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 PETITIONER

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QUESTION PRESENTED

Whether a veteran who has served two separate and distinct periods of qualifying service under the Montgomery GI Bill, 38 U.S.C. § 3001 *et seq.*, and under the Post-9/11 GI Bill, 38 U.S.C. § 3301 *et seq.*, is entitled to receive a total of 48 months of education benefits as between both programs, without first exhausting the Montgomery benefit in order to obtain the more generous Post-9/11 benefit.

PARTIES TO THE PROCEEDINGS

James R. Rudisill is the Petitioner here and was the Claimant-Appellee below.

Denis R. McDonough, in his official capacity as the Secretary of Veterans Affairs, is the Respondent here and was the Respondent-Appellant below.

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INTRODUCTION

For nearly 80 years, GI Bills have provided veterans with valuable educational assistance. These Bills typically give veterans 36 months of benefits per period of qualifying service, subject to a 48-month aggregate-use cap for multiple periods of service, while providing more generous benefits for service in wartime than in peacetime. Thus, Congress created a regime that rewards veterans who have multiple periods of service that qualify them for both wartime and peacetime benefits, respectively, by allowing them to use the lion's share of their benefits under the more generous wartime program, up to the 48-month cap. The most recent iterations of these GI Bills—the Montgomery GI Bill and the Post-9/11 GI Bill—follow this framework, with the Montgomery program offering modest educational stipends and the Post-9/11 program providing comprehensive, full-cost-of-attendance benefits for education. Accordingly, veterans who qualify for both GI Bills with separate periods of service have every reason to use as much of their Post-9/11 program benefits as possible before reaching the 48-month aggregate-use cap.

This case involves the Federal Circuit misreading the Post-9/11 GI Bill as abandoning this pro-veteran regime for long-serving veterans who have separate periods of qualifying service under the Montgomery GI Bill and Post-9/11 GI Bill, in favor of a reading that singles out such veterans for disfavored treatment.

This is what happened. In enacting the Post-9/11 GI Bill in 2008, Congress retroactively converted the eight-year period between the September 11, 2001, terrorist attacks and the Post-9/11 program's effective date in August of 2009—with service during this period previously only qualifying veterans for the less capacious, peacetime, Montgomery program—into service qualifying for generous Post-9/11 wartime benefits. This created a challenge for Congress as to a large category of veterans: those entitled to benefits under the Montgomery program based on a period of qualifying service during the eight years between September 11, 2001, and the Post-9/11 program's effective date. So, Congress enacted a Statutory Note—later codified at 38 U.S.C. § 3327—that explained how those veterans could coordinate their Montgomery and Post-9/11 entitlement, thus allowing them to exchange their Montgomery benefits for the more valuable Post-9/11 benefits, while also getting back the money that these veterans had paid into the Montgomery program.

But the Federal Circuit read this equitable, pro-veteran mechanism as also adopting an unprecedented penalty, requiring long-serving veterans who have no need to convert Montgomery benefits into wartime Post-9/11 benefits—because they have a separate period of service that already qualifies them for the maximum of 36 months of Post-9/11 benefits—to surrender all but 12 months of their

more valuable wartime benefits to exercise their right to receive 48 months of total benefits. Put another way, according to the Federal Circuit, such veterans must either first use up all 36 months of their Montgomery benefits before using any Post-9/11 benefits, meaning that they could only ever use 12 months of Post 9/11 benefits in light of the 48-month aggregate-use cap, or forfeit any remaining Montgomery benefits, meaning that they could not receive more than 36 months of total benefits as between both programs.

This is as nonsensical as it sounds, and—unsurprisingly—finds no grounding in the statutory text or context. Under the text, veterans who qualify for Montgomery benefits in their first period of service, and then qualify for Post-9/11 benefits for a second, separate period of service, have earned 36 months of benefits under each program, 38 U.S.C. § 3011(a) (Montgomery); *id.* § 3311(a)–(b) (Post-9/11), subject to a 48-month aggregate-use cap on total benefits, *id.* § 3695(a). Such veterans have no reason to use 38 U.S.C. § 3327, which is the option that Congress adopted to help veterans turn their Montgomery benefits into Post-9/11 benefits *because those veterans already have the maximum 36 months of Post-9/11 benefits*. These veterans can simply use their already-earned Montgomery and Post-9/11 benefits in whatever order they choose, up to the 48-month aggregate-use cap. The Federal Circuit's

contrary position re-writes Section 3327 by inserting words into that provision not found in the text, while also ignoring the statutory context. Indeed, neither the Federal Circuit nor the Secretary of Veterans Affairs ("VA") have ever offered any explanation for why Congress would have wanted to embed such an anti-veteran regime into the Post-9/11 GI Bill.

This Court should reverse the Federal Circuit.

DECISIONS BELOW

The Federal Circuit's panel opinion upholding the decision of the Court of Appeals for Veterans Claims is reported at *Rudisill v. McDonough*, 4 F.4th 1297 (Fed. Cir. 2021), and reproduced at Pet.App.48a–69a. The Federal Circuit's *en banc* opinion reversing the Court of Appeals for Veterans Claims is reported at *Rudisill v. McDonough*, 55 F.4th 879 (Fed. Cir. 2022) (*en banc*), and reproduced at Pet.App.1a–47a. The Court of Appeals for Veterans Claims' opinion reversing the decision of the Board of Veterans' Appeals is reported at *BO v. Wilkie*, 31 Vet. App. 321 (2019), and reproduced at Pet.App.76a–160a. Finally, the decision of the Board of Veterans' Appeals is unreported but is available at 2016 WL 4653284, and reproduced at Pet.App.161a–72a.

JURISDICTION

The *en banc* Federal Circuit granted the VA's timely petition for rehearing *en banc* on February 3, 2022, Pet.App.173a–76a, and entered its judgment on December 15, 2022, Pet.App.1a. Petitioner timely filed a petition for certiorari on March 13, 2023, which petition this Court granted. This Court has jurisdiction to review the Federal Circuit's judgment under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reproduced at Pet.App.177a–203a. From the Montgomery GI Bill, 38 U.S.C. § 3011(a)(1)(A) is reproduced at Pet.App.177a–79a; and 38 U.S.C. § 3013(a) is reproduced at Pet.App.180a. From the Post-9/11 GI Bill, a Statutory Note to 38 U.S.C. § 3301 is reproduced at Pet.App.181a–82a; 38 U.S.C. § 3311(a)–(b)(1) is reproduced at Pet.App.183a; 38 U.S.C. § 3312(a) is reproduced at Pet.App.184a; 38 U.S.C. § 3322 is reproduced at Pet.App.185a–88a; and 38 U.S.C. § 3327 is reproduced at Pet.App.189a–97a. Applicable to both the Montgomery and the Post-9/11 GI Bills, 38 U.S.C. § 3695(a) is reproduced at Pet.App.198a. Veterans Affairs regulations 38 C.F.R. §§ 21.9520 and 21.9635(w) are reproduced at Pet.App.199a–203a.

STATEMENT OF THE CASE

A. Statutory Background

1. The GI Bills Provide More Generous Benefits For Wartime Service Than Peacetime Service

a. Congress enacted the first "GI Bill" in 1944, during World War II. 38 U.S.C. § 3301 note (available at Pet.App.181a); 90 Cong. Rec. app. A1477, A1560 (1944) (statement of Sen. McFarland). The Serviceman's Readjustment Act of 1944 ("Original GI Bill"), provided a range of benefits to World War II veterans, including payment of tuition and designated expenses for college or trade-school education, as well as options to receive low-interest business loans and mortgages. *See* Pub. L. No. 78-346 §§ 400–505, 58 Stat. 284, 284, 287–93 (1944).

Congress adopted multiple GI Bills thereafter. During the Korean War, Congress enacted the Veterans' Readjustment Assistance Act of 1952, the "Korean Conflict GI Bill," which provided home, farm, and business loans, as well as unemployment and other allowances in addition to education and training benefits to individuals who served in the Armed Forces after June 27, 1950. Pub. L. No. 82-550 §§ 201–34, 301–506, 66 Stat. 663, 663–671, 682–91 (1952). In 1966, Congress enacted the Veterans'

Readjustment Benefits Act—the "Vietnam-Era GI Bill"—providing a full-time tuition stipend similar in value to the Original GI Bill for veterans who served in active duty for more than 180 days between January 31, 1955, and January 1, 1977. Pub. L. No. 89-358 §§ 2–4, 80 Stat. 12, 12–20 (1966). Following the Vietnam War, Congress enacted the Post-Vietnam Veterans' Educational Assistance Program in 1976—the "Post-Vietnam GI Bill"—a contributory matching program where veterans entering service after December 21, 1976, could receive double the amount of monthly contributions that they made to the program (ranging from $25 to $100) for training and educational purposes. Pub. L. No. 94-502 § 404, 90 Stat. 2383, 2393–97 (1976) (codified at 38 U.S.C. § 3201 *et seq.*). Most recently, Congress enacted the Montgomery GI Bill in 1984, and the Post-9/11 GI Bill in 2008, which are discussed more fully below.[1]

All told, these GI Bills have provided educational assistance to "around 25 million beneficiaries," Jennie

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[1] Congress has also enacted lesser GI Bills and educational assistance programs intended typically for reserve service since the post-Vietnam Era, none of which are comparable to the active-duty service GI Bills. *See, e.g.*, Montgomery GI Bill Selected Reserve, 10 U.S.C. § 16131 *et seq.*; Educational Assistance Pilot Program, 10 U.S.C. § 2141 note; Service Members Occupational Conversion and Training Act of 1992, 10 U.S.C. § 1143 note; Veterans Retraining Assistance Program, 38 U.S.C. § 4100 note.

