No. 22-888

In the Supreme Court of the United States

JAMES R. RUDISILL, PETITIONER,
v.
DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS

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

REPLY BRIEF

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REPLY BRIEF

The Question Presented asks this Court to decide whether the Post-9/11 GI Bill forces veterans into an unprecedented, nonsensical choice: surrender their statutory right to 48 months of benefits, or give up a large portion of the generous Post-9/11 benefits that they earned through wartime service in exchange for lesser benefits available for peacetime service. The Solicitor General does not dispute that this Question Presented is exceptionally important, that additional percolation is not possible given the Federal Circuit's exclusive jurisdiction, or that this case is an ideal vehicle. Instead, she opposes the Petition on the grounds that, in her view, the Federal Circuit *en banc* majority got it right, while the Federal Circuit panel and the U.S. Court of Appeals for Veterans Claims got it wrong. But a dispute over the merits of an exceptionally important issue—one on which no split can develop, and which has divided numerous jurists—is not typically a basis for denying review.

The Solicitor General's merits arguments are, in any event, unpersuasive. The Solicitor General concedes that veterans like Petitioner, who have multiple separate periods of service, have earned 48 months of GI Bill benefits. The Solicitor General—like the Federal Circuit *en banc* majority—myopically focuses on 38 U.S.C. § 3327(d), but that provision is concerned only with "coordination" of benefits in order to avoid "duplication" of benefits for the same period of service, and so it has no relevance to veterans like Petitioner. Those veterans who have multiple periods of service thus have no reason to make any "elect[ion]"

under 3327(a), meaning that Section 3327(d) has no application. Tellingly, the Solicitor General does not even try to explain why Congress would have wanted to enact the regime that she reads into Section 3327, where veterans can only use their 48 months of benefits—benefits that they have unquestionably earned through two periods of service—by first using the far-less-valuable, peacetime Montgomery benefits for 36 months, and then using just 12 months of the far-more-valuable, wartime Post-9/11 benefits.

This Court should grant the Petition.

I. The Solicitor General Does Not Dispute That The Question Presented Is Of Great Importance, That No Split Is Possible, Or That The Petition Is An Ideal Vehicle

A. The Question Presented is exceptionally important, given that it impacts over 1.7 million (and growing) veterans and billions of dollars in education benefits. Pet.18–23. The Petition is an ideal vehicle, Pet.23–24, and no additional percolation is possible given the Federal Circuit's exclusive jurisdiction, Pet.24–25. Petitioner's *amici*, which include multiple veterans-rights organizations and a bipartisan coalition of 33 States and the District of Columbia, agree. *See* Nat'l Veterans Legal Servs. Program *et al.* *Amici* Br.9–10; States *Amici* Br.3; Seven Veterans *Amici* Br.13; Edison Elec. Inst. *Amicus* Br.5–6.

B. The Solicitor General does not dispute that this case is exceptionally important, that a split over the Question Presented cannot possibly develop, or that

this case is an ideal vehicle. *See generally* BIO 7–15. Indeed, the Solicitor General's lead dispute with the Petition—aside from disagreeing on the merits, *see infra* Part II—is over Petitioner's estimate that, based on Department of Defense data, Pet.18 n.3, the Question Presented impacts the education benefits that over 1.7 million veterans will receive, BIO 14–15.

The Solicitor General's claim that this 1.7-million figure is "overstated" does not purport to call into question the importance of the Question Presented, but her objection to this figure is wrong in any event. BIO 14. The Solicitor General bizarrely asserts that her reading of Section 3327 applies now only to a "limited category" of veterans, namely "those who have used, but retain unused" Montgomery benefits. BIO 14 (quotation and brackets omitted). But in the Federal Circuit, the Government admitted that its reading of Section 3327(d) applied to *all* veterans with entitlement to Montgomery and Post-9/11 benefits—which includes those with wholly unused Montgomery benefits. Fed.Cir.Dkt.76 at 31; *see also* Fed.Cir.Dkt.91 at 9 n.5; Seven Veterans *Amici* Br.2. And that is the approach that the *en banc* Federal Circuit adopted at the Government's urging, holding that an "election described in § 3327(a)" occurs whenever a multiple-periods-of-service veteran applies for "Post-9/11 benefits instead of exhausting his Montgomery benefits." Pet.App.14a.

