No. 20-1637

In the United States Court of Appeals for the Federal Circuit

JAMES R. RUDISILL,

Claimant - Appellee,

v.

ROBERT WILKIE, 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 AND VETERANS EDUCATION SUCCESS AS AMICI CURIAE IN SUPPORT OF APPELLEE

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CERTIFICATE OF INTEREST

Counsel for *Amici Curiae* National Veterans Legal Services Program and Veterans Education Success certifies the following:

1. Full Name of Party Represented by Me	2. Name of Real Party in Interest (please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
National Veterans Legal Services Program	National Veterans Legal Services Program	
Veterans Education Success	Veterans Education Success	

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

None

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b).

None

Dated: July 20, 2020

/s/ Michael E. Kenneally
Michael E. Kenneally

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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 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.

Veterans Education Success advances higher education success for veterans, service members, and military families, including by protecting the integrity and promise of the GI Bill and other federal education programs. Veterans Education Success accomplishes this mission by marshalling the expertise of its bipartisan policy experts, academic researchers, lawyers and advocates to: offer free legal services, advice, and college and carrier counseling under the GI Bill; research issues

[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, their members, 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.

of concern to student veterans, including federal oversight; assist policy makers on a non-partisan basis to improve higher education quality for veterans; help veterans achieve greater civic engagement; and provide free legal assistance to military-connected students and whistleblowers.

NVLSP and Veterans Education Success offer unique and important perspectives 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 each of the benefits (up to the general 48-month cap) because they are entitled to both under the statutory framework Congress established. NVLSP and Veterans Education Success file this brief to urge the Court to affirm what Congress intended when it created two separate benefits programs.

ARGUMENT

Mr. Rudisill persuasively explains why he is entitled to the benefits he claims as a matter of statutory interpretation. Amici respectfully submit 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. Amici also agree that the Court should decline to reach the merits of this appeal 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 two benefits.

For over seventy-five years, the Nation has shown its gratitude and commitment to its veterans by providing education benefits to ensure their successful transition to a solid civilian career and improved earnings potential. The most recent of these legislative programs, the Post-9/11 GI Bill, was meant to be more generous than its predecessors. Contrary to the government's argument, 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 during service.

These 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 likewise proclaimed that the GI Bill 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 the GI Bill rippled across the Nation. It gave needed resources to returning veterans so that they could get needed services, own homes and businesses, and continue to contribute to society even after taking off the uniform. The VA has portrayed 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, HISTORY—VA HISTORY—ABOUT VA, https://www.va.gov/about_va/vahistory.asp (last visited July 13, 2020).

While the GI Bill offered a number of benefits, its education benefits were understood to likely "have the most permanent and far-reaching effects." Lashbrook, *supra*, at 128. Representative Sonny Montgomery—author of later GI Bill legislation that figures in this dispute—celebrated the new era of education 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).

These significant investments benefited not only those who had served, but the country as a whole. Some estimate that the U.S. economy received seven dollars in return for every one dollar spent through the GI Bill. *See* Rep. Bob Filner, *New GI Bill: Long-Term Investment in Veterans*, THE HILL (July 23, 2009), https://thehill.com/special-reports/defense-july-2009/51771-new-gi-bill-long-term-investment-in-veterans; *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.

The Armed Forces of the United States also benefited. Across many different GI Bills over many decades, the educational opportunities afforded to veterans have proved a valuable tool for attracting recruits to the Armed Forces: "recruitment campaigns rely heavily on educational assistance to advertise the benefits of military service." Buckley & Cleary, *supra*, at 203; *see also* Filner, *supra* ("This [Post-9/11 GI Bill] will give our returning troops the tools to succeed after military service . . . and make military service more attractive as we work to rebuild our military."); 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."). Some have even gone so far as to say that these educational benefits "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).

At the same time, veterans' education benefits transformed higher education. The influx of veterans to American colleges and universities changed the perception of who could benefit from higher education. 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), http://www.highereducation.org/reports/hunt_tierney/hunt.shtml. This perception shattered after 1944 with the surge of veterans who now had financial access to college.

Congress directly confronted the question of how to treat veterans who had earned multiple GI Bill benefits, and that history is relevant and instructive in the case before the Court today. Just a few short years after the original GI Bill, Congress found itself wanting 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 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 receive benefits under both statutes. But it subjected those benefits to a 48-month aggregate cap. § 214(a)(3), 66 Stat. at 665. That aggregate cap was a limit on top of the 36-month cap that the Korean GI Bill placed on education benefits under that specific statute. § 214(a)(2), 66 Stat. at 665. This approach ensured that veterans would be able to use both statutes to pursue their educations.

The same approach carried over into later GI Bills. Congress repeatedly chose to allow 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 ultimately the Montgomery GI Bill.[4] Today, a wide variety of GI Bill

[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)).
[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).

education benefits are subject to the 48-month aggregate cap. *See* 38 U.S.C. § 3695(a); *Carr v. Wilkie*, 961 F.3d 1168, 1169, 1174-75 (Fed. Cir. 2020) (discussing this statutory framework and part of this history).

