BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

22-1018

HERBERT N. HASKELL, II,

Appellant,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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STATEMENT OF THE ISSUE

The plain text of 38 U.S.C. § 1114(t) provides for the award of special monthly compensation when a veteran needs regular aid and attendance for the residuals of a traumatic brain injury. It does not additionally require a higher level of care. The Board favorably found that the Veteran needs regular aid and attendance. Did the Board misinterpret and misapply the statute by denying entitlement to special monthly compensation because the Veteran did not also demonstrate the need for a higher level of care?

STATEMENT OF THE CASE

Herbert N. Haskell, II, is a Purple Heart recipient who has been totally disabled by service-connected injuries since his discharge. R-4505; R-5882 (5879-82); R-5922 (5922-23). He served honorably in the United States Marine Corps from March 1966 to December 1967, also earning the Vietnamese Service Medal, the Republic of Vietnam Campaign Medal, and the National Defense Service Medal. R-4505.

While deployed to Vietnam, Mr. Haskell was knocked unconscious by the blast of a rocket-propelled grenade and sustained multiple shrapnel wounds, including to his head. R-5300 (5300-05); R-5901 (5898-902). He underwent a craniectomy and was diagnosed with posttraumatic encephalopathy manifesting in severe left cerebellar

dysfunction, depression, headaches, and memory loss.[1] R-5901-02; R-5922-23; R-5939. His condition also has caused gait problems, loss of balance, trouble sleeping, dizzy spells, and easy fatigability. R-5806; R-5879.

Since 2008, Mr. Haskell has been totally disabled by the residuals of his in-service traumatic brain injury alone: severe deficits of memory, attention, concentration, and executive function. R-63-67; R-5223 (5219-32). VA has determined that he has needed the regular aid and attendance of another person since October 2011 because of his service-connected disabilities. R-4909 (4908-10). To award SMC based on the need for regular aid and attendance, VA relied on the report of a physician who stated that Mr. Haskell needed assistance in protecting himself from the ordinary hazards of his daily environment and who noted that the Veteran "cannot remember so well because he has a traumatic brain injury." R-4953 (4951-53); *see* R-4908-09.

Around 2014, Mr. Haskell began having episodes of sudden loss of balance, incoordination, confusion, and paranoia. R-2532 (2531-39). The episodes were triggered by stress, and their frequency varied. R-1038 (1038-40); R-2532. He got lost in stores and familiar places, despite using a GPS. R-2533. Although he could drive to the local market himself, he could not find his car in the parking lot. *Id.*

[1] A craniectomy is the excision of a part of the skull. DORLAND'S MEDICAL DICTIONARY ONLINE, *available at* https://www.dorlandsonline.com/dorland/home (last visited Oct. 21, 2022).

Mr. Haskell's wife, Margaret Laska, assisted him due to his episodes of confusion, tendency to fall, and short-term memory loss. R-2649; R-2638-39. His falls had resulted in numerous injuries when he was unattended. R-1038. Ms. Laska performed safety checks around the house because Mr. Haskell tended to leave the stove on or to leave something in the toaster oven for too long. R-1040; R-2533. The Veteran also needed Ms. Laska's reminders to take his medications. R-1328 (1328-32).

In May 2017, Mr. Haskell applied for increased compensation for his TBI residuals including special monthly compensation under 38 U.S.C. § 1114(t). R-2699-2703; R-2704; R-2712; R-2721. VA denied SMC(t), and he timely appealed. R-1119-21 (Nov. 2017 rating decision); R-1083-87 (Jan. 2018 notice of disagreement); R-996-1027 (July 2019 statement of the case); R-915-16 (Aug. 2019 VA Form 9 appeal). In support of his appeal, he submitted a neuropsychologist's opinion that in the absence of the regular aid and attendance of another for the residuals of his TBI, Mr. Haskell would require hospitalization, nursing home care, or some other institutional care since October 2012. R-838 (838-49); *see also* R-834-37 (accompanying argument); R-850-52 (neuropsychologist's curriculum vitae).

In April 2021, a VA examiner noted that Mr. Haskell was "totally dependent on his wife for pretty much everything" in conjunction with a finding of severe functional impairment due to TBI residuals of memory, attention, concentration, or executive function deficits. R-242, R-248 (239-51) (Apr. 2021 TBI examination); R-

823-24 (816-28) (Mar. 2020 Board remand). VA continued to deny SMC(t). *See* R-201 (194-202) (Apr. 2021 aid and attendance examination); R-105-17 (Aug. 2021 supplemental SOC); R-19-27 (the Veteran's response to the SSOC).