If anything, Petitioner's 1.7-million figure vastly *underestimates* the number of veterans harmed by the *en banc* Federal Circuit's decision due to the number of additional veterans who will join the Armed Forces

by 2030, when the Montgomery program ends. *Compare* Pet.3, 18 n.3, *with* BIO 14–15. A decision from this Court on the Question Presented would have a decades-long effect, because even veterans first enlisting in 2030 may use their Montgomery benefits up to ten years after their discharge or retirement, 38 U.S.C. § 3031; may use their Post-9/11 benefits with no expiration date, *id.* § 3321(a)(2); and may transfer benefits to their dependents for their own use, *id.* § 3319(b)–(c); *see also* States *Amici* Br.9–10; Seven Veterans *Amici* Br.13–15.

Finally, while the Solicitor General claims that "petitioner has not identified any previous cases in which the Federal Circuit, the Veterans Court, or the Board of Veterans' Appeals addressed the question presented," BIO 14, that is of no moment. Many decisions from the Board of Veterans' Appeals recognized the "potentially serious consequences" of the Question Presented. *See, e.g.*, Bd. Vet. App. 1426858, 2014 WL 3959165, at *3 (June 13, 2014); Bd. Vet. App. 1737265, 2017 WL 5249079, at *1–2 (Sept. 6, 2017); Bd. Vet. App. 1756965, 2017 WL 7364709, at *2–3 (Dec. 8, 2017). Once Petitioner pressed this issue beyond the Board of Veterans' Appeals, the issue sparked a significant division of judges at every level of decision thereafter, Pet.15–18; broad *amicus* participation from the same lead veterans' organization and veterans filing before this Court, *see supra* p.2; as well as the Government's own *en banc* petition, where it successfully argued that the Question Presented was an "important" issue that warranted the attention of the whole Federal Circuit, sitting *en banc*, Fed.Cir.Dkt.76 at 16.

II. The Solicitor General's Merits Arguments Provide No Basis For Denying The Petition And Are Wrong In Any Event

A. The Solicitor General rests her opposition on her claim that the *en banc* Federal Circuit resolved the Question Presented correctly, while the Federal Circuit panel and the U.S. Court of Appeals for Veterans Claims got it wrong. BIO 7–15. But when confronting a question presented like the present one, which has divided numerous judges on an issue of unquestioned national "import[ance]" and over which no circuit split could develop, the respondent's belief that the decision was correct is not a recognized basis for denying review. *See* Sup. Ct. R. 10(c).

B. In any event, the Solicitor General is wrong on the merits. As the Petition explained, veterans (like Petitioner) who have multiple periods of qualifying service have earned 48 months of benefits under the GI Bills. Pet.26–30. The *en banc* Federal Circuit's conclusion that, in adopting the Post-9/11 GI Bill, Congress imposed an unprecedented requirement that a veteran must first use 36 months of his far-less-valuable Montgomery benefits before he may use only 12 months of his far-more-valuable Post-9/11 benefits in order to obtain his total 48 months of benefits myopically focuses on Section 3327(d). Properly understood by its text and context, Section 3327(d) applies only to veterans who have a single period of service, which single period qualifies them for both Montgomery and Post-9/11 benefits, and who thus seek to "coordinat[e]" their entitlement to these benefits without running afoul of the prohibition on

"duplication" of benefits, *see* 38 U.S.C. § 3322(a), (d), (h), by making an "elect[ion]" under Section 3327(a), *see* Pet. 26–27. Other statutory provisions, the relevant statutory structure, and the manifest purpose of the Post-9/11 GI Bill support the same conclusion, as the Petition explained. Pet.15–30.

The Solicitor General, like the *en banc* Federal Circuit, rests her argument entirely on the unsupported claim that veterans with two periods of service qualifying them for both Montgomery and Post-9/11 benefits must make an "elect[ion]" under Section 3327(a), and thus fall under Section 3327(d). BIO 8. The Solicitor General's claim is wrong: Section 3327's election mechanism is relevant only for veterans with a single period of service, which period would qualify them for both Montgomery and Post-9/11 benefits. Pet.11, 32–33. After all, Section 3322(d)—the only statute that "directs one to" Section 3327, Pet.App.110a; BIO 7—covers only single-period-of-service veterans, since only those veterans may need to "coordinat[e]" their "entitlement" to Montgomery benefits "on the one hand" into "entitlement" to Post-9/11 benefits "on the other" with that single period. § 3322(d). Such "coordination" is only potentially necessary for single-period-of-service veterans to obtain Post-9/11 benefits because only they could have the "*duplication* of educational assistance benefits," § 3322 (emphasis added), from a "single . . . period of service," § 3322(h) (capitalization altered). In other words, Section 3322(d) creates a "harmonizing" process, Pet.App.120a, whereby single-period-of-service veterans may re-credit their period from the

