No. 20-1637

In the United States Court of Appeals for the Federal Circuit

JAMES R. RUDISILL,

Claimant - Appellee,

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,

Respondent - Appellant.

On Appeal from the United States Court of Appeals for Veterans Claims
No. 16-4134, Hon. Margaret Bartley, Mary J. Schoelen, and Michael P. Allen

BRIEF OF NATIONAL VETERANS LEGAL SERVICES PROGRAM AS AMICUS CURIAE IN SUPPORT OF EN BANC APPELLEE JAMES R. RUDISILL

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number	20-1637
Short Case Caption	Rudisill v. McDonough
Filing Party/Entity	National Veterans Legal Services Program

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Name: Michael E. Kenneally

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
National Veterans Legal Services Program		

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4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

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6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

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Public Impact, *The US' GI Bill: the "New Deal for Veterans"* (Sept. 2, 2019), https://www.centreforpublicimpact.org/case-study/us-gi-bill-new-deal-veterans (last visited June 25, 2022).....5

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Ryan Katz, *The history of the GI Bill*, APMREPORTS (Sept. 3, 2015), https://www.apmreports.org/episode/2015/09/03/the-history-of-the-gi-bill); 5

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STATEMENT OF IDENTITY AND INTEREST[1]

The National Veterans Legal Services Program (NVLSP) is a nonprofit organization that since 1981 has worked to ensure that the federal government delivers to the Nation's 22 million veterans and active-duty personnel the benefits to which they are entitled. NVLSP and its attorneys have won important legal gains for veterans, including by ensuring the VA's use of Congress's pro-claimant process for veterans and filing countless appeals before the U.S. Court of Appeals for Veterans Claims to ensure veterans obtain the benefits the law affords them. NVLSP also trains and supervises non-lawyer advocates to represent veterans in claims for VA benefits; publishes the *Veterans Benefits Manual*, a comprehensive guide for veterans' advocates; and files amicus briefs on veterans' behalf.

NVLSP offers a unique and important perspective on veteran benefits and the history and purpose of the GI Bill. Mr. Rudisill and similarly situated veterans who have earned benefits under two GI Bills have the right to choose how to use both the benefits they earned (up to the general 48-month cap) because they are entitled to

[1] No party's counsel authored this brief in part or in whole. No party or party's counsel contributed money to fund preparing or submitting this brief. No person other than the Amicus Curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

This brief is authorized by this Court's February 3, 2022 Order "invit[ing] the view of amici curiae" and noting that amicus briefs "may be filed without consent and leave of court." ECF No. 69 at 3. This brief is also timely because the Court's order created a deadline of "14 days after service of Mr. Rudisill's" brief. *Id.*

both benefits under Congress's statutory framework. NVLSP files this brief to urge the en banc Court to reaffirm what Congress intended when it created two separate benefits programs and affirm the Veterans Court along the lines of the panel majority opinion.

ARGUMENT

Mr. Rudisill persuasively explains why he is entitled to the benefits he claims as a matter of statutory interpretation. The NVLSP respectfully submits this brief to explain more fully how the history and purposes of the many GI Bill programs established by Congress, dating back to World War II, support veterans' right to dual earned benefits, as does the fundamental canon that requires construing legislation in favor of veterans' interests. Amicus also agrees that the Court may dismiss the Government's appeal for lack of jurisdiction because the Solicitor General did not authorize appeal within the statutory time limitation.

I. The history and purpose of the many decades of GI Bill legislation support the conclusion that veterans can earn, and choose how to use, two benefits without sacrificing their full 48-month entitlement.

For nearly eighty years, the Nation has shown its gratitude and commitment to its veterans through education benefits to help their successful transition to a solid civilian career and enhanced earnings potential. The most recent of these programs, the Post-9/11 GI Bill, is more generous than its predecessors by design. The relevant statutory provisions and the history and purposes of the GI Bill programs make clear

that Congress intended for veterans to be eligible for all benefits they earn through their service—compelling affirming in this case.