In January 2022, the Board denied entitlement to SMC(t). R-5 (1-14). Relying on 38 C.F.R. § 3.352(b)(2) (2022), the Board determined that "qualifying for SMC(t) requires both a showing of aid and attendance" and "the need for higher-level care." R-8 (cleaned up). The Board favorably found that "the type of care that [the Veteran's] wife has said she provides defines aid and attendance." R-11. But it found that the Veteran did not "demonstrate the need for higher-level care" and denied entitlement to SMC(t) as a result. *Id.* (cleaned up); *see also* R-5. This timely appeal followed.

SUMMARY OF THE ARGUMENT

The Board erred by denying Mr. Haskell SMC(t) on the ground that he does not require a higher level of care. Section 1114(t) plainly does not require the need for a higher level of care in addition to regular aid and attendance. The Secretary's interpretation of § 1114(t) in section 3.352(b)(2), which imposes the additional requirement of a need for higher-level care, impermissibly restricts the applicability of the statute in violation of plain congressional intent.

The Secretary attempted to justify the addition of this requirement as necessary to harmonize § 1114(t) with § 1114(r)(2), which requires a need for higher-level care

in addition to regular aid and attendance. But simply because § 1114(t) provides for payment of the same compensation as § 1114(r)(2) does not mean that it also contains the same substantive requirements. Its plain text shows that it does not. The Court should hold that the Secretary's interpretation of the statute is contrary to its plain language or alternatively unentitled to deference. It should set aside the regulation as invalid, vacate the Board's decision, and remand for the Board to correctly apply the statute.

STANDARD OF REVIEW

Whether a veteran is entitled to SMC is a finding of fact that this Court reviews for clear error. *Breniser v. Shinseki*, 25 Vet.App. 64, 68 (2011); *see* 38 U.S.C. § 7261(a)(4). The Court reviews the Board's underlying interpretation of a statute or regulation without deference. *See Lennox v. Principi*, 353 F.3d 941, 945 (Fed. Cir. 2003). A conclusion of law shall be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise contrary to law, or unsupported by adequate reasons or bases." *King v. Shinseki*, 26 Vet.App. 433, 437 (2014); *see also* 38 U.S.C. § 7261(a)(3).

ARGUMENT

A veteran who is "not eligible for compensation under subsection (r)(2) [of 38 U.S.C. § 1114]" can be paid at the (r)(2) rate if the veteran "is in need of regular aid and attendance for the residuals of traumatic brain injury" and "in the absence of such regular aid and attendance would require hospitalization, nursing home care, or other

residential institutional care." 38 U.S.C. § 1114(t). Mr. Haskell is ineligible for compensation under subsection (r)(2) because he is not entitled to compensation under § 1114(o), at the maximum rate under § 1114(p), or at the intermediate rate between § 1114(n) and (o) plus the rate under § 1114(k). *Id.* § 1114(r); *see* R-65-66; R-836.

The Board made a favorable factual finding establishing that Mr. Haskell "is in need of regular aid and attendance" as required by § 1114(t). R-11-12. It found that "the type of care that [the Veteran's] wife has said she provides defines aid and attendance." R-11. This favorable finding of material fact cannot be disturbed. *Romero v. Tran*, 33 Vet.App. 252, 265 (2021).

Relying on 38 C.F.R. § 3.352(b), the Board then determined that qualifying for SMC(t) also "requires . . . the need for higher-level care." R-8 (cleaned up). A higher level of care is "personal health-care services provided on a daily basis in the veteran's home by a person who is licensed to provide such services or who provides such services under the regular supervision of a licensed health-care professional." 38 C.F.R. § 3.352(b)(3); *see also* 38 U.S.C. § 1114(r)(2).[2] The Board found that Mr. Haskell's TBI residuals did not require a higher level of care and denied him entitlement to SMC(t) as a result. R-5, R-11-12.

[2] Examples include "physical therapy, administration of injections, placement of indwelling catheters, and the changing of sterile dressings, or like functions." 38 C.F.R. § 3.352(b)(3).

As argued below, section 3.352(b)(2) conflicts with § 1114(t) to the extent that the regulation requires a need for a higher level of care. R-8. As a result, the regulation is invalid, and the Court should set it aside. Because the Board's denial of SMC(t) was based on a misinterpretation of the statute, vacatur and remand are warranted.