Against this backdrop, Congress reaffirmed and updated the Nation's commitment to members of the armed services in the wake of the September 11, 2001 terrorist attacks and ensuing conflicts. *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). Before Congress's enactment of the Post-9/11 GI Bill, the lack of a sufficiently generous GI Bill was weighing on the Nation. While past GI Bills had offered 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, *id.*, and it began to garner increasing public attention. Some commentators noted that "[f]ew Americans realize[d] that the young people who are serving their country in 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 felt the need for a new GI Bill, one that would ensure veterans could access higher education in the 21st century. Senator Jim Webb, himself a veteran and recipient of GI education benefits, took up the mantle. In a speech introducing the legislation, he announced that the Post-9/11 GI Bill would usher in a new, more generous era of assistance. Criticizing past legislative efforts for not being "as generous as our Nation's original G.I. Bill," Senator Webb stated that the Post-9/11 GI Bill was "designed to expand the educational benefits that our Nation offers." 110 CONG. REC. S42, 56 (daily ed. Jan. 4, 2007).

According to one analysis, the revamped benefit structure introduced by the Post-9/11 GI Bill would offer "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 reinstituting 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 Post 9/11 GI Bill also resulted in a decline in veteran student loan debt. *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/.

While the Post-9/11 GI Bill offered robust new benefits, Congress also wanted to ensure veterans would remain able to access benefits to which they were already entitled. So, following in the footsteps of those previous GI Bills, the Post-9/11 GI Bill specifically allowed veterans to access multiple legislative benefits, subject to the standard 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 VA 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.* Moreover, none of the predecessor legislation included the restriction the VA reads into the Post-9/11 GI Bill, and that law 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 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, subject to the familiar 48-month aggregate cap. As Mr. Rudisill explains (at 33-47), the provision on which the VA relies, 38 U.S.C. § 3327, is best read as applying to those veterans who merely have a single period of qualifying service, so the VA cannot justify the revolutionary approach it favors. Absent a clear departure from its 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 operation of a familiar and vital statutory framework.

II. If the Court has any doubt as to the correct legal interpretation, it should apply the pro-veteran canon to affirm.

Amici believe 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, is clear enough on its own to support Mr. Rudisill's right to his benefits, up to the aggregate cap. 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]

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, in Judge O'Malley's words, "that those who served their country are entitled to special benefits from a grateful nation." *Procopio*, 913 F.3d at 1387. That substantive commitment applies with added force in the context of GI Bills.

Around the same 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

[5] Unlike some cases involving statutory ambiguity, here the VA has not argued that its interpretation of the relevant statutory text 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. Appx22. 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 *Chevron* "forfeited" any claims to deference); *CFTC v. Erskine*, 512 F.3d 309, 314 (6th Cir. 2008).

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).

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 veterans' benefits law. As the Supreme Court has explained, 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*, --- S. Ct. ---, 2020 WL 3848063, at *11 (July 9, 2020). 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 to veterans to the fullest extent of interpretive doubt—even if that means giving the pro-veteran canon more weight than the traditional canons of construction. *See, e.g.*, *Procopio*, 913 F.3d at 1386-87 (O'Malley, J., concurring) (arguing that *Chevron* deference "is not applicable" to

questions that may be resolved by the pro-Indian canon, and that the "same should be true" with the pro-veteran canon).

The dissent below and the VA question whether aiding Mr. Rudisill here is truly "pro-veteran" or will benefit veterans overall. *See* Appx40 & n.26; Gov't Br. 31-32. For purposes of the pro-veteran canon's applicability, it should suffice that the interpretation offered by Mr. Rudisill plainly benefits him and other veterans in his position, and also the vast majority of other veterans who benefit from the greater range of options that Mr. Rudisill's interpretation provides. *See* Rudisill Br. 56-59.

If the dissent's approach to the pro-veteran canon were correct, the canon would be almost useless. On that view, if an interpretation does not help all veterans, then the pro-veteran canon is available to no veteran. *See* Appx40. Where all the evidence before the Court suggests that the veteran would benefit from a particular interpretation, the canon should apply.

This is such a case. The interpretation adopted by the majority below will overwhelmingly benefit veterans by giving them more flexibility to use benefits that arise from multiple periods of qualifying service. Rudisill Br. 56-59 (discussing different examples).

The dissent's contrary conclusion rests on the premise 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. In reality, 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 ("But [the dissent's] conclusion rests on the assumption that we have defined 'period of service' when we haven't. That question remains open"). It would violate the pro-veteran canon to treat two groups of veterans differently when they served the same amount of time. Moreover, nothing in the statute suggests differential treatment. Instead, the statute allows veterans to enjoy all the benefits they have earned, through multiple programs, up to the aggregate cap. Properly understood, veterans earn their benefits based on the amount of time of qualifying service they have given to their country. The Court should honor veterans' right to all of the benefits they earn through their service.

Hence the interpretation that benefits veterans is clear. It is better for them to have the option of an early switch from a partly used Montgomery GI Bill benefit to a Post-9/11 GI Bill benefit than it is for them to be forced to first exhaust their Montgomery GI Bill benefits and risk running into the aggregate cap sooner. The practical reality that the Montgomery GI Bill is significantly less generous than the Post-9/11 GI Bill is instructive: Veterans overwhelmingly prefer the more generous Post-9/11 GI Bill[6] and should not be required to use the less generous Montgomery GI Bill

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

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 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 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). In this regard, VA's regulations support the conclusion that veterans are entitled to the full benefits they have earned under multiple programs. There is no reason to defer to the Government'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 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.

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

Amici agree with Mr. Rudisill that this Court 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 all appellate courts" "*shall be* conducted, handled, or supervised by the Solicitor General." 28 C.F.R. § 0.20.

These limitations have real-world effect 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, as here, 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, Amici respectfully request that the Court dismiss the appeal or affirm the decision below.

Dated: July 20, 2020

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on July 20, 2020, 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 20, 2020

/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(b) and 32(b)(1). This brief contains 5,002 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 20, 2020

/s/ Michael E. Kenneally
Michael E. Kenneally