A. GI Bill benefits have had tremendous societal impact.

The veteran-education programs date back to the Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284, commonly known as the original GI Bill. Sweeping in scope and substance, this pathbreaking legislation was seen at the time as "one of the most important measures that ha[d] ever come before Congress." 90 CONG. REC. (Appx.) A1477, A1560 (1944) (statement of Sen. Ernest McFarland). One congressional committee observed that this "legislation was more extensive and more generous to the veterans than any other bill ever introduced for veterans of this war or of any other." Lora D. Lashbrook, *Analysis of the G.I. Bill of Rights*, 20 NOTRE DAME L. REV. 122, 123 (1944). President Franklin D. Roosevelt said the statute gave "emphatic notice to the men and women in our armed forces that the American people do not intend to let them down." GLYNN SULLINGS, CENTRE FOR PUBLIC IMPACT, THE US' GI BILL: THE "NEW DEAL FOR VETERANS" (Sept. 2, 2019), https://www.centreforpublicimpact.org/case-study/us-gi-bill-new-deal-veterans.

The effects of this GI Bill rippled across the Nation. It gave crucial resources to returning veterans so that they could get needed services, own homes and businesses, and continue contributing to society after taking off the uniform. The VA describes the GI Bill as having "had more impact on the American way of life than

any law since the Homestead Act of 1862." U.S. DEP'T OF VETERANS AFFAIRS, VA HISTORY, https://www.va.gov/HISTORY/VA_History/Overview.asp (last visited June 25, 2022).

While the GI Bill offered several benefits, its education benefits were understood by many to "have the most permanent and far-reaching effects." Lashbrook, *supra*, at 128. Representative Sonny Montgomery—who later authored new GI Bill legislation—celebrated the educational opportunities ushered in by the 1944 statute in the following terms:

> With the stroke of his pen, President Roosevelt transformed the face and future of American Society. Higher education, which had been the privilege of the fortunate few, became part of the American dream—available to all citizens who served their country through military service. No longer were the hopes and expectations of young Americans of modest economic means restricted because the key to advancement—higher education—was beyond their reach. Few, if any, more important pieces of legislation have been enacted by Congress, and ***no government investment has paid higher dividends to us all***.

Katherine Kiemle Buckley & Bridgid Cleary, *The Restoration and Modernization of Education Benefits under the Post-9/11 Veterans Assistance Act of 2008*, 2 VETERANS L. REV. 185, 185 (2010) (emphasis added) (citation omitted).

These significant investments benefited not only those who served, but the entire country. Congress has estimated that the U.S. "economy received seven dol-

lars in return" for each dollar spent through the GI Bill. *See* Centre for Public Impact, *The US' GI Bill: the "New Deal for Veterans"* (Sept. 2, 2019), https://www.centreforpublicimpact.org/case-study/us-gi-bill-new-deal-veterans (last visited June 25, 2022) (citing Ryan Katz, *The history of the GI Bill*, APMREPORTS (Sept. 3, 2015), https://www.apmreports.org/episode/2015/09/03/the-history-of-the-gi-bill); *cf.* PRESIDENT'S COMMISSION ON VETERANS' PENSIONS, VETERANS' BENEFITS IN THE UNITED STATES: A REPORT TO THE PRESIDENT (Apr. 1956), https://www.va.gov/vetdata/docs/Bradley_Report.pdf (cataloguing economic benefits from veteran benefits, including GI Bills).

The Armed Forces of the United States also benefited. The educational opportunities afforded to veterans have long proved a valuable tool for attracting recruits: "recruitment campaigns rely heavily on educational assistance to advertise the benefits of military service." Buckley & Cleary, *supra*, at 203; *see also* 110 CONG. REC. S42, 57 (daily ed. Jan. 4, 2007) (statement of Sen. Jim Webb) ("[A] strong GI Bill will have a positive effect on military recruitment, broadening the socio-economic makeup of the military and reducing the direct costs of recruitment."). For many, these long-standing educational benefits have "linked the idea of service to education": "You serve the country; the government pays you back by allowing you educational opportunities you otherwise wouldn't have had, and that

in turn helps you improve this society." PETER S. GAYTAN ET AL., FOR SERVICE TO YOUR COUNTRY: THE INSIDER'S GUIDE TO VETERAN BENEFITS 6 (2008).

