IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

Vet. App. No. 19-2795

PETER VAN DERMARK,

Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Appellee.

BRIEF OF *AMICI CURIAE*
NATIONAL VETERANS LEGAL SERVICE PROGRAM AND
MODERN MILITARY ASSOCIATION OF AMERICA
IN SUPPORT OF APPELLANT PETER VAN DERMARK

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INTERESTS OF *AMICI CURIAE*

The *amici curiae* are the National Veterans Legal Services Program ("NVLSP") and the Modern Military Association of America ("MMAA"). *Amici curiae* share a common interest in ensuring that, whenever Congress guarantees a benefit to our nation's veterans or their dependents, the Secretary of Veterans Affairs ("Secretary") does not eliminate or restrict eligibility for any of Congress' intended beneficiaries.

NVLSP is an independent nonprofit organization that has worked since 1981 to ensure that our nation's 22 million veterans and active duty personnel receive the federal benefits they have earned through service to our nation. NVLSP advocates before federal agencies, courts, and Congress to protect service members and veterans irrespective of their physical location. NVLSP has represented thousands of individual service members and veterans, participated as *amicus curiae* in support of service members and veterans in numerous agency and court actions, and served and continues to serve as counsel for certified classes of veterans and their dependents. NVLSP has expertise in the system by which VA is required to reimburse veterans for the value of emergency medical care furnished at non-VA facilities by virtue of the fact that NVLSP attorneys serve as class counsel for the petitioner class in *Wolfe v. Wilkie,* U.S. Vet. App. No. 18-6091. NVLSP's experience and expertise situate it well to explain why the Secretary has no power to eliminate or restrict eligibility for reimbursement for costs of emergency treatment of veterans that happens to be furnished at non-VA facilities abroad.

MMAA is one of the country's largest non-profit, non-partisan legal services, policy, and watchdog organizations serving lesbian, gay, bisexual, transgender, and queer

(LGBTQ) military personnel, veterans, military spouses, family members, and allies, as well as individuals living with HIV. MMAA was formed through the merger of the American Military Partner Association and OutServe-SLDN, Inc., and it has over 75,000 members and supporters. MMAA has a unique understanding of the challenges faced by the populations it serves. Since 1993, MMAA and its predecessor entities have assisted over 12,500 clients.

MMAA regularly engages in high-profile litigation and participates as *amicus curiae* to challenge policies that target, stigmatize, or otherwise negatively affect service members and their families—reducing morale and diminishing military readiness by inhibiting the military's efforts at recruiting and retention. For example, MMAA has filed lawsuits challenging laws and regulations that discriminate against and stigmatize LGBTQ service members, including: the former "Don't Ask, Don't Tell" law requiring that lesbian, gay, and bisexual service members conceal their sexual orientation; regulations prohibiting same-sex military spouses from receiving spousal benefits; the current ban on openly transgender people serving in the U.S. military; and regulations negatively affecting service members with HIV. MMAA has a strong interest in advocating for its members who may be affected by the Secretary unlawfully singling out *any* group of service members or veterans to deprive them of legal rights, including veterans whose only access to emergency medical treatment is at non-VA facilities abroad.

INTRODUCTION

This appeal presents two principal legal issues: The "narrower" issue affects thousands of our nation's veterans who are living or traveling abroad. This issue is that,

when Congress guaranteed veterans that VA will reimburse veterans for the value of emergency medical treatment furnished at non-VA facilities, Congress intended for the guarantee to extend worldwide. *Amici curiae* agree with Mr. Van Dermark's arguments made on the basis of this guarantee. They write separately, however, to emphasize a few aspects of the relevant statutes' legislative history. *See* Argument, Part I.

The second, broader, issue is that, whenever Congress guarantees that VA will perform an act "under such regulations as the Secretary prescribes," the Secretary may not vitiate Congress' underlying guarantee. Here, where Congress clearly intended for its guarantee that VA will reimburse veterans for the value of emergency medical treatment furnished at non-VA facilities to extend worldwide, 38 U.S.C. § 1728's language "under such regulations as the Secretary prescribes" does not empower the Secretary to promulgate regulations curtailing that guarantee, such as by restricting it to medical treatment furnished within the United States. *See* Argument, Part II.

