EXHIBIT A

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

JAMES R. RUDISILL,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 16-4134
	)	
DENIS MCDONOUGH, Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

[PROPOSED] APPELLANT'S REPLY IN SUPPORT OF MOTION FOR AN INJUNCTION PENDING APPEAL

The Court should grant Mr. Rudisill's motion for an injunction pending appeal. *First*, the Court has jurisdiction to grant injunctive relief pending appeal. *Second*, the Court may do so even though the Secretary's appeal has prevented Mr. Rudisill's victory from becoming final, without violating the Constitution's Appropriations Clause. *Third*, nothing the Secretary argues undercuts Mr. Rudisill's arguments on the merits.

I. The Court Has Jurisdiction to Grant Mr. Rudisill an Injunction.

As a threshold matter, the Secretary questions the Court's jurisdiction to grant Mr. Rudisill relief. Resp. at 2-4. Contrary to the Secretary's suggestion, no rule or precedent forecloses this Court's authority to grant Mr. Rudisill an injunction pending appeal; if anything, he is compelled by rule to seek such relief in this Court first. Fed. R. App. P. 8(a)(1) ("A party must ordinarily move first in the district court" for an order "granting an injunction while an appeal is pending."). Consistent with that rule, the only thing this Court is precluded from doing is exercising jurisdiction over "those aspects of the case involved

in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). Mr. Rudisill's injunction motion involves an entirely different issue, which sits comfortably within the long history of cases allowing lower courts to grant injunctive relief to enforce an un-stayed, albeit appealed order. Here, as discussed below, the Court's order on appeal has not been stayed by any court[1] and the requested relief does not affect the Federal Circuit's review of *BO* in any way. Thus, the Court has jurisdiction and should issue the requested injunction.

The Secretary cites no case holding that the Court can never issue an injunction pending appeal. Indeed, the opposite is true. Fed. R. App. P. 8; *see Galderma Labs., L.P. v. Teva Pharma. USA, Inc.*, 799 Fed. Appx. 838, 842 (Fed. Cir. 2020) (discussing routine post-notice of appeal injunction proceedings in district court and then Federal Circuit); Sec'y Resp. to Mar. 10, 2021 Order at 9-10, *Wolfe v. McDonough*, Vet. App. No. 18-6091 (Mar. 22, 2021) (the "*Wolfe* Resp.") (inviting Court to "entertain and rule on the merits of" Secretary's post-notice of appeal motion, even if the Court were to construe it as seeking an injunction pending appeal).

Instead, the Secretary merely overstates the significance of cases recognizing the general rule of jurisdictional divestiture "over those aspects of the case involved in the appeal." Resp. at 2 (ultimately quoting *Griggs*). In support, he notes this Court's statement that "a case should not be in two places at once with respect to the same issue." *Id.* at 3 (quoting *Monk v. Wilkie*, 32 Vet. App. 87, 94 (2019) (*en banc*)). He omits, however, that

[1] Quite the contrary; this Court denied the Secretary's request for a stay and the Secretary failed to renew his request in the Federal Circuit. Order (Jan. 7, 2020).

the Court simultaneously recognized "that a lower court retains jurisdiction in situations in which it will not 'interfere with' the issues on appeal." *Monk*, 32 Vet. App. at 94 (internal citation omitted; cautioning against reading *Sumner*, cited by the Secretary (Resp. at 2, 3, 4), too broadly). This includes the "well-established exception" that a lower court "retains jurisdiction to the extent necessary to enforce its judgment which has not been stayed." *In re Grand Jury Subpoenas Duces Tecum*, 85 F.3d 372, 375-76 (8th Cir. 1996) (cited in *Monk*).