These benefits also helped transform higher education. The influx of student-veterans changed the perception of who could benefit from American colleges and universities. Before World War II, "only a small proportion of Americans attended college . . . and most of them came directly out of high school and directly from our wealthier classes." James B. Hunt Jr., *Educational Leadership for the 21st Century*, HIGHER EDUC. (May 2006), https://files.eric.ed.gov/fulltext/ED491912.pdf (last visited June 25, 2022). This perception shattered after 1944 with the surge of veterans who now had financial access to college. *See id.* ("[T]he G.I. Bill permanently changed our conception of who could benefit from higher education.").

B. Congress created a framework for coordinating GI Bill benefits.

In enacting wide-ranging and expansive GI Bills, Congress has often faced the question of how to treat veterans who had earned multiple GI Bill benefits through multiple periods of qualifying service. This history is instructive to the questions before the en banc Court. Just a few short years after the original GI Bill, Congress chose to extend similar benefits to veterans of later conflicts. With the enactment of a second GI Bill called the Korean Conflict GI Bill, *see* Veterans' Readjustment Assistance Act of 1952, Pub. L. No. 82-550, 66 Stat. 663, Congress explicitly addressed the issue of how to treat veterans who had served in multiple wars.

Aware that some veterans could be eligible for benefits under both statutes, Congress decided that qualifying veterans should not be limited to benefits under one statute or the other, but rather should receive benefits under both. Those benefits, however, were subject to a 48-month aggregate cap. § 214(a)(3), 66 Stat. at 665. That aggregate cap was distinct from the individual GI Bills' limits for the benefits they created. The Korean GI Bill, for example, afforded up to 36 months of education benefits. § 214(a)(2), 66 Stat. at 665. So under the aggregate cap, a veteran who used the full 36-month entitlement under the Korean GI Bill could use no more than 12 months of benefits under another GI Bill. This approach ensured that veterans would be able to use multiple statutes to pursue their educations. And it necessarily was premised upon the fact that some veterans would qualify for, and take advantage of, more than just the 36 months of benefits under an individual statute, up to a maximum of 48 months of combined benefits.

This approach extended to later GI Bills. Congress repeatedly allowed veterans to receive education benefits under multiple statutes—subject to an aggregate 48-month limit. That includes, for example, the Post-Korean Conflict and Vietnam Era GI Bill,[2] the Post-Vietnam Era Veterans Educational Assistance Program,[3] and

[2] *See* Act of Oct. 23, 1968, Pub. L. No. 90-631, § 1(d), 82 Stat. 1331, 1331.

[3] *See* Veterans' Rehabilitation and Education Amendments of 1980, Pub. L. No. 96-466, § 404, 94 Stat. 2171, 2201-02 (codified as amended at 38 U.S.C. § 3231(a)(1)).

ultimately the Montgomery GI Bill.[4] Today, a wide variety of GI Bill education benefits are subject to the 48-month aggregate cap. *See* 38 U.S.C. § 3695(a); *see also Carr v. Wilkie*, 961 F.3d 1168, 1169, 1174-75 (Fed. Cir. 2020) (discussing this statutory framework and part of this history).

C. The Post-9/11 GI Bill created more generous benefits and continued Congress's historic practice of allowing up to 48 months of combined benefits.