ARGUMENT

I. THE STATUTE: CONGRESS INTENDED THAT VA REIMBURSE VETERANS FOR EMERGENCY MEDICAL CARE FURNISHED AT ANY NON-VA FACILITY, REGARDLESS OF LOCATION.

As Mr. Van Dermark addresses in his brief, 38 U.S.C. § 1724 restricts where VA may *furnish* medical services. Congress again used "furnish," or a conjugation of that verb, in §§ 1725 and 1728 when guaranteeing that VA shall *reimburse* veterans for the value of emergency medical treatment *furnished* (or *rendered*) at non-VA facilities. *Amici curiae* join Mr. Van Dermark's arguments regarding Congress' intended meaning in using these terms, including that, should Congress have intended for *reimburse* and *furnish* to have the

same meaning, Congress would not have used both terms within the same statutes. *See, e.g.*, *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in statutory text is generally read the same way each time it appears."); *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (when Congress uses different terminology in the same statutes, it generally intends different meanings). Congress' use of the same term across statutes while using different terms within those statutes communicates its clear and unambiguous intent to guarantee reimbursement to Mr. Van Dermark and all eligible veterans worldwide.

Amici curiae also join in Mr. Van Dermark's arguments as to why the legislative history behind the statutes at issue confirms Congressional intent to require VA to reimburse Mr. Van Dermark and other eligible veterans who incur eligible emergency medical costs at non-VA facilities worldwide. *See, e.g.*, *Casey v. Wilkie*, 31 Vet. App. 260, 264 (2019) ("Considering the purposes behind a statutory scheme is a useful check on a court's interpretation of a specific statutory provision."). *Amici curiae* write separately to emphasize the following aspects of the statutes' legislative histories.

Congress amended 38 U.S.C. § 1724 (then 38 U.S.C. § 624) in 1959 to "extend the existing authority of VA to *provide* hospital and medical care for veterans who are United States citizens temporarily residing abroad." Act of August 11, 1959, Pub. L. No. 86-152, 73 Stat. 332 (emphasis added). The amended language stated that "the administrator may *furnish* necessary hospital care and medical services to any otherwise eligible veteran for any service-connected disability if the veteran (1) is a citizen of the United States temporarily sojourning or residing abroad, or (2) is in the Republic of the Philippines." *Id.*

(emphasis added). Congress amended the same statute again in 1988 to address limitations on VA's authority to *provide* health care to veterans who are Canadian citizens, H.R. Rep. No. 100-191, at 441 (1987), adding language allowing VA to *furnish* care and services for veterans who are Canadian citizens. *See* An Act to amend title 38, United States Code, to revise, improve, and extend various veterans' programs, and for other purposes, Pub. L. No. 100-322, 102 Stat. 487 (1988).

In 1973, Congress created 38 U.S.C. § 1728 (then 38 U.S.C. § 628), to codify a VA regulation providing for the VA to *reimburse* eligible veterans for the reasonable value of non-VA hospital care and medical services when VA facilities were not readily available. *See* H.R. Rep. No. 93-368, at 1701 (1973). Under the pre-1973-existing law, veterans with permanent and total service-connected disabilities were entitled to full VA medical care for any disability, either directly in a VA facility or by fee or contract. *Id.* The enactment of 38 U.S.C. § 628 expanded VA's reimbursement authority for emergency treatment in a non-VA hospital where no VA hospital or clinic was accessible. *Id.*

Congress' intention for an expansive interpretation of the statutes is confirmed by its 1973 addition of 38 U.S.C. § 628, in which it provided guidance to VA to close the "small gap" in existing law. *See* H.R. Rep. No. 93-368, at 1701 (1973). Per committee language, the statute should be read to cover reimbursement after emergency expenditures when no VA hospital or clinic was accessible. *Id.* Congressional language is clear that the law entitles permanently and totally, service-connected disabled veterans to medical care reimbursement for *any* disability. *See id.* (emphasis added). Section 1728 has *never* contained a geographical restriction.

