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 VETERANS IMPACTED BY THE DECISION BELOW AS AMICI CURIAE IN SUPPORT OF APPELLEE

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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 Steven Attaway, Scott Cone, Michael Petta, Byron Elliot, Elizabeth Lewis, Eric Richardson

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

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Name: R. Andrew Austria

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
Steven Attaway		
Scott Cone		
Michael Petta		
Byron Elliott		
Elizabeth Lewis		
Eric Richardson		

☐ Additional pages attached

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).

☑ None/Not Applicable ☐ Additional pages attached

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STATEMENT OF INTEREST[1]

Steven Attaway, Scott Cone, Michael Petta, Byron Elliott, Elizabeth Lewis, and Eric Richardson are veterans[2] impacted by the decision below. Like Mr. Rudisill, they have earned benefits under the Montgomery GI Bill (Montgomery) and the Post-9/11 GI Bill. And they are entitled to both, subject only to the 48-month cap, under the statutory framework Congress established. These veterans offer perspective on how the U.S. Department of Veteran Affairs' (VA) erroneous interpretation of 38 U.S.C. § 3327 hurts veterans and their families.

[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 Amici Curiae or their counsel contributed money that was intended to fund preparing or submitting the brief. Both parties have consented to the filing of this brief. Under this Court's Order of February 3, 2022, an amicus brief may be filed without leave of court.

[2] For efficiency, this brief uses "veteran" to refer to both honorably discharged and active servicemembers, as the GI Bills discussed here do not distinguish between the two. Additionally, this brief uses "veteran" to refer to those with multiple periods of qualifying service. Cone and Petta currently serve on active duty. The views expressed in this amicus brief do not reflect the official policy or position of the United States Navy, United States Army, United States Air Force, United States Coast Guard, United States Department of Defense, United States Department of Homeland Security, or the United States Government.

Steven Attaway, Scott Cone, Michael Petta, Byron Elliott, Elizabeth Lewis, and Eric Richardson urge this Court to affirm the decision below.

ARGUMENT

The issue this case presents is an intricate statutory interpretation question. But extensive legal arguments about how to read 38 U.S.C. § 3327 should not obscure the scope of the real-world impact this Court's decision will have on veterans and their families.

As the VA admits, this case poses an "important" issue to "the veterans community." Sec'y En Banc Br. 16. This brief presents the stories of six veterans, including one war widow, most of whom have 20 or more years of service. All of them are rightfully entitled to 48 months of education benefits. The VA wants to cut them down to 36 months. As a result, each veteran stands to lose up to $65,000.00 or more in Post 9/11 GI Bill benefits.[3] The Veteran's Court and the panel decision in this case do right by these veterans, and this Court en banc should agree.

[3] The maximum tuition and fee reimbursement per academic year under the Post-9/11 GI Bill is $26,042.81. *See* Post-9/11 GI Bill (Chapter 33) Payment Rates for 2021 Academic Year (August 1, 2021 - July 31, 2022). This equates to $34,723.75 for 12 months of benefits. The Post-9/11 GI Bill benefits also include an annual $1,000 stipend for books and supplies, and a monthly housing stipend that varies based on location. *Id.* For example, the monthly housing stipend for the

Veterans Steven Attaway, Scott Cone, Michael Petta, Byron Elliott, Elizabeth Lewis, and Eric Richardson respectfully submit this amicus brief in support of Mr. Rudisill and urge this Court to affirm the lower court's decision.

I. The VA's interpretation of 38 U.S.C. § 3327(d) harms veterans and military families by cutting down their months of benefits from 48 to 36 months.

The VA contends that for "veterans who have 'used, but retain[] unused, entitlement' to Montgomery benefits when they elect to use their Post-9/11 benefits, their Post-9/11 entitlement 'shall be the number of months … of unused [Montgomery] entitlement.'" Sec'y En Banc Br. 41-42 (quoting 38 U.S.C. § 3327(d)(2)(A)).

