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

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BRIEF OF 7 VETERANS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Steven Attaway, Robert F. Griggs, Scott Cone, Michael Petta, Byron Elliott, Elizabeth Lewis, and Eric Richardson are veterans whose education benefits were reduced by the decision below.[2]

Like Petitioner, they earned benefits under the Montgomery GI Bill (Montgomery) and the Post-9/11 GI Bill. Under a proper interpretation of the law, they are entitled to both, subject only to a 48-month cap. These veterans offer perspective on how the lower court's erroneous interpretation of 38 U.S.C. § 3327 hurts veterans and their families.

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[1] Under Rule 37.6, 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 Amici Curiae or their counsel contributed money that was intended to fund preparing or submitting the brief. Counsel of record for all parties were timely notified under Rule 37.2 of Amici Curiae's intent to file this brief.

[2] This brief uses "veteran" to refer to both honorably discharged and active servicemembers. Cone currently serves on active duty. The views expressed in this amicus brief do not reflect the official policy or position of the United States Government or any branch of the military.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents an intricate statutory interpretation question. But complex legal arguments about how best to read 38 U.S.C. § 3327 should not obscure the real-world effect on veterans and their families.

As the Government admitted below, this case poses an "important" issue to "the veterans community." Sec'y En Banc Br. 16. This brief presents the stories of seven veterans, including one war widow, most of whom have 20 or more years of service. All are rightfully entitled to 48 months of education benefits. The decision below, by wrongly interpreting 38 U.S.C. § 3327(d), has cut them down to 36 months. As a result, these veterans (and their children) each stand to lose tens of thousands of dollars in education benefits.[3]

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[3] Twelve months of education benefits can be worth $65,000 or more. The maximum tuition and fee reimbursement per academic year under the Post-9/11 GI Bill is $26,042.81. *See* Post-9/11 GI Bill (Chapter 33) Payment Rates for 2021 Academic Year (August 1, 2021 - July 31, 2022), *available at* https://www.va.gov/education/benefit-rates/post-9-11-gi-bill-rates/past-rates/. This equates to $34,723.75 for 12 months of benefits. Benefits also include an annual $1,000 stipend for books and supplies, and a monthly housing stipend that varies based on location. *Id.* For example, the monthly housing stipend for the University of Maryland at College Park, is $2,388 per month. *See* GI Bill Comparison Tool, *available at* https://www.va.gov/education/gi-bill-comparison-tool/. The Yellow Ribbon Program may also provide Post-9/11 GI Bill

Veterans Steven Attaway, Robert F. Griggs, Scott Cone, Michael Petta, Byron Elliott, Elizabeth Lewis, and Eric Richardson respectfully urge this Court to grant review and reverse.

ARGUMENT

I. The decision below harms veterans and military families by cutting down their benefits from 48 to 36 months.

The Federal Circuit held that "Section 3327(d)(2) unambiguously limits the 'number of months of entitlement' for [individuals with multiple periods of service] to 'the number of months of unused entitlement of the individual under [the Montgomery program].'" Pet. App. 15a.

That interpretation of 38 U.S.C. § 3327(d) shortchanges veterans out of at least twelve months of Post-9/11 GI Bill benefits by subjecting them to a supposed 36-month cap. Both the Court of Appeals for Veterans Claims and a panel of the Federal Circuit recognized this error and injustice. This Court should do the same.

Veterans Steven Attaway, Robert F. Griggs, Scott Cone, Michael Petta, Byron Elliott, Elizabeth Lewis, and Eric Richardson have each suffered because of this 36-month cap. These are their stories and how

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recipients with additional thousands of dollars to pay for tuition and fees not covered by the Post-9/11 GI Bill. *See* Yellow Ribbon Program, *available at* https://www.va.gov/education/about-gi-bill-benefits/post-9-11/yellow-ribbon-program/#am-i-eligible-for-the-yellow-r.

each stand to regain their earned benefits if this Court grants review and reverses.

A. Steven Attaway

Steven Attaway is an Air Force veteran and a first-generation college graduate. His father and brother also served in the U.S. Air Force.

