No. 22-888

In the
Supreme Court of the United States

JAMES R. RUDISILL,
Petitioner,

v.

DENIS R. MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR *AMICUS CURIAE* THE VETERANS OF FOREIGN WARS OF THE UNITED STATES IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Legislative Materials

Other Authorities

STATEMENT OF INTEREST[1]

The Veterans of Foreign Wars of the United States (VFW) is a congressionally chartered veterans service organization established in 1899 that, with its Auxiliary, represents over 1.5 million members. The VFW helped establish the Veterans Administration and create the World War II GI Bill and the Post-9/11 GI Bill. The interpretation of the Post-9/11 GI Bill and the provision of education benefits to veterans are important to the VFW. Both touch on its past and future efforts to ensure that veterans are respected for their service, always receive their earned entitlements, and are recognized for the sacrifices they and their loved ones have made.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Imagine two veterans, each serving overseas in the Global War on Terrorism. Both veterans share the same experiences. A local population torn between warring ideologies, enemies who know the ins and outs of the terrain, and IEDs that loom as an ever-present threat when on patrol—all in a blazing desert climate. Both veterans also share the same hopes and dreams upon returning home: to reacclimate to civilian life, pursue a higher education, and build a career devoid of combat stress.

Back stateside after their deployments end, our two veterans leave the military and turn their sights

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[1] Rule 37 statement: No counsel for any party authored this brief in whole or in part, and no entity or person, aside from VFW, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

to the road ahead. College is on the horizon, and through their wartime service, both veterans qualify for 36 months of education benefits under the Post-9/11 GI Bill. The veterans both intend to rely on those benefits, too; tuition assistance will cover at least a bachelor's degree.

Suppose, however, that the two veterans are different in just one respect. The first veteran, before serving in wartime, also served in peacetime, while the second veteran did not. Because of her prior service, the first veteran also qualified for 36 months of less-valuable education benefits under the Montgomery GI Bill, which gives veterans money "to help meet, in part" the costs of a higher education.[2] And before re-enlisting to serve our country in its time of need, the first veteran used 12 months of her Montgomery benefits to begin an apprenticeship program.

Anyone familiar with our country's veneration for veterans might expect that more military service would lead to more benefits. That expectation is especially justified for our hypothetical, in which the first veteran's dual eligibility flows from separate sources, both of which give, neither of which takes.

But the VA sees things differently. It says a provision in the Post-9/11 GI Bill, which all parties agree allows a veteran to convert unused Montgomery benefits into more-generous Post-9/11 benefits, also forces veterans who have qualified separately for both to choose between them. And not just to choose which benefit to take at a given time (elsewhere, the law

[2] 38 U.S.C. §§ 3013(a)(1), 3014(a).

prevents doubling up by taking benefits concurrently), but to choose which benefit to take *at all*.

Under the VA's current scheme, a veteran who uses a portion of Montgomery eligibility cannot simply pivot to separately earned Post-9/11 benefits. Instead, before she can use even a single month of Post-9/11 eligibility, the VA forces her to use up her Montgomery benefits—or to exchange her remaining Montgomery benefits for an equal duration of Post-9/11 benefits (which, given her separate Post-9/11 eligibility, she does not need).

The upshot for those like the first veteran in our hypothetical is that more service leads to *fewer* benefits. Her greater sacrifice results in less money to pay for school. That's because the law imposes an overarching 48-month cap on GI Bill benefits,[3] and benefits under the Montgomery Bill are much less (on average, $8,656 annually) than benefits under the Post-9/11 Bill (on average, $15,364 annually).[4] So the first veteran receives $41,332 if she exhausts her Montgomery benefits first,[5] or just $39,384 if she instead exchanges her remaining Montgomery benefits for the same duration of Post-9/11 benefits.[6] And the second veteran, who has the same wartime

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[3] 38 U.S.C. § 3695

[4] Pet. Br. at 10 (table of average expenditure per veteran under each GI Bill program).

[5] Thirty-six months, or three years, of Montgomery benefits ($8,656 x 3 = $25,968), plus 12 months, or one year, of Post-9/11 benefits ($15,364).

[6] Twelve months, or one year, of Montgomery benefits ($8,656), plus twenty-four months, or two years, of Post-9/11 benefits ($15,364 x 2 = $30,728).

service but *no* peacetime service, receives $46,092[7]—thousands of dollars more.

Phrased in practical terms, then, the Court must decide whether Congress wrote into the Post-9/11 GI Bill a trap door that opens for veterans who serve during wartime if they have served during peacetime and taken some of their peacetime benefits.

Petitioner correctly explains that Congress did nothing of the sort. But if any doubt remains, the pro-veteran canon erases it. The best interpretation of the statutory provisions at issue here is the one that recognizes the Post-9/11 GI Bill for what it is: a law that helps veterans.

The pro-veteran canon has deep roots in American law, and over time it has taken two distinct forms. The first helps courts at the beginning of the interpretive process, providing context on how Congress legislates. The second helps courts that have exhausted all other tools of statutory construction and are left with ambiguity: the canon swoops in to break the tie.

Both variants of the pro-veteran canon apply with force here. The Post-9/11 GI Bill—every subchapter, section, and subsection—favors veterans. So the canon tells us to construe the statute liberally, in line with the respect Congress holds for veterans and acted on when drafting and enacting the Bill. And should the Court find ambiguity, the canon also tells us that the tie goes to Petitioner.

Congress favors veterans, it knows of the pro-veteran canon, and had it wanted to strip benefits

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[7] Thirty-six months, or three years, of Post-9/11 benefits ($15,364 x 3).

from veterans who went to war because they also served when there was peace and took a portion of their peacetime benefits, it would have said so in stark terms. Instead, Congress wrote a law that from top to bottom helps veterans rather than hinders them. The Court should recognize as much and should reverse.

BACKGROUND

I. Education helps veterans reacclimate to civilian life.

A. Military service takes a toll—especially after 9/11.

For millions of veterans, military service often comes at a great and enduring physical and emotional cost. Not all veterans face the same problems, though. The distribution of challenges among various veteran demographics is uneven, divided largely by differences in when they served. For those who served in a time of war—and especially after September 11, 2001—life beyond the military often presents higher hurdles to clear.