Indeed, in 2008 Congress amended § 1728 again to further emphasize that VA lacks any discretion to deny reimbursement. 38 U.S.C. § 1728 (as amended in 2008 by Pub. L. No. 110-387) (changing "the Secretary may reimburse…" to "the Secretary shall reimburse…"). Congress similarly amended 38 U.S.C. § 1725 in 2009 to expand the eligibility for reimbursement by the VA for emergency treatment expenses incurred for a non-service-connected disability at a non-VA facility. H.R. Rep. No. 111-55, at 1482 (2009). That amendment "also clearly establishes that the VA is responsible for the cost of emergency treatment which exceeds the amount payable or paid by the third-party insurer." *Id*. Section 1725 has *never* contained a geographic restriction, and *amici curiae* understand that Mr. Van Dermark's emergency treatment was not covered in full by a third-party insurer. Congress' sweeping amendments are evidence of its intent to ensure a comprehensive reimbursement program.

Interpreted together, the language and legislative histories of 38 U.S.C. §§ 1724, 1725, and 1728 reflect that Congress intended to geographically restrict only the *provision* of medical services, while ensuring certainty that VA *reimburse* costs of emergency treatment for an ailing veteran who is unable to access a VA hospital or clinic. Congress' use of *provide* in legislative reports when referring to VA's authority to *furnish* healthcare evinces a clear intent to give *furnish* its understood meaning of "providing with what is needed." Thus, any requirement that the Secretary shall not *furnish* certain medical services outside any State means only that the Secretary is restricted in its *provision* of services as a healthcare provider. It does not affect the Secretary's obligation to *reimburse* the costs of those services if provided by a non-VA facility.

II. THE REGULATION: THE SECRETARY'S GEOGRAPHIC RESTRICTIONS ARE INVALID.

Pursuant to 38 U.S.C. § 1728(a)(3), "[t]he Secretary shall, under such regulations as the Secretary prescribes, reimburse … emergency treatment … for … [a]ny disability of a veteran if the veteran has a total disability permanent in nature from a service-connected disability." *Amici curiae* understand that, here, Mr. Van Dermark has a total disability that is permanent in nature from a service-connected disability. *See* Appellant's Br. at 11-12. The Board denied Mr. Van Dermark entitlement to reimbursement under § 1728(a)(3) based on two grounds: (1) its misinterpretation of § 1724 and that statute's implementing regulation, addressed in Mr. Van Dermark's brief and for reasons emphasized *supra* pages 3-6; and (2) 38 C.F.R. § 17.120(a)(3) (2018).

38 C.F.R. § 17.120(a)(3) states that VA is not required to reimburse emergency treatment for any disability of a veteran who has a total disability permanent in nature resulting from a service-connected disability if the emergency services were provided outside the United States. *See* 38 C.F.R. § 17.120(a)(3) ("To the extent allowable, payment or reimbursement of the expenses of emergency treatment, not previously authorized, in a … hospital not operated by the Department of Veterans Affairs … will be paid on the basis of a claim timely filed, under the following circumstances … Emergency treatment not previously authorized was rendered to a veteran in need of such emergency treatment … For any disability of a veteran who has a total disability permanent in nature resulting from a service-connected disability *(does not apply outside of the States, Territories, and possessions of the United States, the District of Columbia, and the*

Commonwealth of Puerto Rico)" (emphasis added)). That geographical restriction, however, is invalid.