In 1989, Attaway enlisted in the U.S. Air Force and served as a weapons loader and gunner for 8 years. Attaway then received an honorable discharge. Afterward, Attaway enrolled at the University of North Texas. To help pay for his college degree, Attaway used 13 months and 27 days of his Montgomery benefits.

After graduating in 2001, Attaway was commissioned as an officer and served 13 more years as an aircraft maintenance officer. While on active duty, Attaway served in the Middle East and deployed to Afghanistan, Kuwait, and Saudi Arabia in support of Operation Enduring Freedom.

In 2010, Attaway agreed to serve four more years in order to transfer his remaining education benefits to his daughter. At the end of that service obligation, Attaway retired with an honorable discharge as a Major/O-4.

In preparation for his daughter to attend Texas A&M University in the fall of 2022, Attaway obtained a certificate of eligibility from the VA. Based on its erroneous interpretation of § 3327(d)(2), the VA decided that Attaway could only transfer 22 months and 3 days of Post-9/11 GI Bill benefits to his

daughter. If this Court reverses, Attaway's daughter would receive 34 months of education benefits, not 22.

B. Robert F. Griggs

Dr. Robert F. Griggs is a decorated U.S. Army combat veteran and a retired Lieutenant Colonel/O-5. Inspired by his father's service in Vietnam and South Korea, Griggs enlisted in the United States Army and served in the 82nd Airborne Division.

Griggs first served in the Army from 1988 to 1991, including combat in Panama. He then received an Army Green to Gold Scholarship for college. Griggs enrolled in Campbell University, where he had to separate from the Army and join Army ROTC in order to use his scholarship. He graduated in 1994 and was commissioned as an officer.

After 9/11, Griggs served combat tours in Afghanistan and Iraq. In 2011, he agreed to another service obligation so he could transfer his education benefits to his son and daughter. Griggs then returned to combat zones, serving a final tour in Afghanistan before retiring in 2014.

In total, Griggs served six combat tours across more than 23 years in the Army. He earned the Ranger Tab, the Master Parachutist Badge with gold star for five combat jumps, and the Combat Infantryman Badge (twice awarded). After retirement, he completed a doctorate at Penn State University.

Despite the strains on his family from his service, Dr. Griggs' children have excelled academically. He should have 18 months of education benefits to transfer to them under the obligation he undertook in 2011. But in 2021, the VA determined that Dr. Griggs had only six months of benefits to transfer.

Dr. Griggs relied on the U.S. Army's commitment to support his children's education, but their opportunities for graduate school and decisions about professional paths have been adversely impacted by the lower court's decision. For example, the VA's restriction of Dr. Griggs's benefits harmed his son's eligibility for Yellow Ribbon Program benefits, which would otherwise support the cost of attendance at the University of Pennsylvania Carey Law School. If this Court reverses, Dr. Griggs' children would be entitled to at least 18 months of education benefits, instead of six.

C. Scott Cone

Scott Cone currently serves on active duty as a Captain/O-6 in the United States Navy. He has nearly 35 years of military service.

In 1988, with a G.E.D. and his parents' permission, Cone began his naval career at the age of 17. He served 12 years as an enlisted Sailor, reaching the rank of Chief/E-7. As an enlisted Sailor, Cone used part of his Montgomery benefits to become a first-generation college graduate from the University of Maryland at College Park (1997).

In August 2000, Cone was commissioned as an officer. While on active duty, Cone flew as a naval aircrewman, completed deployments on submarines and with carrier strike groups, and served overseas in multiple locations.

As an officer, Cone again used portions of his Montgomery benefits to pay for a graduate degree in public policy. In total, Cone used 24 months of Montgomery benefits to obtain his undergraduate and graduate degree, each of which was critical to further promotions in the Navy.

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

D. Michael Petta

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

After he missed the birth of his first child because he was at sea on a ballistic missile submarine, Petta dedicated himself to earning a college degree so he could find a civilian profession to provide for his family. After eight years of study during his service, Petta earned a degree from Southern Illinois

University. After graduation, he left the service for a civilian job.

When 9/11 came, Petta wanted to serve his country again. He returned to active duty in the United States Navy in October 2001, as a preliminary step toward receiving a commission in the United States Coast Guard. In 2006, the Coast Guard selected Petta to attend law school. Petta used his Montgomery benefits to help pay for law school, using a total of 33 months and 7 days of benefits.