That combat veterans face more struggles than those who served in peacetime is unsurprising. Stress begets stress, and war is full of it. Mortars explode; bullets whizz—things no person should witness, but unavoidable realities of the battlefield.

And service after 9/11 has presented unique challenges as well. The Iraq War and Global War on Terrorism are America's first protracted military campaigns since Congress abolished the draft in 1973. Without mandatory service requirements to replenish the Nation's ranks, post-9/11 veterans found themselves serving in a military of about 1.5 million

active duty troops at any given time.[8] That number might seem vast, but compared to World War II (12.1 million soldiers), the Korean War (3.6 million soldiers), and in Vietnam (3.5 million soldiers), it's relatively small.[9] With extended conflict but shortened reserves, today's soldiers serve for longer stretches than their predecessors did, and they often deploy multiple times.[10] And if that were not enough, in the first decade after 9/11, the Department of Defense used "stop loss" policies often, extending servicemembers' active duty service obligations without their consent.[11]

Those added burdens abroad have led to added burdens at home. Veterans face higher rates of disability, stress, alcohol abuse, trouble readjusting to civilian life, divorce, and suicide.

Disability. Roughly one-quarter of all veterans separate from the military with a service-connected

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[8] *See* Jonathan E. Vespa, *Those Who Served: America's Veterans From World War II to the War on Terror*, ACS-43, U.S. Census Bureau, Washington, DC (2020), available at https://perma.cc/ZQ2N-SLMH ("Census").

[9] *Id*.

[10] *See* Institute of Medicine, *Returning Home from Iraq and Afghanistan: Assessment of Readjustment Needs of Veterans, Service Members, and Their Families* 39-40 (National Academies Press 2013), available at: https://perma.cc/YF6W-2J4L (finding that the average post-9/11 Veteran has deployed 1.72 times, for roughly 7.7 months at a time).

[11] *See* Charles A. Henning, *U.S. Military Stop Loss Program: Key Questions and Answers*, Congressional Research Service, R40121 (July 10, 2009), available at: https://perma.cc/HTH5-MDB6.

disability.[12] For Gulf War and post-9/11 veterans, that rate rises to nearly 40%.[13] Among injured veterans, post-9/11 veterans sustain more debilitating injuries, at higher rates, than those who served before them.[14] And despite having been out of service for a shorter time span, a greater percentage of post-9/11 veterans (38.9%) have received VA healthcare than post-Vietnam veterans who served in peacetime (25.9%).[15]

Stress. Veterans returning home often suffer from stress as well. Indeed, 16% of all pre-9/11 veterans—and 32% of combat pre-9/11 combat veterans—report enduring psychological and emotional stress stemming from their service.[16] For post-9/11 veterans, that percentage more than doubled, and of the post-9/11 veterans who experienced psychological trauma overseas, around 75% suffered flashbacks or nightmares after returning stateside.[17]

Alcohol Abuse. Compared to non-veterans, veterans are more likely to use alcohol (56.6% versus 50.8% over one month) and use it heavily (7.5% versus 6.5% over one month).[18] Problematic drinking is higher in those with combat exposure as well. For

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[12] Census, at 8–9.

[13] *Id*. at 10.

[14] *Id.*

[15] *Id.*

[16] *See* Pew Research Center, *The Military-Civilian Gap: War and Sacrifice in the Post-9/11 Era*, 10 (Oct. 5, 2011), available at: https://perma.cc/UH7W-NJTE ("Pew").

[17] *Id.* at 10, 52.

[18] *See* Catarina Inoue *et al.*, *Veteran and Military Mental Health Issues* 5–6 (StatPearls 2023).

example, those with high combat exposure drink heavily 26.8% of the time and binge drink 54.8% of the time.[19] This problem disproportionately affects post-9/11 veterans, 58% of whom served in combat—compared to 31% of pre-9/11 veterans.[20]. And of veterans who enter a treatment program, 65% report alcohol as the substance they abuse most often, which is nearly twice the percentage that the same civilian population reports.[21]

Readjustment. Veterans returning to civilian life often have trouble adjusting. For those with pre-9/11 service, 25% experienced such difficulties,[22] and for those serving after 9/11, that number rose to 44%.[23]

Divorce. Veterans also see their marriages end more often than the general population does. The divorce rate among veterans is 15%.[24] For those who never served, however, it's just 11.1%.[25]

Suicide. Before 2000, suicide rates within veteran populations were lower than in the civilian population

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[19] *Id*.

[20] *See* Pew at 4.

[21] SAMHSA, *Veteran's Primary Substance of Abuse is Alcohol in Treatment Admissions*, The CBHSQ Report, Nov. 10, 2015, available at: https://perma.cc/9W2U-EUMR.

[22] *See* Pew at 10.

[23] *Id*.

[24] *See Costs of War*, Watson Institute for International & Public Affairs, Brown University, available at: https://perma.cc/5T6K-9RPF (last visited Aug. 7, 2023); *Profile of Post-9/11 Veterans: 2015*, United States Department of Veterans Affairs, at *7 (Mar. 2017), available at: https://perma.cc/95QX-DWN6.

[25] *Id*.

more generally.[26] But then things changed. Between 2000 and 2012, military suicide rates doubled.[27] Veterans are now 50% more likely to commit suicide than civilians are,[28] and this risk is highest for veterans within their first year of separation from the military.[29]

B. Access to education eases reintegration and promotes a better life.

Long gone are the days when a high school education was all one needed to be on the path to success. To be sure, higher education isn't strictly necessary for one to live a good life. But a college degree goes a long way toward easing everyday burdens.

Those who earn a bachelor's degree tend to earn a better income than those who don't.[30] They also have a lower unemployment rate.[31] And, unsurprisingly, higher wages and lower unemployment also mean

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[26] *See* Inoue, *supra* n.18, at 5–6.

