No. 23-178

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

REPLY BRIEF FOR PETITIONER

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

DOCKETED CASES

STATUTORY PROVISIONS

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

INTRODUCTION

This case presents a pure question of law regarding whether the commands in 38 U.S.C. §§ 1728 & 1725 that the VA "shall reimburse" eligible veterans for emergency medical treatment are limited to emergency treatment received in the United States. The government does not deny that this issue is vitally important and that the Federal Circuit's decision will have potentially disastrous consequences for millions of veterans. Nor does the government dispute that this case is an appropriate vehicle to review this pure question of law. Rather, the government primarily opposes review by contending that the decision below was correct. But the government's own flawed arguments reinforce the need for review by the Court, and the merits should be decided after full briefing and argument.

The government misconstrues the plain text of Sections 1728 and 1725, and then compounds the error by misapplying various canons of statutory construction. For example, the government improperly invokes the presumption against implied repeals to import a domestic-emergency requirement into Sections 1728 and 1725. But that presumption does not give courts license to rewrite statutes in this manner.

The government also relies heavily on the presumption against extraterritoriality to support its cramped reading of Sections 1728 and 1725. But the government ignores that the operative commands in Sections 1728 and 1725 are directed to a U.S. official in the United States reimbursing U.S. veterans with funds from the U.S. treasury. That is domestic conduct and involves a quintessentially domestic concern: providing benefits to those who have valiantly defended the Nation.

The government also misapplies the rule that more specific statutes govern over more general ones. Sections 1728 and 1725 are more specific in every relevant respect. They are specifically directed to emergency treatment rather than medical care in general, and reimbursement is a far more specific act than the government's expansive interpretation of what it means to "furnish" care. Moreover, contrary to the government's argument, Sections 1728 and 1725 are also more specific regarding location. Both statutes consider proximity to federal facilities in a way that results in more geographically specific determinations of eligibility for reimbursement than the general pronouncement in 38 U.S.C. § 1724.

Although the government suggests that its interpretation harmonizes Sections 1728 and 1725 with Section 1724, Mr. Van Dermark offers an interpretation of all three statutes that is equally harmonious: Sections 1728 and 1725 require the VA to reimburse eligible veterans for emergency treatment whenever they are too far away to receive treatment at VA or other federal facilities, but under Section 1724, the VA may furnish non-emergency care only within the United States.

Finally, if there were any lingering ambiguity about the reach of Sections 1728 and 1725, the pro-veteran canon instructs that those provisions should be interpreted in favor of Mr. Van Dermark and similarly situated veterans.

The Federal Circuit's decision puts millions of veterans at risk every time they set foot outside the United States, and review by this Court is urgently needed to restore the protections Congress enacted for veterans who experience medical emergencies.

ARGUMENT

I. THERE IS NO DISPUTE THAT THIS CASE PRESENTS A VITALLY IMPORTANT QUESTION WITH FAR-REACHING CONSEQUENCES

A. The government does not deny that the question presented is important and that the Federal Circuit's decision could harm millions of veterans. The risk is continuous for the tens of thousands of U.S. veterans living abroad. Pet. 31. As a coalition of amici points out, "[m]ore than 18,000 veterans enrolled in VA's health care system live outside of the United States," and "the number of veterans living overseas is increasing." Brief of Military-Veterans Advocacy et al. (Coalition Br.) 6-7. The Federal Circuit's decision will preclude many of these veterans from receiving reimbursement for emergency treatment they might need while residing abroad.

Moreover, the Federal Circuit's decision negatively affects the *entire* population of over nine million veterans who are enrolled in the VA's healthcare program. Pet. 32. In addition to recreational travel, veterans may need to take business trips to other countries as part of their civilian employment. *See* Brief of Veterans' Advocacy Law Clinic 9-10. Veterans who live close to the border are particularly likely to travel to neighboring countries. *See, e.g.*, *id.* at 7-8. But every time these veterans set foot outside the country, they risk being left devastated by debt incurred during a medical emergency.

Review of the question presented in this case is thus critically important to the lives and livelihoods of millions of veterans who sacrificed to serve the Nation. The debt of gratitude we owe these veterans can never be fully repaid, but this Court should at least ensure that veterans who fought to defend the rule of law receive a

full hearing on the merits to restore the law as written by Congress, not as rewritten by the Federal Circuit.