In 2016, Petta sought to transfer his Post-9/11 GI Bill to his two youngest children. But when he submitted a claim in early 2022 for his son to use these benefits, the VA stated that he had only two months and 23 days of benefits eligible for transfer.

As a single father long focused on providing his children with the best opportunities, Petta would have chosen to use his Montgomery benefits differently in 2006 had he known the transfer of benefits to his sons would be subject to this supposed 36-month cap. If this Court reverses, Petta would have close to 15 months of earned Post-9/11 GI Bill benefits to transfer to his children.

E. Byron Elliott

Byron Elliott is a retired Lieutenant Colonel/O-5 and served in the United States Army and Army Reserve. Raised by a single mother, he enlisted in the Army in 1993. He left active duty in 1997 to attend Regis University.

Elliott was a recipient of an Army Green to Gold Scholarship and used some of his Montgomery benefits to pay for school. He was later commissioned as an officer, including deployments to Kosovo and Iraq. In 2004, as a Company Commander, Elliott enrolled in an MBA program at Colorado Christian University, using a year of his Montgomery benefits. In 2005, he transitioned from active duty to the United States Army Reserves and completed his MBA.

After the Post-9/11 GI Bill, Elliott enrolled at University of Denver, Sturm College of Law, under the impression he could use his Post-9/11 GI Bill benefits toward his law school education. The VA at first confirmed his eligibility.

When Elliott returned for his second year of law school, the VA informed him that he had only two months of eligibility remaining. He had to either drop out of law school or fund the rest of it with loans. He chose the loans and completed law school in debt.

Because of the 36-month cap, Elliott—a 24-year veteran—had to fund two and half years of law school on his own. Today, he is concerned not only with the financial burden of his student loans, but with the lack of notice he received when he began law school. If this Court reverses the lower court's decision, Elliott should get back 12 months of his earned Post-9/11 GI Bill benefits.

F. Elizabeth Lewis

Elizabeth Lewis enlisted in the United States Army in 2002, serving four years as a track and wheel

mechanic. While serving in South Korea, she met her husband. After they were married, Lewis's husband deployed to Afghanistan, where he was killed in action.

Lewis had enrolled in nursing school to become an operating room nurse, using her Montgomery benefits. When her husband was killed in Afghanistan, she left nursing school because it required her to encounter life and death situations that triggered her own trauma. She currently resides in San Antonio, Texas, with her son and her parents. Lewis has not yet received a college degree, and she is sustained by part-time employment and survivor benefits.

After extensive wrangling with the VA, it remains the case that because of the 36-month cap and her own service, Lewis cannot receive the full 48 months of benefits she is entitled to through her various GI Bill benefits and as a recipient of the Marine Gunnery Sergeant John David Fry Scholarship for survivors of Post-9/11 veterans killed in action. If this Court reverses, Lewis should get at least 12 more months of education benefits.

G. Eric Richardson

Eric Richardson served in the United States Army and is a retired Colonel/O-6. Richardson enlisted in the Army and served five years, until he was honorably discharged in 1996. During his enlisted service, Richardson supervised and performed maintenance on helicopters.

In 1996, Richardson was commissioned as an officer and continued to serve as a reservist. After 9/11, Richardson was deployed several times, including a year and a half in Afghanistan.

In December 2008, Richardson took classes at the Florida Institute of Technology. He used some of his Montgomery benefits to pay for seven months and 18 days of coursework.

In 2009, Richardson transferred 14-months and 6 days of benefits to each of his two children from his first marriage, incurring another service obligation. When he checked to see what entitlement he had remaining for his stepchildren in August 2021, Richardson learned that he had no remaining benefits. If this Court reverses, Richardson's stepchildren would get 12 months of education benefits.