W. Wenger & Jason M. Ward, *The Role of Education Benefits in Supporting Veterans as They Transition to Civilian Life*, RAND Corp. (2022),[2] including Presidents George H.W. Bush and Gerald Ford; Vice President Al Gore; Senators Bob Dole, John Glenn, and Daniel Inouye; Chief Justice William Rehnquist; Associate Justices John Paul Stevens and Byron White; and Secretary of State Henry Kissinger, *see* Suzanne Mettler, *How the GI Bill Built the Middle Class and Enhanced Democracy*, Scholars Strategy Network (Jan. 2012);[3] Kenneth E. Cox, *The Greatest Legislation*, Am. Legion Mag., June 2004 at 18–20.[4] The Original GI Bill enabled World War II veteran Oliver Brown to buy a home near the Sumner School, positioning him to become the lead plaintiff in *Brown v. Board of Education*, 347 U.S. 483 (1954). Cox, *supra*, at 18. And GI Bills have helped launch the careers of "two dozen Pulitzer Prize winners, 238,000 teachers, 91,000 scientists, [and] 67,000 doctors." John McChesney, *GI Bill's Impact Slipping in Recent Years*, Nat'l Pub. Radio (Sept. 26, 2007).[5]

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[2] Available at https://www.rand.org/pubs/perspectives/PEA1363-4.html (all websites last visited Aug. 9, 2023).

[3] Available at https://scholars.org/contribution/how-gi-bill-built-middle-class-and-enhanced-democracy.

[4] Available at https://archive.legion.org/node/2476.

[5] Available at https://www.npr.org/templates/story/story.php?storyId=14715263.

b. Each iteration of the GI Bill has provided different benefits amounts to veterans, based upon factors like the prevailing cost of higher education and whether the service during the qualifying period was in a time of war. As the chart below shows, Congress generally awards greater benefits in its GI Bills for veterans with wartime service:

(Chart on following page.)

MAJOR GI BILLS THROUGHOUT THE DECADES, USING INFLATION-ADJUSTED DATA[6]		
GI Bill Program	**Qualifying Service**	**Average Expenditure Per Veteran**
World War II	Sept. 16, 1940 – Dec. 31, 1946	$17,894
Korean War	June 27, 1950 – Jan. 31, 1955	$15,561
Vietnam Era	Feb. 1, 1955 – Dec. 31, 1976	$10,841
Post-Vietnam Era	Jan. 1, 1977 – June 30, 1985	$5,964
Montgomery (Active Duty)	July 1, 1985 – Sept. 30, 2030	$8,656 (annual)[7]
Post-9/11	Sept. 11, 2001 – present	$15,364 (annual)

[6] Using 2020 dollars or best-available data from Cong. Rsch. Serv., *Veterans' Educational Assistance Programs and Benefits: A Primer* at 6–15, 21, 26–40 (Dec. 3, 2021), available at https://crsreports.congress.gov/product/pdf/R/R42785.

[7] For retired programs, the Congressional Research Service provides aggregated total expenditures; for the active programs, only annual expenditure data currently are available.

c. Because some veterans serve for a sufficiently long period of time that they earn entitlement to benefits under multiple GI Bill programs, Congress has enacted a series of provisions governing these veterans' entitlement to education benefits.

First, since 1952, Congress has applied a 48-month aggregate-use cap on veterans' use of education benefits from multiple programs. *See* Pub. L. No. 82-550, § 214(a)(3), 66 Stat. at 665 (Korean Conflict); Pub. L. No. 90-631, 82 Stat. 1331, 1331 (1968) (Vietnam); 38 U.S.C. § 3231(a)(1) (1976) (Post-Vietnam); *id.* § 3013(a)(1) (1984) (Montgomery, Active Duty); 10 U.S.C. § 16131(c)(2) (1984) (Montgomery, Selected Reserve); 38 U.S.C. § 3312(a)(1) (2008) (Post-9/11); *see also* 38 U.S.C. § 3695 (listing all programs subject to the 48-month aggregate-use cap).

Second, since 1952, Congress has prohibited veterans from using benefits from two or more programs concurrently. *See* Pub. L. No. 82-550, § 232(h), 66 Stat. at 670 (Korean Conflict); Pub. L. No. 89-358, § 3(b), 80 Stat. at 21 (Vietnam); 38 U.S.C. § 3681(b) (Post-Vietnam); 38 U.S.C. § 3033(a)(1) (Montgomery Active Duty); 10 U.S.C. § 16131(k)(2) (Montgomery Selected Reserve); 38 U.S.C. § 3322(a) (prohibiting concurrent use of Post-9/11 benefits and benefits provided under, among others, the Post-Vietnam, Montgomery Active Duty, and Montgomery Selected Reserve programs).

Finally, veterans meeting the eligibility criteria for multiple GI Bill programs through separate periods of service can use those benefits at different times, in the order that they deem most beneficial, by specifying under which program they wish to receive benefits. *See* Pub. L. No.82-550, § 232(h), 66 Stat. at 670 (Korean Conflict); Pub. L. No. 89-358, § 3(b), 80 Stat. at 21 (Vietnam); 38 C.F.R. § 21.5022(a)(2) (Post-Vietnam); *id.* §§ 21.7143(b), 21.7042(d)(4) (Montgomery Active Duty, also encompassing Post-9/11); *id.* §§ 21.7642(b), 21.7540(c)(3) (Montgomery Selected Reserve, also encompassing Post-9/11); *id.* § 21.4022 (applicable to all active programs); *see Carr v. Wilkie*, 961 F.3d 1168, 1169–70 (Fed. Cir. 2020). For example, if a veteran spent three years on active duty during the Vietnam War, then reenlisted after that war's end and served an additional three years on active duty, those periods of service would qualify the veteran for both the Vietnam Era GI Bill and Post-Vietnam Era GI Bill, respectively. *See* Pub. L. No. 89-358, §§ 2, 3(b), 80 Stat. at 13, 21 (Vietnam Era); 38 U.S.C. § 3231(a)(1) (Post-Vietnam); 38 C.F.R. § 21.5022(a)(2) (Post-Vietnam). In using these benefits, that veteran could choose to use 36 months of his Vietnam Era entitlement, the more generous of the two programs, *see supra* p.10, and then an additional 12 months of Post-Vietnam Era entitlement by assigning his Vietnam War service and his subsequent peacetime service, respectively, to the corresponding benefit programs. *See* 38 U.S.C.

§ 3231(a)(1) (subjecting use of Post-Vietnam benefits to the 48-month aggregate-use cap).

2. The Post-9/11 GI Bill Retroactively Awards Wartime Benefits For An Eight-Year Period Previously Only Eligible For Montgomery Benefits

The Montgomery GI Bill. The Montgomery GI Bill, 38 U.S.C. § 3001 *et seq.*, named after Congressman Sonny Montgomery, was the sole education benefit that Congress provided to veterans for active-duty service from 1985 to 2009. Designed for peacetime service, the Montgomery GI Bill provides "basic educational assistance," *id.* § 3011(a), in the form of a modest, fixed monthly stipend for up to 36 months, designed "to help meet, in part," the costs of tuition, books, and fees, *id.* §§ 3013(a)(1), 3014(a).

Montgomery benefits are available based upon sufficient service tenure and payment of mandatory monetary contributions to the program. Individuals are eligible for Montgomery benefits if they "first become[ ] a member of the Armed Forces or first enter[ ] on active duty as a member of the Armed Forces" during "the period beginning July 1, 1985, and ending September 30, 2030"; serve an "obligated period of active duty" of two or three "continuous" years (depending on the individual's particular

enlistment contract); complete secondary school; and are honorably discharged. 38 U.S.C. § 3011(a)(1)(A)(i). Servicemembers then establish entitlement to 36 months of Montgomery benefits by making 12 monthly monetary contributions of $100 and completing the required two to three continuous years of service. *Id.* § 3011(b)(1). A servicemember "may make an election not to receive educational assistance" under the Montgomery program "during the 90-day period beginning on the day that is 180 days after the date on which the individual initially enters initial training." *Id.* § 3011(c)(1).[8] This election is irrevocable. *See id.* Thus, veterans who enlist for the first time today and through September 30, 2030, and who do not make the irrevocable election to opt out, will automatically begin making payments that entitle them to basic educational assistance under the Montgomery program.

The Post-9/11 GI Bill. Congress enacted the Post-9/11 GI Bill in June 2008, with an effective date of August 1, 2009, 10 U.S.C. § 16163 note, in recognition of the "especially arduous" active-duty service required since the September 11, 2001 terrorist attacks, 38 U.S.C. § 3301 note (Pet.App.181a–82a).

[8] Individuals serving in the Selected Reserve may also make such an election out of the Montgomery program "at the time the individual initially enters on active duty as a member of the Armed Forces." *Id.* § 3012(d)(1).