I. Section 1114(t) unambiguously shows Congress's intent to provide SMC(t) to veterans who do *not* need higher-level care in addition to regular aid and attendance.

Section 1114(t) provides in relevant part that a veteran "shall be paid, in addition to any other compensation under this section, a monthly aid and attendance allowance equal to the rate described in subsection (r)(2)" if the veteran "is in need of regular aid and attendance for the residuals of traumatic brain injury, is not eligible for compensation under subsection (r)(2), and in the absence of such regular aid and attendance would require hospitalization, nursing home care, or other residential institutional care." 38 U.S.C. § 1114(t).

Section 3.352(b)(2) contains VA's interpretation of § 1114(t). *See* 38 C.F.R. § 3.352(b)(2); *see generally Special Monthly Compensation for Veterans With Traumatic Brain Injury*, Final Rule, 83 Fed. Reg. 20735 (May 8, 2018); *Special Monthly Compensation for Veterans With Traumatic Brain Injury*, Proposed Rule, 81 Fed. Reg. 93649 (Dec. 21, 2016); *see also* 38 C.F.R. § 3.350(j) (2022) (providing that the determination of the need for SMC(t) is "subject to the criteria of § 3.352").

Section 3.352(b)(2) conditions entitlement to SMC(t) on a need for "a 'higher level of care'" due to TBI residuals in addition to the need for regular aid and attendance.[3] 38 C.F.R. § 3.352(b)(2)(i), (ii); *see also id.* § 3.352(b)(2) (stipulating that "all of the following conditions" must be met). The regulation also conditions entitlement to SMC(t) on a need for institutional care "in the absence of the provision of such higher level of care." *Id.* § 3.352(b)(2)(ii). But the statute plainly provides that a veteran need only demonstrate a need for regular aid and attendance, and not a higher level of care. *See* 38 U.S.C. § 1114(t).

When an agency interprets a statute through a regulation, judicial review of that interpretation is governed by the two-step inquiry in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). The first question is "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If so, "that

[3] Section 3.352(b)(2) provides in relevant part,

> A veteran is entitled to [SMC(t)] when all of the following conditions are met:
>
> (i) As a result of service-connected residuals of traumatic brain injury, the veteran meets the requirements for entitlement to the regular aid and attendance allowance . . . .
>
> (ii) As a result of service-connected residuals of traumatic brain injury, the veteran needs a "higher level of care" (as defined in paragraph (b)(3) of this section) than is required to establish entitlement to the regular aid and attendance allowance, and in the absence of the provision of such higher level of care the veteran would require hospitalization, nursing home care, or other residential institutional care.

is the end of the matter," and the only question remaining is whether the regulation at issue is in accordance with congressional intent. *Id.* at 842-43. If the regulation is inconsistent with congressional intent, it is invalid. *See* 38 U.S.C. § 7261(a)(3) (providing that this Court "shall . . . hold unlawful and set aside" a regulation that conflicts with a statute); *Carr v. McDonough*, 33 Vet.App. 285, 290 (2021) (invalidating a VA regulation that conflicted with its authorizing statute).

In § 1114(t), Congress has directly spoken to whether an award of SMC(t) requires a need for higher-level care in addition to a need for regular aid and attendance. It does not. "The 'starting point' in statutory construction 'is the language of the statute'—not a single sentence or word of the statute, but rather the 'provisions of the whole law,' its object, and its policy." *Wright v. Sec'y of Health & Hum. Servs.*, 22 F.4th 999, 1004 (Fed. Cir. 2022) (quoting *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 35 (1990)).

Viewed in its context in § 1114, subsection (t) shows Congress's deliberate choice not to condition SMC(t) on the need for a higher level of care. *See King v. Burwell*, 576 U.S. 473, 486 (2015) (internal quotation marks omitted) ("[W]hen deciding whether the language is plain, we must read the words in their context and with a view to their place in the overall statutory scheme.").

The requirement of a "need of a higher level of care" does not appear in subsection (t) of § 1114, even though it appears in subsection (r)(2). *Compare* 38 U.S.C. § 1114(t) *with id.* § 1114(r)(2). Rather, subsection (t) requires only the "need of

regular aid and attendance." 38 U.S.C. § 1114(t). Subsection (r)(2), on the other hand, requires *both* a "need for regular aid and attendance" *and* a "need of a higher level of care." *Id.* § 1114(r)(2).