Under this interpretation of 38 U.S.C. 3327(d), the VA shortchanges veterans out of at least twelve months of Post-9/11 GI Bill

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University of Maryland at College Park, is $2,544 per month, which we use in our calculation above. *See GI Bill Comparison Tool*. https://www.va.gov/education/gi-bill-comparison-tool/?search=name&name=UNIVERSITY%20OF%20MARYLAND%20COLLEGE%20PARK-WASHINGTON%20DC&excludedSchoolTypes%5B%5D=PUBLIC&excludedSchoolTypes%5B%5D=FOR%20PROFIT&excludedSchoolTypes%5B%5D=PRIVATE&excludedSchoolTypes%5B%5D=FOREIGN&excludedSchoolTypes%5B%5D=FLIGHT&excludedSchoolTypes%5B%5D=CORRESPONDENCE&excludedSchoolTypes%5B%5D=HIGH%20SCHOOL .

benefits by subjecting them to a 36-month cap. Both the lower court and a panel of this Court recognized this error and injustice. This Court sitting en banc should do the same.

Veterans Steven Attaway, Scott Cone, Michael Petta, Byron Elliott, Elizabeth Lewis, and Eric Richardson have each suffered because of this 36-month cap. Below are their stories and how each stand to regain their earned benefits should this Court affirm.

A. Steven C. Attaway

Steven Attaway is an Air Force veteran and a first-generation college graduate who comes from a family with a deep tradition of military service. His mother served in the Royal Air Force and his father retired from the United States Air Force. Attaway's brother also served in the United States Air Force as a F-16 pilot and retired after 21 years of service.

In 1989, inspired by his family's service and seeking direction, Attaway enlisted in the United States Air Force and served as a weapons loader and gunner for 8 years. In 1997, Attaway received an honorable discharge. Afterward, Attaway enrolled at the University of North Texas. While at the University of North Texas he participated in Air

Force ROTC. To pay for his college degree, Attaway completed a work study program, relied on VA vocational rehabilitation benefits due to his twenty percent disability rating, and used 13 months and 27 days of his Montgomery benefits. After graduating in 2001, Attaway was commissioned as an officer and served an additional 13 years on active duty as an aircraft maintenance officer. While on active duty, Attaway served extensively in the Middle East and deployed to Kandahar, Afghanistan, Kuwait, and Saudi Arabia in support of Operation Enduring Freedom. In 2014, Mr. Attaway retired from the Air Force as a Major/O-4 and received an honorable discharge.

In 2010, during his second period of qualifying service, Attaway transferred his Post-9/11 GI Bill benefits to his daughter and incurred another four-year service obligation in order to do so. In preparation for his daughter to attend Texas A&M University in the fall of 2022, Attaway obtained a certificate of eligibility from the VA. Based on its erroneous interpretation of 38 U.S.C. § 3327(d)(2), the VA determined Attaway was only entitled to transfer 22 months and 3 days of Post-9/11 GI Bill benefits to his daughter. Should this Court affirm, Attaway's daughter should receive 34 months of his earned Post-9/11 GI Bill benefits, not 22.

B. Scott Cone

Scott Cone currently serves on active duty as a Captain/O-6 in the United States Navy and has nearly 34 years of military service. In 1988, after obtaining a G.E.D. and his parents' permission, Cone began his naval career at the age of 17. He then served for 12 years as an enlisted Sailor, reaching the rank of Chief/E-7. In August 2000, Cone was commissioned as an officer. While on active duty, Cone flew as a naval aircrewman on shore-based and carrier-based reconnaissance aircraft, completed deployments on submarines, combatants, and with carrier strike groups, and served overseas in multiple locations, including Spain, Australia, and Italy. He is currently assigned to an executive fellowship program at the National Security Agency and is on due course for potential future promotion to become a flag officer.

As an enlisted Sailor, Cone used part of his Montgomery benefits to become a first-generation college graduate from the University of Maryland at College Park (1997). As an officer, Cone again used portions of his Montgomery benefits to pay for his first graduate degree, a Master of Public Policy from Bowie State University (2004), before subsequently earning a Master of Science in Systems Engineering from the Naval

Postgraduate School (2006). He used 24 months of Montgomery benefits to obtain his undergraduate and graduate degrees, each of which were critical to his continued eligibility and competitiveness for promotion.

