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*

## REPLY BRIEF FOR PETITIONER


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## INTRODUCTION

Petitioner has presented a straightforward interpretation of the Post-9/11 GI Bill, grounded in the statutory text and context. Veterans who have earned 36 months of peacetime Montgomery benefits through their first period of service and 36 months of wartime Post-9/11 benefits through their second period of qualifying service have the right to use the Post-9/11 benefits that they earned under 38 U.S.C. § 3311, as Subsection 3312(a) makes clear. Section 3327, in turn, has no relevance for such veterans because that provision provides only an optional ("may elect") mechanism for trading Montgomery benefits for Post-9/11 benefits, at a 1:1 ratio. Veterans who have already earned the right to use 36 months of Post-9/11 benefits have no reason to make this election because they already have the right to use the maximum of Post-9/11 benefits.

Respondent ("VA"), on the other hand, has put forward an increasingly convoluted rewriting of the statutory text, while now hypothesizing for the first time a series of unconvincing reasons why Congress would have adopted a historically unprecedented exhaust-or-forfeit scheme. The VA concedes that veterans with a second period of qualifying service can use the Post-9/11 benefits that they earned under 38 U.S.C. § 3311, without making a Subsection 3327(a) election, at least in some circumstances. Yet the VA argues that when Subsection 3327(a) says that veterans "may elect" Post-9/11 benefits, that really

means that veterans "must elect" if they want to use such benefits, but only if they have not already first exhausted their Montgomery benefits. No text in Section 3327 contains this "some veterans but not others must elect Post-9/11 benefits" provision, which would be unprecedented in the long history of GI Bills. The VA's interpretation also is neither suggested nor supported by any of the VA's belatedly raised contextual arguments, including the VA's lead (but self-defeating) attempt to equate Subsection 3327(a)'s voluntary "may elect" clause with Subsection 3322(a)'s mandatory "shall elect" clause. The VA offers no sensible explanation for why Congress would have wanted to embed an exhaust-or-forfeit regime in the Post-9/11 GI Bill, as the VA's unconvincing invocation of costs, administrability, and retention well illustrates. Instead, Congress specifically found that post-9/11-era veterans' "especially arduous" service should entitle them to "enhanced educational assistance benefits that are worthy of such service," and not the "outmoded" Montgomery GI Bill benefits. 38 U.S.C. § 3301 note.

Finally, while Petitioner believes that his interpretation is correct as a matter of statutory text, if this Court concludes that the VA has sewn any doubts, this would be an ideal case for resolution under the pro-veteran canon. As multiple *amici* veterans' organizations have shown, this canon is part of the background against which Congress enacts

veterans' benefits laws, notwithstanding the VA's effort to denigrate this venerable doctrine as violating the Appropriations Clause. If the canon is ever to have a practical meaning, it would preclude the VA from imposing its anti-veteran, exhaust-or-forfeit regime through the type of byzantine statutory arguments that the VA has put forward here.

This Court should reverse the Federal Circuit.

## ARGUMENT

### I. The VA's Rewriting Of Subsection 3327(a)'s "May Elect" Clause To "Must Make An Election To Receive Benefits, But Only For Veterans Who Do Not First Exhaust Their Montgomery Benefits" Is Atextual

A. Petitioner in his Opening Brief explained that veterans with two periods of qualifying service under the Montgomery GI Bill and the Post-9/11 GI Bill have already earned the statutory maximum of both sets of benefits, which they have the right to use up to Subsection 3695(a)'s 48-month aggregate cap, without any need to resort to Subsection 3327(a)'s voluntary-election option. Br.14–23, 38–41. These veterans earned the right to use the maximum of 36 months of peacetime Montgomery benefits under 38 U.S.C. § 3011 by completing their first period of service and making 12 monthly contributions of $100,

as Subsection 3013(a) makes clear. *Id.* §§ 3011(a)(1)(A)(i), (b)(1), 3013(a)(1); Br.38–39. These veterans have also earned the right to use the maximum of 36 months of wartime Post-9/11 benefits by completing an additional 36 months of active-duty service in the post-9/11 era under 38 U.S.C. § 3311, as Subsection 3312(a) makes clear. *Id.* §§ 3311(b)(1)(A), 3312(a), 3013(a)(1).[1] The only relevant limits on these veterans' *use* of these earned benefits are that, under Subsection 3695(a), they may not use more than 48 months of total education benefits, 38 U.S.C. §§ 3695(a), 3013(a), 3312(a), and, under Subsection 3322(a), they may not use more than one set of benefits at a time, *id.* § 3322(a). Br.39–40.

