No. 22-888

In the Supreme Court of the United States

JAMES R. RUDISILL, PETITIONER

v.

DENIS R. MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether 38 U.S.C. 3327(d)(2)(A), which specifies a formula for calculating the education benefits payable to certain veterans, applies to veterans with multiple periods of qualifying service.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-47a) is reported at 55 F.4th 879. The opinion of the court of appeals panel (Pet. App. 48a-69a) is reported at 4 F.4th 1297. The opinion of the Court of Appeals for Veterans Claims (Pet. App. 76a-160a) is reported at 31 Vet. App. 321. The decision of the Board of Veterans' Appeals (Pet. App. 161a-172a) is available at 2016 WL 4653284.

JURISDICTION

The judgment of the en banc court of appeals was entered on December 15, 2022. The petition for a writ of certiorari was filed on March 13, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1944, Congress enacted the G.I. Bill to provide education benefits to returning World War II veterans. See Pet. App. 3a. Although the original G.I. Bill expired in 1956, Congress has since enacted new G.I. Bills to provide education benefits to new generations of veterans. See *ibid.*; *id.* at 40a (Reyna, J., dissenting).

This case involves two such statutes: the Montgomery G.I. Bill and the Post-9/11 G.I. Bill. See Pet. App. 3a. The Montgomery G.I. Bill—named for its sponsor, Congressman Sonny Montgomery—was enacted in 1984 and provides benefits to veterans who have served on active duty between July 1, 1985, and September 30, 2030. See *ibid.* (citing 38 U.S.C. 3011(a)(1)(A)). The Post-9/11 G.I. Bill was enacted in 2008 and provides benefits to veterans who have served on active duty since September 11, 2001. See *ibid.* (citing 38 U.S.C. 3311(b)). Each statute caps the education benefits that a veteran may earn under that statute at 36 months (the equivalent of a four-year college degree: four years multiplied by nine months per academic year). See *id.* at 4a (citing 38 U.S.C. 3013(a)(1), 3312(a)).

Congress has enacted multiple statutory provisions that address the overlap between the various federal education-benefits programs (including, but not limited to, the Montgomery and Post-9/11 programs). Under those provisions, a service member generally does not receive double credit for the same period of service; rather, he must choose the program under which his service is to be credited. See 38 U.S.C. 3322(h)(1). A veteran eligible for different programs also does not receive benefits under multiple programs at the same time; rather, he must choose under which program to receive assistance. See 38 U.S.C. 3322(a). A final pro-

vision states that a veteran cannot obtain more than 48 months of benefits under the various federal programs combined. See 38 U.S.C. 3695(a).

Congress also has enacted more specific provisions to coordinate the Montgomery and Post-9/11 programs. See 38 U.S.C. 3322(d), 3327(a). The clause at issue in this case applies to veterans who have used some but not all of their Montgomery benefits. See 38 U.S.C. 3327(a)(1)(A). Such a veteran may elect to receive benefits under the Post-9/11 program, if he otherwise satisfies that program's eligibility requirements. 38 U.S.C. 3327(a). But a veteran who makes such an election becomes subject to a "limitation on entitlement": "the number of months of [Post-9/11 benefits]" is limited to "the number of months of unused [Montgomery benefits]." 38 U.S.C. 3327(d)(2)(A) (capitalization omitted).

2. Petitioner has served in the military over three separate periods totaling nearly eight years. See Pet. App. 81a-82a. He first enlisted in the Army in 2000 and served until 2002. See *ibid.* He later enlisted in the Army National Guard, through which he was deployed to Iraq from 2004 to 2005. See *ibid.* He returned to the Army as a commissioned officer in 2007, was deployed to Iraq and Afghanistan, and served until 2011. See *id.* at 82a.

Petitioner's first period of military service earned him 36 months of Montgomery benefits. See Pet. App. 81a-82a. Starting before and ending after his second period of service, petitioner used 25 months and 14 days of those benefits to pursue a college degree. See *id.* at 82a. That left him with 10 months and 16 days of unused Montgomery benefits. See *id.* at 57a-58a.

After petitioner's third period of service ended in 2011, he sought a graduate education at Yale Divinity

School. See Pet. App. 6a. Instead of using his retained Montgomery benefits, petitioner elected to receive benefits under the Post-9/11 program. See *id.* at 6a-7a. In filing the application, he acknowledged the following: "If electing [Post-9/11 benefits] in lieu of [Montgomery benefits], my months of entitlement under [the Post-9/11 program] will be limited to the number of months of entitlement remaining under [the Montgomery program]." *Id.* at 6a (emphasis omitted).