Courts have long looked to Congress' intent behind its passage of laws to determine the path through which said laws must be enforced. Again, the judiciary's goal on issues of statutory interpretation is to identify and implement Congress' intent in enacting statutes. *Casey*, 31 Vet. App. at 264. When confronted with an agency's interpretation of a statute, the Court must determine whether the agency has stayed within its bounds of authority. *See, e.g.*, *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 297 (2013). If Congress has directly spoken to the precise question at issue, that is the end of the matter and a contrary agency interpretation must give way. *See e.g.*, *id.* at 314. To determine Congressional intent, as Mr. Van Dermark notes, the Court must interpret the statute as part of a coherent regulatory scheme. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

Courts are frequently called upon to invalidate agency regulations that exceed the agency's authority or otherwise counter Congressional intent. *Id.* at 136 (Congress' delegation of "general controls" to the FDA in the regulation of tobacco products did not mean that the FDA could ban tobacco products, as Congress has evidenced an intent to keep tobacco products on the market). That is so even when Congress permits the agency *some* leeway to promulgate regulations. For example, in *Merck & Co. v. U.S. Dep't of Health & Human Servs.*, 385 F. Supp. 3d 81 (D.D.C. 2019) ("*Merck*"), the court considered statutory language that read "the Secretary shall prescribe such regulations as may be necessary to carry out the administration of the insurance programs under this subchapter."

The court held that such language meant that Congress had delegated to the agency only the power to "establish rules and regulations for 'running' or 'managing' the federal public health insurance programs." *Id.* at 90. "The important word, in the court's view, is 'administration.'" *Id*. The court held that Congress had vested only certain control to the Secretary—administrative control—and defined the objects of that control as the federal public health insurance programs. *Id*. Accordingly, HHS's adoption of a rule that regulated the conduct of market actors that were not direct participants in the relevant federal public healthcare programs, namely, the pricing of prescription drugs, contravened Congressional intent and therefore exceeded HHS's authority. *Id*; *see also Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166 (D.C. Cir. 2003) (where statute allowed agency to make exclusion based on insurance coverage, agency's exclusion based on type of insurance was contrary to Congressional intent).

Here, similar to the statute at issue in *Merck*, 38 U.S.C. § 1728 provides that the Secretary "shall, under such regulations as the Secretary prescribes, reimburse veterans eligible for hospital care or medical services under this chapter…" Using similar tools of analysis as used in *Merck*, the key terms are "shall" and "reimburse." They evince Congress' intent to limit its delegation to the Secretary under § 1728 to control over administering reimbursement to Congress' intended beneficiaries. Stated differently, Congress defined the objects of that control as reimbursement of health care or medical services bestowed upon eligible veterans—with § 1728 defining veterans' eligibility. Congress also limited that control by its usage of "shall." "Shall" is defined as "to express a command or exhortation." *Webster's Third New Int'l Dictionary* [pin] (1993). Thus,

Congress has delegated only ministerial control to VA to reimburse eligible veterans—again, as *Congress* has defined eligibility—for emergency procedures, commanding that VA must actually reimburse said eligible veterans.

The statute is clear that "reimbursement…for *any* disability of a veteran if the veteran has a total disability permanent in nature from a service-connected disability" is required. *See* 38 U.S.C. § 1728(a)(3) (emphasis added). The term "any" is broad. "When coupled with a singular noun in an affirmative context, *any* typically 'refers to a member of a particular group or class without distinction or limitation' and 'implies *every* member of the class or group." *Cook v. Wilkie*, 908 F.3d 813, 818 (Fed. Cir. 2018) (emphasis in original) (quoting *SAS Inst., Inc. v. Iancu*, 138 S.Ct. 1348 (2018)). Here, *any* refers to a disability of a veteran who has total disability permanent in nature from a service-connected disability. Thus, the statute imposes a positive duty on the Secretary to reimburse for *any* disability of a veteran who fits into the aforementioned group, such as Mr. Van Dermark. *See Quinn v. Wilkie*, 31 Vet. App. 284, 290 (2019) ("before the Board decides *any* appeal, it must afford the appellant an opportunity for a hearing" indicates that the Board is not free to curate which appeals are entitled to an "opportunity for a hearing") (emphasis added).