H. The pro-veteran canon.

Under the pro-veteran canon, a statute providing benefits to veterans "is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943); *see also Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (holding that Selective Training and Service Act of 1940 must be "liberally construed for the benefit of those who left private life to serve their country in its hour of great need"). If other interpretive tools leave the meaning of a provision unclear, under the canon, "interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

At worst, § 3327 is ambiguous about the proper cap. Amici agree with Petitioner that any ambiguity in the statutes at issue must be resolved in veterans' favor. *See* Sec'y En Banc Br. 31 n.7; Rudisill En Banc Br. 63-69. This Court should apply the pro-veteran canon to prevent the VA from stripping veterans of their well-earned benefits. As Attaway, Griggs, Cone, Petta, Elliott, Lewis, and Richardson's stories show, veterans and their families will only suffer if this Court allows the erroneous interpretation to stand.

II. Transfers of education benefits within military families are important and needlessly hindered by the supposed 36-month cap.

"There is an old maxim in the military that while you recruit the servicemember, you retain the family." 154 Cong. Rec. 10,373 (2008) (remarks of Sen. Levin). But under the VA's interpretation of 38 U.S.C. § 3327(d)(2), many servicemembers with multiple periods of qualifying service are unable to fully transfer their Post-9/11 GI Bill benefits they earned to their children. By restricting the total amount of benefits to 36 months for veterans with multiple periods of qualifying service, the VA erroneously limits their ability to transfer their full entitlement to their dependents.

The negative impact will touch many military families. Today, there are 1.6 million military children. DEP'T OF DEF., 2020 DEMOGRAPHICS PROFILE OF THE MILITARY COMMUNITY 100 (2020). Many of these children stand to lose if the VA's 36-month cap stands.

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

Under 38 U.S.C. § 3319(b)–(c), a servicemember who has completed "six years of service in the Armed Forces and enters into an agreement to serve at least four more years as a member of the uniformed services" may transfer their Post-9/11 GI Bill benefits to their dependents. In enacting the transferability provision, Congress intended "to promote recruitment and retention in the uniformed services." 38 U.S.C. § 3319(a)(2). Transferability of Post-9/11 GI Bill benefits is an important recruitment and retention tool.

Recently, Congress amended 38 U.S.C. § 3319 to prevent the Secretary of Defense from making any regulation that would limit transferability "based on a maximum number of years of service in the Armed Forces." 38 U.S.C. § 3319(j)(3) (2019) ("The Secretary of Defense may not prescribe any regulation that would provide for a limitation on eligibility to transfer unused education benefits to family members based on a maximum number of years of service in the Armed Forces."). This recent amendment ensures that servicemembers are able to transfer their benefits to their dependents so long as they have met the prerequisite years of service. The amendment underscores Congress's intent that Post-9/11 GI Bill benefits serve as an important retention and recruitment tool.

Congress's purpose in enacting the Post-9/11 GI Bill was to promote military recruitment and retention by providing additional benefits to

servicemembers and permitting these benefits to be transferred to their dependents. *See* 38 U.S.C. § 3319. In doing so, Congress sought to "recruit the servicemember [and] retain the family." 154 Cong. Rec. 10,373 (2008) (remarks of Sen. Levin).

But the 36-month cap impedes this Congressional purpose by erroneously capping the amount of benefits a servicemember with multiple periods of qualifying service can receive. In turn, the 36-month cap thereby caps the benefits a servicemember can transfer to dependents under the Post-9/11 GI Bill. By limiting the amount of benefits servicemembers can transfer to their dependents under the Post-9/11 GI Bill, the 36-month cap conflicts with the Congress's objectives and diminishes the incentive Congress enacted to recruit and retain servicemembers.

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

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

veterans of the supposed 36-month limit when they elected to serve longer.

The stories of Captain Scott Cone, Lieutenant Colonel Robert F. Griggs, Colonel Eric Richardson, Commander Michael Petta, and Major Steven Attaway each illustrate real-world consequences for those who detrimentally relied on the ability to transfer their benefits to their dependents. For example, Colonel Richardson consulted several VA education counselors on his entitlements right after the Post-9/11 GI Bill was enacted. He knew that he would not be allowed to draw benefits simultaneously from both. But he was never informed of any 36-month cap. Likewise, Captain Cone, Lieutenant Colonel Elliot, and Major Attaway also did not receive notice of any 36-month cap. Only when they sought to *use* their benefits did they first learn of the 36-month cap. The VA shortchanged these veterans, as well as countless others similarly situated, of 12 months of Post-9/11 GI Bill benefits meant for their children.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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