Against this backdrop, Congress renewed the Nation's commitment to the members of the Armed Services after the September 11, 2001, terrorist attacks. *See* Post-9/11 Veterans Educational Assistance Act of 2008, Pub. L. No. 110-252, tit. V, 122 Stat. 2357 (codified as amended at 38 U.S.C. ch. 33). While past GI Bills continued to offer valuable education benefits, the rising cost of education relative to a static legislative framework left those benefits with diminished value. By 2007, the level of benefits available had "fall[en] substantially below the rising cost of college tuition." Buckley & Cleary, *supra*, at 203. This unfortunate reality became "one of the most common sources of bitterness and frustration" for veterans of the post-9/11 conflicts, *id.*, and garnered increasing public attention. As one commentator noted, "[f]ew Americans realize[d] that the young people who are serving their country in

[4] *See* Veterans' Educational Assistance Act of 1984, Pub. L. No. 98-525, § 702(a)(1), 98 Stat. 2553, 2557 (codified as amended at 38 U.S.C. § 3013(a)(1)) (subjecting Montgomery GI Bill benefits to 48-month aggregate cap now codified at 38 U.S.C. § 3695 and previously codified at 38 U.S.C. § 1795 and, before that, at 38 U.S.C. § 1791).

Iraq and Afghanistan [would] not receive the kind of assistance that their grandfathers received when they returned from World War II." Joseph B. Keillor, *Veterans at the Gates: Exploring the New GI Bill and Its Transformative Possibilities*, 87 WASH. U. L. REV. 175, 178 (2009) (quoting James Wright, *The New GI Bill: It's a Win-Win Proposition*, CHRON. HIGHER EDUC. (May 16, 2008)).

Congress saw the need for a new GI Bill to ensure veterans could continue to access higher education into the 21st century. Senator Jim Webb, himself a veteran and recipient of GI Bill education benefits, took up the mantle. In introducing the legislation, he criticized past legislative efforts for not being "as generous as our Nation's original G.I. Bill," and announced that the Post-9/11 GI Bill would usher in a new, more generous era of assistance and "expand the educational benefits that our Nation offers." 110 CONG. REC. S42, 56 (daily ed. Jan. 4, 2007).

According to one analysis, the Post-9/11 GI Bill's revamped structure offered "approximately double the value of benefits previously paid to veterans under the Montgomery GI Bill." Keillor, *supra*, at 184. This expansion of benefits led some to see the Post-9/11 GI Bill as stepping into the shoes of the much-heralded original GI Bill. *See* Buckley & Cleary, *supra*, at 186 ("With the signing of the Post-9/11 GI Bill, proponents argue that the federal government is finally 'getting it right' by re-instituting the 1944 model of education benefits which led to the transformation of American society."); *see also Pending Montgomery G.I. Legislation*, *Hearing before*

the Subcomm. on Econ. Opportunity of the H. Comm on Veterans' Affairs, 110th Cong. 2 (2008) ("the Post-9/11 Veterans Educational Assistance Act of 2007[] would offer a 'World War II-like' GI Bill") (statement of Thomas L. Bush, Acting Deputy Assistant Secretary of Defense for Reserve Affairs and Curtis L. Gilroy, U.S. Department of Defense). The legislation also led to declining student loan debt among veterans. *See* VETERANS EDUCATION SUCCESS, VETERAN STUDENT LOAN DEBT 7 YEARS AFTER IMPLEMENTATION OF THE POST 9/11 GI BILL (Jan. 2019), https://vetsedsuccess.org/veteran-student-loan-debt-7-years-after-implementation-of-the-post-9-11-gi-bill (last visited June 25, 2022).

While the Post-9/11 GI Bill offered robust new benefits, Congress wanted to ensure veterans would remain able to access benefits to which they were already entitled. So, following its predecessors, the Post-9/11 GI Bill allowed veterans to access multiple legislative benefits, subject to the traditional 48-month aggregate cap. *See* 38 U.S.C. § 3695(a) ("The aggregate period for which any person may receive assistance under two or more of the provisions of law listed below may not exceed 48 months (or the part-time equivalent thereof): [lists out 8 different GI Bills in effect].").