The absence from subsection (t) of a higher-level care requirement in addition to an aid and attendance requirement represents a conscious congressional choice not to impose that additional requirement. "'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Bates v. United States*, 522 U.S. 23, 29-30 (1997) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)) (alteration omitted). And "Congress is presumed to know its own laws" when it amends them. *Larimore v. Comptroller of Currency*, 789 F.2d 1244, 1253 (7th Cir. 1986); *see also Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979).

When Congress in 2010 added subsection (t) to § 1114, subsection (r)(2) of the statute had required the need for "a higher level of care" in addition to the need for regular aid and attendance for nearly three decades. *See* 38 U.S.C. § 1114(r)(2) (2009); Veterans' Benefits Act of 2010, Pub. L. 111-275, 124 Stat. 2864 (Oct. 13, 2010), § 601(b); Veterans' Disability Compensation and Survivors' Benefits Act of 1978, Pub. L. 95-479, 92 Stat. 1560 (Oct. 18, 1978), § 101(c). Then, as now, subsection (r)(2) imposed both requirements. 38 U.S.C. § 1114(r)(2) (2009). There can be no doubt that if Congress also intended to condition entitlement to SMC(t) on the need

for *both* aid and attendance *and* a higher level of care, it knew how to do so. Instead, it conditioned SMC(t) on the need for regular aid and attendance only. 38 U.S.C. § 1114(t). This must be read as a deliberate choice. *See Bates*, 522 U.S. at 29-30.

If there could be any doubt that this choice was intentional, Congress dispelled it when it also declined to link the required need for institutionalization under subsection (t) to the absence of higher-level care. *See* 38 U.S.C. § 1114(t). Under subsection (t), a veteran must require institutional care "in the absence of . . . regular aid and attendance," and not "in the absence of the provision of such [higher-level] care," as under subsection (r)(2). *Id.*; *cf. id.* § 1114(r)(2). If Congress had intended to require the need for both aid and attendance and higher-level of care, it would not have conditioned the need for institutionalization on the absence of the *lower* of the two levels of care. *See Timex V.I., Inc. v. United States*, 157 F.3d 879, 886 (Fed. Cir. 1998) (rejecting an agency interpretation that "violate[d] the canon that a statutory construction that causes absurd results is to be avoided if at all possible").

Even if this were all, the Court should "refrain from concluding . . . that the differing language in the two subsections has the same meaning in each" or "presume to ascribe this difference to a simple mistake in draftsmanship." *Russello*, 464 U.S. at 23. But what is more, Congress expressly provided SMC(t) to veterans who are "*not* eligible for compensation under subsection (r)(2)"—that is, *not* in need of higher-level care in addition to the need for regular aid and attendance. 38 U.S.C. § 1114(t) (emphasis added); *see id.* § 1114(r)(2).

Subsection (t) provides in relevant part that a veteran "shall be paid . . . a monthly aid and attendance allowance equal to the rate described in subsection (r)(2)" even though the veteran "is not eligible for compensation under subsection (r)(2)." *Id.* To be "eligible for compensation under subsection (r)(2)," *id.*, a veteran must meet two requirements that are relevant here. First, the veteran must be "otherwise entitled to compensation" at the maximum SMC rate. *Id.* § 1114(r). Second, the veteran must be "in need of a higher level of care" in addition to the need for regular aid and attendance. *Id.* § 1114(r)(2).

A veteran is "not eligible for compensation under subsection (r)(2)," *id.* § 1114(t), if the veteran fails to meet *either* of these two requirements: the first is a precondition to any compensation under § 1114(r), and the second is a requirement of § 1114(r)(2). *See id.* § 1114(r)(2). Accordingly, a veteran who is *not* "in need of a higher level of care" in addition to the need for regular aid and attendance, *id.*, is "not eligible for compensation under subsection (r)(2)" and therefore eligible for SMC(t), *see id.* § 1114(t). The structure of the statute, and specifically subsection (t)'s reference to subsection (r)(2), plainly shows that a need for higher-level care in addition to the need for aid and attendance is not required under subsection (t). *See King*, 576 U.S. at 486.

Because "the text and reasonable inferences from it give a clear answer," that "is the end of the matter." *Brown v. Gardner*, 513 U.S. 115, 120 (1994) (internal quotation marks omitted). Subsection (t)'s language and place in the statutory scheme

show Congress's intent to provide SMC(t) regardless of a need for higher-level care. *King*, 576 U.S. at 486; *see* 38 U.S.C. § 1114.