The Department of Veterans Affairs (VA) found petitioner eligible for Post-9/11 benefits, but determined that he was subject to the limitation set forth in Section 3327(d)(2). See Pet. App. 7a. The VA calculated that, because petitioner had 10 months and 16 days of unused Montgomery benefits, Section 3327(d)(2) limited him to 10 months and 16 days of Post-9/11 benefits. See *ibid.*

3. Petitioner challenged the VA's decision, but the Board of Veterans' Appeals (Board) denied his appeal. Pet. App. 161a-172a. The Board found that "[a]dditional benefits" beyond those initially calculated by the VA were "not warranted as a matter of law." *Id.* at 172a. The Board also stated that "no equities, no matter how compelling, can create a right to payment out of the United States Treasury which has not been provided for by Congress." *Id.* at 171a (citation omitted).

4. A divided panel of the Court of Appeals for Veterans Claims (Veterans Court) reversed the Board's decision. Pet. App. 76a-148a.

The Veterans Court determined that petitioner was not subject to the limitation in Section 3327(d)(2). Pet. App. 95a-97a. The court held that Section 3327(d)(2) applies only to veterans who qualified for both the Montgomery and Post-9/11 programs based on "a *single* pe-

riod of service," not to veterans (like petitioner) with "multiple periods of service." *Id.* at 101a, 127a.

Judge Bartley dissented. Pet. App. 129a-148a. She found the Veterans Court's holding "insupportable" and noted that the governing statutory provisions make "no mention whatsoever of an individual's period or periods of service." *Id.* at 139a.

5. A divided panel of the Federal Circuit affirmed the Veterans Court's decision. Pet. App. 48a-69a.

The court of appeals first rejected petitioner's contention that it lacked appellate jurisdiction because the Solicitor General had approved the appeal after, rather than before, the filing of the notice of appeal. See Pet. App. 60a-63a. The court observed that, "given the extensive and time-consuming process the Government follows in order to pursue affirmative appeals, it is not uncommon for so-called 'protective' notices of appeal to be filed, pending a final decision from the Solicitor General." *Id.* at 62a (citation omitted).

Turning to the merits, the court of appeals agreed with the Veterans Court's interpretation of the statute. See Pet. App. 63a-65a. Like the Veterans Court, the court of appeals found Section 3327(d)(2) inapplicable to "veterans with multiple periods of qualifying service." *Id.* at 65a.

Judge Dyk concurred in the court of appeals' jurisdictional holding, but dissented on the merits. Pet. App. 67a-69a. He stated that "nothing in the language or history of the relevant statutes remotely justifies" reading Section 3327(d)(2) to apply "only to veterans with * * * a single period of service, and not to veterans like [petitioner] who have earned benefits for multiple periods of service." *Id.* at 69a.

6. The Federal Circuit granted the government's petition for rehearing en banc. Pet. App. 173a-176a. By a vote of 10-2, the en banc court reversed the Veterans Court's decision. *Id.* at 1a-47a.

The en banc court of appeals, like the panel, held that the court had appellate jurisdiction. See Pet. App. 9a-13a. After reviewing applicable Department of Justice regulations, the en banc court concluded that the Department had "properly filed a protective notice of appeal pending Solicitor General approval." *Id.* at 12a.

On the merits, the en banc court of appeals held that, "[b]y its plain language, § 3327(d)(2) applies to [petitioner]." Pet. App. 14a. The court rejected petitioner's contention that Section 3327(d)(2) "only applies to individuals with a single period of service," observing that "there is no such limit in the language of the provision." *Id.* at 15a. Petitioner relied in part on the "pro-veteran canon of interpretation," but the court found that interpretive principle irrelevant to the proper disposition of this case, stating that the canon "plays no role where the language of the statute is unambiguous—the situation here." *Id.* at 16a-17a.

Judge Newman and Judge Reyna—the judges who had comprised the panel majority—dissented from the en banc court's decision and joined each other's dissents. See Pet. App. 18a-37a (Newman, J., dissenting); *id.* at 38a-47a (Reyna, J., dissenting). Judge Newman's dissent reiterated the panel's conclusion that Section 3327(d)(2) "do[es] not relate to the entitlement of veterans with multiple periods of service." *Id.* at 25a-26a (Newman, J., dissenting). Judge Reyna's dissent argued that the court should have resolved the case by applying the "pro-veteran canon." *Id.* at 39a.