[27] *Id.*

[28] *Id.* (citing J.D. Green *et al.*, *Evaluating the Effectiveness of Safety Plans for Military Veterans: Do Safety Plans Tailored to Veteran Characteristics Decrease Suicide Risk?* Behav Ther. 49(6), 931-938 (Nov. 2018)).

[29] *Id.*

[30] Jennifer Ma *et al.*, *Education Pays 2016: The Benefits of Higher Education for Individuals and Society* College Board (2016), 3 ("Bachelor's degree recipients paid an estimated $6,900 (91%) more in taxes and took home $17,700 (61%) more in after-tax income than high school graduates.").

[31] *Id.* at 4 ("The unemployment rate for individuals age 25 and older with at least a bachelor's degree has consistently been about half of the unemployment rate for high school graduates.").

that those with a four-year college degree are less likely to live in poverty.[32]

Veterans need the advantages that college degrees offer—especially post-9/11 veterans. Nearly one in six pre-9/11 veterans reported having financial trouble between late 2021 and early 2022.[33] And for post-9/11 veterans, the number was one in three.[34] Financial difficulties can translate to other challenges as well: unemployment among veterans is linked to poorer health and well-being.[35]

So access to education matters—a proposition that the numbers bear out. Over 75% of employed post-9/11 veterans had completed some college or more.[36] And veterans who earn a college degree are more likely to experience a smooth transition after their service than those who do not progress past high school.[37]

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[32] *Id.* ("In 2015, 4% of bachelor's degree recipients age 25 and older lived in poverty, compared with 13% of high school graduates.").

[33] Gary Bond, *et al.*, *Transition from Military Service: Mental Health and Well-being Among Service Members and Veterans with Service-connected Disabilities,* 49 The Journal of Behavioral Health Services & Research 282, 283 (Jul. 2022).

[34] *Id.*

[35] *Id.*

[36] Clayton Gumber & Jonathan Vespa, *The Employment, Earnings, and Occupations of Post-9/11 Veterans*, ACS-46, United States Census, at *3 (Nov. 2020), available at https://perma.cc/8HFT-7DV9.

[37] *See* Rich Morin, *The Difficult Transition from Military to Civilian Life*, Pew Research Center, at 7, Dec. 8, 2011, available at https://perma.cc/6UDZ-22WT.

II. The government has recognized the burden military service imposes and has bestowed benefits on veterans.

A. Congress has a long history of enacting pro-veteran legislation, including GI Bills that provide education benefits.

"Veterans' benefits are as old as civilization itself."[38] The English Parliament passed its first veterans benefits laws in 1592, and by the time the colonies declared their independence, they had adopted their own versions.[39]

Not to be outdone, the First Congress made a promise that it continues to honor to this day: America would provide for its veterans as a matter of law.[40] Back then, it did so through the Commutation Act of 1783, which promised former officers five years of full pay through either cash payments or interest-bearing securities.[41]

In the years that followed, future Congresses built on the momentum. "Veterans' pensions, homes,

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[38] James D. Ridgeway, *The Splendid Isolation Revisited: Lessons from the History of Veterans' Benefits Before Judicial Review,* 4 Vet. L. Rev. 135, 137 (2011).

[39] *Id.* at 138 (citing Gustavus A. Weber & Laurence F. Schmeckebier, *The Veterans' Administration: Its History, Activities and Organization*, 2–4 (1934); William Henry Glasson, *Federal Military Pensions in the United States*, at 9-18 (1918)).

[40] Sun Won Kang & Hugh Rockoff, *After Johnny Came Marching Home: The Political Economy of Veterans' Benefits in the Nineteenth Century*, 13 (Nat'l Bureau of Econ. Research, Working Paper No. 13223, 2007), available at https://perma.cc/PD43-N773.

[41] *Id*. at 12.

hospitals, and other facilities have been supplied on an ever-increasing scale."[42] Congress has afforded veterans unique unemployment and disability benefits, which exist concurrently with job training programs.[43] Veterans even have access to guaranteed small business loans with favorable terms.[44]

Health benefits, of course, are also crucial. Many laws provide medical and disability benefits for veterans injured in the line of duty.[45] And yet other laws provide more assistance to veterans exposed to specific hazards, including Agent Orange in the Vietnam War.[46]

Education benefits have grown into a role of prominence as well. From the first GI Bill[47] to the Post-9/11 Veterans Educational Assistance Act of 2008,[48] Congress has conferred increasingly generous payments to cover access to higher education. Title 38, where most of those education benefit laws reside,

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[42] *United States v. Oregon*, 366 U.S. 643, 647 (1961).

[43] *See, e.g.*, Ex-Servicemen's Unemployment Compensation Act of 1958, Pub. L. 85-848, 72 Sta. 1087 (Aug. 28, 1958); Veterans' Pension Act of 1959, Pub. L. 86-211, 73 Stat. 432 (Aug. 29, 1959); Veterans and Survivors Pension Improvement Act of 1978, Pub. L. 95-588, 92 Stat. 2497 (Nov. 4, 1978); Emergency Veterans' Job Training Act of 1983, Pub. L. 98-77, 97 Stat. 443 (Aug. 15, 1983); 38 U.S.C. § 4104.

[44] *See* 38 U.S.C. § 3742.

[45] 38 U.S.C. §§ 1110, 1131 (establishing disability benefits).

[46] Agent Orange Act of 1991, Pub. L. 102-4, 106 Stat. 11 (Feb. 6, 1991).

[47] Pub. L. No. 78-346, 58 Stat. 284 (June 22, 1944).