B. The government also does not dispute that this case is a good vehicle for the Court to address the important question presented. Mr. Van Dermark has a total disability rating based on injuries received during more than a decade of service. C.A. App. 1274. In addition, the courts below appropriately assumed that Mr. Van Dermark's care in Thailand constituted "emergency treatment" within the meaning of Sections 1728 and 1725. Pet. App. 1a, 33a. That assumption is undoubtedly correct, as Mr. Van Dermark's doctor told him in 2016 that he could not fly and needed immediate surgery to treat his abdominal aortic aneurysm. Pet. App. 49a; C.A. App. 1275. The Federal Circuit decided the case as a question of law, and the petition likewise presents a pure question of statutory interpretation for this Court's review.

C. The government fleetingly offers a few reasons why this case supposedly "does not satisfy the Court's usual criteria for review," Opp. 9, but they are wrong or irrelevant. First, the government criticizes Mr. Van Dermark for "not assert[ing] a circuit conflict." *Id.* This argument borders on frivolous. As Mr. Van Dermark previously explained (Pet. 30-31), the Federal Circuit is the only Article III court of appeals with jurisdiction to hear disputes over veterans-benefits determinations by the VA. 38 U.S.C. § 7292(c). It is therefore impossible for a circuit conflict to arise regarding the proper interpretation of Sections 1728 and 1725. The Federal Circuit's flawed decision will apply to *all* U.S. veterans unless and until this Court overturns it—increasing, not diminishing, the need for review. This Court thus regularly reviews important questions of statutory interpretation affecting veterans. *E.g.*, *Rudisill* v. *McDonough*,

No. 22-888 (U.S.) (argued Nov. 8, 2023); *Arellano* v. *McDonough*, 598 U.S. 1, 5-6 (2023).

Second, the government criticizes Mr. Van Dermark for not identifying "any conflict with a specific decision of this Court." Opp. 9. But as Mr. Van Dermark explained throughout his petition and discusses further below, the Federal Circuit sharply departed from this Court's precedents on the presumption against implied repeals, the specific/general canon, and the pro-veteran canon. Pet. 19-30; *see infra* Section III.

II. THE FEDERAL CIRCUIT'S DECISION CONTRAVENED THE PLAIN TEXT OF SECTIONS 1728 AND 1725

The Federal Circuit erred by importing a requirement into Sections 1728 and 1725 that emergency treatment must be received in the United States for the associated out-of-pocket costs to be reimbursable.

Section 1728 states that the VA "*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).[1] This provision, which includes four eligibility requirements, is carefully designed to indicate when it applies. *See* Pet. 13-15. Section 1725 similarly states that the VA "*shall* reimburse a veteran" who meets certain conditions "for the reasonable value of emergency treatment furnished the veteran in a non-Department facility." 38 U.S.C. § 1725(a) (emphasis added). Like Section 1728, Section 1725 indicates the specific circumstances in which it applies, including eligibility requirements and

[1] Mr. Van Dermark continues to cite the applicable versions of Sections 1728 and 1725. Pet. 2 n.1, 3 n.2; Pet. App. 61a-66a, 69a-70a.

limitations on reimbursement. *See* Pet. 15-16. Neither Section 1728 nor Section 1725 limits its command to emergency treatment in the United States.

Congress specifically considered the geographic scope of Sections 1728 and 1725 when it left them unbounded. Congress defined "emergency treatment" to cover only care received "when Department or other 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); *see also id.* § 1728(c) (incorporating Section 1725's definition of "emergency treatment"). Excluding reimbursement for emergency treatment outside the United States would thus defeat Congress's purpose of ensuring that critical care is available whenever and wherever it is needed.

The statutory history underscores that congressional purpose. When Congress amended Sections 1728 and 1725 in 2008 to make reimbursement mandatory, Congress expressed its conviction that "*all* veterans have access to emergency care." 154 Cong. Rec. S10439, S10439 (daily ed. Oct. 2, 2008) (joint explanatory statement) (emphasis added). Congress expected that Section 1725 in particular would "make[] sure that veterans are reimbursed for emergency care *no matter where* they get that treatment." 145 Cong. Rec. H8392, H8403 (daily ed. Sept. 21, 1999) (emphasis added).