All this makes the Post-9/11 GI Bill the *least likely* veterans' education benefits legislation to impose a *new restriction* on veterans' access to benefits like the

restriction for which the Secretary advocates in this case. Indeed, Congress explicitly stated that veterans "may receive assistance under two or more of the provisions of law listed below." *Id.* None of the predecessor legislation included the restriction the VA advocates here, which requires veterans to either use up less generous benefits before enjoying better ones or give up some fraction of their four years of total benefits. The Government turns Congress's objectives upside-down in seeking to read this unprecedented restriction into a statute that was meant to strengthen veterans' access to education.

In light of the history and purpose of the GI Bills generally, and the Post-9/11 GI Bill's specific language, any interpretation that reads a new substantive limitation like the one the Secretary invented here on veteran entitlements into this law is hard to credit. *See, e.g.*, *Finley v. United States*, 490 U.S. 545, 554 (1989) ("Under established canons of statutory construction, 'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.'" (citing *Anderson v. Pac. Coast S.S. Co.*, 225 U.S. 187, 199 (1912))); *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957) ("no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed").

Here, there is no clear indication that Congress intended to upend its usual approach to veterans' education benefits—*i.e.*, that veterans whose service qualifies

them for benefits under two programs are entitled to benefits under two programs in whatever non-concurrent formulation they wish, subject to the familiar 48-month aggregate cap. As Mr. Rudisill explains (at 41-58), the provision on which the VA relies, 38 U.S.C. § 3327, is best read as applying to those veterans who wish to make a benefit-exchange election, as many with merely a single period of qualifying service would need to do. The VA cannot justify the revolutionary approach it favors by punishing veterans with multiple periods of qualifying service if they exercise their right to take advantage of the more generous Post-9/11 GI Bill benefits before exhausting their Montgomery GI Bill benefits.

Absent a clear departure from Congress's past approach, the Court should interpret Congress's language in the Post-9/11 GI Bill as consistent with the language of the past GI Bills: allowing veterans to claim benefits under each statute for which they are eligible, limited only by the aggregate cap. *Cf. Carr*, 961 F.3d at 1175-76 (rejecting the "harsh consequence[s]" of the VA's position on a different educational benefits issue because the Court is "unwilling to assume such anomalous treatment without a clearer expression of intent").

Maintaining consistent interpretation from one piece of legislation to the next serves an important function. It is of "paramount importance . . . that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts." *Finley*, 490 U.S. at 556. Otherwise, Congress

would have to navigate the legislative process with no fixed points of reference. Particularly here, to interpret this law differently from its predecessors would force Congress, and the veterans who depend on these benefits, into a guessing game where an esoteric reading of a lone statutory provision could unsettle the familiar operation of a vital statutory framework.

II. If the Court harbors doubt about the correct legal interpretation, it should apply the pro-veteran canon to affirm.

NVLSP believes that the statutory language at issue in this case, combined with the history set out above of allowing veterans to earn dual benefits under prior GI Bills and the legislative intent to provide *more generous* benefits through the Post-9/11 GI Bill, is clear enough on its own to support Mr. Rudisill's right to the benefits he seeks. But if the Court had any doubts about how to read the interlocking statutory provisions, it should resolve such doubts in favor of Mr. Rudisill based on the well-settled "rule that interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 117-18 (1994).[5]

[5] Unlike some cases involving statutory ambiguity, here the VA has not argued that its interpretation is entitled to *Chevron* deference. *Cf. Procopio v. Wilkie*, 913 F.3d 1371, 1382-87 (Fed. Cir. 2019) (en banc) (O'Malley, J., concurring) (discussing the interaction between the pro-veteran canon and *Chevron* deference). As the court below recognized, there is no regulation supporting the VA's statutory interpretation in this case, and, in fact, the VA's regulations are contrary to its position here. Appx22, Appx25-27. Moreover, because the VA has not argued it is entitled to deference, any such argument would be forfeited and improper to consider. *See, e.g.*, *Neustar, Inc. v. FCC*, 857 F.3d 886, 893-94 (D.C. Cir. 2017) (failure to invoke

The pro-veteran canon instructs courts to construe "provisions for benefits to members of the Armed Services . . . in the beneficiaries' favor." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 441 (2011) (citation omitted). This canon is not a mere procedural canon, or a canon "of last resort" like the rule of lenity. Rather, it represents Congress's and the courts' substantive commitment to veterans: a recognition "that those who served their country are entitled to special benefits from a grateful nation." *Procopio v. Wilkie*, 913 F.3d 1371, 1387 (Fed. Cir. 2019) (en banc) (O'Malley, J., concurring). That substantive commitment applies with added force in the context of GI Bills.