ARGUMENT

Petitioner contends (Pet. 18-39) that Section 3327(d)(2)'s limitations apply only to a veteran with a single period of service, not to a veteran with multiple qualifying periods of service. The en banc court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court. Further review is not warranted.

1. The Federal Circuit correctly held that Section 3327(d)(2) applies to petitioner.

a. Three statutory provisions—Section 3322(d), Section 3327(a), and Section 3327(d)(2)—answer the question presented in this case. Section 3322(d) provides that, "[i]n the case of an individual entitled to educational assistance under [the Montgomery program] * * * , coordination of entitlement to educational assistance under [the Post-9/11 program], on the one hand, and [the Montgomery program], on the other, shall be governed by [Section 3327]." 38 U.S.C. 3322(d). Section 3322(d) thus does not resolve the specific question that is presented in this case, but it identifies Section 3327 as the provision that *does* resolve it.

Section 3327(a), in turn, provides that a veteran "may elect to receive educational assistance under [the Post-9/11 program]" if he satisfies specified eligibility criteria. 38 U.S.C. 3327(a). Paragraph (1)(A) states that a veteran is eligible if, "as of August 1, 2009," he "is entitled to basic educational assistance under [the Montgomery program] and has used, but retains unused, entitlement under that [program]." 38 U.S.C. 3327(a)(1)(A). That language encompasses veterans who are entitled to Montgomery benefits and have used some but not all of those benefits.

Finally, Section 3327(d)(2) sets forth a "limitation on entitlement" that applies to "an individual making an election under subsection (a) who is described by paragraph (1)(A)." 38 U.S.C. 3327(d)(2) (capitalization omitted). For such a veteran, "the number of months of entitlement of the individual to educational assistance under [the Post-9/11 program] shall be the number of months equal to * * * the number of months of unused entitlement of the individual under [the Montgomery program]." 38 U.S.C. 3327(d)(2)(A); see Pet. App. 5a n.4 (noting that the statute contains an exception that is not at issue here).

Under the plain terms of those provisions, the limitation in Section 3327(d)(2) applies to a veteran who possesses three characteristics. First, the veteran must be "entitled to educational assistance under [the Montgomery program]." 38 U.S.C. 3322(d). Second, the veteran must be one "who is described by paragraph (1)(A)," 38 U.S.C. 3327(d)(2), *i.e.*, a veteran who "has used, but retains unused, [Montgomery] entitlement," 38 U.S.C. 3327(a)(1)(A). Third, the veteran must have "ma[de] an election under subsection (a)." 38 U.S.C. 3327(d)(2); see 38 U.S.C. 3327(a) ("may elect to receive educational assistance").

Petitioner possesses each of those characteristics. He was entitled to Montgomery benefits; he had used a portion of those benefits, but retained another portion unused; and he has made an election under Section 3327(a). See Pet. App. 6a-7a, 14a-15a. He is therefore subject to the limitation on entitlement in Section 3327(d)(2).

b. Petitioner argues (Pet. 31) that the limitation in Section 3327(d)(2) applies only to "veterans who have *only a single period of qualifying service*." In his view,

the limitation does not extend to veterans (like him) "who qualify for Montgomery and Post-9/11 benefits with *multiple periods of service*." That argument is incorrect.

The terms that petitioner italicizes (Pet. 31)—"single period" and "multiple periods"—do not appear in any statutory provision that addresses the question presented here. Section 3322(d) refers to "an individual entitled to [Montgomery] educational assistance." 38 U.S.C. 3322(d). Section 3327(a) refers to an individual who "has used, but retains unused, [Montgomery] entitlement." 38 U.S.C. 3327(a)(1). And Section 3327(d) refers to "an individual making an election under subsection (a) who is described by paragraph (1)(A)." 38 U.S.C. 3327(d)(2). None of the applicable provisions contains any reference to periods of service. And courts "ordinarily resist reading words or elements into a statute that do not appear on its face." *Bates* v. *United States*, 522 U.S. 23, 29 (1997).