Petitioner also explained that Subsection 3327(a)'s voluntary-election mechanism has no relevance for these veterans. Br.44–47. Section 3327 provides a mechanism through which certain veterans "*may* elect to receive" Post-9/11 benefits in exchange for their Montgomery benefits, at a 1:1 ratio, while receiving back a proportional share of their Montgomery contributions. 38 U.S.C. § 3327(a), (c)–(d) (emphasis added); Br.19–22, 42–58. For veterans who already have earned the right to 36

[1] Contrary to the VA's mischaracterization of Petitioner's position, Resp.18–19, a veteran may serve this additional period either immediately following the completion of the veteran's first period or after a break from active duty, Br.16–18, 39.

months of Post-9/11 benefits with their second period of service, engaging in this voluntary exchange is unnecessary, and makes no sense because no veteran can use more than 36-months of Post-9/11 benefits.

B. In its Response Brief, the VA does not dispute much of Petitioner's account of this statutory scheme. The VA concedes that the Montgomery program and the Post-9/11 program both offer 36 months of benefits for each respective period of qualifying service. Resp.2–3. The VA also concedes that Section 3327 permits veterans to exchange their Montgomery benefits for Post-9/11 benefits, at a 1:1 ratio. Resp.4. Further, the VA admits that no veteran has to make a Subsection 3327(a) election. Resp.4. And while the VA criticizes Petitioner for arguing that Subsection 3695(a) confers a "statutory right" to receive 48 months of benefits, Resp.23–24, the VA does not dispute the relevant point as to this provision: veterans who earned the right to use 36 months of Montgomery benefits with their first period of service and then earned the right to use 36 months of Post-9/11 benefits through their second period of service, have a right to 48 months of benefits. *Compare* Br.39–40, *with* Resp.17.

Importantly, the VA also concedes that veterans with two periods of qualifying service can use Post-9/11 benefits that they earned with their second period of service under Section 3311, without making

a Subsection 3327(a) election. Resp.17. The VA makes this concession in an oblique manner, arguing that Petitioner could have "avoided" Section 3327—including the limits in Subsection 3327(d)—and still used his Post-9/11 benefits by first exhausting his Montgomery benefits and then using his Post-9/11 benefits. Resp.17–18. Of course, the VA's exhaustion idea finds no textual support. *Infra* Part.I.C. The critical point, however, is that the VA admits that a Subsection 3327(a) election is not a precondition for using Post-9/11 benefits. *See* Resp.17–18.[2]

The VA's concession on this point should be the end of this case. As Petitioner explained, a veteran's right to *use* Post-9/11 benefits flows directly from his having *earned* those benefits under Section 3311, as Subsection 3312(a) makes clear, Br.39, a point that the VA cannot and does not dispute. Petitioner is

[2] The VA had to make this concession because the contrary position—that a veteran may only use his Post-9/11 benefits by making a Subsection 3327(a) election—would produce atextual and "absurd," intolerable results. *Clinton v. City of New York*, 524 U.S. 417, 429 (1998). In addition to conflicting with Subsection 3327(a)'s voluntary "may" language, this position would lead to the absurd consequence that a veteran who used 36 months of Montgomery benefits before 2009, the effective date for the Post-9/11 GI Bill, would never have access to the Post-9/11 program, even if that veteran had an additional period of qualifying service after September 11, 2001. That is because that veteran would not fall into any of the categories listed in Subsection 3327(a).

merely asserting his right to use his Post-9/11 benefits that he earned under Section 3311, which would entitle him to 22 months and 16 days of Post-9/11 benefits because that is how many months he has remaining under his 48-month cap. Br.41.

C. The VA attempts to salvage its case with the following clumsy statutory-redrafting maneuver: although veterans *generally* have the statutory right to use Post-9/11 benefits without making a Subsection 3327(a) election in light of Section 3311, *if* a particular veteran holding Montgomery benefits has not yet exhausted those benefits, *then* that veteran must make a Subsection 3327(a) election to use his Post-9/11 benefits, thereby revoking his remaining Montgomery entitlement under Subsection 3327(d)(2). Resp.15–16. That makes no textual sense. The VA concedes that a veteran who has earned Post-9/11 benefits through a second period of service can use those benefits without making a Subsection 3327(a) election. *Supra* pp.5–6. No statutory text in Section 3327 or elsewhere even arguably *revokes* the right of a veteran with separately qualifying periods of service simply to *use* the benefits he earned under Section 3311 unless he first exhausts his Montgomery benefits. Br.43–47.

The VA is rewriting the statutory text. While Subsection 3327(a) says that a veteran "*may* elect" Post-9/11 benefits, what this really means—according

to the VA—is that the veteran "must elect" under Subsection 3327(a) to be able to use Post-9/11 benefits, but only if the veteran has not already exhausted his Montgomery benefits. *See* Resp.11–13 ("Because petitioner had used, but retained unused, Montgomery benefits, he could receive Post-9/11 benefits only by electing them under Section 3327."). That is not what Section 3327 says, and "this Court is not free to 'rewrite the statute' to the Government's liking.'" *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. 109, 123 (2018) (quoting *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 130 (2016)).