In June 2013, Cone transferred his Post-9/11 GI Bill benefits to his children. Based on the 36-month cap, Cone is only entitled to 12 months of Post-9/11 GI Bill benefits due to his prior use of Montgomery benefits. But should this Court affirm, Cone's children should be entitled to 24 months of his earned Post-9/11 GI Bill benefits.

C. Michael Petta

Michael Petta currently serves as a Commander/O-5 in the United States Coast Guard. Raised in a broken home by a single mother, Petta enlisted in the United States Navy in 1992, where he served as a submarine sonar technician for 10 years.

Missing the birth of his first child while at sea on a ballistic missile submarine, Petta committed himself to earning a college degree with hopes of finding a civilian profession in which he could provide for his family. After eight years of studies, he earned his undergraduate degree through a remote program offered by the United States Navy from Southern Illinois University. Upon graduating from college, the first in

his family to do so, he separated from the service in 2000, finding professional employment that allowed him to provide for his then two children while being present in their lives.

Motivated to serve his country again after the attacks of 9/11, Petta returned to active duty in October 2001 as an enlisted recruiter with a hope of obtaining a commission. In 2002, Petta was selected for commissioning by the United States Coast Guard. In 2006, Petta was selected for the Coast Guard's Legal Advanced Education Program to attend law school. Now with three children, Petta elected to use his Montgomery benefits to help pay for law school, utilizing a total of 33 months and 7 days of benefits.

In 2016, Petta attempted to transfer his Post-9/11 GI Bill to his two youngest children. But when he submitted a claim in early 2022 for his son to use these benefits, the VA denied his claim and instructed him that he only had two months and 23 days of benefits eligible for transfer. As a single father long focused on providing his children with the best opportunities, Petta would have chosen to use his Montgomery benefits differently in 2006 had he known he would be subject to this 36-month

cap. Should this Court affirm, Petta should have 14 months of earned Post-9/11 GI Bill benefits to transfer to his children.

D. Byron Elliott

Byron Elliott is a retired Lieutenant Colonel/O-5 and served in the United States Army and United States Army Reserve. Raised by a single mother, he enlisted in the United States Army in 1993 as a 13B Cannon Crewmember and served in South Korea. He left active duty in the summer of 1997 to attend Regis University and participated in Army ROTC. Elliott was a recipient of an Army Green to Gold Scholarship and used a small portion of his Montgomery benefits to pay for school. He was later commissioned as an officer, serving overseas in Germany with deployments to Kosovo and Iraq. In 2004, he was assigned as a Company Commander and enrolled in an MBA program at Colorado Christian University, using a year of his Montgomery benefits. In 2005, he transitioned from active duty to the United States Army Reserves, and completed the last year of his MBA.

Upon release of the Post-9/11 GI Bill, Elliott enrolled at University of Denver, Sturm College of Law, under the impression he could use his

Post-9/11 GI Bill benefits toward his law school education. The VA at first confirmed his eligibility when he applied to use his benefits.

When Elliott returned for his second year of law school, the VA informed him that he had only two months of eligibility remaining. He had to either disenroll from law school or fund the rest of it by taking out loans. He chose the loans, and he completed law school in debt. Because of the 36-month cap, Elliott—a 24-year veteran—had to fund two and half years of law school on his own. Elliott retired with 24 years of service, including over 20 years of active-duty time due to several recalls to active duty while serving as a reservist. Today, he is concerned not only with the financial burden of his student loans, but with the lack of notice he received when he began law school. Should this Court affirm the decision of the court below, Elliott should get back 12 months of his earned of Post-9/11 GI Bill benefits.

E. Elizabeth Lewis

Elizabeth Lewis enlisted in the United States Army in 2002, serving a little over four years as a track mechanic and wheel mechanic. While serving in South Korea, she met her husband. After serving her initial enlistment, she reenlisted, but did not complete her reenlistment

because she became pregnant with her son. After getting married, Lewis' husband deployed to Afghanistan, where he was killed in action six months into his tour.