Petitioner's effort to add an element to the statute is particularly misplaced given the precision with which Congress spoke. Congress set forth, with painstaking detail, the criteria used to determine whether a veteran falls within Section 3327(d)(2)'s limitations. See 38 U.S.C. 3327(d)(2) ("an individual making an election under subsection (a) who is described by paragraph (1)(A) of that subsection"). Under the familiar interpretive principle known as *expressio unius est exclusio alterius*, the inclusion of those express criteria implies the exclusion of other, unstated criteria. See, *e.g.*, *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 844 (2018).

By contrast, other statutory provisions governing veterans' benefits explicitly reference periods of service. One provision imposes a "bar to duplication of eli-

gibility based on a single event or period of service." 38 U.S.C. 3322(h) (capitalization omitted). Another provision states that a "period of service counted for purposes * * * of an education loan under [a different program] may not be counted as a period of service for entitlement to educational assistance under [the Post-9/11 program]." 38 U.S.C. 3322(b). "Atextual judicial supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision." *Rotkiske* v. *Klemm*, 140 S. Ct. 355, 361 (2019).

c. Petitioner's contrary arguments are incorrect. Petitioner argues that "Section 3327 applies only to veterans 'making an election under subsection (a),'" and that "veterans falling within Section 3327(a) are veterans who have *only a single period of qualifying service*." Pet. 31 (citation omitted). But petitioner did "mak[e] an election under subsection (a)." 38 U.S.C. 3327(d)(2); see Pet. App. 6a-7a (quoting form in which petitioner made the election); *id.* at 168a ("[Petitioner's] completed online application * * * was very clear that he did [make the] elect[ion]."). And petitioner identifies no language in Section 3327(a) that even arguably limits the provision to veterans with a single period of qualifying service.

Petitioner also relies (Pet. 32-33) on Section 3322(d). But Section 3322(d) likewise says nothing about single or multiple periods of service. Section 3322(d) instead applies to "individual[s] entitled to [Montgomery] educational assistance," 38 U.S.C. 3322(d)—a category to which petitioner indisputably belongs. Petitioner focuses (Pet. 33) on the headings of Section 3322 as a whole ("Bar to duplication of educational assistance benefits") and of Section 3322(d) ("Additional Coordina-

tion Matters"). 38 U.S.C. 3322 (capitalization omitted). But section headings can only "shed light on some ambiguous word or phrase" within the statute; "they cannot undo or limit that which the text makes plain." *Brotherhood of R.R. Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 529 (1947). In any event, the Federal Circuit's reading of the statute is consistent with those headings, since Section 3327(d)(2) is readily described as "coordinating" the Montgomery program with the Post-9/11 program.

Petitioner also repeatedly invokes (*e.g.*, Pet. 26-28, 34-35) 38 U.S.C. 3695(a), an umbrella provision stating that a veteran may not obtain more than a combined total of 48 months of education benefits under various federal programs. But Section 3327(d)(2) and Section 3695(a) set forth separate and independent limits on educational benefits. The fact that petitioner could be given 12 additional months of Post-9/11 benefits while still satisfying Section 3695(a)'s aggregate limit does not justify disregarding the distinct limit in Section 3327(d)(2). "When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at liberty to pick and choose among congressional enactments and must instead strive to give effect to both." *Epic Systems Corp.* v. *Lewis*, 138 S. Ct. 1612, 1624 (2018) (citation and internal quotation marks omitted). Indeed, petitioner's recognition that Section 3695(a)'s aggregate limit applies to veterans with multiple periods of service simply highlights the absence of textual support for his contention that Section 3327(d)(2) does not.

Adherence to that principle is especially apt here because Section 3695(a) addresses a broad range of programs, including but not limited to the Montgomery and

Post-9/11 programs. See 38 U.S.C. 3695(a) (listing eight classes of programs to which the provision applies). Section 3327(d)(2), in contrast, specifically addresses the overlap between the Montgomery and Post-9/11 programs. Even if the two provisions conflicted, Section 3327(d)(2)'s specific limit would control over the more general limit in Section 3695(a). See *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012).

d. Petitioner also relies (Pet. 30) on the "pro-veteran canon." But "canons of construction are no more than rules of thumb that help courts determine the meaning of legislation." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992). A court interpreting a statute "should always turn first to one, cardinal canon before all others": Congress "says in a statute what it means and means in a statute what it says there." *Id.* at 253-254. "When the words of a statute are unambiguous, * * * , this first canon is also the last." *Id.* at 254.