This is also why the VA's analogies—such as an airline telling its passengers that they "may elect to receive" a kosher meal in-flight, or a hotel telling its guests that they "may elect to receive" a wake-up call—do not get off the ground. Resp.12. There is often more than one way to establish the right to *use* a good or benefit. Thus, if certain airline passengers have already purchased kosher meals at the airport before boarding their flight, nothing about the airline telling them that they "may elect to receive" a kosher meal during in-flight service would prohibit them from eating their previously purchased kosher meals without making the in-flight election. That is because the passengers' purchase of the meals in the airport secured their right to eat the kosher meals at their

option.[3] To apply this analogy here, while veterans "may elect to receive" Post-9/11 benefits under Section 3327 by exchanging their remaining Montgomery benefits that they earned from a first period of qualifying service for Post-9/11 benefits under Section 3327 (like the airline passengers "may elect to receive" kosher meals in-flight), that does not revoke the veterans' right to *use* the Post-9/11 benefits that they earned through their second period of service without making a Section 3327 election (much like how the passengers' decision not to elect to receive kosher meals from the airline attendant does not preclude them from consuming the kosher meals that they bought before boarding).

The VA also spends page after page fighting against a straw-man argument, falsely claiming that Petitioner reads the phrase "single period of service" into Subsection 3327(a). Resp.18–23. That is not Petitioner's argument. Petitioner's point is as follows: "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" a Subsection 3327(a) election. Br.43. After all, trading

[3] Similarly, if the hotel front desk tells its guests that they "may elect to receive" a wake-up call, Resp.12, this does not preclude guests who arranged a wake-up call through another method from receiving such a call without making the election with the front desk.

Montgomery benefits for more Post-9/11 benefits would make no sense for someone who already had the entitlement to use the maximum 36 months of those benefits, based on a separate period of service.

So while Petitioner believes that Congress did not design Section 3327's benefits-exchange mechanism for veterans who already have a statutory right to the maximum amount of Post-9/11 benefits because of their second period of service, Petitioner does not argue that the statutory text forecloses NVLSP *Amici*'s view that "[v]eterans with multiple periods of service are free to elect to exchange their Montgomery benefits for Post-9/11 benefits under § 3327." *Amici* Br. of Nat'l Veterans Legal Servs. Program, *et al.* ("NVLSP *Amici* Br.") at 6 n.2. Rather, Petitioner's point is that these *Amici* (or the VA) would need to locate a veteran for whom that election would make sense for this possibility to have any relevance. After all, if a multiple-period-of-service veteran made a self-defeating Subsection 3327(a) election—for example, trading Montgomery benefits for Post-9/11 benefits based upon an erroneous belief that the veteran could then use 48 months of Post-9/11 benefits—the VA would have to reverse that election under Subsection 3327(h)(1).

Finally, the VA is incorrect to suggest that Petitioner's completion of the mandatory VA Form 22-1990, which required Petitioner to check a box stating

that he understood that he would receive Post-9/11 benefits "in lieu of" Montgomery benefits, supports its position. Resp.15–16, 17–18. As Petitioner pointed out in his Opening Brief, Br.47 n.19, the VA below conceded that Petitioner's completion of Form 22-1990 is irrelevant 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);[4] Br.47 n.19. The VA does not dispute its forfeiture of this issue below and, in any event, cannot adopt a mandatory form based upon a misreading of the law and then force veterans who wish to use Post-9/11 benefits to sign it. Br.47 n.19.

## II. The Statutory Context Further Supports Petitioner's Interpretation

A. As Petitioner also explained in his Opening Brief, the statutory context supports his interpretation of Section 3327. Br.47–58. When Congress enacted the Post-9/11 GI Bill in 2008 (effective August 2009), many veterans already had started using the peacetime Montgomery program benefits awarded for a period of service that now entitled them to more generous Post-9/11 benefits. Br.14–19, 48–51. Thus, Congress crafted Section

[4] Available at uscourts.cavc.gov/documents/BO.mp3 (last visited October 9, 2023).

3327's benefits-exchange provision, providing a voluntary mechanism through which veterans "may elect to receive" more generous Post-9/11 benefits in lieu of their peacetime Montgomery benefits, at a 1:1 ratio, while receiving back a proportional share of their monthly Montgomery contributions. 38 U.S.C. § 3327(a), (c)–(d); Br.19–23, 42–58. Various provisions within the Post-9/11 GI Bill confirm this understanding of the beneficial benefits-exchange regime. Several of those contextual provisions are in Section 3322, which is entitled "Bar to duplication of educational assistance benefits." Veterans who are using the Post-9/11 benefits earned with their second period of service are not in danger of duplicating their benefits. Br.19, 50, 52–53. For example, through Subsection 3322(a), Congress explicitly permitted multiple-period-of-service veterans to use their benefits under separate programs consecutively (but not concurrently) by choosing "which [program they wish] to receive educational assistance" from at any given time. Br.53. And in Subsection 3322(d), Congress pointed veterans who want to "coordinat[e]" their entitlement to Montgomery and Post-9/11 benefits to Section 3327. Br.20.