Congress concluded that the Montgomery GI Bill was "outmoded and designed for peacetime service" and that it was "in the national interest for the United States to provide veterans who serve on active duty in the Armed Forces after September 11, 2001, with enhanced educational assistance benefits that are worthy of such service." *Id.*

The Post-9/11 GI Bill is far more generous than its Montgomery predecessor, offering "the actual net cost for in-State tuition and fees," public-private cost-sharing to cover excess tuition and fees at private institutions, a variable monthly stipend based on the location of the school campus, an annual lump sum for books, one-time relocation monies, and reimbursement for testing and professional licensing. *Id.* §§ 3313(c)(1)(A)–(B), 3315, 3316, 3317, 3318; 38 C.F.R. § 21.9640(b)(1)(i)–(iii). The value of these benefits varies depending on, among other factors, each institution's tuition and fees and participation in public-private cost sharing under 38 U.S.C. § 3317. Thus, a veteran attending a high-cost private institution could receive more than $350,000 in benefit values, which would cover the full cost of his four years of tuition and other expenses. *See, e.g.*, Univ. of S. Cal., *Prospective Students: Financial Aid* (establishing 2023–24 tuition and fees alone in the

amount of over $67,000);[9] U.S. Dep't of Veterans Affs., *Yellow Ribbon School Search Results* (indicating Post-9/11 cost-sharing "pays remaining tuition" for the same institution's undergraduate programs not otherwise covered by Post-9/11);[10] Dep't of Def., Def. Travel Mgmt. Off., *Basic Allowance for Housing* (over $3,000 monthly housing allowance for Los Angeles);[11] *see also* 38 U.S.C. § 3313(c)(1)(B) (tying Post-9/11's variable monthly stipend to similar location-based Department of Defense allowances).

Generally, to be eligible for the full amount of the Post-9/11 GI Bill's benefits, an individual must "serve[ ] an aggregate of at least 36 months on active duty," through any single period or combined periods of service, beginning "on or after September 11, 2001." 38 U.S.C. § 3311(a)–(b)(1) (qualification for maximum benefits level). Thus, in effect, the Post-9/11 GI Bill retroactively altered the available benefits for veterans who served in the period from September 11, 2001, to August 1, 2009, granting them access to the more generous Post-9/11 GI Bill benefits

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[9] Available at https://admission.usc.edu/learn/cost-financial-aid/.

[10] Available at www.va.gov/education/yellow-ribbon-participating-schools/?name=University+of+Southern+California.

[11] Available at https://www.defensetravel.dod.mil/pdcgi/bah/bahsrch.cgi?YEAR=23&Zipcode=90089&Rank=5&submit1=CALCULATE/.

commensurate with their wartime sacrifices. *See id.* § 3301 note. Veterans who served 36 months on active duty after September 11, 2001, are entitled to 36 months of benefits under the program. *Id.* § 3312(a).

For veterans with multiple periods of qualifying service within the relevant years, the Montgomery GI Bill and Post-9/11 GI Bill work together as follows. These veterans' first period of service makes them eligible for both Montgomery benefits and Post-9/11 benefits, respectively, so long as this period occurs after September 11, 2001, *id.* § 3011(a)(1)(A); *id.* § 3311(b), and they make the mandatory payments to the Montgomery program, *id.* § 3011(b)(1). These veterans' second period of service, in turn, would *only* qualify them for Post-9/11 GI Bill benefits, because veterans will have already earned the maximum of 36 months of Montgomery benefits from their first period of service and so cannot obtain any more benefits from the Montgomery program, *id.* § 3013(a)(1)—and, in any event, as relevant here, the Montgomery program limits eligibility to those veterans who "*first* become[ ]" a member of the Armed Forces or "*first*

enter[ ] active duty" during the covered time period. *Id.* § 3011(a)(1)(A) (emphases added).[12]

3. Sections 3322 And 3327 Allow Veterans To Turn Montgomery Benefits Into Post-9/11 Benefits

The retroactive nature of the Post-9/11 GI Bill, as well as the far more generous nature of Post-9/11 benefits, created a challenge for Congress. There were many veterans who enlisted after September 11, 2001, began making payments entitling them to peacetime benefits under the Montgomery program, but who were now eligible for much more generous wartime benefits for that period of service. To assist those veterans, Congress created a mechanism allowing them to upgrade their peacetime Montgomery benefits to wartime Post-9/11 benefits, while also getting back the payments that they had

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[12] Subsection 3011(a) also provided a now largely moot and narrow exception to this first-period-of-service requirement, not relevant here, under the Montgomery GI Bill, allowing veterans that were eligible for benefits under the Vietnam Era GI Bill, Pub. L. No. 89-358, 80 Stat. 12, to receive Montgomery benefits if they were either on active duty or reenlisted between October 19, 1984, and July 1, 1985, and subsequently continued on active duty for at least three years continuous years after June 30, 1985. 38 U.S.C. § 3011(a)(1)(B)–(C); *see also id.* (exceptions to the continuous service requirement for injury, disability, or hardship); *id.* §§ 3018A, 3018B.

made into the Montgomery program. Congress achieved this through Sections 3322 and 3327.

Section 3322—entitled "Bar to duplication of educational assistance benefits"—includes various provisions arising out of the overlap between Post-9/11 and other benefits programs, including Montgomery. Subsection 3322(a), for example, provides that "[a]n individual entitled to educational assistance" under both the Post-9/11 GI Bill and, among others, the Montgomery GI Bill, "may not receive assistance under two or more such programs currently" and must "elect . . . under which chapter or provisions to receive educational assistance." 38 U.S.C. § 3322(a). Subsection 3322(g), enacted in 2011, provides that a spouse or child entitled to educational assistance under the Post-9/11 GI Bill from a transfer of entitlement from more than one individual "may not receive assistance based on transfers from more than one such individual concurrently." *Id.* § 3322(g). Subsection 3322(h), entitled "Bar To Duplication of Eligibility Based on a Single Event or Period of Service" and also enacted in 2011, provides that "[a]n individual with qualifying service in the Armed Forces that establishes eligibility on the part of such individual for educational assistance" under both the Post-9/11 GI Bill and the Montgomery program "shall elect . . . under which authority such service is to be credited." *Id.* § 3322(h)(1).

Most relevant here, Subsection 3322(d)—entitled "Additional Coordination Matters"—provides that, "[i]n the case of an individual entitled to educational assistance" under the Montgomery GI Bill, among others, "as of August 1, 2009, coordination of entitlement to educational assistance under [the Post-9/11 GI Bill], on the one hand, and [the Montgomery GI Bill], on the other, shall be governed by the provisions of section 5003(c) of the Post-9/11 Veterans Educational Assistance Act of 2008"—a then-uncodified Statutory Note to the Public Law, now codified at Section 3327. *Id.* § 3322(d).

Section 3327, the provision that Subsection 3322(d) cross-references, explains how the benefit-exchange regime works. Veterans entitled to benefits under the Montgomery program with sufficient post-9/11 service may make a voluntary exchange of such benefits for Post-9/11 GI Bill benefits at a 1:1 ratio. *Id.* §§ 3327(a), (c)–(d). Subsection 3327(a)(1) provides that "[a]n individual may elect to receive educational assistance under [the Post-9/11 GI Bill] if such individual—as of August 1, 2009"—falls into one of several categories. *Id.* § 3327(a)(1). As relevant here, those categories include veterans with some amount

of remaining Montgomery entitlement. *See id.* § 3327(a)(1)(A), (C), (E).[13]

Subsection 3327(d) then explains the conditions under which veterans who choose to use the benefit-exchange mechanism in Subsection 3327(a) may make the exchange. Subsection 3327(d)(1) provides that "an individual making an election under subsection (a)" will receive Post-9/11 GI Bill benefits "instead of basic educational assistance" under Montgomery. *Id.* § 3327(d)(1). Subsection 3327(d)(2)

[13] Subsection 3327(a)(1) identifies several types of individuals eligible to make a Subsection 3327(a) election, including an individual who is "entitled to basic educational assistance under [Montgomery] and has used, but retains unused, entitlement under that [program], 38 U.S.C. § 3327(a)(1)(A); an individual "entitled to basic educational assistance under [Montgomery] but has not used any entitlement under that [program]," *id.* § 3327(a)(1)(C); and "a member of the Armed Forces who is eligible for receipt of basic educational assistance under [Montgomery] and is making contributions toward such assistance," *id.* § 3327(a)(1)(E). Subsections 3327(a)(1)(B) and (D) also provide that individuals entitled to benefits under other specified educational assistance bills available for post-9/11 service, such as the Selected Reserve version of Montgomery, may also utilize Section 3327. *Id.* § 3327(a)(1)(B), (D) (identifying Chapters 107, 1606, 1607 of Title 10). Subsection 3327(a)(1)(F) provides that even if a veteran made the irrevocable election to opt out of the Montgomery program under Subsection 3011(c)(1) (Active Duty) or 3012(d)(1) (Selected Reserve), he may take advantage of the Section 3327 election. *Id.* § 3327(a)(1)(F).

then states that this swap will be at a 1:1 ratio: "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 [Montgomery]." *Id.* § 3327(d)(2)(A).