After leaving the military but before her husband's death, Lewis enrolled in nursing school to become an operating room nurse, using her Montgomery benefits. When her husband was killed in Afghanistan, she dropped out of nursing school because it required her to encounter life and death situations that triggered her own trauma. She then enrolled in school to be a sonographer but dropped out due to the COVID-19 pandemic. She currently resides in San Antonio, Texas, with her son and her parents. She has not yet received a higher education degree, and she is sustained by part-time employment and survivor benefits.

In 2009, Lewis relinquished her Montgomery benefits and transferred her entitlement to the Post-9/11 GI Bill. After her husband was killed, Lewis received a Marine Gunnery Sergeant John David Fry Scholarship. But when she applied for the scholarship in 2020, she was told that she did not qualify. After fighting for the benefit, the VA provided her with a 13-month scholarship. Because of the 36-month cap and her own service, Lewis cannot receive the full 48 months of Post-9/11

GI bill benefits she is entitled to through her various GI Bill benefits and as a recipient of the Marine Gunnery Sergeant John David Fry Scholarship. Should this Court affirm, Lewis should get back at least 12 months of Post-9/11 GI Bill benefits.

F. Eric Richardson

Eric Richardson served in the United States Army and is a retired Colonel/O-6. In 1991, Richardson enlisted in the United States Army and was honorably discharged in 1996. During his enlisted service, Richardson supervised and performed maintenance on UH-1 helicopters, working on Bell UH-1 Iroquois and Sikorsky UH-60 Black Hawk aircrafts.

In 1996, Richardson was commissioned as an officer and continued to serve as a reservist. After 9/11, Richardson was deployed numerous times, including spending a year and a half in Afghanistan. He also served overseas in Germany, South Korea, and the United Kingdom.

In December 2008, Richardson took classes at the Florida Institute of Technology. He used a small portion of his Montgomery benefits to pay for seven months and 18 days of coursework. In 2009, shortly after the enactment of the Post-9/11 GI Bill, Richardson transferred 14-

months and 6 days of benefits to each of his two children from his first marriage, incurring an additional service obligation. When checking to see what entitlement he had remaining for his stepchildren in August 2021, Richardson learned that he had no remaining benefits. Should this Court affirm, Richardson's stepchildren should get 12 months of his earned get Post-9/11 GI Bill benefits.

G. The pro-veteran canon.

Under the pro-veteran canon, a statute providing benefits to veterans "is always to 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); *see also Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (holding that Selective Training and Service Act of 1940 must be "liberally construed for the benefit of those who left private life to serve their country in its hour of great need"). The pro-veteran canon is a traditional tool of statutory interpretation that courts must first use to interpret any ambiguities found within a veterans' benefits statute. *See Chevron USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). If all other interpretive tools leave the meaning of a provision unclear, the

canon provides that "interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *see also Hudgens v. McDonald*, 823 F.3d 630, 637 (Fed. Cir. 2016).

In light of the extensive briefing here and in the court below, at worst, § 3327 is ambiguous as to what the proper cap might be. We need not repeat the arguments set forth by the parties, but Amici Curiae agree with Mr. Rudisill that any ambiguity in the statutes at issue must be resolved in veterans' favor. *See* Sec'y En Banc Br. 31 n.7; Rudisill En Banc Br. 63-69. This Court should apply the pro-veteran canon to prevent the VA from stripping veterans of their well-earned benefits. As Attaway, Cone, Petta, Elliott, Lewis, and Richardson's stories demonstrate, veterans and their families will only suffer should this Court allow the VA's erroneous interpterion to stand.

II. Transfers of education benefits within military families are important to the Post-9/11 GI Bill and needlessly hindered by the supposed 36-month cap.

"There is an old maxim in the military that while you recruit the servicemember, you retain the family." 154 Cong. Rec. 10,373 (2008) (remarks of Sen. Levin). But under the VA's interpretation of 38 U.S.C. § 3327(d)(2), many servicemembers with multiple periods of qualifying

service are unable to fully transfer their Post-9/11 GI Bill benefits they earned to their children. By restricting the total amount of benefits to 36 months for veterans with multiple periods of qualifying service, the VA erroneously limits their ability to transfer their full entitlement to their dependents.