[48] 38 U.S.C. § 3301 *et seq.*,

strives to offer "numerous advantages" to veterans as compensation "for their past contributions[.]"[49] And it has accomplished that goal. The Post-9/11 portions of Title 38 provide servicemembers the full cost of in-state tuition, a monthly housing allowance, a stipend for books and supplies up to $1,000 per year, and even the ability to transfer any unused educational benefits to their children.[50] And thanks to the Post-9/11 GI Bill, 75% of today's employed post-9/11 veterans have completed at least some college.[51]

B. Veterans still struggle with the VA to obtain the benefits they have earned.

In theory, the VA should be a champion of veterans nationwide. As an executive agency, it "must execute the laws Congress enacts."[52] Those laws favor veterans at every turn. The VA has even declared its "commitment to provid[ing] the best experience possible to veterans."[53] And Congress requires the VA, when adjudicating claims, to "give the benefit of the doubt to the claimant."[54]

In practice, however, veterans too often must fight the VA for the benefits they have earned. On this point, appellate statistics help make the abstract concrete. Each fiscal year, the Veterans Court releases

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[49] *Regan v. Tax'n With Representation of Washington*, 461 U.S. 540, 551 (1983).

[50] 38 U.S.C. §§ 3313, 3319.

[51] Gumber & Vespa, *supra* note 36, at 3.

[52] *Forest Serv. Emps. For Env't Ethics v. U.S. Forest Serv.*, 530 F. Supp. 2d 1126, 1127 (D. Mont. 2008).

[53] 38 C.F.R. § 0.600.

[54] 38 U.S.C. § 5107(b)

an annual report that lists the outcomes in the cases it hears. For each of the last five years, the VA has secured a complete victory in about one in every ten appeals decided on the merits.[55] Put differently, veterans who take on the VA succeed, at least in part, around 90% of the time.

Fiscal Year	Appeals to Reach Merits	Full Victories for VA	VA's Win Rate
2022	4,619	411	8.89%
2021	5,421	572	10.55%
2020	5,103	551	10.79%
2019	4,487	510	11.3%
2018	3,065	382	12.4%

How the VA loses also speaks volumes. Although the Veterans Court doesn't award style points, it does award attorney's fees. Under the Equal Access to

[55] U.S. Court of Appeals for Veterans Claims, Annual Report: October 1, 2021 to September 30, 2022 (Fiscal Year 2022) at 3 (2022), available at https://perma.cc/E6NR-EJ7B; U.S. Court of Appeals for Veterans Claims, Annual Report: October 1, 2020 to September 30, 2021 (Fiscal Year 2021) at 3 (2021), available at https://perma.cc/4MJT-VK5F; U.S. Court of Appeals for Veterans Claims, Annual Report: October 1, 2019 to September 30, 2020 (Fiscal Year 2020) at 3 (2020), available at https://perma.cc/Y99L-PY6W; U.S. Court of Appeals for Veterans Claims, Annual Report: October 1, 2018 to September 30, 2019 (Fiscal Year 2019) at 3 (2019), available at https://perma.cc/5AVQ-PL2M; U.S. Court of Appeals for Veterans Claims, Annual Report: October 1, 2017 to September 30, 2018 (Fiscal Year 2018) at 3 (2018), available at https://perma.cc/A6JN-AV78), (collectively "Veterans Court Annual Reports").

Justice Act, a litigant who defeats the federal government can recover attorney's fees if the government's position in the case was not "substantially justified."[56] Said another way, the government's position must be incapable of "satisfy[ing] a reasonable person."[57] For the last five years, veterans who applied to recover their fees under the Act almost always got them,[58] meaning the VA's position was only rarely substantially justified:

Fiscal Year	EAJA Applications Filed	EAJA Applications Granted	Rate of Fee Recovery
2022	6,530	6,522	99.87%
2021	7,282	7,267	99.79%
2020	6,741	6,729	99.82%
2019	5,330	5,317	99.75%
2018	3,283	3,297	99.5%

These statistics suggest that veterans must overcome barriers they should not have faced because of positions the VA never should have taken.

C. When Congress created judicial review of VA benefits decisions, it altered the playing field in favor of veterans.

The VA's benefits decisions have not always been subject to judicial review. The VA traces its history to 1930, when Congress established the Veterans Administration to consolidate three preexisting

[56] 28 U.S.C. § 2412(d)(1)(A).

[57] *Pierce v. Underwood*, 487 U.S. 552, 563, 565–66 & n.2 (1988).

[58] Veterans Court Annual Reports at 4.

agencies responsible for administering veterans benefits: the Veterans Bureau, the Bureau of Pensions, and the national Home for Disabled Volunteer Soldiers.[59] For decades afterward, the VA, now known as the Department of Veterans Affairs, operated in "splendid isolation."[60]

That changed in 1988. Through the Department of Veterans Affairs Act, Congress officially recognized and restructured the VA.[61] And with the Veterans' Judicial Review Act, Congress created a review mechanism to guarantee that "each individual veteran receives from the VA every benefit and service to which he or she is entitled under the law."[62]

Judicial review of VA decisions further enshrines Congress's preferential treatment for veterans—a rarity for agency-citizen relationships. As a starting point, unlike other agencies, the VA must adjudicate veterans' claims for benefits through a non-adversarial process.[63] This pro-veteran approach prohibits the VA from simply rejecting veterans' benefits claims based on procedural or initial substantive deficiencies—a frequent practice in other

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[59] *See* Act of July 3, 1930, Pub. L. No. 71-536, 46 Stat. 1016, 1016; Exec. Order No. 5398 (July 21, 1930), available at https://perma.cc/5QVM-UMTD.

[60] *Brown v. Gardner*, 513 U.S. 115, 122 (1994) (quoting H.R. Rep. No. 100-963, pt. 1, at 10 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5782).

[61] *See* Pub. L. 100-527, 102 Stat. 2635 (1988).

[62] Pub. L. 100-687, 102 Stat. 4105 (Nov. 18, 1988); S. Rep. 100-418, at 31 (July 7, 1988).

[63] 38 C.F.R. § 20.700(c).

agencies.[64] Instead, Congress imposed a "statutory duty" on the VA "to assist veterans in developing the evidence necessary to substantiate their claims."[65] And after receiving a deficient application, the VA must notify claimants of "any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim" for benefits.[66]

Congress also requires the VA to give veterans "the benefit of the doubt" unless evidence unambiguously requires the agency to deny claims.[67] And although a veteran may appeal an adverse decision, the VA Secretary may not challenge an administrative decision to award benefits.[68]

Together, these provisions reflect Congress's intent to "place a thumb on the scale in the veteran's favor."[69]

ARGUMENT

In this clash over the meaning of 38 U.S.C. §§ 3322 and 3327, one thing everyone can agree on is that Congress created a trade-up mechanism. Veterans with a single period of service that would

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[64] *See, e.g.*, 42 U.S.C. § 421.

