. He now resides in Florida.

On top of its impact on veterans living abroad, the Federal Circuit's decision affects millions of veterans in the United States whenever they travel abroad. There are "over 9 million Veterans enrolled in the VA health care program." *Veterans Health Administration*, U.S. Dep't of Veterans Affrs., https://www.va.gov/health/aboutVHA.asp (visited Aug. 21, 2023). A large number of those veterans are eligible for reimbursement under Section 1725(b) for money spent on emergency treatment. Some of those veterans and additional veterans are also potentially eligible for reimbursement under Section 1728(a) due to their service-connected disabilities. *See* Dep't of Veterans Affrs., Off. of Inspector Gen., *The Veterans Benefits Administration Inadequately Supported Permanent and Total Disability Decisions* 1 (Sept. 10, 2020), https://www.va.gov/oig/pubs/VAOIG-19-00227-226.pdf (in fiscal year 2018, more than 680,000 veterans received "monetary disability benefits at the 100 percent rate").

The Federal Circuit's decision potentially subjects these millions of veterans to ruinous debt if they happen to have medical emergencies while traveling outside the United States. Approximately two-thirds of the American population lives within 100 miles of a U.S. land or coastal border. *The Constitution in the 100-Mile Border Zone*, Am. Civ. Liberties Union (Aug. 21, 2014), https://tinyurl.com/3nch3c48. For many of those individuals, traveling outside the United States is a regular occurrence. In 2019, right before the Covid-19 pandemic disrupted international travel, nearly 45 million Americans traveled overseas. *Number of United States Residents Travelling Overseas from 2002 to 2021*, Statista, https://tinyurl.com/5a7xm9mj (visited Aug. 21, 2023). With such a large percentage of Americans traveling internationally, at least some veterans will need

emergency treatment while outside the United States, whether they are involved in some type of accident or have an underlying condition that flares up at an inopportune moment. These veterans should not be left in the lurch just because they happen to have medical emergencies outside U.S. borders.

Regardless, the Federal Circuit's decision does not just affect veterans who live or have traveled abroad. The Federal Circuit's decision affects *all eligible veterans*, who must now bear the risk of possibly being saddled with hospital bills that they cannot afford if they choose to leave the country. Take, for example, an organization like the Best Defense Foundation, which strives to "ensure[] that any [World War II] veteran who wants a measure of closure or the recognition he so richly deserves has an opportunity to return to his battlefield." *Taking Care of the Ones Who Took Care of Us*, Best Defense Foundation, https://bestdefensefoundation.org/ (visited Aug. 21, 2023). A veteran should not be forced to forgo a once-in-a-lifetime trip abroad out of fear that a medical emergency will be financially calamitous.

For veterans who live or travel abroad and have no choice but to receive emergency medical treatment in a foreign facility, the consequences can be devastating. Mr. Van Dermark is personally on the hook for over $70,000 in costs for his life-saving surgeries. C.A. App. 1070, 1297. There is no question that the VA would have been obligated to reimburse these out-of-pocket costs if the emergencies had occurred on U.S. soil.[9] Yet when

[9] It is a sad irony that the cost of emergency treatment in the United States would almost certainly be much higher than the cost of the same care in any other country. *See* Johnson, *The Real Reason the U.S. Spends Twice as Much on Health Care as Other Wealthy Countries*, Wash. Post (Mar. 13, 2018), https://

veterans are unfortunately struck by emergencies elsewhere, the Federal Circuit's decision means that they must choose either to pay for their own emergency treatment or to put their lives at risk by delaying critical care.

The Federal Circuit's outcome is not the one that Congress intended when it set out to ensure that "*all* veterans have access to emergency care." 145 Cong. Rec. at S10439 (emphasis added). Nonetheless, the Federal Circuit's interpretation of Sections 1728 and 1725 leaves millions of veterans vulnerable to the financial burdens of paying for emergency treatment received outside the United States. That outcome is not warranted by the plain text of Sections 1728 and 1725, nor is it dictated by the various canons of construction that the Federal Circuit misapplied. This Court should grant review to fix this unjust result and restore the statutes as written by Congress.

As this Court has remarked, veterans "left private life to serve their country in its hour of great need." *Fishgold*, 328 U.S. at 285. Now that their service is complete, the VA should not abandon veterans in their own hour of great need.

---

tinyurl.com/mu7hbbzk (noting that "the United States spends almost twice as much on health care as 10 other wealthy countries").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DOMINICK HURLEY
WILMER CUTLER PICKERING
HALE AND DORR LLP
350 South Grand Ave.
Suite 2400
Los Angeles, CA 90071
(213) 443-5300

THOMAS G. SAUNDERS
Counsel of Record
GARY M. FOX
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 Pennsylvania Ave., NW
Washington, DC 20037
(202) 663-6000
thomas.saunders@wilmerhale.com

AUGUST 2023