The statutory language here is unambiguous. Nothing in the text of Section 3322(d), 3327(a), or 3327(d)(2) suggests that those provisions treat a veteran with one period of service differently from a veteran with multiple periods of service. That should be the end of the analysis. Neither the pro-veteran canon nor any other interpretive principle entitles a court to "rewrite the statute to make it more favorable to veterans when the statutory language is clear." Pet. App. 17a; see, *e.g.*, *Arellano* v. *McDonough*, 143 S. Ct. 543, 552 (2023).

Petitioner's reading of the statute, moreover, is not unambiguously pro-veteran. Although Section 3327 carries some costs for the veterans it covers—as illustrated by the Section 3327(d)(2) limitation at issue in this case—it also grants those veterans extra benefits.

Section 3327(f), for example, increases the monthly stipend paid to certain veterans who have "ma[de] an election under subsection (a)." 38 U.S.C. 3327(f)(1). And Section 3327(g) offers extra payments to veterans with certain "critical skills." 38 U.S.C. 3327(g) (capitalization omitted). As the en banc court of appeals explained and as petitioner concedes, petitioner's reading would deprive veterans with multiple periods of service of the opportunity to seek those benefits. See Pet. App. 15a-16a; see also Pet. 37 (conceding that "[p]etitioner's understanding of the statutory scheme precludes veterans with multiple periods of qualifying service from utilizing those [benefits]"). The pro-veteran canon would be a particularly unsound basis for choosing an interpretation that would benefit some veterans (including petitioner) but would disadvantage others.

Finally, petitioner overlooks that Section 3327 offers veterans a choice; it provides that "[a]n individual *may* elect to receive educational assistance under [the Post-9/11 program]." 38 U.S.C. 3327(a) (emphasis added). If a particular veteran concludes that the costs of Section 3327 outweigh the benefits, she can refrain from making that election. Yet petitioner "voluntarily signed an irrevocable election" under Section 3327(a). Pet. App. 8a (citation omitted). In doing so, he signed the following acknowledgment: "By electing [Post-9/11 benefits], I acknowledge that I understand * * * [that] my months of entitlement under [the Post-9/11 program] will be limited to the number of months of entitlement remaining under [the Montgomery program] on the effective date of my election." *Id.* at 6a (emphasis omitted). It is not unduly "harsh," Pet. 38 (citation omitted), to apply the limitation that Section 3327(d)(2) expressly pre-

scribes and that petitioner knowingly accepted when he made his election.

2. Petitioner argues (Pet. 18-23) that this Court should grant review because the question presented affects "about 1.7 million veterans and billions of dollars." Pet. 18 (capitalization and emphasis omitted). Those figures are greatly overstated. Petitioner estimates that "roughly 1.7 million veterans" have served long enough "to fully earn benefits under both" the Montgomery and Post-9/11 programs, and he assumes that *all* those veterans "are impacted by the Question Presented." Pet. 18 n.3. But Section 3327(d)(2) does not apply to *all* veterans who qualify for benefits under both programs. It applies only to a subset of those veterans: those who "ha[ve] used, but retain[ed] unused, [Montgomery] entitlement." 38 U.S.C. 3327(a)(1)(A). Petitioner identifies no reason to believe that the number of veterans in that limited category is anything close to "1.7 million," or that the amount of money at stake for that category comes anywhere near "billions of dollars." Pet. 18 (capitalization and emphasis omitted).

To be sure, the question presented is significant to petitioner and to other veterans to whom Section 3327(d)(2) does apply. But that question arises far less often than petitioner suggests. The Post-9/11 G.I. Bill, including Section 3327(d)(2)'s limit on assistance, has been in effect since 2009. See 10 U.S.C. 16163 note. From the beginning, the agency has understood that limit to apply "to individuals such as [petitioner], with entitlements under separate periods of service." Pet. App. 143a (Bartley, J., dissenting). Yet petitioner has not identified any previous case in which the Federal Circuit, the Veterans Court, or the Board of Veterans' Appeals addressed the question presented. And the

question presented is of diminishing prospective importance, since the Montgomery program is scheduled to stop accepting new entrants in 2030. See 38 U.S.C. 3011(a)(1)(A).

As ten judges on the en banc court of appeals recognized, no language in the applicable statutory provisions supports petitioner's proposed distinction between veterans with single and those with multiple periods of service. See Pet. App. 2a. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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