The precedent establishing the foregoing exception is "voluminous and convincing" and contemplates enforcement of un-stayed orders via "any appropriate means." *In re Grand Jury Subpoena No. 7409*, 2018 WL 8334866, at *2 (D.D.C. Oct. 5, 2018) (collecting cases). Granting the narrowly tailored injunction Mr. Rudisill seeks will enforce the Court's un-stayed judgment pending appeal and no more, thereby protecting him from irreparable injury and a potentially hollow victory, without interfering with the Federal Circuit's decision. It will not go "to the heart of the merits issue on appeal to the Federal Circuit" or require the "Court to exercise concurrent jurisdiction over the exact aspects of the case" on appeal, Resp. at 4, as the voluminous case law discussed above demonstrates.

An injunction will not in any way alter *BO* or impact whether it is ultimately affirmed or reversed. *See Wolfe* Resp. at 14 (distinguishing from *Griggs* the Secretary's request for a stay of *Wolfe* Order pending appeal of underlying merits decision, which, like here, is "not asking this Court to vacate, alter, amend, or otherwise address any of the

aspects of the ... case involved in the appeal").[2] Thus, the Court has jurisdiction to issue an injunction.[3]

II. Neither the Appropriations Clause nor the Finality of *BO* are Barriers to Granting Mr. Rudisill an Injunction.

The Secretary next questions whether the Appropriations Clause or notions of finality preclude granting Mr. Rudisill an injunction. Resp. at 4-6. Like the Secretary's jurisdictional arguments, however, these arguments are misplaced.

As discussed above, the injunction sought here is, as a practical matter, to enforce the Court's un-stayed judgment pending appeal. The Court held in *BO* that Mr. Rudisill is entitled to additional Post-9/11 benefits under the statutory scheme established by Congress. Granting an injunction pending appeal would merely enforce that statutory interpretation. As a result, there is no Appropriations Clause issue, just as there is none in any of the Court's decisions finding veterans statutorily entitled to benefits. *See Burris v. Wilkie*, 888 F.3d 1352, 1359 (Fed. Cir. 2018) (precluding only veterans from "obtain[ing], on equitable grounds, monetary relief that they are not *otherwise eligible to receive under substantive statutory law*") (emphasis added).

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[2] The Court should take a dim view of the Secretary's "heads I win" in *Wolfe*, "tails you lose" in *Rudisill* theory. In both cases, the question at issue is one of non-enforcement or enforcement of an un-stayed order while an appeal is pending. The Court's jurisdiction does not turn on the identity of the party seeking such relief or other subtle differences.

[3] The Secretary also questions whether Vet. App. Rule 8 is the proper vehicle for Mr. Rudisill's motion. Resp. at 4. Mr. Rudisill believes it is, as the Rule should be liberally construed to account for the Court's authority to grant injunctions pending appeal, as explained above. *See also Wolfe* Resp. at 9 (explaining origins of Rule 8). But if Rule 8 is inapt, Mr. Rudisill agrees with the Secretary that it should be no impediment to granting relief under the Court's Rule 2 and/or its inherent powers. *Id.* at 10, 13-14.

Likewise, the fact that *BO* is not yet final under 38 U.S.C. § 7291 is no reason to deny an injunction pending appeal. The finality contemplated in § 7291 is *res judicata*, to preclude "successive litigation of the same claim." *Sapp v. Wilkie*, 32 Vet. App. 125, 146 (2019) (citing *Taylor v. Sturgell*, 553 U.S. 800, 892 (2008)). Section 7291 does not somehow prohibit the Court from enforcing its un-stayed judgments pending appeal, as all federal courts may do, even if the Federal Circuit may later "modify or reverse" it under § 7292. *See* Sec. I, *supra* (discussing well-established exception to general rule allowing lower courts to enforce their un-stayed judgments pending appeal).

III. Mr. Rudisill Has Carried His Burden of Establishing Entitlement to an Injunction.

Finally, nothing the Secretary argues on the merits undermines Mr. Rudisill's entitlement to an injunction.

a. Strong likelihood of success on the merits

Mr. Rudisill has shown there is a strong likelihood he will ultimately succeed on appeal. The Secretary omits from his discussion of the Federal Circuit's jurisdiction, Resp. at 6-7, that the sole source of authority for his notice of appeal, which he admittedly filed without Solicitor General authorization, does not apply to appeals from this Court. *See* DOJ Directive 1-15, § 4 (defining the "direct reference or delegated case[s]" from which "protective" notices of appeal can be taken under § 6). He likewise ignores Mr. Rudisill's discussion of this Court's repeated post-merits orders as weighing in his favor. *Compare* Resp. at 7, *with* Mot. at 5-6.