"To the extent any doubt remains about Congress' intent, the legislative history confirms what the plain text strongly suggests." *Boumediene v. Bush*, 553 U.S. 723, 778 (2008). The Senate Committee on Veterans' Affairs explained in its report on the amendment of § 1114 that SMC(t) would be available to a veteran who "in the absence of regular aid and attendance[]"—not higher-level care—"would require institutional care." S. Rep. 111-71, at *18 (Sept. 2, 2009). The Committee also contemplated a veteran's receipt of SMC(t) based on the need for assistance that did not (and does not) qualify as "a higher level of care" under the extant statutory and regulatory definitions. *Id.* at *17-18. Then and now, "a higher level of care" is defined as "personal health-care services provided on a daily basis in the veteran's home by a person who is licensed to provide such services or who provides such services under the regular supervision of a licensed health-care professional." 38 U.S.C. § 1114(r)(2). Examples include "physical therapy, administration of injections, placement of indwelling catheters, and the changing of sterile dressings, or like functions." 38 C.F.R. § 3.352(b)(2) (2009); 38 C.F.R. § 3.352(b)(3) (2022).

Congress was aware that higher-level care was limited to "health-care services." S. Rep. 111-71, at *17; *see* 38 U.S.C. § 1114(r)(2) (2009). Nonetheless, it sought to ensure that veterans with severe TBI residuals can "arrange *whatever services they may need* to live as independently as possible in their own homes." S. Rep. 111-71, at *18

(emphasis added). The Committee Report quotes testimony urging compensation at the (r)(2) rate for veterans with severe TBI residuals who require "medical *or* non-medical" assistance with "independent activities of daily living," and not just medical needs. *Id.* at *18 (emphasis added). This type of assistance is consistent with regular aid and attendance, but not with higher-level care. *Compare* 38 C.F.R. § 3.352(a) (setting forth the basic criteria for regular aid and attendance) *with* 38 U.S.C. § 1114(r)(2) *and* 38 C.F.R. § 3.352(b)(3) (defining higher-level care). The legislative history only bolsters what a plain reading of the statutory text shows—that § 1114(t) does not require a need for higher-level care.

The Court should hold that Congress clearly intended to provide SMC(t) to veterans who do not need a higher level of care in addition to a need for regular aid and attendance. And the agency cannot by regulation "impose limitations on the scope of [the statute] beyond those specifically dictated by Congress." *Viegas v. Shinseki*, 705 F.3d 1374, 1379 (Fed. Cir. 2013) (citing *Gardner*, 513 U.S. at 117-20). It "may not prescribe any regulations . . . which add a restriction to a statute which is not justified by statutory language or the intent of Congress." *Bank of Guam v. United States*, 578 F.3d 1318, 1328 (Fed. Cir. 2009) (quoting *Gov't of Guam v. Koster*, 362 F.2d 248, 252 (9th Cir. 1966)).

Section 3.352(b)(2) is therefore invalid to the extent that it adds a higher-level care criterion to the statutory requirements under § 1114(t). *Chevron*, 467 U.S. at 842-43; *see Carr*, 33 Vet.App. at 290. "'The power . . . to administer a federal statute and to

prescribe rules and regulations to that end is not the power to make law . . . but [only] the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'" *Dixon v. United States*, 381 U.S. 68, 74 (1965) (quoting *Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue*, 297 U.S. 129, 134 (1936)). "A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." *Id.*

As argued below, even if the Court disagrees that Congress's intent is plain from the statutory language, the Secretary's interpretation of the statute is unentitled to deference. *Chevron*, 467 U.S. at 843.

II. Section 3.352(b)(2) impermissibly adds a substantive requirement for entitlement to SMC(t) where there is no statutory gap to fill.

As noted above, § 1114(t) provides that a veteran shall be paid the same additional monthly allowance specified in subsection (r)(2) even though the veteran "is not eligible for compensation under subsection (r)(2)." 38 U.S.C. § 1114(t). Although the two subsections provide for the same amount of additional monthly allowance, they refer differently to the underlying payment of compensation. Under subsection (r)(2), a veteran must be "otherwise entitled to compensation" at one of several SMC rates at or near the maximum rate, and the additional monthly allowance is paid "in addition to such compensation."[4] *Id.* § 1114(r)(2). But under subsection

[4] The veteran must be "entitled to compensation authorized under subsection (o) of this section, at the maximum rate authorized under subsection (p) of this section, or at the intermediate rate authorized between the rates authorized under subsections (n)

(t), the additional monthly allowance is paid "in addition to *any* other compensation under this section," *id.* § 1114(t) (emphasis added). Unlike subsection (r)(2), then, subsection (t) does not expressly condition a veteran's receipt of the additional allowance on an underlying award of SMC at a specific rate. *Id.* § 1114(t).