Around the time that the original GI Bill was being drafted, the Supreme Court instructed that statutes providing benefits to veterans "always" must "be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943). Benefits awarded to those who "left private life to serve their country" in times of great need are to be construed broadly as part of our national duty. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 278, 285 (1946). Congress has shown a long-standing "solicitude" for veterans, and appropriately so. *United States v. Oregon*, 366 U.S. 643, 647 (1961).

Chevron "forfeited" any claims to deference); *CFTC v. Erskine*, 512 F.3d 309, 314 (6th Cir. 2008). In all events, even if *Chevron* applied, the pro-veteran canon should apply before any step-two deference to the agency.

Sometimes Congress expressly directs other government officials to assist veterans in obtaining benefits. *See, e.g.*, 38 U.S.C. § 5103A (obligating the VA to assist veteran claimants in developing their claims); *id.* § 5107(b) (obligating the VA to give veterans "the benefit of the doubt" in adjudicating benefits claims). But even without that sort of express direction, the veterans benefit scheme overall reflects Congress's intention to "award entitlements to a special class of citizens, those who risked harm to serve and defen[d] their country," and indeed "[t]his entire scheme is imbued with special beneficence from a grateful sovereign." *Barrett v. Principi*, 363 F.3d 1316, 1320 (Fed. Cir. 2004) (citation omitted).

The pro-veteran canon takes its cue from such congressional commitments and requires courts to interpret laws in veterans' favor based on the same important policy that informs every veteran-benefits law. As the Supreme Court has explained—and importantly for purposes of this case—Congress is presumed to understand this canon and legislate knowing that its laws will be interpreted through this lens. *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 (1991).

This canon should control the outcome in, at minimum, close cases. The closest analogy might be the pro-Indian canon. *See Procopio*, 913 F.3d at 1386 (O'Malley, J., concurring); *cf. McGirt v. Oklahoma*, 140 S. Ct. 2452, 2470 (2020) ("treaty rights are to be construed in favor, not against, tribal rights"). That canon likewise stems from an equitable obligation the United States has assumed to look after the

interests of a particular group. It leads to the conclusion that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). More than that, "standard principles of statutory construction do not have their usual force" when weighed against the pro-Indian canon because the canon is "rooted in the unique trust relationship between the United States and the Indians." *Id.* (citation omitted).

Veterans, of course, have a unique relationship of their own with the United States. Day after day, year after year, they risk and sacrifice much for the Nation. Congress must be viewed as paying the debt it owes veterans to the fullest extent of interpretive doubt—even if that means giving the pro-veteran canon more weight than other traditional canons of construction. *See, e.g.*, *Procopio*, 913 F.3d at 1386-87 (O'Malley, J., concurring) (arguing that just like *Chevron* deference "is not applicable" to questions that may be resolved by the pro-Indian canon, the "same should be true" with the pro-veteran canon).

The dissent in the Veterans Court and the Secretary on appeal question whether aiding Mr. Rudisill here is truly "pro-veteran" or will benefit veterans overall. *See* Appx40 & n.26; Gov't En Banc Br. 26-30. (The panel dissent in this Court, by contrast, did not address the pro-veteran canon. *See* Panel Op. 16-18.) For purposes of the pro-veteran canon's applicability, however, it should suffice that the

interpretation offered by Mr. Rudisill plainly benefits him and other veterans in his position. But NVLSP also believes, based on its years of experience providing legal assistance to veterans, that Mr. Rudisill's interpretation benefits the vast majority of other veterans, too. As his brief explains, veterans in many circumstances have a much greater range of options under his interpretation than the Government's. *See* Rudisill En Banc Br. 69-71.