The other subsections of Section 3327 flesh out the details of this benefit-exchange option. Subsection 3327(b) explains that, for an individual who is still in the process of making monthly contributions toward the Montgomery program, that individual may cease making such payments at the start of the month following his election to receive Post-9/11 benefits. *Id.* § 3327(b). Subsection 3327(c) provides that an individual who has transferred entitlement to basic educational assistance under the Montgomery program to another individual may revoke such transfer. *Id.* § 3327(c). Subsection 3327(e) clarifies that an individual making a benefit-exchange election can utilize their Post-9/11 benefits for education programs approved under the exchanged benefit program, like certain trade schools, but not necessarily under the Post-9/11 GI Bill. *Id.* § 3327(e). Subsection 3327(f) provides that veterans who made the required $100 monthly contributions to the Montgomery program may get those contributions back in the same proportion as their benefit exchange. *Id.* § 3327(f). Subsection 3327(g) allows veterans who were entitled to an increase in the basic education

assistance provided by Montgomery due to certain critical skills incentive programs to retain those entitlements. *Id.* § 3327(g).[14] Subsection 3327(h) empowers the VA to make an election on behalf of any veteran who makes an election "clearly against the interests of the individual." *Id.* § 3327(h). Finally, Subsection 3327(i) provides that a Subsection 3327(a) election is irrevocable. *Id.* § 3327(i).

4. The VA Revises Form 22-1990, Creating The Controversy At Issue

In December 2008, the VA revised its pre-existing Form 22-1990, which the VA requires all veterans to complete before they can receive any veterans' education benefits, now including Post-9/11 benefits. *See* SA7–9; JA1a. That Form is based upon a (mis)reading of Section 3327 as requiring veterans selecting "Chapter 33 – Post-9/11 GI Bill" benefits to check a box stating that "[b]y electing Chapter 33," such veterans understand that their "months of entitlement under chapter 33 will be limited to the number of months of entitlement remaining under chapter 30 on the effective date of [their] election"—meaning the remaining number of months a veteran has under the Montgomery program. SA9. For

[14] The Montgomery critical skills incentives found in 38 U.S.C. § 3015(d) provide veterans with a maximum of an additional $950 per month.

veterans who have qualified for Post-9/11 benefits and Montgomery benefits with multiple periods of service, the upshot of Form 22-1990's misreading of Section 3327 is that those veterans must either give up their statutory right to 48 months of benefits (by forfeiting their remaining Montgomery benefits and having their Post-9/11 benefits limited to the number of months of Montgomery that were left), or use only 12 months of the more generous Post-9/11 benefits they earned (by first exhausting their 36 months of Montgomery benefits, and then using only 12 months of Post-9/11 benefits). *See* SA8–9.

This Form not only conflicts with the statutory text and context, as Petitioner explains throughout this Brief, but is also inconsistent with VA's implementing regulations for the Post-9/11 program (which post-date the revision of Form 22-1990). Those regulations allow veterans "in receipt of education assistance" under the Post-9/11 program who remain "eligible for" benefits under another program—such as Montgomery—to "choose to" alternate back to receiving benefits under the other program at certain intervals. 38 C.F.R. § 21.9635(w); *see also id.* §§ 21.4022, 21.9690(b); 21.7143(b), 21.7642(b).

B. Factual And Procedural Background

1. Petitioner served approximately eight aggregate years on active duty over three separate

periods of service, including several wartime deployments to Iraq and Afghanistan where he saw considerable combat and sustained multiple injuries in suicide attacks and roadside bomb explosions. Pet.App.81a–82a; Fed.Cir.Dkt.24 at 4. As a platoon leader, Petitioner saved the lives of numerous other American soldiers by repelling a Taliban assault on a remote outpost while directing medical evacuations under fire. *Id.* Petitioner reached the rank of Captain, receiving multiple commendations during his service, including a Bronze Star, a Combat Action Badge, an Air Assault Badge, Afghanistan and Iraq Campaign Medals with multiple campaign stars, and a Kosovo Campaign Medal. Pet.App.47a.

Petitioner had multiple periods of service, both before and after the 9/11 terrorist attacks. Pet.App.81a–82a. His first period of service began in January 2000, prior to the September 11, 2001, attacks, when he enlisted in the Army before attending college. Pet.App.81a–82a. During this first enlistment, Petitioner made payments into the Montgomery program and qualified for Montgomery benefits. *See* Pet.App.81a–82a; 38 U.S.C. § 3011(b)(1). Upon an honorable discharge in June 2002, Petitioner pursued his undergraduate degree using a portion of his Montgomery benefits. Pet.App.81a–82a. While attending college, Petitioner enlisted for a second time, serving in the Army National Guard and deploying to Iraq on activated

status from June 2004 to December 2005. Pet.App.82a. After a second honorable discharge, Petitioner resumed his undergraduate studies, ultimately using a combined 25 months and 14 days of Montgomery benefits, leaving him with 10 months and 16 days left under that program. Pet.App.82a. After graduating, Petitioner began his third period of service as an officer in the Army from November 2007 to August 2011. Pet.App.20a, 82a. During his third term, Congress enacted the Post-9/11 GI Bill. After a third honorable discharge, Petitioner continued to serve our Nation as an FBI agent. Fed.Cir.Dkt.24 at 4–5; Fed.Cir.Dkt.82 at 6.

Following Petitioner's third period of service, Petitioner gained admission to Yale Divinity School—hoping to return to service as a chaplain in the Army—and planned to pay for that expensive degree program with the generous Post-9/11 GI Bill benefits he had earned. Pet.App.82a–83a; JA2a–3a. Petitioner intended to credit approximately 22 months of those benefits to his education at Yale. Petitioner had earned 36 months of Post-9/11 benefits through his additional periods of service, and his usage of those benefits would be limited to 22 months and 16 days under Subsection 3695(a)'s 48-month aggregate-use cap.

In 2015, Petitioner filled out the VA's mandatory Form 22-1990, *supra* pp.23–24, while requesting his

duly earned Post-9/11 GI Bill benefits based on service that does not form the basis for his Montgomery entitlement, JA3a; Pet.App.82a–83a; *see* 38 C.F.R. §§ 21.9520(a), 21.4020(a). Petitioner expressly indicated on his application form that he was applying for Post-9/11 benefits based on his second two periods of service, JA3a (selecting service between June 2004 and August 2011). This is not the service that forms the basis of Petitioner's Montgomery GI Bill entitlement. *Cf.* SA4 (indicating establishment of Montgomery benefits in July 2003). But instead of giving Petitioner the 22 months and 16 days of Post-9/11 benefits to which he was entitled by statute, the VA "limited" Petitioner's Post-9/11 benefits "to the number of months of" his remaining Montgomery entitlement—only 10 months and 16 days—under the Form's unlawful terms. Pet.App.83a; JA42a–45a (electronic VA Form 22-1990).

Petitioner filed a Notice of Disagreement with the VA on July 30, 2015, contesting the VA's interpretation of the Post-9/11 GI Bill and disagreeing with the VA's benefits determinations, JA21a–23a, after which the VA issued Petitioner a Statement of the Case regarding his contentions, JA37a–41a. Petitioner then immediately appealed to the Board of Veterans' Appeals ("Board"), which affirmed the VA's conclusion that Petitioner could receive only 10

months and 16 days of Post-9/11 GI Bill benefits. Pet.App.84a–85a, 172a.

2. Petitioner appealed to the Court of Appeals for Veterans Claims, which reversed in his favor, explaining that "Congress' statutory scheme is best interpreted to provide that separate periods of qualifying service allow a veteran such as [Petitioner] to receive full benefits under both programs subject to [Section 3695(a)'s] aggregate [48-month] cap on all such benefits." Pet.App.86a. Judge Bartley dissented. Pet.App.129a–30a, 148a.

3. On appeal, the Federal Circuit panel majority—Judge Newman writing, joined by Judge Reyna—also ruled for Petitioner. Pet.App.48a–49a. The panel majority held that the Montgomery and Post-9/11 GI Bills "provide[ ] additional benefits to veterans with multiple periods of qualifying service, whereby each period of service qualifies for education benefits" under each GI Bill, subject only to the "cap of 48 aggregate months of benefits" in Subsection 3695(a). Pet.App.65a. Section 3327 "authorizes veterans who were using previously available GI Bill benefits to switch to the more generous Post-9/11 benefits for the number of months of unused entitlement." Pet.App.56a (citation omitted). Petitioner's reading is "in conformity with law" and congressional intent. Pet.App.52a, 65a. Judge Dyk dissented. Pet.App.67a–69a.

4. The Federal Circuit granted the VA's *en banc* petition, Pet.App.173a–76a, vacated the panel decision and reversed the Court of Appeals for Veterans Claims, Pet.App.1a–17a.

The *en banc* majority opinion, authored by Judge Dyk, held that Petitioner was subject to the limitation in Subsection 3327(d)(2) because he must have made an election pursuant to Subsection 3327(a). Pet.App.14a. "[A]s of August 1, 2009," Petitioner was "entitled to basic educational assistance under [the Montgomery program]" and "retain[ed] unused entitlement" under that program and then "elect[ed] to receive educational assistance under [the Post-9/11 program]." *Id.* (quoting 38 U.S.C. § 3327(a)(1)(A) (second and fifth alterations in original). Finding there was no language within Section 3327 limiting its application to veterans with only a "single period of service," the *en banc* majority held that it imposes its limit on all veterans with any amount of Montgomery entitlement who seek to use the Post-9/11 benefits that they have earned. Pet.App.15a. In support of this interpretation, the majority asserted that Petitioner's reading could potentially harm some veterans by prohibiting them from "avail[ing] themselves of the benefits of § 3327(f) and (g)." Pet.App.15a–16a. The *en banc* majority then refused to apply the pro-veteran canon. Pet.App.16a–17a.