[65] *Henderson ex rel Henderson v. Shinseki*, 562 U.S. 428, 431-32 (2011) (citing 38 U.S.C. §§ 5103(a), 5103A).

[66] 38 U.S.C. § 5103(a).

[67] 38 U.S.C. § 5107(b).

[68] 38 U.S.C. 7252(a).

[69] *Henderson*, 562 U.S. at 440 (citation omitted).

qualify them for both Montgomery benefits and Post-9/11 benefits can exchange the former for the latter.[70]

What the parties dispute, however, is whether Congress also created a sweep-in mechanism. Under the VA's reading of sections 3322 and 3327, Congress chose to pluck veterans with separate bundles of Montgomery and Post-9/11 eligibility from the traditional benefits process and funnel them into a lose-lose scenario. They can take all 36 months of their less-valuable Montgomery benefits, leaving just 12 months of their Post-9/11 benefits before hitting the overarching 48-month cap. Or they can forfeit their remaining Montgomery eligibility and exchange it for an equal duration of Post-9/11 eligibility, which supplants the Post-9/11 eligibility they already had, leaving them with less Post-9/11 eligibility than they started with—all because of a conversion they never needed in the first place.

As Petitioner explained persuasively in his opening brief, Congress started and stopped with the trade-up mechanism. The pro-veteran canon reaffirms this conclusion. For decades, courts have invoked the canon in one of two forms. The first form assists courts at the start of the interpretive process, offering context on how Congress legislates, which lets courts discern which of a disputed term's permissible meanings fits the pattern of legislation and which does not. And the

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[70] En banc opening brief of respondent-appellant Denis McDonough, Secretary of Veteran Affairs, 2022 WL 1488053, at *7-8 (May 4, 2022); Brief for the Respondent in Opposition, 2023 WL 3479618, at *3 (May 15, 2023) ("Such a veteran may elect to receive benefits under the Post-9/11 program, if he otherwise satisfies that program's eligibility requirements.").

second form returns to break the tie if, after courts exhaust all their interpretive tools, ambiguity remains.

Both forms of the canon support reversal. The disputed provisions reside in a pro-veteran law, surrounded by pro-veteran sections and subsections. Nothing about them or the context in which they appear suggests they oust from the traditional benefits process veterans with standalone Post-9/11 eligibility. The canon, then, applies in the first instance, and it reveals that the VA's reading produces a substantive effect incompatible with the rest of the Post-9/11 GI Bill. And should any ambiguity remain, the canon applies in the last instance to break the tie in Petitioner's favor.

I. The pro-veteran canon has deep roots in American law.

The search for statutory meaning takes a well-worn path. The "analysis begins and ends with the text."[71] A term's "ordinary meaning" controls,[72] but that meaning can depend on a lot of things. The "structure of the law itself" is one of them.[73] So is context.[74] Courts take a "holistic" approach, because stepping back from a disputed term can often clarify

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[71] *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553 (2014).

[72] *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2363 (2019)

[73] *Id.* at 2364.

[74] *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989).

its meaning.[75] As just one example, sometimes only one of "the permissible meanings produces a substantive effect that is compatible with the rest of the law."[76]

Other times, however, a statute is ambiguous. Its plain meaning is unclear, and more than one reading is plausible. When this happens, courts do different things depending on the type of law involved. And one ambiguity-resolving method is to break a tie in a particular party's favor.[77]

Consistent with these principles, the pro-veteran canon assists courts in both the beginning stages and the home stretch of their interpretive journey.

A. Out of the gate, the pro-veteran canon provides context on how Congress legislates.

At the start of the interpretive process, the pro-veteran canon offers context that often reveals much of what a court needs to know. That's because long before the pro-veteran canon had a name, this Court recognized a simple fact about veterans: Congress legislates in their favor.

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[75] *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988).

[76] *Id.*

[77] *See, e.g.*, *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019) ("Employing the canon as the government wishes would also sit uneasily with the rule of lenity's teaching that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor."); *Wooden v. United States*, 142 S. Ct. 1063, 1081 (2022) (Gorsuch, J., concurring in part) ("Many ambiguous cases are sure to arise. In them, a rule of decision is required—and lenity supplies it.").

That recognition dates to the Founding.[78] In *Hayburn's Case*, Chief Justice John Jay wrote to President George Washington on behalf of the Circuit Court for the District of New York.[79] He did so to comment on the Invalid Pensions Act of 1792, in which Congress created a pathway for disabled veterans of Revolutionary War to apply for pensions.[80] The goal of the Act, he noted, was "exceedingly benevolent" and did "real honor to the humanity and justice of Congress."[81]

Six decades later, in 1856, this Court was called upon in *Walton v. Cotton*[82] to interpret other laws granting pensions to Revolutionary War veterans. These statutes let deceased veterans pass their pensions onto their spouses and "children."[83] But what if a veteran's children had also died—could his grandchildren still share in his pension benefits? The Court ruled that they could, construing the laws' use of "children" broadly to conform to the traditional per stirpes method of distributing assets.[84] In reaching that result, the Court recognized that Congress was "presumed to have acted under the ordinary

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[78] *See* Brief of the Commonwealth of Virginia, 32 other States, and the District of Columbia as *amici curiae* in support of Petitioner, at 11.

[79] *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410 (1792).

[80] Hall, Kermit L. Ed., *The Oxford Companion to the Supreme Court of the United States* 427 (Oxford Univ. Press, 2d ed. 2005).

[81] *Hayburn's Case*, 2 U.S. at 410.

[82] 60 U.S. (19 How.) 355 (1856).

[83] *Id*. at 358.