The Secretary's contrary argument in this Court tries to hypothesize a veteran who has multiple periods of qualifying service and who would prefer to make an election under § 3327(a) to recredit service that has already been credited to the Montgomery GI Bill as credit to the Post-9/11 GI Bill instead. Gov't En Banc Br. 28-29. The Secretary recognizes that, in his view, such an election would limit the veteran to 36 months of education benefits rather than 48. But the Secretary speculates that some veterans might prefer to give up that year of education benefits in exchange for an increased stipend under § 3327(f) or critical skills assistance under § 3327(g). *Id.* It is not clear that any real-world veteran would choose to make that trade-off given the value of the forgone year of education benefits. But it also is not clear that the correct reading of the statute would foreclose a veteran from making such an election voluntarily. The question before this Court is whether a veteran in Mr. Rudisill's position *must* make a § 3327(a) election to use Post-9/11 GI Bill education benefits. The Court need not decide whether a veteran who does not need

to make that election in such circumstances may voluntarily do so. Correctly read, especially in the light of the pro-veteran canon, the statutes at issue give veterans the choice to use the benefits to which they are entitled in the way that benefits them—so nothing in a decision for Mr. Rudisill need harm even the hypothetical veterans imagined by the Secretary.

In any event, all the evidence before the Court suggests that the veteran before the Court would benefit from a particular interpretation. That interpretation certainly helps Mr. Rudisill, and it will also help many other real-world veterans in his position. It will give these veterans more flexibility to use education benefits that arise from multiple periods of qualifying service. Rudisill En Banc Br. 69-71 (discussing examples). The examples Mr. Rudisill discusses are (i) much more realistic than the Secretary's imaginary veterans who prefer less or shorter educational benefits and (ii) very likely represent a much greater number of veterans who would be helped by the panel majority's interpretation than those hurt by it (which may be zero).

The Veterans Court dissent also contends that the majority's approach would treat a veteran with two separate periods of service more favorably than a veteran with one continuous period of service that is the same length as the first veteran's aggregate service. But the majority rejected the dissent's view that its holding would be limited to veterans with two separate periods of service *with breaks in the middle*. *See* Appx29 n.15. The Federal Circuit majority did not include that limitation either,

see Panel Op. 15, and the en banc Court need not adopt this limitation to affirm. It might violate the pro-veteran canon to treat two groups of veterans differently when they served the same amount of time, but nothing in the statute suggests differential treatment. Instead, the statute allows veterans to choose from all the benefits they have earned, through multiple programs, up to the aggregate cap. The Court should honor veterans' right to all the benefits they earn through their service.

The interpretation that benefits veterans is clear. It is better for Mr. Rudisill and countless others in his position to have the option of an early switch from a partly used Montgomery GI Bill benefit to a Post-9/11 GI Bill benefit rather than be forced to exhaust their indisputably less generous Montgomery GI Bill benefits first or risk running into the aggregate cap sooner. Veterans overwhelmingly prefer the much more generous Post-9/11 GI Bill benefits,[6] and there is no reason to require qualifying veterans to use the less generous Montgomery GI Bill when they have met the service requirement and earned benefits under the Post-9/11 GI Bill, as Mr. Rudisill has.

The rest of the statutory scheme also supports giving veterans this flexibility, as do the VA's own regulations. For instance, 38 C.F.R. § 21.9690 states that individuals entitled to benefits in addition to Post-9/11 GI Bill benefits "may choose to

[6] In 2016, 90% of veterans chose the Post-9/11 GI Bill over the Montgomery GI Bill. VETERANS EDUCATION SUCCESS, *supra*.

receive payment under another . . . program at any time," although they cannot change "more than once during a term, quarter, or semester." The same individuals can elect to change back to Post-9/11 GI Bill benefits at any time in the same increments. *Id.* § 21.4022. The VA has made clear that veterans entitled to benefits under multiple programs may switch freely between programs for their benefits. *See id.* §§ 21.4022, 21.9690, 21.9635(w). Yet, such switching between benefits is impossible under the VA's interpretation. So, the VA's regulations require the conclusion that veterans are entitled to the full benefits they have earned under multiple programs. There is no reason to accept the Secretary's contrary litigation position.