In promulgating section 3.352(b)(2), the Secretary determined that § 1114(t) was ambiguous on whether a veteran should receive the same underlying compensation as under subsection (r)(2)—at or near the maximum SMC rate—in addition to amount of the (t) allowance. *Special Monthly Compensation for Veterans With Traumatic Brain Injury*, 81 Fed. Reg. at 93650-51. The Secretary resolved the perceived ambiguity in veterans' favor. He concluded that "section 1114(t) is most properly construed to permit payment of both the 'additional' amount specified in [subsection] (r)(2)" and the same "predicate SMC rate" as under subsection (r)(2). *Id.* at 93651.

It is assumed for argument's sake that the asserted ambiguity existed and that interpreting subsections (r)(2) and (t) to both provide the same amount of compensation was consistent with congressional intent—matters not at issue here. *See* S. Rep. 111-71, at *17 (explaining in 2009 that proposed § 1114(t) "would allow veterans suffering from severe TBIs to receive the highest level of aid and attendance

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and (o) of this section and at the rate authorized under subsection (k) of this section." 38 U.S.C. § 1114(r)(2). The rate under subsection (o) and the maximum rate under subsection (p) are both $4667. The intermediate rate between subsections (n) and (o) is $4421, and the rate under subsection (k) ranges from $96, not to exceed a total of $4667 when combined with another rate. *Id.* § 1114.

benefits from VA," which to date had been provided by § 1114(r)(2)). But ambiguity as to what compensation is to be paid under § 1114(t) is not automatically ambiguity as to § 1114(t)'s substantive criteria. On the contrary, the substantive criteria plainly do not include a need for higher-level care in addition to aid and attendance, as argued above. The Secretary misconstrued the plain language of the statute when he concluded that Congress "chose [in subsection (t)] to match the existing rate *and* aid and attendance requirements described under (r)(2)." *Special Monthly Compensation for Veterans With Traumatic Brain Injury*, 81 Fed. Reg. at 93650 (emphasis added).

The Secretary determined that "subsection (t) is intended to provide additional compensation to veterans with TBI who . . . require a higher level of care comparable to what would otherwise be contemplated by the allowance provided by (r)(2)." *Id.* But the statute unambiguously shows that a veteran need not meet the same substantive requirement of a need for higher-level care under subsection (t) as under subsection (r)(2). *See* 38 U.S.C. § 1114(r)(2), (t). On the contrary, Congress expressly provided SMC(t) to veterans who are "*not* eligible for compensation under subsection (r)(2)." 38 U.S.C. § 1114(t) (emphasis added).

The Secretary construed this language to mean that a veteran must "still require a higher level of care" even if the veteran "[is] not *otherwise* eligible for benefits under (r)(2)." *Special Monthly Compensation for Veterans With Traumatic Brain Injury*, 81 Fed. Reg. at 93650 (emphasis added). But if Congress meant to limit the meaning of "not eligible for compensation under subsection (r)(2)" in this way and to still require a

need for higher-level care under subsection (t), it knew how to do so. 38 U.S.C. § 1114(t). In subsection (r)(2), Congress required that a veteran, "*in addition to [the] need for regular aid and attendance*, is in need of a higher level of care." *Id.* § 1114(r)(2) (emphasis added). It did not do so when it added subsection (t). Instead, it required only that a veteran be "*in need of regular aid and attendance* for the residuals of traumatic brain injury." *Id.* § 1114(t) (emphasis added). Moreover, whereas in subsection (r)(2) it had linked the need for institutional care to the absence of higher-level care, in subsection (t) it linked the need for institutional care to the absence of regular aid and attendance. *Compare id.* § 1114(r)(2) *with id.* § 1114(t).