[84] *Id*.

influences which lead to an equitable and not a capricious result."[85]

Then came two cases to which the origin of the pro-veteran canon is sometimes attributed. The first was *Boone v. Lightner*.[86] There, in 1943, the Court held that the Soldiers' and Sailors' Civil Relief Act of 1940 was "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."[87] Three years later, in *Fishgold v. Sullivan Drydock & Repair Corporation*,[88] the Court expanded past the Relief Act to conclude that when a statute has been "designed to protect the veteran," it must be "liberally construed for the benefit of those who left private life to serve their country in its hour of great need."[89]

And five decades after *Boone* and *Fishgold*, in 1991, this Court reaffirmed the pro-veteran principle in *King v. St. Vincent's Hospital*.[90] There, the Court refused to read into the Veterans' Reemployment Rights Act a reasonableness requirement on how long an employee could take leave from his job to serve full time in the National Guard.[91] When suggesting that an express limit in another statutory subsection might "unsettle[] the significance" of how Congress drafted the subsection at issue in the case, the Court noted

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[85] *Id.*

[86] 319 U.S. 561 (1943).

[87] *Id.* at 575.

[88] 328 U.S. 275 (1946).

[89] *Id.* at 284–85.

[90] 502 U.S. 215, 220 n.9 (1991).

[91] *Id.* at 220.

that it would still read the contested provision in the soldier's favor because of the principle announced in *Fishgold*.[92] And for the first time, the Court described the pro-veteran concept as "the *canon* that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor."[93]

Most recently, in 2011, the Court applied the canon in *Henderson ex rel. Henderson v. Shinseki*.[94] There, the law at issue set a deadline for appealing VA decisions to the Veterans Court.[95] This Court ruled that the statute was not jurisdictional,[96] which left flexibility for veterans who missed the deadline to still appeal. The Court stressed that the unique nature of veterans law cautioned against strict interpretations.[97] It also recognized "[t]he solicitude of Congress for veterans is of long standing" and "is plainly reflected in the [Veterans' Judicial Review Act], as well as in subsequent laws that place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions."[98] The Court again mentioned the canon, noting that it had "long applied the canon that provisions for

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[92] *Id*. n.9

[93] *Id*. (emphasis added).

[94] 562 U.S. 428, 441 (2011).

[95] *Id*. at 433.

[96] *Id*. at 438–439.

[97] *Id*. at 440–441.

[98] *Id*. at 440.

benefits to members of the Armed Services are to be construed in the beneficiaries' favor."[99]

The pro-veteran canon, then, accounts for how Congress legislates when writing laws that affect veterans. Congress has a "solicitude" for those with military service, and it is "long standing."[100] So the canon tells courts to start with an eye toward the reading that favors veterans because, from the get-go, courts know that's what Congress set out to do. And veterans benefits laws, especially, display this principle in action. After all, the whole point of such laws is to provide something to veterans.

But there is more. The *King* Court also "presume[d] congressional understanding of [the canon]."[101] So not only does Congress legislate in favor of veterans, but Congress also *expects* courts to interpret its laws that way. Indeed, Congress has enacted an entire title of the U.S. Code to help veterans,[102] and it drafted much of Title 38 after *King* issued, meaning Congress has written and passed many provisions knowing full well how courts would interpret them.

These results make sense. When courts know how Congress legislates, that knowledge helps clarify the meaning of the terms Congress uses. With that context in mind, courts can discern which of a disputed term's permissible meanings "fit[s] well in the pattern

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[99] *Id*. at 441.

[100] *Oregon*, 366 U.S. at 647.

[101] 502 U.S. at 220 n.9.

[102] *See generally* 38 U.S.C. §§ 101-8528.

of legislation" that helps veterans[103] and which of those meanings would instead create "a trap for the unwary"[104] or would serve as "a stratagem to deny compensation to a veteran who has a valid claim."[105]

In short, the pro-veteran canon offers context that assists courts at the beginning of the interpretive journey.

B. When ambiguity lingers, the pro-veteran canon breaks the tie.

After a court has worked through its interpretive tool kit, if a law's meaning is still unclear, the pro-veteran canon serves a second function: Beyond providing context, it also breaks ambiguity-related ties.

This tie-breaking role stems from *Brown v. Gardner*.[106] There, in the first veterans benefits case this Court reviewed after the enactment of the Veterans Judicial Review Act of 1988, the Court examined whether, to receive benefits, a veteran injured during a VA hospital stay had to prove his injury was the VA's fault.[107] The *Brown* Court held that no such proof was required because the operative word—"injury"—could not be read in context to carry some form of fault. It also noted that, even if the language of the statute were ambiguous, the Court

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[103] *Oregon*, 366 U.S. at 647

[104] *Comer v. Peake*, 552 F.3d 1362, 1369 (Fed. Cir. 2009).

[105] *Id.*

[106] 513 U.S. 115 (1994).

[107] *Id.* at 116.

might apply "the rule that interpretive doubt is to be resolved in the veteran's favor."[108]

From that statement arose a now common formulation of the pro-veteran canon: "if there is ambiguity in the statute, interpretive doubt is to be resolved in the veteran's favor."[109] Since *Gardner*, courts and parties alike have invoked its variant of the pro-veteran canon.

Consider two examples. First, in *Otero-Castro v. Principi*,[110] the Veterans Court reviewed the VA's denial of a veteran's request for an increased disability rating for his service-connected heart disease. The court found the applicable regulation ambiguous, rejected the VA's interpretation, and adopted the veteran's interpretation "because interpretive doubt is to be resolved in favor of the claimant."[111]

Second, in *Cottle v. Principi*, the Veterans Court encountered a disability benefits determination that turned on whether the veteran was injured in "the pursuit of a course of vocational rehabilitation."[112] Neither the statute nor the implementing regulations defined the phrase, and the legislative history revealed nothing illuminating.[113] So the court found

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[108] *Id.* at 118.

[109] *McKnight v. Gober*, 131 F.3d 1483, 1485 (Fed. Cir. 1997) (per curiam).

[110] 16 Vet. App. 375, 380 (2002)

[111] *Id.* at 382.

[112] 14 Vet. App. 329 (2001).