In short, "[w]ithout a clear indication that Congress wished to impose the harsh consequence" that the Government here supports, *Carr*, 961 F.3d at 1176, the en banc Court should turn to the pro-veteran canon and adopt the interpretation that furthers Congress's purpose of providing more generous education benefits to veterans. That interpretation is Mr. Rudisill's and the panel majority's.

III. The Court should protect veterans when the Government acts outside the mandatory statutory time limits.

Finally, NVLSP agrees with Mr. Rudisill that the en banc Court can and should decline to reach the merits of this appeal because the Solicitor General did not authorize appeal within the statutory time limitation. Like any litigant, the federal government cannot file an appeal in federal court without statutory authority.

See, e.g., *United States v. Providence Journal Co.*, 485 U.S. 693, 699 (1988) (dismissing case for want of jurisdiction given appeal taken with no statutory authority). Here, however, the federal government's authority to appeal is subject to special limitations. In particular, Congress has provided that "the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General." 28 U.S.C. § 516; *see also id.* § 519 ("the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party"). And the Attorney General, in turn, has issued regulations requiring that "[d]etermining whether, and to what extent, appeals will be taken by the Government" to circuit-level appellate courts "*shall be* conducted, handled, or supervised by the Solicitor General." 28 C.F.R. § 0.20 (emphasis added).

These limitations have real-world effects on the timeliness of the federal government's appeals. *See FEC v. NRA Political Victory Fund*, 513 U.S. 88, 96-97 (1994). While "Congress could obviously choose . . . to sacrifice the policy favoring concentration of litigating authority . . . in the Solicitor General" to allow others in the government to determine whether to appeal, *id.*, it instead gave the Attorney General the authority to limit appeals in the way he has done. Here, the Government's counsel admitted that the VA took the appeal without the Solicitor General's approval. *See* ECF No. 13, at 2. It lacked authority to do so.

The only question is whether the Solicitor General's later approval can cure that defect. But under the Supreme Court's *NRA Political Victory Fund* ruling, the answer depends on whether approval came before the statutory time limit to appeal, and here it did not. *See* 38 U.S.C. § 7292(a) (providing that "review shall be obtained by filing a notice of appeal with the Court of Appeals for Veterans Claims within the time and in the manner prescribed for appeal to United States courts of appeals from United States district courts"); *see also* 28 U.S.C. § 2107(b) (establishing a 60-day jurisdictional time limit in cases involving the United States and its agencies). In *NRA Political Victory Fund*, the Court held that retroactive authorization is ineffective once the time to appeal has passed; otherwise, the Solicitor General would "have the unilateral power to extend" the statutory deadline for appeal. 513 U.S. at 99.

Unauthorized appeals taken by the federal government beyond the statutory time limit cannot be reconciled with these legal requirements. Where a veteran has won his or her case, an unauthorized appeal unjustifiably delays the benefits earned by the veteran and vindicated in the Veterans Court. This Court should decline to reach the merits of this appeal because the Solicitor General did not authorize appeal within the statutory time limitation, as the VA's counsel confirmed.

CONCLUSION

For all these reasons, NVLSP respectfully requests that the Court dismiss the appeal or affirm the decision below.

Dated: July 5, 2022

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on July 5, 2022, I electronically transmitted the foregoing Brief of Amicus Curiae to the Clerk of the Court using the Court's CM/ECF document filing system. I further certify that all counsel of record are being served with a copy of this Brief by electronic means via the Court's CM/ECF system.

Dated: July 5, 2022

/s/ Michael E. Kenneally
Michael E. Kenneally

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Circuit Rules 29(a) and 32(b)(1). This brief contains 5,511 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b)(2).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Times New Roman 14-point font in Microsoft Word 2016.

Dated: July 5, 2022

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