Congress has provided additional subsections specifying eligibility for reimbursement. 38 U.S.C. § 1728(a). Congress could have, but did not, include text restricting eligibility to treatment performed in certain locations. Congress' specificity in defining veterans' eligibility clearly demonstrates that it considered the scope of the statute and chose not to restrict eligibility based on location, instead choosing to narrow eligibility

based on type of disability and service-connection. Thus, Congress clearly did not intend to attach liability to permanently and totally disabled veterans who receive treatment abroad. *See Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438 (2002) ("It is unlikely that Congress, which neither created a separate category for signatory operators nor included signatory operators within the categories, intended to attach liability to a group such as successors in interest to signatory operators through a general clause that was meant to reach persons 'described' in one of three explicit categories").

Because Congress intended no exception for emergency medical treatment provided internationally, neither the VA nor this Court can create one. *See, e.g.*, *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) ("If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *Ward v. Wilkie*, 31 Vet. App. 233, 240 (2019) ("The Secretary may not add restrictions to a regulation [or statute] where they do not exist, 'because, in doing so, the Board imposes a greater burden on a claimant than the law does.'" (quoting *English v. Wilkie*, 30 Vet. App. 347, 353 (2018))); *Detroit Receiving Hosp. & Univ. Health Ctr. v. Sebelius*, 575 F.3d 609, 613–14 (6th Cir. 2009) (the lack of a stated exception for qualified Medicare beneficiaries' bad debt in a reimbursement statute is unambiguous and the Court may not carve out the exception).

Although Congress has permitted the Secretary *some* leeway under § 1728 to reimburse eligible veterans "under such regulations as the Secretary prescribes," that is by no means a blank check. VA may not curtail Congress statutory objective. VA's rule that restricts reimbursement based on location does just that, overreaching the bounds of VA's

authority by, contrary to Congress' intent for § 1728's guarantees to apply worldwide, refusing to reimburse veterans who did not receive treatment within the geographic restrictions of 38 C.F.R. § 17.120(a)(3). However, as Congress' intent is clear, that is the end of the matter. VA's restriction is invalid.

Even if that were not the end of the matter, 38 C.F.R. § 17.120(a)(3)'s geographical restriction suffers from a fatal procedural defect. VA provided no reasoned basis for adding it. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). When proposing to add the geographical restriction, which VA did among other regulatory revisions, VA stated only that "[t]he proposed amendments to 38 CFR Part 17 more precisely define the prerequisites for this benefit … ." 50 Fed. Reg. 29,990 (July 23, 1985). When publishing the final rule, it stated only that it "is amending its medical regulations, (38 CFR Part 17) to more … accurately define the eligibility requirements for claims filed for VA payment of unauthorized medical services," 51 Fed. Reg. 8,671 (Mar. 13, 1986), and that "this amendment to VA regulations more accurately defines the eligibility requirements for claims filed for VA payment of unauthorized medical services … ." *Id.* at 8,672.

VA never addressed the geographical restriction specifically, nor how it can possibly define the eligibility requirements when Congress had made clear its intent for eligibility to extend worldwide. Even if Congress had provided VA with sufficient authority to cabin eligibility for reimbursement of emergency medical treatment to that furnished within the United States, *sub silentio* singling out veterans without access to such treatment was impermissible. *See, e.g.*, *State Farm*, 463 U.S. at 43; *Judulang v. Holder*,

565 U.S. 42, 55 (2011) ("Rather than considering factors that might be thought germane to the deportation decision, that policy hinges § 212(c) eligibility on an irrelevant comparison between statutory provisions."); *See also, e.g.*, *Marquez-Martinez v. U.S. Attorney Gen.*, 752 F. App'x 832, 836 (11th Cir. 2018) (agency's denial of motion to reopen was arbitrary and capricious due to its reliance on irrelevant factors and a failure to provide a reasoned basis for its reliance thereon).

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Respectfully submitted,

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