Ultimately, Congress said what it meant, and it meant what it said: the VA "*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, whether in the United States or abroad. 38 U.S.C. § 1725(a) (emphasis added). The VA is not free to disregard Congress's "shall" commands.

See Kingdomware Techs., Inc. v. *United States*, 579 U.S. 162, 171 (2016).

III. The Federal Circuit Misapplied Multiple Tools Of Statutory Construction

A. To support its narrow interpretation of Sections 1728 and 1725, the government relies on the presumption against implied repeals. Opp. 11-12. The government never invoked that presumption before the courts below. *See* Pet. 19-20. In any event, as this Court has explained, the presumption against implied repeals is merely a presumption against "too easily finding irreconcilable conflicts" among statutes. *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1624 (2018). It does not give courts free rein to rewrite a statute to avoid a conflict with another, especially when the rewritten statute would be inconsistent with congressional intent. *See 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 statue that Congress has enacted." (quotation marks omitted)).

Yet the Federal Circuit did precisely what this Court has said it should not. Without engaging in a full statutory analysis, the Federal Circuit invoked the presumption to rewrite the law and override the clear commands in Sections 1728 and 1725 that the VA "shall reimburse" eligible veterans. *See* Pet. App. 23a-24a.

Mr. Van Dermark previously examined all the implied-repeal cases cited by the Federal Circuit and explained why those cases do not support its decision. Pet. 21-22. The government does not engage with any of this analysis. Moreover, Mr. Van Dermark showed that the presumption against implied repeals traditionally applies when (1) earlier- and later-enacted statutes are only tangentially related, and (2) the earlier statute is

more specific. Pet. 22-24. On the latter point, the government argues only that Section 1724 is more specific than Sections 1728 and 1725, which is wrong for the reasons discussed below. *See infra* Section III.B. The government leaves the first point wholly unaddressed.

The government's failure to engage with the limits of the implied-repeal doctrine mirrors the Federal Circuit's unduly simplistic approach. Indeed, this erroneous understanding of the presumption reinforces the need for review, and in addition to addressing the important question of the scope of Sections 1728 and 1725, this case provides an opportunity to bring clarity regarding the proper application of the presumption against implied repeals.

B. Like the Federal Circuit, the government gives short shrift to the longstanding principle that a specific statute governs over a more general one. *See, e.g.*, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). Sections 1728 and 1725 are more specific than Section 1724 in all relevant respects. Pet. 25-27. The government concedes that "Sections 1725 and 1728 address a narrower category of medical care" than Section 1724. Opp. 15. Sections 1728 and 1725 are also more specific because they address reimbursement by the VA, which the Federal Circuit interpreted as only one of several ways in which the VA may "furnish" care.

Moreover, although the government attempts to shift the focus exclusively to the geographic reach of the statutes, it has no response to Mr. Van Dermark's explanation that Sections 1728 and 1725 are geographically more specific because they define their reach in relation to a veteran's proximity to federal facilities. *See* Pet. 26-27 (citing 38 U.S.C. § 1725(f)(1)(A)).

Sections 1728 and 1725 are properly interpreted as limited exceptions to Section 1724 that control whenever a veteran seeks reimbursement for out-of-pocket costs for emergency treatment, regardless of the country in which that emergency treatment is received. Section 1724 otherwise operates to prohibit the VA from furnishing non-emergency care outside the United States. Under this harmonious interpretation, the basic purposes and effects of all three statutory provisions "will obviously be served." *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 156 (1976).[2]

C. Although the Federal Circuit had "no occasion to test [Sections] 1728 and 1725 against the presumption against extraterritoriality," Pet. App. 24a, the government relies on that presumption as an alternative basis to defend the Federal Circuit's decision. But the presumption poses no barrier to interpreting Sections 1728 and 1725 as written, to apply regardless of the country in which emergency treatment is received. Indeed, the government does not cite any case ever applying the presumption to a veterans-benefits statute like Sections 1728 and 1725.