The use of different substantive standards in the two subsections must be read as a deliberate choice. *Russello*, 464 U.S. at 23. The Secretary's finding of ambiguity in whether the rates under the two subsections should be the same is not a basis for imposing limitations on substantive entitlement under subsection (t) beyond those specifically dictated by Congress. *See Viegas*, 705 F.3d at 1379. The Secretary asserted that it was "counterintuitive that Congress would link the allowance [under subsection (t)] to (r)(2)" if it did not also intend to limit entitlement to SMC(t) to veterans who need higher-level care. *Special Monthly Compensation for Veterans With Traumatic Brain Injury*, 81 Fed. Reg. at 93650. If Congress did not mean to require higher-level care, he surmised, it would have "simply declar[ed] that any veteran in need of regular aid and attendance for the residuals of TBI should receive a specified dollar amount." *Id.*

But the simple explanation for Congress's reference to the rate described subsection (r)(2) is that it intended to pay qualifying veterans with TBI the same amount.

"[T]here are many plausible explanations for Congress' decision" to provide the monthly allowance provided by subsection (r)(2) to a veteran who does not require a higher level of care in addition to regular aid and attendance. *Sharp v. United States*, 580 F.3d 1234, 1239 (Fed. Cir. 2009). It is clear from the statute and the legislative history that Congress intended the addition of § 1114(t) to "enhance[] disability compensation for . . . disabled veterans in need of regular aid and attendance for residuals of traumatic brain injury." Veterans' Benefits Act of 2010, Pub. L. 111-275, October 13, 2010, 124 Stat. 2864, Sec. 601. The House Committee on Veterans' Affairs recognized that "[b]ecause brain injury is considered a signature wound of OEF/OIF, this war will produce a generation of veterans with life changing invisible wounds of war." H.R. Rep. 111-223, at *7 (July 23, 2009). And the Senate Committee Report discusses how the allowance under subsection (r)(2) emphasizes physical impairments and locomotion—the types of disabilities that would lead to underlying entitlement to SMC at the maximum rate—over the cognitive difficulties that, as in Mr. Haskell's case, tend to result from a TBI. S. Rep. 111-71, at *17; *see*, *e.g.*, R-242.

"Whatever the reason" for any perceived tension between the rates and substantive requirements under subsections (r)(2) and (t), "the government has failed to make the 'extraordinary showing of [Congress'] contrary intentions' that would

permit this court to construe [the statute] in a way that eviscerates its plain language." *Sharp*, 580 F.3d at 1239. The Secretary cannot add substantive requirements to a statute that plainly does not contain them, by "[]intuit[ion]" or otherwise. *Special Monthly Compensation for Veterans With Traumatic Brain Injury*, 81 Fed. Reg. at 93650; *see Viegas*, 705 F.3d at 1379.

Again, although the plain text resolves the matter, the Secretary also misconstrued the legislative history when he promulgated section 3.352(b)(2). He claimed that the Senate Committee Report showed Congress's intent "to provide additional compensation to veterans with TBI who . . . require a higher level of care." *Special Monthly Compensation for Veterans With Traumatic Brain Injury*, 81 Fed. Reg. at 93650. But consistent with the plain language of the statute, Congress stated in the Senate Committee Report its intent to ensure that veterans with severe TBI residuals can "arrange *whatever services they may need*" and contemplated that veterans would receive types of assistance that do not qualify as higher-level of care, referring to "medical *or* non-medical" assistance. S. Rep. 111-71, at *17-18 (emphases added); *see* 38 U.S.C. § 1114(r)(2); 38 C.F.R. § 3.352(b)(2) (2009); 38 C.F.R. § 3.352(b)(3) (2022).

Congress unambiguously intended to provide SMC(t) to veterans who do not require higher-level care in addition to regular aid and attendance. It did not "[choose] [in subsection (t)] to match the existing rate *and* aid and attendance requirements described under (r)(2)." *Special Monthly Compensation for Veterans With Traumatic Brain Injury*, 81 Fed. Reg. at 93650 (emphasis added). There was no gap to

fill, and the Secretary's claim of one is contrary to the plain meaning of the statute. *See id.*

Even if the Court finds the statute ambiguous, it should hold that the Secretary's addition of a higher-level care requirement to the criteria for SMC(t) was arbitrary and capricious. A court should set aside an agency's choice of policy if it does not "represent[] a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute" or if "it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Chevron*, 467 U.S. at 845 (internal quotation marks omitted).