Two judges dissented. Judge Newman, in an opinion joined by Judge Reyna, explained that GI Bills have long "provide[d] that a re-enlisting veteran eligible under multiple programs earns aggregate benefits up to the total of 48 months." Pet.App.23a. Judge Newman explained that Subsection 3322(d) and Section 3327 are applicable to veterans "switching . . . unused benefits from a given period of service to Post-9/11 benefits." Pet.App.25a, 27a. Judge Newman also criticized the contrary reading as "absurd[ly]" treating veterans with multiple periods of service worse than certain non-veterans. Pet.App.29a–30a (citations omitted). Judge Reyna, in a dissenting opinion joined by Judge Newman, explained that the pro-veteran canon supported Petitioner's position. Pet.App.44a–47a.

5. Since leaving the Army, Petitioner has continued to serve his country as an agent in the FBI's domestic-terrorism unit and as an Ensign in the Navy Reserve. Fed.Cir.Dkt.24 at 4–5; Fed.Cir.Dkt.82 at 6. His work with the FBI has involved combating domestic terrorism by white supremacists and ISIS supporters. *See* CBS News, *Bond Denied for 2 Accused of Plotting Church Attacks* (Nov. 12, 2015);[15] U.S. Dep't of Just., *ISIS Supporter Sentenced to*

[15] Available at https://www.cbsnews.com/news/bond-denied-for-2-accused-of-plotting-church-attacks-virginia/.

Prison for Firearms Offenses (Feb. 12, 2018);[16] Landon Shroder, *Domestic Terrorism Inside the FBI's Joint Terrorism Task Force in Richmond,* RVA Mag. (Aug. 1, 2018).[17] Petitioner has now aged out of the Army's chaplain program, but "still wants to attend seminary so he can help vet[erans] suffering from post-traumatic stress and facing challenges in transitioning from combat to civilian life." Stephanie Zimmermann, *Supreme Court to Hear Decorated Army Vet's Claim That VA Shortchanged His GI Bill Benefits*, Chi. Sun Times (June 26, 2023).[18]

SUMMARY OF THE ARGUMENT

I.A. The plain text of the Montgomery and Post-9/11 GI Bills provide that veterans who qualify for benefits under each program with separate periods of service can use those benefits in the order that they choose, limited only by the 48-month aggregate-use cap and concurrent-usage bar. Under the Montgomery GI Bill, veterans who first serve a two- or three-continuous-year period of active duty and

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[16] Available at https://www.justice.gov/opa/pr/isis-supporter-sentenced-prison-firearms-offense.

[17] Available at https://rvamag.com/news/domestic-terrorism-inside-the-fbis-joint-terrorism-task-force-in-richmond.html.

[18] Available at https://chicago.suntimes.com/2023/6/26/23774351/gibill-veterans-affairs-rudisill-supreme-court-post911-gi-bill-montgomery-army.

make 12 monthly payments of $100 are entitled to 36 months of Montgomery benefits. Under the Post-9/11 GI Bill, veterans who serve 36 months of aggregate active-duty service after September 11, 2001, are entitled to 36 months of maximum Post-9/11 benefits. For veterans who earn both sets of benefits with separate periods of service, the only limitations on their use of these benefits are that they cannot receive the benefits concurrently and cannot receive, in the aggregate, more than 48 total months of benefits.

B. Petitioner is entitled to receive 36 months of Montgomery benefits for his first period of service, and 36 months of Post-9/11 benefits for his subsequent periods of service occurring after the 9/11 terrorist attacks. Petitioner has the right to use those benefits in any order that he prefers, up to the 48-month cap. Because Petitioner already used 25 months and 14 days of Montgomery benefits for undergraduate studies, Petitioner can now use 22 months and 16 days of the Post-9/11 benefits that he earned, thereby receiving the statutory maximum of 48 months of total benefits.

II. The Federal Circuit concluded that Petitioner must make an election under Subsection 3327(a) to use his Post-9/11 benefits (unless he first uses all of his Montgomery benefits), thus triggering Subsection 3327(d)'s limitation. Under this reading, Petitioner either had to exhaust his remaining Montgomery

benefits before receiving Post-9/11 benefits (limiting him to only 12 months of the Post-9/11 program's more generous benefits), or exchange his remaining Montgomery benefits for Post-9/11 benefits (thereby forfeiting the 12 additional months of benefits he could receive under the 48-month aggregate-use cap). The Federal Circuit's interpretation violates the statutory text and context.

A.1. Because Petitioner qualifies for Montgomery and Post-9/11 benefits through two separate periods of qualifying service, he would have no reason to use Subsection 3327(a)'s benefit-exchange mechanism, as evidenced by its plain text. Subsection 3327(a) provides that veterans "may elect" to receive Post-9/11 benefits through this mechanism, indicating that this is a discretionary process. Veterans like Petitioner, who have a separate period of service that already entitles them to the maximum of 36 months of Post-9/11 benefits, simply have no reason to make such an election because they can never be entitled to more than 36 months of Post-9/11 benefits.

2. In its contrary interpretation of Subsection 3327(a), the Federal Circuit rewrites Subsections 3327(a) and 3327(d), transforming a voluntary mechanism that allows certain veterans to convert lesser Montgomery benefits into more generous Post-9/11 benefits into one *requiring* veterans with any remaining Montgomery entitlement to march

through these subsections in order to receive Post-9/11 benefits. This argument fails on its own terms, given Subsection 3327(a)'s voluntary "may" language, which is reason enough for this Court to reject the Federal Circuit's position.

B. The statutory context—which the Federal Circuit largely ignored—also supports Petitioner.

1. Congress enacted the Post-9/11 GI Bill to provide generous benefits commensurate with the difficult service these wartime veterans provided to our Nation. Because the Post-9/11 GI Bill retroactively provided veterans with these wartime benefits, Congress needed a mechanism for veterans who had obtained Montgomery benefits through service that now qualified them for Post-9/11 benefits to upgrade their benefits to the more generous program, while also allowing these veterans to get back their Montgomery payments. Subsection 3327 is Congress' answer. Beginning with Section 3322, Congress ensured that veterans with one period of service qualifying for both programs could not obtain entitlement to both, or "double-dip," but allowed these veterans to coordinate their peacetime benefits to more generous Post-9/11 benefits at a 1:1 ratio. To effectuate that coordination, Subsection 3322(d) cross-references Section 3327, which provides that such veterans "may elect" to exchange their Montgomery benefits for Post-9/11 benefits, thus

allowing these veterans to upgrade their benefits to Post-9/11 benefits. This has no relevance for veterans with multiple periods of service, who have already earned the right to use 36 months of benefits from both programs, subject to the 48-month benefit cap.

Other provisions of the Post-9/11 GI Bill further confirm this reading. In these provisions, Congress allowed veterans to use separate benefits consecutively and up to an aggregate 48-month cap, rather than the 36-month cap for each program, all consistent with the interpretation that veterans with multiple qualifying periods of service can assign each service period to a separate benefits program and collect. Further, the Federal Circuit's contrary interpretation leads to absurd results, punishing long-serving veterans with two separate and distinct qualifying periods of service, while putting certain non-veteran beneficiaries in a better position than those long-serving veterans themselves.

2. The Federal Circuit and the VA never articulated any plausible reason why Congress would have wanted the punitive, anti-veteran system that their interpretation of the Post-9/11 GI Bill creates, and the only limited instances of statutory context that the Federal Circuit addressed all cut against its reading. While the Federal Circuit claimed that Subsections 3327(f) and 3327(g) support its position, with all respect, the *en banc* court got it backwards.

Those provisions permit veterans who are exchanging Montgomery benefits for Post-9/11 benefits to recoup the portion of the monthly contributions they paid into the Montgomery program that corresponds to the months of Montgomery benefits transferred to Post-9/11 benefits, or to retain certain increased educational assistance despite the conversion. But veterans with separate qualifying periods of service have no reason to convert Montgomery benefits into Post-9/11 benefits, so these provisions provide further contextual support for Petitioner's interpretation.

C. Even if the statutory text and context were not so clearly in Petitioner's favor, the pro-veteran canon would settle this case for Petitioner. Under this canon, courts must construe veterans' benefits statutes in veterans' favor. Petitioner's reading is plainly the pro-veteran one, providing veterans with the right to use the benefits that they earned through longtime service in the order that best serves their education goals and honors their wartime service. The Federal Circuit's reading, on the other hand, puts these veterans to a choice, either of which is harmful to these veterans: either they must surrender all but 12 months of their wartime, Post-9/11 benefits, or they must give up their statutory right to receive a total of 48 months of benefits.

ARGUMENT

Courts must interpret statutes according to their text, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997), giving words their "ordinary meaning" unless "otherwise defined," *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006). Courts must read the statutory text in context, including "the text of the Act of Congress surrounding the [provisions] at issue," "the texts of other related congressional Acts," *Rowland v. Cal. Men's Colony*, 506 U.S. 194, 199 (1993), and the location of the provisions within the larger statutory scheme, *see Fla. Dep't of Rev. v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008). In reading statutes, courts endeavor to avoid "an absurd and unjust result which Congress could not have intended." *Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (citations omitted). Finally, the pro-veteran canon requires that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor," *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991), and "liberally construed to protect those who have been obliged to drop their own affairs and take up the burdens of the nation," *Boone v. Lightner*, 319 U.S. 561, 575 (1943). Applying these principles, this Court should reverse the Federal Circuit.