[113] *Id.* at 332, 334.

the phrase ambiguous, then construed that ambiguity in the veteran's favor, citing *Gardner* throughout.[114]

Unfortunately, courts have also treated *Gardner*'s tie-breaking formulation of the pro-veteran canon as the only one. Take the Federal Circuit's en banc opinion below. Rather than acknowledging the liberal construction aspect of the pro-veteran canon and using it from the start of the interpretive process, the court first construed the disputed statutory terms, then rejected the canon's application because it thought those terms were unambiguous.[115] Or consider this Court's recent decision in *Arellano v. McDonough*, when the Court rejected the petitioner's invocation of the pro-veteran canon, noting that "[i]f the text and structure favored [the petitioner], the nature of the subject matter would garnish an already solid argument" but that the case was not one "in which competing interpretations [we]re equally plausible."[116]

Properly understood, *Gardner*'s version of the canon is just one side of the pro-veteran-canon coin. On the reverse side sits the primary, still-viable formulations from *Boone*, *Fishgold*, *King*, and *Henderson*—none of which require ambiguity.

The pro-veteran canon, then, serves dual roles. At the start of the statutory construction process, it assists courts by providing context on how Congress

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[114] *Id*. at 336.

[115] Pet. App. 16a–17a ("Whatever role this canon plays in statutory interpretation, it plays no role where the language of the statute is unambiguous—the situation here.").

[116] 143 S. Ct. 543, 552 (2023).

legislates. And at the end of the interpretive road, it breaks the tie if ambiguity remains.

C. The pro-veteran canon is still necessary and useful in today's legal world.

Now, as much as ever, the pro-veteran canon offers courts a helpful interpretive tool. Scholars could no doubt identify many reasons for employing the canon even under the strictest textualist approach, but at least two obvious ones come to mind.

First, continued recognition and application of the pro-veteran canon reflects Congress's grand design for veterans benefits. As discussed above, the VA administrative process is a non-adversarial one.[117] Congress tilted the field in veterans' favor from the start. Normally, a legal decisionmaker can never offer legal advice to parties. But the VA *must* do so; it holds an obligation to tell claimants what is required to get benefits.[118] And traditionally, any losing party may appeal. But not the VA Secretary; only a veteran may challenge an adverse decision.[119] Congress, then, continues to legislate in favor of veterans, not just in the benefits it provides, but in the procedures it creates to govern how veterans obtain them. So Congress is as pro-veteran as it has ever been, which means the rationale for the canon stands strong.

Second, despite the many advantages veterans enjoy, they still often face an uphill battle with the VA. Recall the statistics set out above. They are troubling.

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[117] *Supra*, p. 17.

[118] *Id.*

[119] *Id.*

In appeals to the Veterans Court, veterans prevail over the VA in at least some respect nine times out of ten. And the court routinely finds that the VA has taken a position that's not substantially justified—that's incapable of satisfying a reasonable person—and that's therefore worthy of awarding fees and costs to the veteran.[120] These outcomes speak volumes about the barriers veterans face despite interacting with a system designed to help them. The pro-veteran canon is therefore worth keeping to counterbalance the unwarranted challenges that the VA's positions too often impose on veterans seeking benefits.

II. Applied here, the pro-veteran canon requires reversal.

The Post-9/11 GI Bill is a pro-veteran law, containing provision after provision of pro-veteran substance. Petitioner's reading of sections 3322 and 3327 "produces a substantive effect that is compatible with the rest of the law."[121] The VA's reading does not.

Start with the law itself. Congress designed it to "enhance" education benefits for veterans serving after September 11, 2001.[122] Those veterans deserved "recognition and respect," which Congress showed by increasing education benefits relative to "the Montgomery GI Bill, which [wa]s a peacetime bill."[123]

Next, travel down one level of generality to consider the Post-9/11 GI Bill's sections. Subchapter

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[120] *Supra*, p. 14 & n.55.

[121] *Timbers*, 484 U.S. at 371.

[122] *Hearing on Pending Benefits Legislation: Hearing Before the S. Comm. on Veterans' Affairs*, 110th Cong. 5–6 (2007).

[123] *Id.*

II, which spans from 38 U.S.C. § 3311 to § 3320, gives veterans more than they had previously. Section 3311 describes who is entitled to benefits.[124] Section 3312 sets the duration of benefits at 36 months.[125] Section 3313 outlines the amount veterans can receive.[126] And Sections 3314 through 3315B describe what other benefits individuals "entitled to educational assistance under [Chapter 33] *shall also* be entitled to"[127]: payment for tutorial assistance; licensing or certification tests; certain national tests; and preparatory courses for licensure, certification, or national tests.

The remaining sections in Subchapter II then offer more benefits for specific subsets of veterans. Section 3316 allows military members with critical skills or additional service to obtain increased monthly amounts of educational assistance.[128] Section 3317 creates a voluntary contribution-matching program that colleges and universities can join if standard benefits don't cover the full cost of tuition and fees.[129] Section 3318 provides an additional $500 to those relocating or traveling a significant distance to pursue an education.[130] Section 3319 allows for the transfer of unused education benefits to family

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[124] 38 U.S.C. § 3311.

[125] *Id.* § 3312.

[126] *Id.* § 3313.

[127] *Id.* §§ 3314, 3315, 3315A, 3315B (emphasis added).

[128] *Id.* § 3316.

[129] *Id.* § 3317.

[130] *Id.* § 3318.

members.[131] And Section 3320 offers additional benefits to individuals chosen for the Edith Nourse Rogers STEM Scholarship.[132]

The trend here is unmistakable. Congress was "exceedingly benevolent,"[133] and it "acted under the ordinary influences which lead to an equitable and not a capricious result."[134] At no point does any section of Subchapter II take benefits from veterans or reduce their wartime benefits because of peacetime service.

To be sure, the contested provisions here (Sections 3322 and 3327) appear in Subchapter III's administrative provisions. But the sections that surround them contain no hint of benefit reduction either. Section 3321 sets the time limit for use of, and eligibility for, entitlement.[135] Section 3323 instructs the Secretary of Defense to provide benefits information to veterans and to certain other recipients.[136] Section 3324 allocates the cost of the education benefits to funds appropriated for the payment of readjustment benefits.[137] Section 3325 imposes reporting requirements for the Secretary of Defense.[138] And Section 3326 adds reporting

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[131] *Id.* § 3319.