At step two of this Court's two-step extraterritoriality framework, courts identify "the focus of congressional concern underlying the provision at issue" and then "ask whether the conduct relevant to that focus

[2] The government argues (at 10) that Sections 1728 and 1725 cannot be exceptions to Section 1724 because neither Section 1724(b) nor Section 1724(c) authorizes reimbursement for treatment for non-service-connected disabilities received abroad (except in the Philippines). But the government incorrectly presumes that Section 1724(b)'s authorization of medical care, which is more general, overrides Sections 1728 and 1725, which are more specific. Sections 1728 and 1725 authorize—indeed, *obligate*—the VA to reimburse eligible veterans specifically for emergency treatment.

occurred in United States territory." *Abitron Austria GmbH* v. *Hetronic Int'l, Inc.*, 600 U.S. 412, 418 (2023) (cleaned up) (emphasis omitted). Where, as here, the "'conduct relevant to the statute's focus'" occurs domestically, the presumption is overcome, "'even if other conduct occurred abroad.'" *Id.* at 419. As the government recognizes, a statute's focus "'is the object of its solicitude, which can include the conduct it seeks to regulate, as well as the parties and interests it seeks to protect or vindicate.'" Opp. 13 (quoting *Abitron*, 600 U.S. at 418).

The conduct relevant to the focus of Sections 1728 and 1725 is domestic. The only conduct that Sections 1728 and 1725 regulate is that of a U.S. official in the United States overseeing the reimbursement of U.S. veterans with funds from the U.S. treasury. Sections 1728 and 1725 do not seek to regulate the provision of emergency treatment, as neither statute dictates how emergency treatment should be rendered. Further, by commanding that the VA reimburse eligible veterans for their out-of-pocket costs for emergency treatment, Congress set out to "vindicate" the fundamentally domestic interest of compensating U.S. veterans for their service to the Nation. *See WesternGeco LLC* v. *ION Geophysical Corp.*, 138 S. Ct. 2129, 2137 (2018).

Because the regulated conduct is domestic, and because the statutes' fundamentally domestic interest is served no matter where in the world emergency treatment is received, reimbursement for foreign emergency treatment does not constitute an impermissible extraterritorial application of Sections 1728 and 1725.

D. Sections 1728 and 1725 unambiguously require the VA to reimburse eligible veterans for emergency treatment whenever federal facilities are unavailable, even if the emergency treatment is received abroad.

But if there were any remaining doubt regarding the interaction of Sections 1728 and 1725 with Section 1724, the pro-veteran canon resolves that doubt in Mr. Van Dermark's favor.

The government echoes the Federal Circuit's reasoning that the canon is inapplicable here because a narrower interpretation of "furnish" in Section 1724 might "benefit some veterans at the expense of others." Opp. 16. But Mr. Van Dermark is not seeking review based on the definition of "furnish." *See* Pet. 26 & n.7; Opp. 8-9, 14. Nor does the pro-veteran canon apply solely to the Federal Circuit's interpretation of Section 1724. It also informs the interpretation of Sections 1728 and 1725, and its application to those provisions could only benefit veterans by allowing more reimbursement.

The government's only response is to argue that Mr. Van Dermark has not cited a case suggesting that the pro-veteran canon "supersede[s] the presumption against extraterritorial application of United States law or the presumption against implied repeals." Opp. 16. But that is not an excuse to ignore the pro-veteran canon. The pro-veteran canon applies to resolve "interpretive doubt," *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994), and it is unnecessary to determine whether it can "supersede" other canons to conclude that, at the very least, it should apply where, as here, other canons fail to foreclose the veteran's interpretation.

The pro-veteran canon has deep roots in American law. *See* Coalition Br. 14-19; Brief of Wohl Veterans Legal Clinic 5-8. The Federal Circuit's decision contravened this deeply rooted principle, and this Court should grant certiorari to reverse. Like Mr. Van Dermark, every veteran "has performed an especially important service for the Nation, often at the risk of his or her own

life." *Shinseki* v. *Sanders*, 556 U.S. 396, 412 (2009). Veterans should not be forced to assume additional risk if they happen to have medical emergencies outside the United States.

CONCLUSION

The petition 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

DECEMBER 2023