I. Veterans Who Have A Period Of Montgomery Qualifying Service And A Separate Period Of Post-9/11 Qualifying Service Have The Right To Use Their Benefits In The Order Of Their Choice, Up To The 48-Month Benefits Cap

A. The Montgomery GI Bill and the Post-9/11 GI Bill provide that veterans whose first period of service qualifies them for 36 months of Montgomery benefits and whose second period of service qualifies them for 36 months of Post-9/11 benefits are entitled to those benefits in whatever order the veterans choose, subject to the 48-month aggregate-use cap and the concurrent-use prohibition.

Section 3011 establishes how veterans earn Montgomery GI Bill benefits, which, by the program's design, arises out of veterans' first period of service. As relevant here, any "individual" is entitled to Montgomery benefits if that individual "*first* becomes a member of the Armed Forces or *first* enters on active duty as a member of the Armed Forces" during "the period beginning July 1, 1985, and ending September 30, 2030," 38 U.S.C. § 3011(a) (emphases added), so long as that individual serves "an obligated period of active duty" of two or three "continuous" years, depending on the particular enlistment contract, *id.* § 3011(a)(1)(A). If an individual meets those conditions and makes 12 required $100 monthly

contributions while in this first period of active duty, he "is entitled to basic educational assistance under [the Montgomery GI Bill]." *Id.* § 3011(a)–(b). Thus, veterans who served two or three continuous years after July 1, 1985, and made 12 monthly $100 contributions, are entitled to use 36 months of Montgomery benefits.

Section 3311 provides how veterans earn Post-9/11 benefits. An "individual" is entitled to the maximum amount of "educational assistance" under the Post-9/11 GI Bill if, among other requirements, the "individual . . . serves an aggregate of at least 36 months on active duty in the Armed Forces (including service on active duty in entry level and skill training)," beginning "on or after September 11, 2001." *Id.* § 3311(a)–(b). As a result, and as relevant here, any veterans who serve at least 36 months of active duty after the 9/11 terrorist attacks are eligible for 36 months of Post-9/11 benefits. As relevant, if this service is a second or subsequent period of service, that service will be eligible only for Post-9/11 program benefits, because only a veteran's initial periods of service can entitle them to Montgomery benefits. *Id.* § 3011(a)(1)(A).

For veterans who have earned both Montgomery and Post-9/11 benefits through separate periods of service, the only limitations on their use of those benefits are the 48-month aggregate-use cap and the

bar on concurrent use of benefits. Subsection 3695(a) provides that the "aggregate period for which any person may receive assistance under two or more" specified GI Bill programs "may not exceed 48 months." *Id.* § 3695(a). Subsection 3695(a) includes both the Montgomery GI Bill and the Post-9/11 GI Bill in the list of programs to which the 48-month total limitation applies. *Id.* § 3695(a)(4). Further, under Subsection 3322(a), any "individual entitled to educational assistance under [the Post-9/11 program] who is also eligible for educational assistance under [the Montgomery program, among others,] may not receive assistance under two or more such programs concurrently." *Id.* § 3322(a).

This statutory regime gives such multiple-period-of-service veterans the right to utilize their Montgomery and Post-9/11 benefits in whatever order they deem best for their educational purposes, just as veterans have always been able to do when they have two separate periods of qualifying service. *See supra* pp.12–13. So long as such veterans comply with the bar on concurrent benefits usage, 38 U.S.C. § 3322(a), and the 48-month aggregate-use cap, *id.* § 3695(a), they can use their Montgomery and Post-9/11 benefits in whatever order they deem best.

B. Petitioner is entitled to receive 36 months of Montgomery benefits for his first period of qualifying service and 36 months of Post-9/11 benefits for his

subsequent periods of qualifying service. Further, he may use those benefits in whatever order he chooses, subject only to the 48-month aggregate-use cap and concurrent-use bar. Petitioner first entered active duty in January 2000, made 12 monthly $100 payments into the Montgomery program, and was honorably discharged in June 2002, *see* Pet.App.81a–82a, thus qualifying for all 36 months of benefits under the Montgomery GI Bill for this first period of service, *see* 38 U.S.C. § 3011(a). Petitioner returned to active duty in June 2004, serving until December 2005, Pet.App.82a, and he returned again for a third time in November 2007, serving until August 2011, Pet.App.82a. Petitioner thus completed more than the required 36 aggregate months of service in the post-9/11 era to establish full entitlement to all 36 months of Post-9/11 benefits. *See* 38 U.S.C. § 3311(a)–(b). Because Petitioner has already used 25 months and 14 days of Montgomery benefits for his undergraduate education, *supra* pp.25–26, he is limited to receipt of 22 months and 16 days of Post-9/11 benefits, under the 48-month cap, *supra* pp.11–13.

II. Section 3327 Does Not Require Such Veterans To Surrender All But 12 Months Of Wartime Post-9/11 Benefits To Exercise Their Right To 48 Months Of Benefits

Notwithstanding the fact that Petitioner only wanted to use the Post-9/11 benefits that he earned through a separate period of qualifying service, *see* JA1a–7a, the Federal Circuit adopted the VA's position that Petitioner must make an election under Subsection 3327(a) to use any Post-9/11 benefits, unless he first uses up all 36 months of his separately earned Montgomery benefits. A Subsection 3327(a) election would, in turn, trigger the provision in Subsection 3327(d) that "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], as of the date of the election." 38 U.S.C. § 3327(d)(2)(A). Under the Federal Circuit's holding, therefore, veterans like Petitioner must either give up their statutory right to 48 months of benefits or limit their usage of Post-9/11 benefits to only 12 months. The reason that neither the Federal Circuit nor the VA have been able to articulate why Congress would have wanted to enact such a byzantine, nonsensical, anti-veteran regime is simple: Congress did not do so.

A. The Statutory Text Does Not Require Veterans To Make A Subsection 3327(a) Election To Use Their Post-9/11 Benefits In The Order Of Their Choice

1. Petitioner prevails on the Question Presented because, as a threshold and entirely dispositive matter, the Subsection 3327(a) election mechanism is voluntary. For veterans who do not want to participate in Section 3327's mechanism of converting their Montgomery benefits to Post-9/11 benefits, those veterans can simply make no Subsection 3327(a) election. Veterans in Petitioner's position—having a second qualifying period of service that already entitles them to the statutory maximum of 36 months of Post-9/11 benefits—would have no reason to make such an election. After all, their entitlement to the maximum 36 months of Post-9/11 benefits from their second period of qualifying service would make any conversion unnecessary, since a veteran cannot ever be entitled to more than 36 months of Post-9/11 benefits. Such veterans can use the benefits they are entitled to under Sections 3011 and 3311, respectively, in whatever order they want, subject to the 48-month aggregate-use cap. *See supra* pp.11–13.

Subsection 3327(a)'s plain text dictates this conclusion. That subsection provides, as relevant here, that "[a]n individual *may elect* to receive educational assistance under this chapter if such

individual" falls within any of several categories of veterans who are entitled to Montgomery benefits based upon a single period of service. 38 U.S.C. § 3327(a)(1) (emphasis added). By using the term "may," Congress made this provision voluntary, meaning that veterans never need to make an election under Subsection 3327(a), unless they want to. *See Biden v. Texas*, 142 S. Ct. 2528, 2541 (2022) ("This Court has 'repeatedly observed' that 'the word "may" *clearly* connotes discretion.'" (quoting *Opati v. Republic of Sudan*, 140 S. Ct. 1601, 1609 (2020)). Again, veterans like Petitioner have no need to use Subsection 3327(a)'s election mechanism because they earned 36 months of Post-9/11 benefits from a second, separate period of qualifying service, consistent with the plain terms of Subsections 3311(a)–(b)(1)(A) and 3312(a).

2. While the Federal Circuit based its conclusion on a myopic focus on Subsections 3327(a) and 3327(d), to the exclusion of all statutory text and context discussed below, *see infra* Part II.B, the Federal Circuit's holding fails even on its own terms.

To understand the Federal Circuit's holding, it is important first to articulate the role that Subsection 3327(a) plays under the Federal Circuit's approach. Everyone agrees that many veterans can use their Post-9/11 benefits under Section 3311 itself, without ever making an election under Subsection 3327(a).

For example, it is undisputed that if a veteran earns 36 months of Montgomery benefits with a first period of qualifying service and then uses all 36 months of those benefits, and if that veteran also has a second period of qualifying service entitling him to 36 months of Post-9/11 benefits, he can then use 12 months of those benefits—thus reaching the 48-month total benefit cap—without ever making a Subsection 3327(a) election. *See* BIO 3, 11, 13–14. Accordingly, the Federal Circuit's position must be that veterans with two periods of qualifying service, entitling them to Montgomery and Post-9/11 benefits, respectively, must make an election under Subsection 3327(a) to be able to use the Post-9/11 benefits, but only if those veterans have some entitlement to Montgomery benefits still remaining.

The Federal Circuit's attempt to rewrite the Subsection 3327(a) election (and thus Subsection 3327(d)) as mandatory only for veterans having some unused Montgomery benefits fails as a matter of Subsection 3327(a)'s text. Again, Subsection 3327(a) provides that "[a]n individual [described in the various subsections within Subsection 3327(a)] *may elect* to receive educational assistance under [the Post-9/11 GI Bill]." 38 U.S.C. § 3327(a) (emphasis added). The Federal Circuit would redraft that text to something like the following:

> An individual [described in the various subsections within Subsection 3327(a)] **[must make an election under this Subsection as a necessary predicate for]** receiv[ing] educational assistance under [the Post-9/11 GI Bill].