The negative impact will touch many military families. Today, there are 1,621,473 military children, at least 400,000 of whom are between ages 12 and 18. DEP'T OF DEF., 2020 DEMOGRAPHICS PROFILE OF THE MILITARY COMMUNITY 100 (2020). Many of these children stand to lose if the VA's 36-month cap stands and will be forced to choose between taking out loans and going into debt, or not earning a higher degree.

A. Transferability under 38 U.S.C. § 3319.

Under 38 U.S.C. § 3319(b)–(c), a servicemember who has completed "six years of service in the Armed Forces and enters into an agreement to serve at least four more years as a member of the uniformed services" may transfer their Post-9/11 GI Bill benefits to one or more of their dependents. In enacting the transferability provision of the Post-9/11 GI Bill, Congress intended "to promote recruitment and retention in the

uniformed services." 38 U.S.C. § 3319(a)(2). Transferability of Post-9/11 GI Bill benefits is an important recruitment and retention tool.

The bill's legislative history underscores that Congress intended the Post-9/11 GI Bill's transferability provisions to serve as an important recruitment and retention tool. The accompanying Senate Report makes clear that Congress wanted to "reemphasize that the purpose of providing for transferability of benefits to dependents is to promote recruitment and retention in the uniformed services…" S. REP. NO. 111-346, at 17 (2010). Senators Carl Levin and Mark Warner stressed these twin objectives in their floor remarks during the bill's passage in the Senate:

> Senator Levin: These transferability provisions provide additional incentive for servicemembers to stay on [a]ctive [d]uty by tying continued service to varying levels of transferability of the benefit to immediate family members, with 100 percent transferability coming after the servicemember has served 10 years. Ten years is an important milestone. Once a service member hits midcareer, the military retirement benefit, an extremely generous benefit that is collectible immediately upon hitting 20 years of service, becomes the strongest retention incentive. Getting servicemembers to midcareer is critical, and this transferability provision will help do that.

154 Cong. Rec. 10,373 (2008) (remarks of Sen. Levin).

> Senator Warner: [reading from a letter from then-Secretary of Defense Robert Gates to the Senate] Transferability supports military families, thereby enhancing retention.' There it is. We are meeting the Secretary of Defense's letter to the Senate expressing the need for this transferability.

154 Cong. Rec. 9,757 (2008) (remarks of Sen. Warner).

Along with this legislative history, President George W. Bush emphasized that improving the ability of servicemembers to transfer their education benefits will help "recruit and reward the best military on the face of the Earth." Statement by President George W. Bush Upon Signing H.R. 2642, 2008 U.S.C.C.A.N. S15, S16 (June 30, 2008).

More recently, Congress amended 38 U.S.C. § 3319 in 2019 to limit the Secretary of Defense's ability to proscribe any regulation that would limit transferability "based on a maximum number of years of service in the Armed Forces." 38 U.S.C. § 3319(j)(3) (2019) ("The Secretary of Defense may not prescribe any regulation that would provide for a limitation on eligibility to transfer unused education benefits to family members based on a maximum number of years of service in the Armed Forces."); *see also* Section 578 of the National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116-92, 133 Stat. 1198. This recent

amendment ensures that servicemembers are able transfer their benefits to their dependents so long as they have met the prerequisite years of service. Such an amendment underscores Congress' original intent that Post-9/11 GI Bill benefits serve as an important retention and recruitment tool.

B. The 36-month cap fails to fully serve the Post-9/11 GI Bill's objectives.

Congress' purpose in enacting the Post-9/11 GI Bill was to promote military recruitment and retention by providing additional benefits to servicemembers and permitting these benefits to be transferred to their dependents. *See* 38 U.S.C. § 3319. In doing so, Congress sought to "recruit the servicemember [and] retain the family." 154 Cong. Rec. 10,373 (2008) (remarks of Sen. Levin). But the 36-month cap impedes this Congressional purpose by erroneously capping the amount of Post-9/11 GI Bill benefits a servicemember with multiple periods of qualifying service can receive. In turn, the 36-month cap thereby caps the benefits a servicemember can transfer to dependents under the Post-9/11 GI Bill. By limiting the amount of benefits servicemembers can transfer to their dependents under the Post-9/11 GI Bill, the 36-month cap conflicts with

the Congress's clear objectives and diminishes the incentive Congress enacted to recruit and retain servicemembers.