Montgomery program to the far-more-valuable Post-9/11 program, without obtaining a windfall of more than 36 months of benefits from a single period, Pet.32–33. Multiple-periods-of-service veterans like Petitioner have no need for such "coordination" or "harmoniz[ation]" of a single period, however, since their *multiple* periods *separately* qualify them for both Montgomery and Post-9/11 benefits.[*]

The Solicitor General disputes Petitioner's interpretation of this statutory regime, claiming that the terms "single period" and "multiple periods" "do not appear in any statutory provision that addresses the question presented." BIO 9. But Section 3322 *does* use the term "single . . . period of service" in the

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[*] The Solicitor General appears to suggest that Section 3327(d) applies to veterans, like Petitioner, who completed the Department's mandatory veterans-education-benefits form. *See* BIO at 4, 10, 13–14. But that form forces *every* veteran with both Montgomery and Post-9/11 entitlement to check a box "elect[ing] to give up eligibility under the [Montgomery] program . . . to receive benefits under the Post-9/11 GI Bill." Fed.Cir.Dkt.29 at 100–02; Pet.App.6a–7a. After Petitioner checked that mandatory box—as every veteran seeking Post-9/11 benefits before exhausting Montgomery entitlement has to do—he promptly brought this lawsuit. Pet.App.57a–59a. Notably, after the U.S. Court of Appeals for Veterans Claims adopted Petitioner's view of the Question Presented, it correctly noted that a veteran's completion of this mandatory form is an irrelevant "nullity." Pet.App.128a. The Solicitor General concedes the point through silence, as she does not argue that Petitioner's completion of this form would have any relevance if this Court adopted Petitioner's reading of the statutory text.

subsection heading of Section 3322(h), § 3322(h) (capitalization altered), which bars veterans from "double-dipping" Montgomery and Post-9/11 benefits with a single period of service, Pet.33, Pet.App.102a. Further, Section 3322's heading is "[b]ar to *duplication* of educational assistance benefits," which also refers to the prohibition on a veteran double-dipping or receiving benefits concurrently. § 3322 (emphasis added); Pet.32–33. As this Court has repeatedly held, such section and subsection headings are important interpretive "tools" for understanding statutory text. *See Yates v. United States*, 574 U.S. 528, 540 (2015) (plurality op.) (citation omitted); *id.* at 552 (Alito, J., concurring in the judgment); *see also Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 893 (2018); *Almendarez–Torres v. United States*, 523 U.S. 224, 234, (1998); Pet.32–33. Further, the most natural reading of "election" under Section 3327(a), in context, is as an equitable mechanism by which single-period-of-service veterans can change a prior selection under Section 3322(h), without duplicating benefits. Pet.App.119a.

The Solicitor General also criticizes Petitioner's citation of the "umbrella provision" of 38 U.S.C. § 3695(a), BIO 11–12, which sets the "aggregate period for which any person may receive assistance under two or more" veterans-education-benefits statutes, including the Montgomery and Post-9/11 GI Bills, § 3695(a)(4); Pet.27, 34–35. But Section 3695's 48-month-entitlement provision strongly supports Petitioner: by placing both the Montgomery and Post-9/11 programs within this 48-month entitlement provision, Congress contemplated

veterans earning and using benefits under both programs through separate periods of service. *See* Pet. 27, 34–35. As the Petition explained, it would be nonsensical for Congress to have then, for the first time, made eligibility for that full 48 months of benefits subject to a nonsensical benefits-ordering regime, under which a veteran would have to give up many months of more-valuable, wartime-service credits for less-valuable, peacetime-service credits. Pet.31, 34, 36.

Relatedly, the Solicitor General also argues that Section 3327(d)(2) imposes a more specific limit that "control[s] over the more general limit in Section 3695(a)," BIO 11–12, but Petitioner's interpretation does not create any "contradiction" between or "superfluidity" among Section 3695(a)'s 48-month entitlement provision and Section 3327(d)(2)'s limitation, thus there is no need to resort to the "general/specific canon" here, *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). Section 3327(d)'s special-election provision applies only to veterans with a single period of qualifying service, equitably re-crediting those veterans' Montgomery benefits to Post-9/11 benefits on a 1:1 ratio. Pet.11–12. Section 3695(a), on the other hand, entitles multiple-periods-of-service veterans to 48 months of benefits. Pet.8–9, 26–27.