If more is needed, *see* Resp. at 7 (claiming Mr. Rudisill "has failed to present any cogent arguments regarding the merits"), Mr. Rudisill has also identified on appeal previously unavailable internal guidance that confirms the soundness of *BO*. The Secretary's M22-4 Manual explains, at odds with the Secretary's litigation position, that 38 U.S.C. § 3322(h)(1) makes the Post-9/11 program fully "consistent with all other GI Bill programs," by allowing veterans to point a previously unused "period of service to one benefit instead of another" (*i.e.*, so-called "period of service" elections, which are required for "all benefits" programs). Pt. 4, § 3.02(a), Pt. 3, § 3.10.[4] Moreover, the Manual explains that so-called "in lieu of" elections under 38 U.S.C. § 3327 are required only when an individual must "forfeit one benefit in order to qualify for" Post-9/11 benefits because of a prior period of service election. *Id.* § 3.10 (distinguishing between the "two separate and distinct types of elections"). Thus, as the Secretary's own long-standing interpretation shows, Mr. Rudisill has a strong likelihood of success on appeal.

b. Irreparable harm

The Secretary does not dispute that Mr. Rudisill will suffer irreparable harm without an injunction. Instead, he argues only that *BO* is not final, but if it is affirmed by the Federal Circuit, the Secretary will then "provide [Mr. Rudisill] with his Post-9/11 benefits." Resp. at 8. As explained in Section II, *supra*, the finality of *BO* is no impediment to granting an injunction. But more importantly, the Court should not assume that the Federal Circuit will issue its mandate before Mr. Rudisill's benefits are exhausted on May 21, 2021. *See* Fed.

[4] Available at <https://perma.cc/9DU8-HXPE?type=image> and <https://perma.cc/XUY8-JZSN?type=image>.

R. App. P. 41. It could be months if not years before that occurs, depending on the course of litigation, during which time Mr. Rudisill would suffer irreparably, which the Secretary does not dispute.

c. Substantial injury to the Secretary and the public interest

Finally, the Secretary does not seriously dispute that he will suffer no substantial injury under an injunction or that the public interest weighs in favor of an injunction.

The Secretary does not argue that he would be injured by payment of Post-9/11 benefits to Mr. Rudisill. He speculatively notes only that he would have to expend labor and resources to recover any debt from Mr. Rudisill, *if* (and only if) *BO* is ultimately reversed (which is unlikely, as explained above). Resp. at 8-9. He also speculates whether he would be successful in his debt collection efforts given Mr. Rudisill's explanation that he cannot today take out student loans to replace his lost benefits. *Id.* To remove any doubt, Mr. Rudisill acknowledges that he would be obligated to repay any final, valid debt resulting from his receipt of benefits under an injunction order. Mot. at 10. He further recognizes that the Secretary has ample authority to ensure that happens. *E.g.*, 38 C.F.R. §§ 1.910 *et seq.* (Standards for Collection of Claims, including installment plans), 1.980 (Salary Offset Provisions applicable to federal employees, like Mr. Rudisill).

The Secretary's argument regarding the public interest fails for the same reason. Mr. Rudisill has not "implied that he does not have the ability to pay back any overpayment of education benefits" if *BO* is ultimately reversed. Resp. at 9. He has stated only that he "is unable to take out loans" to replace lost benefits in the interim. Mot. at 7-8 (citing Decl.

¶ 17-19). Those are very different things, and as explained above Mr. Rudisill will repay any final, valid debt resulting from his receipt of benefits under an injunction order.

Conclusion

For the reasons above and in Mr. Rudisill's motion, the Court should grant him an injunction pending appeal.

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Respectfully submitted,

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