C. Veterans detrimentally relied on being able to transfer their full entitlement when they incurred additional service obligations.

Thousands of veterans have served their country honorably in order to receive GI Bill benefits to put themselves or their children through college. Many of these veterans incurred additional service obligations and spent extended time away from their families in order to transfer their Post-9/11 GI Bill benefits to their dependents. But when these veterans sought to utilize those benefits, they were suddenly told that their entitlement under the Post-9/11 GI Bill would be limited to the amount of entitlement remaining under their Montgomery benefits. The VA failed to adequately inform veterans of the supposed 36-month limit when they elected to serve longer in order to transfer their benefits to their dependents.

The stories of Captain Scott Cone, Colonel Eric Richardson, Commander Michael Petta, and Major Steven Attaway each illustrate real-world consequences for those who detrimentally relied on the ability to transfer their benefits to their dependents. For example, Colonel

Richardson consulted several VA education counselors regarding his entitlements immediately after the Post-9/11 GI Bill was enacted. He knew that he would not be allowed to draw benefits simultaneously from both. But he was never informed of any 36-month cap stemming from his prior use of his Montgomery benefits. Likewise, Captain Cone, Lieutenant Colonel Elliot, and Major Attaway also did not receive adequate notice of any 36-month cap. Only when they sought to use their benefits did they first learn of the 36-month cap. The VA shortchanged these veterans, as well as countless others similarly situated, of 12 months of Post-9/11 GI Bill benefits meant for their children.

III. The VA's erroneous interpretation of 38 § 3327(d)(2) will impede military families from obtaining social and economic upward mobility.

Higher education is inextricably linked to economic upward mobility, which is why the supposed 36-month cap will hinder veterans with multiple periods of qualifying service from establishing better lives for themselves and their families. Providing only 36 and not 48 months of education benefits, especially shortening the generous Post-9/11 GI Bill benefits, will make it more difficult for these veterans and their families to afford important educational opportunities. Faced with

taking out loans and incurring sometimes crushing debt, many veterans or their families will forego education that could move them up in the world.

This is especially discouraging when considering the current education levels of active duty servicemembers. In 2020, the Department of Defense (DoD) reported that there are approximately 1.3 million active-duty members in the United States Armed Forces, of which more than 1 million are enlisted active duty servicemembers. DEP'T OF DEF., 2020 DEMOGRAPHICS PROFILE OF THE MILITARY COMMUNITY 11 (2020). More than 850,000 of them have only a high school education. *Id.* at 39. The 36-month cap undermines the ability of this majority to earn degrees in higher education, thereby limiting the prospects of these veterans and their families.

While active-duty officers have higher education levels than enlisted personnel, the 36-month cap will also similarly hinder their educational opportunities. Most officers have at least some advanced education, but nearly half have only a bachelors degree. *Id.* at 41. Yet as the experience of Captain Cone, Colonel Richardson, Commander Petta, and Lieutenant Colonel Elliott demonstrate, officers also benefit

from advanced degrees. If the 36-month cap stands, many of these officers will not have the chance to earn higher degrees or will be forced to take out loans to pay for tuition for further education.

Numerous veterans entered the military to create better lives for themselves and their families. For veterans like Captain Cone, Commander Petta, and Major Attaway, this aspiration often encompasses being the first member of their family to go to college and sending their children to college using GI Bill benefits. The VA's position contradicts the motivation of many veterans who enter the military with the goal of economic and social mobility, and disproportionately harms those veterans and families who come from backgrounds in which education is largely inaccessible.

CONCLUSION

For all of these reasons, Amici respectfully request that this Court affirm the decision below.

Dated: July 5, 2022

Respectfully submitted,

/s/ R. Andrew Austria

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PROOF OF SERVICE

I hereby certify that on July 5, 2022, I electronically transmitted the foregoing Brief of Amici 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/ *R. Andrew Austria*
R. Andrew Austria

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(b) and 32(b)(1). This brief contains 4,120 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 Century Schoolbook 14-point font in Microsoft Word 2016.

Dated: July 5, 2022

/s/ R. Andrew Austria
R. Andrew Austria