38 U.S.C. § 3327(a) (Federal Circuit's revision in bold and underline). That is not at all what Subsection 3327(a) says. Subsection 3327(a), instead, offers a voluntary ("may") mechanism for certain veterans who wish to convert their Montgomery benefits into more generous, wartime Post-9/11 benefits, and does not impose a condition on veterans using separately earned Post-9/11 benefits.

Relatedly, the Federal Circuit erred in placing emphasis on the fact that Subsection 3327(a) does not state that its election mechanism is limited to veterans with only a single period of service. *See* Pet.App.15a. The Federal Circuit's reasoning on this score misunderstands the nature and amount of the benefits that veterans like Petitioner have earned. Again, veterans with separate qualifying periods of service that entitle them to Montgomery and Post-9/11 benefits, respectively, have no reason whatsoever to "elect" to receive benefits via the Post-9/11 GI Bill under Subsection 3327(a). That is because those veterans have already earned the right to receive the maximum of 36 months of such benefits

by virtue of their second qualifying period of service. 38 U.S.C. § 3311.[19]

B. The Statutory Context Further Shows That Subsection 3322(d) And Section 3327 Simply Give Veterans The Option Of Turning Montgomery Benefits Into Post-9/11 Benefits

While the Federal Circuit is wrong as to Subsection 3327(a)'s text, as explained immediately above, the Federal Circuit's failure to account for

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[19] While the VA relied at the certiorari stage on Petitioner's completion of VA Form 22-1990, *see* BIO 10, 13–14, to assert that he made an "election" under Subsection 3327(a), the VA forfeited that meritless argument below. As the VA conceded below, Petitioner's completion of VA Form 22-1990 is irrelevant if Petitioner is correct on his interpretation of Sections 3322 and 3327 because "if the legal position that the form took was wrong," then "the signing of the form doesn't have an impact." Oral Argument at 33:29–36:23, *BO v. Wilkie*, No.16-4134 (Vet. App. May 2, 2018), available at uscourts.cavc.gov/documents /BO.mp3. That concession is, of course, correct. VA Form 22-1990 erroneously requires all veterans eligible for both Montgomery GI Bill and Post-9/11 GI Bill benefits "to give up eligibility under the [Montgomery] program . . . to receive benefits under the Post-9/11 GI Bill," SA8, based upon the VA's erroneous interpretation of the applicable statutory provisions at issue here. The VA cannot rewrite the statutory text to veterans' detriment by adopting a mandatory form under its own misunderstanding of the law.

statutory context provides further reason to reject its position. *See Rowland*, 506 U.S. at 199; *Piccadilly Cafeterias*, 554 U.S. at 47. The statutory context of the Post-9/11 GI Bill, in general, and Sections 3322 and 3327, in particular, make clear that Congress designed Subsection 3327(a) as part of an equitable, voluntary mechanism that assists veterans who want to turn their Montgomery benefits (earned from a "first" period of service after June 30, 1985) into more generous Post-9/11 benefits, while recouping payments they made into the Montgomery program. This makes clear that Congress did not adopt Sections 3322 and 3327 to place an unprecedented penalty on veterans who have no need to exchange their Montgomery benefits for Post-9/11 benefits because they also earned the maximum 36 months of Post-9/11 benefits through a subsequent period of service.

1. Congress enacted the Post-9/11 GI Bill to reward veterans who served in the difficult post-9/11 wartime era. Recognizing that the Montgomery GI Bill was "outmoded and designed for peacetime service," Congress enacted the Post-9/11 GI Bill to be commensurate with this "arduous" wartime service and to "provide veterans who serve on active duty in the Armed Forces after September 11, 2001, with enhanced educational assistance benefits that are worthy of such service." 38 U.S.C. § 3301 note. This is unlike Montgomery benefits, which provide a modest, fixed monthly stipend for up to 36 months,

designed "to help meet, in part," the costs of tuition, books, and fees. *Id.* §§ 3013(a)(1), 3014(a). Post-9/11 benefits give wartime veterans the actual net cost for in-state tuition and fees, public-private cost-sharing to cover excess tuition and fees at private institutions, a variable monthly stipend based on the location of the school's campus, an annual lump sum for books, one-time relocation costs, and reimbursement for testing and professional licensing. *Id.* §§ 3313(c)(1)(A)–(B), 3315, 3316, 3317, 3318; 38 C.F.R. § 21.9640(b)(1)(i)–(iii). Further, Congress enacted the Post-9/11 GI Bill to apply retroactively from its August 1, 2009, effective date, such that veterans who served after September 11, 2001, could receive more generous benefits. 38 U.S.C. § 3311.

The retroactive nature of the Post-9/11 GI Bill created a need to establish some mechanism by which veterans eligible for Montgomery benefits could upgrade those benefits to more generous benefits under the Post-9/11 GI Bill. In other words, for veterans who earned Montgomery eligibility with post-9/11 service, Congress saw the need to allow them to reallocate their qualifying service to a more generous benefits package and recoup the out-of-pocket contributions they had paid into the more modest peacetime program.

Subsection 3327(a) is part of that mechanism, which begins in Subsection 3322(d). By its title,

Section 3322 operates to impose a "[b]ar to duplication of educational assistance benefits." 38 U.S.C. § 3322 (title); *see Yates v. United States*, 574 U.S. 528, 539–40 (2015) (plurality op.). Consistent with that design, provisions within Section 3322 prohibit "concurrent[ ]" receipt of benefits under "two or more . . . programs," 38 U.S.C. § 3322(a), and establish how certain veterans can "coordinat[e]" existing benefits into the newer Post-9/11 program, *id.* § 3322(d). In particular, Subsection 3322(d)—titled "Additional Coordination Matters"—provides that "in the case of an individual entitled to educational assistance" under the Montgomery GI Bill, among others, "as of August 1, 2009, coordination of entitlement to educational assistance under [the Post-9/11 GI Bill], on the one hand, and [the Montgomery GI Bill], on the other, shall be governed by the provisions of section 5003(c) of the Post-9/11 Veterans Educational Assistance Act of 2008," a Statutory Note to the Public Law, now codified at Section 3327. *Id.* § 3322(d). The "in the case of" language, *id.*, indicates that there would be other cases, such as the cases of long-serving veterans that qualify for Post-9/11 benefits through separately qualifying service, and thus would have no need to "coordinate" Montgomery benefits into Post-9/11 benefits in order to receive the latter.

As cross-referenced in Subsection 3322(d), Section 3327 provides that veterans entitled to Montgomery benefits "as of August 1, 2009," "may elect" to

equitably exchange them for Post-9/11 benefits at a 1:1 ratio, assuming such veterans otherwise qualify for the Post-9/11 GI Bill. *Id.* § 3327(a), (c)–(d). Subsections 3327(a) and (d), working together, thus allow veterans with qualifying service after the 9/11 terrorist attacks, to begin using Post-9/11 GI Bill benefits "instead of basic educational assistance under chapter 30," the Montgomery GI Bill. *Id.* § 3327(d)(1). Subsection 3327(d) specifies that such veterans will retain the same number of months of total entitlement—*e.g.*, if a hypothetical veteran had 20 months of entitlement to Montgomery benefits remaining, he could exchange them for 20 months of Post-9/11 benefits. *Id.* § 3327(d)(2). Subsection 3327(f) then closes the loop on this exchange process, ensuring that those benefits-exchanging veterans receive a refund of their $100 monthly Montgomery contributions in an amount equivalent to the proportion of Montgomery benefits converted to Post-9/11 benefits. *Id.* § 3327(f). This guarantees that veterans who exchange their benefits for Post-9/11 benefits need not make a financial contribution, which Congress did not require of wartime veterans under the Post-9/11 GI Bill. But, again, veterans with a separate qualifying period of service that entitles them to Post-9/11 benefits have no reason to make such a benefits exchange, rendering this mechanism unnecessary and thus irrelevant as to them.

Put another way, Subsection 3322(d) and Section 3327 work together to allow certain veterans to opt *out* of the Montgomery program and opt *in* to the more generous Post-9/11 program, while (1) allowing those veterans to recoup a proportional amount of the $100 monthly payments they previously made into the Montgomery program for the months converted to Post-9/11, and (2) restricting the trade to a 1:1 ratio to ensure that veterans will not "double dip" and obtain more months of benefits than their service entitled them. *Supra* pp.18–23. These aspects of the Post-9/11 program strongly indicate that Congress designed Subsection 3327(a)'s election mechanism to ensure that individuals seeking to recredit their Montgomery-eligible period of service to the Post-9/11 program could elect to receive these more capacious benefits instead.

The text of related provisions further refutes any notion that Section 3327's election option is relevant for veterans who earned their Post-9/11 benefits with a second period of service. Subsection 3322(d) is the only provision that "directs" to Subsection 3327(a), but Section 3322, by its header, relates to a "[b]ar to duplication of educational assistance benefits," 38 U.S.C. § 3322, showing that Congress was seeking to prohibit "'duplication' or double-dipping" of education benefits based upon a single period of service. Pet.App.102a; *see Merit Mgmt. Grp., LP v. FTI Consulting Grp., Inc.*, 138 S. Ct. 883, 893 (2018).