Any perceived ambiguity on whether the same rate is to be paid under subsections (r)(2) and (t) did not justify the Secretary's decision to also import the substantive requirements of subsection (r)(2) into subsection (t). Making it more difficult to obtain this benefit is not "a reasonable accommodation that Congress would have sanctioned." *Bareford v. McDonough*, 35 Vet.App. 171, 190 (2022). Moreover, "if there is any ambiguity regarding the prerequisites for compensation under [a statute], 'interpretive doubt [must be] resolved in the veteran's favor.'" *Viegas*, 705 F.3d at 1380 (quoting *Gardner*, 513 U.S. at 118). By its plain terms, section 1114(t) imposes no requirement that a veteran need a higher level of care in addition to regular aid and attendance. "Even if it were a close case, however, [the Court] would be constrained to construe the statute" not to impose that additional requirement. *Viegas*, 705 F.3d at 1380; *see also Trafter v. Shinseki*, 26 Vet.App. 267, 272

(2013) (Even "if VA's interpretation of [a] statute[] is reasonable," the Court should set it aside if it "is unfavorable to veterans, such that it conflicts with the beneficence underpinning VA's veterans benefits scheme, and a more liberal construction is available that affords a harmonious interplay between provisions."). Construing the statute to provide for payment of the (r)(2) monthly allowance under subsection (t) without also requiring a need for higher-level care is consistent with the statute and the more veteran-friendly reading. The Court should not defer to the agency's interpretation in section 3.352(b)(2).

III. The Board's reliance on section 3.352(b)(2) was prejudicial, so the Court should set aside the invalid regulation and vacate and remand for the Board to apply the statute.

But for its application of the invalid regulation, the Board could have determined that Mr. Haskell was entitled to SMC under § 1114(t). *See Simmons v. Wilkie*, 30 Vet.App. 267, 279 (2018) (stating that prejudice is established by demonstrating that the error "could have affected the outcome of the determination"), *aff'd*, 964 F.3d 1381 (Fed. Cir. 2020). Mr. Haskell "is not eligible for compensation under subsection (r)(2)," 38 U.S.C. § 1114(t), because he is not "otherwise entitled to compensation" under subsection (o), at the maximum rate under subsection (p), or under subsection (k) plus at the rate between subsections (n) and (o), *id.* § 1114(r)(2). *See* R-836. As the Board favorably found, "the type of care that [the Veteran's] wife has said she provides defines aid and attendance." R-11; *see*

38 U.S.C. § 1114(t). The Court cannot disturb this favorable factual finding. *Romero*, 33 Vet.App. at 265.

In applying § 1114(t) on remand, the Board also could find that Mr. Haskell's TBI residuals necessitated the regular aid and attendance of another and that, in the absence of regular aid and attendance, Mr. Haskell would need institutional care. *See* 38 U.S.C. § 1114(t). The 2021 VA TBI examiner noted that Mr. Haskell was "totally dependent on his wife for pretty much everything" in conjunction with a finding of severe functional impairment due to TBI residuals of memory, attention, concentration, or executive function deficits. R-242, R-248. And the private neuropsychologist opined that in the absence of regular aid and attendance for the residuals of his TBI, Mr. Haskell would require hospitalization, nursing home care, or some other institutional care since October 2012. R-838. Remand is warranted for the Board to make these factual findings in the first instance. *Tadlock v. McDonough*, 5 F.4th 1327, 1337-38 (Fed. Cir. 2021).

Because the Board prejudicially relied on section 3.352(b)(2) to deny SMC(t), the Court should set the regulation aside to the extent that it conflicts with § 1114(t) by requiring the need for higher-level care. *See* 38 U.S.C. § 7261(a)(3) (providing that this Court "shall . . . hold unlawful and set aside" a regulation that conflicts with a statute when "necessary to its decision"); *Carr*, 33 Vet.App. at 290 (invalidating a VA regulation that conflicted with its authorizing statute). The Court also should vacate the Board's denial of SMC(t) as contrary to § 1114(t) and remand for the Board to

determine under the statute whether Mr. Haskell is entitled to SMC for the residuals of his service-connected TBI. *See* 38 U.S.C. §§ 7252(a); 7261(a)(3)).

CONCLUSION

The Board favorably found that Mr. Haskell needs regular aid and attendance from his wife. And the record suggests that his need arises from the residuals of his in-service TBI: he is totally dependent on her for "pretty much everything" due to his severe impairment of memory, attention, concentration, or executive functions. This also suggests that he would need institutional care in the absence of her aid and attendance. Had the Board not relied on VA's invalid interpretation of § 1114(t) to require a need for higher-level care in addition to regular aid and attendance, it could have granted him SMC(t). The Court should set aside the regulation and vacate and remand for the Board to properly apply § 1114(t).

Respectfully submitted,

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