The Solicitor General largely ignores other arguments that Petitioner raised, which arguments demonstrate how the text, context, and history of Section 3327 limit this Section only to veterans with a single period of qualifying service. Entitlement to

Montgomery benefits is conditioned on a "*first*" period of "continuous active duty," while entitlement to Post-9/11 benefits is conditioned on "aggregat[ing]" multiple periods of service, *compare* 38 U.S.C. § 3011(a) (emphasis added), *with id.* § 3311(b); Pet.27. Further, Section 3327 creates a permissible, not mandatory, special-election mechanism, § 3327(a) ("may elect"), which presupposes that only some—*but not all*—veterans may need to "coordinat[e]" their Montgomery benefits by equitably exchanging them for Post-9/11 benefits, Pet.3, 11–12. Next, under Section 3322, veterans may not receive Montgomery and Post-9/11 benefits "*concurrently*," § 3322(a) (emphasis added), demonstrating that Congress expected veterans to hold Montgomery and Post-9/11 benefits simultaneously and use them as they saw fit, so long as it was not at the same time, Pet.10–11, 27–29, 30—consistent with Congress' structuring of all prior GI Bills, Pet.6–7, 28; Pet.App.46a.

The Solicitor General offers no reason why Congress would have desired the perverse result that her interpretation achieves. Under the Solicitor General's view, a veteran entitled to both Montgomery and Post-9/11 benefits through separate qualifying periods of service may only use his full 48 months of benefits if he first exhausts his 36 months of less-valuable Montgomery benefits and then uses only 12 months of his far-more-valuable, wartime Post-9/11 benefits. *See* BIO 8–11; Pet.30–31. The Solicitor General does not even try to explain why Congress would have wanted to impose this nonsensical ordering—particularly since Congress enacted the Post-9/11 program to "enhance[ ]

educational assistance benefits" for veterans, in recognition of their "especially arduous" wartime service. Pub. L. No. 110-252, tit. V, § 5002, 122 Stat. 2357 (2008).

Finally, the Solicitor General claims that the pro-veteran canon has no role to play in this case, since the statutory scheme unambiguously supports her position, *see* BIO 12–14, but this is also wrong, *see* Pet.38–39. Respectfully, Petitioner has shown either that the statutory text plainly supports his view or—at the very least—that it is ambiguous with respect to Sections 3322(d) and 3327's role in the broader statutory regime, such that the pro-veteran canon resolves the ambiguity in Petitioner's favor. Pet.38; States *Amici* Br.12–14.

The Solicitor General also seeks to escape this pro-veteran canon on the basis that Petitioner's interpretation "is not unambiguously pro-veteran" because it precludes veterans with multiple periods of service from accessing the modest benefits under Sections 3327(f) and 3327(g). BIO 12–13. This argument flunks basic math. Under the Solicitor General's view, a small number of veterans could receive a one-time payment of up to $1,200 under Section 3327(f), as a refund of contributions that they paid into the Montgomery program under Section 3011(b). Further, under the Solicitor General's interpretation, the even fewer veterans who earned critical-skills incentives under 38 U.S.C. § 3015(d)(1) could receive an extra sum, "not [to] exceed $950 per month," for up to 36 months, under Section 3327(g). Yet, under Petitioner's view, *all* multiple-period-of-

service veterans can maximize the value of the 48 months of benefits to which they are entitled under the Montgomery and Post-9/11 programs, yielding *far more substantial* financial value for all veterans. Pet.36–37. A multiple-periods-of-service veteran who reaches his 48-month entitlement by first using 36 months of Post-9/11 benefits for undergraduate studies followed by 12 months of Montgomery benefits for graduate studies could receive over *$125,000 more* in benefits than if that same veteran had (following the Solicitor General's view) first used 36 months of Montgomery benefits followed by 12 months of Post-9/11 benefits, swamping the paltry sums that the Solicitor General invokes. *Accord* Pet.23; Seven Veterans *Amici* Br.2 & n.3; Nat'l Veterans Legal Servs. Program *et al. Amici* Br.19–20.† That uniformly pro-veteran result explains the strong support from veterans that Petitioner has received throughout this litigation, *see supra* p.2, while no single veteran supported the Government at any stage of these high-profile proceedings.

CONCLUSION

This Court should grant the Petition.

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† *See* U.S. Dept' of Veterans Affairs, *GI Bill Comparison Tool*, https://www.va.gov/education/gi-bill-comparison-tool/ (last visited May 24, 2023) (selecting and comparing Montgomery and Post-9/11 benefits with "Yellow Ribbon" public-private cost-sharing, for both Harvard University and Yale Law School).

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