Veterans with separate qualifying periods of service are not at risk of "double-dipping" because they earned benefits under both programs based on separately qualifying service periods.

Multiple other statutory provisions within the Post-9/11 GI Bill show that Congress contemplated veterans obtaining and holding both Montgomery and Post-9/11 benefits with separate and distinct periods of service, further refuting the Federal Circuit's holding. *See Rowland*, 506 U.S. at 199. Congress permitted such multi-period-of-service veterans to: use their separately established entitlements consecutively, but not concurrently, 38 U.S.C. § 3322(a); and use their separately established entitlements up to a 48-month aggregate-use cap, *id.* § 3695(a). Under the Federal Circuit's interpretation that all veterans must first forfeit or exhaust unused Montgomery benefits to receive Post-9/11 benefits, these various provisions simply "lose[ ] force as a practical matter." Pet.App.117a. For example, the Federal Circuit's view locks veterans wishing to use the maximum 48 months of benefits into "only a single route" to the maximum benefit—first exhaust 36 months of the much less-generous, peacetime Montgomery benefits, and then use only 12 months of the more generous, wartime Post-9/11 benefits—which renders Subsection 3322(a)'s authorization of consecutive use of benefits partially superfluous. Pet.App.124a & n.13. Further, under the Federal

Circuit's reading, a veteran cannot switch from his Post-9/11 benefits to his Montgomery benefits, although that is "clearly" contemplated by Subsection 3322(a) and the VA's regulations, since the VA would have him exhaust his Montgomery benefits before receiving Post-9/11 benefits. Pet.App.121a–23a.[20]

Finally, the Federal Circuit's holding produces "an absurd and unjust result which Congress could not have intended," *Clinton*, 524 U.S. at 429 (citation omitted), further supporting Petitioner's reading. The Federal Circuit's interpretation of the Montgomery and Post-9/11 programs punishes long-serving veterans who have two separate and distinct qualifying service periods by forcing them to choose between giving up their statutory right to 48 months of benefits, or forcing them to use only 12 months of the generous Post-9/11 benefits that they earned.

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[20] As noted above, *supra* p.24, the VA's regulations promulgated under the Post-9/11 GI Bill recognize that veterans can utilize separate programs alternatively or consecutively by "specify[ing] under which program her or she is claiming benefits" on a school-term-by-term basis, 38 C.F.R. § 21.7143(b); can choose to receive Post-9/11 benefits multiple times so long as "not more than once during a certified term, quarter, or semester," *id.* § 21.4022; and can even "choose to" alternate back and forth between benefits programs at certain intervals, "effective the first day of the enrollment period during which" such choice is made, *id.* § 21.9635(w).

Indeed, the Federal Circuit's position as to multiple-period-of-service veterans is so absurd that some of these veterans would receive more restrictive Post-9/11 benefit options than their non-veteran beneficiaries. Under Subsection 3322(g), "[a] spouse or child who is entitled to educational assistance under [the Post-9/11 GI Bill] based on a transfer of entitlement from more than one individual . . . may not receive assistance based on transfers from more than one such individual concurrently, but shall elect (in such form and manner as the Secretary may prescribe) under which source to utilize such assistance at any one time." 38 U.S.C. § 3322(g). This allows veterans to provide a spouse or child many months of accrued education benefits, not to exceed 36 months per veteran donated. *Id.* § 3319(d). In the aggregate, these provisions allow for a non-veteran beneficiary to receive in excess of 36 months, *id.*, limited by the prohibition that the beneficiary cannot "receive assistance based on transfers from more than one such individual concurrently," and instead must "elect . . . under which source to utilize such assistance at any one time," *id.* § 3322(g), with no limitation, even under the Federal Circuit's reading. Thus, under the Federal Circuit's interpretation, Congress required the absurd result that non-veteran beneficiaries could alternate between entitlement sources to maximize their benefits, but veterans themselves must comply with an exhaust-or-forfeit requirement, limiting their freedom to receive the

benefits they earned through separate periods of service in the order that best serves them.

2. The Federal Circuit and VA have never been able to articulate even a plausible reason why Congress would have wanted to create the punitive regime that they read into the Post-9/11 GI Bill, while also largely ignoring the entirety of the context of Sections 3322 and 3327, discussed above.

The Federal Circuit's only contextual argument—that its reading allows multiple-period-of-service veterans like Petitioner to have access to Subsections 3327(f) and 3327(g), Pet.App.15a–16a—does not help its position. These subsections are part of Congress' generous benefits regime in the Post-9/11 GI Bill for veterans who turn their Montgomery benefits into Post-9/11 benefits, and thus support Petitioner's account of Section 3327's function, as described above. *See supra* Part II.A.

Consider first Subsection 3327(f), which allows veterans who are exchanging their Montgomery benefits for Post-9/11 benefits to recoup the portion of their monthly contributions related to their now-converted Montgomery benefits, 38 U.S.C. § 3327(f), an amount that cannot exceed $1,200, *id.* § 3011(b)(1). Read in context, Subsection 3327(f) simply allows veterans who want to exchange their Montgomery benefits for Post-9/11 benefits to opt out fully from the

Montgomery program by getting back money that they paid into the program. This reinforces Petitioner's understanding of Section 3327 as simply a pro-veteran, voluntary, benefits-exchange option, which those who have separately earned 36 months of Post-9/11 benefits would have no reason to use. *See supra* pp.43–47. As to whether such a reading benefits all relevant veterans in light of Subsection 3327(f), which appears to be the Federal Circuit's concern, Pet.App.15a–16a, under Petitioners' reading, multiple-period-of-service veterans get a much better deal than under the Federal Circuit's view. Such veterans get to use 48 months of total benefits (or, if relevant, pass the unused portion of those benefits to their spouses or children, 38 U.S.C. § 3319), and do not have to limit their usage of their generous, wartime Post-9/11 benefits to just 12 months. Petitioner's position thus easily swamps whatever financial upside to veterans the Federal Circuit saw in its reading of Subsection 3327(f).

And Subsection 3327(g) simply provides that veterans who convert benefits from Montgomery to Post-9/11 shall not lose any "increased educational assistance or supplemental educational assistance" by doing so. *Id.* § 3327(g). The Post-9/11 GI Bill has an identical mechanism for the service branch secretaries to offer an "increase [in] the monthly amount of educational assistance" certain skilled or specialty veterans may receive, *id.* § 3316(a),

rendering Subsection 3327(g)'s savings clause unnecessary for veterans who are *separately* entitled to benefits under the Post-9/11 program and can qualify for increased assistance through Subsection 3316(a), rather than Subsection 3015(d), as maintained by Subsection 3327(g)'s savings clause.

C. The Pro-Veteran Canon Resolves Any Doubt In Veterans' Favor

1. The pro-veteran canon provides that veterans' benefits statutes must "be liberally construed to protect those who have been obliged to drop their own affairs and take up the burdens of the nation." *Boone*, 319 U.S. at 575. Courts must "construe the separate provisions" of veterans' legislation "as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as harmonious interplay of the separate provisions permits." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). Following these general rules, this Court has refused to find that veterans' benefits statutory provisions "carry" "harsh consequences" in the absence of "clear indication" of Congress' intent in the

statutory language. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 441 (2011).[21]

2. As explained above, the statutory text and context require Petitioner's interpretation. *See supra* Parts II.A–B. But even if this Court were to find any ambiguity in the statutory scheme, this Court should resolve such ambiguity in favor of Petitioner, consistent with the pro-veteran canon's mandate that veterans' benefits statutes "be liberally construed to protect those who have been obliged to drop their own affairs and take up the burdens of the nation." *Boone*, 319 U.S. at 575. Indeed, as the Court of Appeals for Veterans Claims aptly stated, if the pro-veteran canon "would ever have a real effect on an outcome, it would be here." Pet.App.127a.

Petitioner's position is plainly the pro-veteran one. Petitioner reads the Post-9/11 GI Bill as providing additional, far-more-generous benefits to veterans who serve after September 11. Veterans who have served beyond the initial two or three years required for Montgomery entitlement and whose

[21] Petitioner is not even the first member of his extended family to encounter the venerable pro-veteran canon. Citing *Boone* and *Fishgold*, the Court of Appeals for the Fourth Circuit held that George Kerr Rudisill, a distant cousin of Petitioner, was entitled to reappointment to a civilian railway job when he returned from voluntary service in World War II. *Rudisill v. Chesapeake & Ohio Ry. Co.*, 167 F.2d 175, 179 (4th Cir. 1948).

additional service occurred in the post-9/11 era may utilize their subsequent periods of service to establish Post-9/11 GI Bill entitlement, and may use a combination of Montgomery and Post-9/11 benefits in whatever order best serves their needs, limited only by the 48-month aggregate-use cap in Section 3695, 38 U.S.C. § 3695(a), and the concurrent-use bar, *id.* § 3322(a). This reading is beneficial to veterans because the Post-9/11 benefits are so much more generous than the Montgomery benefits, and Petitioner's reading allows veterans to maximize their usage of those Post-9/11 benefits, including obtaining a total of 48 months of benefits (or, for example, passing such benefits to their children). The Federal Circuit's reading, on the other hand, takes this option away from these veterans, forcing them either to give up their statutory right to 48 months of aggregate benefits or to give up all but 12 months of the more generous wartime benefits that they earned with wartime service after the September 11 attacks.

CONCLUSION

This Court should reverse the Federal Circuit.

Respectfully submitted,

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