[132] *Id.* § 3320.

[133] *Hayburn's Case*, 2 U.S. at 410.

[134] *Walton*, 60 U.S. at 358.

[135] 38 U.S.C. § 3321.

[136] *Id.* § 3323.

[137] *Id.* § 3324.

[138] *Id.* § 3325.

requirements for the schools that receive payments under the program.[139]

Once more, the trend is consistent: not one mention of a penalty. And Chapter 33's high level structure is evident. Subchapter II provides the substance; Subchapter III provides the procedure; and *both* Subchapters are pro-veteran. (For completeness, Subchapter I contains definitions.)

Now bump down yet another level of generality to ponder the subsections that neighbor those in dispute (Subsections 3322(d), 3327(a), and 3327(d)). Like the rest of Subchapter III, the adjoining subsections outline procedures, not substance.

Section 3322 prohibits double-dipping. Subsection (a) requires veterans to take separate benefits consecutively, not concurrently.[140] Subsection (b) prevents veterans from using a period of service to qualify for both benefits and student-loan forgiveness.[141] Subsection (c) requires someone serving in the Selected Reserve to pick which education benefit their service will count toward.[142] Subsection (e) applies another consecutive-not-concurrent requirement, this time for benefits under the Marine Gunnery Sergeant John David Fry Scholarship.[143] Subsection (f) prohibits individuals from receiving both Post-9/11 benefits and benefits under the Fry

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[139] *Id.* § 3326.

[140] *Id.* § 3322(a).

[141] *Id.* § 3322(b).

[142] *Id.* § 3322(c).

[143] *Id.* § 3322(e).

Scholarship as someone's dependent.[144] Subsection (g) bars concurrent receipt of transferred education benefits.[145] And Subsection (h) prohibits a single period of service for counting toward eligibility for more than one type of education benefit.[146]

Section 3327 sets out how the trade-up process works. Subsection (b) says that once someone makes a trade-up election, he or she no longer needs to contribute toward the Montgomery GI Bill.[147] Subsection 3327(c) allows anyone who transferred Montgomery entitlement to someone else to revoke the transfer.[148] Subsection 3327(e) clarifies that someone who trades up from Montgomery benefits to Post-9/11 benefits can use his or her benefits for programs the Montgomery GI Bill approved—even if the Post-9/11 GI Bill didn't approve them.[149] Subsection 3327(f) lets veterans get back the required monthly contributions they made to the Montgomery program, in the same proportion as their trade up from Montgomery to Post-9/11 benefits.[150] Subsection 3327(g) says that veterans who received increased Montgomery benefits because they had critical skills can retain entitlement to those increased amounts.[151] Subsection 3327(h) lets the VA make elections for veterans who themselves make one

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[144] *Id.* § 3322(f).

[145] *Id.* § 3322(g).

[146] *Id.* § 3322(h).

[147] *Id.* § 3327(b).

[148] *Id.* § 3327(c).

[149] *Id.* § 3327(e).

[150] *Id.* § 3327(f).

[151] *Id.* § 3327(g).

that's clearly against their own interest.[152] And Subsection 3327(i) instructs veterans that their Subsection 3327(a) election is irrevocable.[153]

At every level, the Post-9/11 GI Bill gives veterans benefits, allows them to trade up from lesser benefits to greater ones, or tells them how they may use what they've earned. Nowhere—in no Subchapter, in no Section, and in no Subsection—does the Bill contain a benefits reduction.

So when the VA tells the Court that veterans like Petitioner lose their standalone Post-9/11 eligibility by using a portion of their separate Montgomery eligibility—and that the culprit is an optional election (to trade up from Montgomery for Post-9/11 benefits) that was never necessary in the first place (because Petitioner already had Post-9/11 benefits)—that's cause for deep skepticism. It's also the pro-veteran canon's cue.

What the canon tells us about how Congress legislates aligns with what Congress did here. Congress designed the Post-9/11 GI Bill "to protect the veteran," so the Court must "liberally construe[]" the law "for the benefit of those who left private life to serve their country in its hour of great need."[154] When provisions left, right, and center grant benefits, a liberal construction avoids stripping them. And even

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[152] *Id.* § 3327(h).

[153] *Id.* § 3327(i).

[154] *Fishgold*, 328 U.S. at 284–85.

were the Court to find ambiguity, the canon would break the tie in Petitioner's favor.[155]

Remember that Congress knew of the pro-veteran canon when drafting the Post-9/11 GI Bill. Against that backdrop, any rational lawmaker would speak clearly—blatantly—when crafting an anti-veteran provision. Congress's failure to so speak is another sign that Sections 3322 and 3327 contain no benefit-plundering powers.

And recall the real-life ramifications of laws like the Post-9/11 GI Bill. Life after the battlefield is mined with higher stress rates; higher divorce rates; and higher incidences of alcohol abuse, serious disability, and suicide.[156] But research shows that veterans who attain a higher education transition more easily out of military life.[157] Except in a world gone topsy-turvy, veterans with wartime service do not lose such crucial benefits because of prior peacetime service.

The Court has "long applied the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor,"[158] and it should do so here.

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[155] *Gardner*, 513 U.S. at 122.

[156] *Supra*, p. 6–9.

[157] *Supra*, p. 10.

[158] *Henderson*, 562 U.S. at 441.

CONCLUSION

This case arose because the VA used a statute that *gives* veterans education benefits to *take* a portion of those benefits from Petitioner—all because he served his country more than once. To state the realities of the VA's position is to know that's not the law Congress enacted. But if, after deploying the standard tools of statutory interpretation, any doubts remain, the pro-veteran canon puts them to rest. Just as Congress "does not…hide elephants in mouseholes,"[159] it does not hide trap doors in the bridges it builds for veterans transitioning to civilian life. The Court should reverse.

Respectfully submitted,

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[159] *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).