Petitioner also explained that the VA's contrary interpretation would create a nonsensical and punitive regime that Congress certainly did not intend. Br.54–56. Under the VA's interpretation, any long-serving veterans who maintain entitlement to

both Montgomery and Post-9/11 benefits based upon separate qualifying periods of service must either exhaust all 36 months of their peacetime Montgomery benefits before using only 12 months of wartime Post-9/11 benefits, or forfeit any remaining Montgomery benefits and then use no more than 36 months of Post-9/11 benefits (or less than 36 months of Post-9/11 benefits, if they had already used some Montgomery benefits). Br.54–55. The VA below offered no reason why Congress would have wanted to impose this unprecedented, punitive regime on veterans, when creating a new program of "enhanced" benefits that Congress specifically intended to be commensurate with the "especially arduous" nature of active-duty service in the post-9/11 era. Br.48, 56 (quoting 38 U.S.C. § 3301 note).

B. The contextual arguments that the VA makes in its Response Brief are unconvincing.

*First*, the VA's reliance on Subsection 3322(a)'s election provision as contextual support for its position, Resp.13–14, backfires (even putting aside that the VA ignores entirely Petitioner's contextual argument based upon that same Subsection, Br.53–54). That Subsection provides, in relevant part, that "[a]n individual entitled to educational assistance under [two or more GI Bill programs] *may not* receive assistance under two or more such programs concurrently, but *shall elect* . . . under which chapter

or provisions to receive educational assistance." 38 U.S.C. § 3322(a) (emphases added). The Montgomery GI Bill has for decades contained a virtually identical provision, providing under Subsection 3033(a) that a veteran qualified for Montgomery educational benefits and other benefits programs "may not receive assistance under two or more of such programs concurrently but *shall elect* . . . under which program to receive educational assistance." 38 U.S.C. § 3033(a)(1).

This all strongly supports Petitioner's position. Under Subsection 3322(a) (and Subsection 3033(a)), a veteran like Petitioner—who is entitled to receive GI Bill benefits under two programs—cannot receive two types of benefits at once, but *must* ("*shall*") "elect" under which program the veteran will receive benefits at any one time. In contrast, Subsection 3327(a) provides, in relevant part, 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). When Congress "distinguishes between 'may' and 'shall,' it is generally clear that 'shall' imposes a mandatory duty," while "may" allows for the "exercise [of] discretion." *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1321 (2020); *accord Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004). Accordingly, Subsection 3322(a)'s (and Subsection

3033(a)'s) use of mandatory language ("shall") regarding a veteran's requirement to elect which of multiple education benefits to use at any one time further underscores the permissive nature of Subsection 3327(a)'s optional ("may") election, which allows veterans to trade their Montgomery benefits for Post-9/11 benefits.

*Second*, the VA interprets the word "coordination" in Subsection 3322(d)—which the VA would define as "bring[ing] into proper order or relation," Resp.14 (quoting Webster's New World College Dictionary 320 (4th ed. 2009))—to suggest, as a matter of context, that any time a veteran is entitled to both Montgomery and Post-9/11 benefits, the veteran is subject to Subsection 3327(d)'s limit. Resp.14–15. The VA is wrong as to both the premise and conclusion of its argument, which argument is also inconsistent with the VA's position as to multiple-period-of-service veterans who exhaust their Montgomery benefits before using Post-9/11 benefits.

As a threshold matter, the VA is wrong about what "coordination" means in Subsection 3322(d). While the VA offers one possible definition of "coordinate," that word can also mean "[t]o act in combined order for the production of a particular result." *See* 3 Oxford English Dictionary 898 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989). Here, Subsection 3322(d) cross-references Section 3327 when discussing

"coordination of entitlement," 38 U.S.C. § 3322(d), and Section 3327 provides for conversion of educational benefits from other programs like Montgomery to Post-9/11, *see id.* § 3327(a). Thus, Congress' use of "coordination" in Subsection 3322(d) just points veterans to Section 3327, and then Section 3327 allows them the option to "combine[ ]" those benefits to "produc[e]" the "particular result" of a benefits *conversion*. 3 Oxford English Dictionary 898. That understanding is reinforced by the fact that Subsection 3322(d), which is within Section 3322, is entitled "Bar to duplication of educational assistance benefits," since conversion of one type of benefits to another avoids duplication of those benefits. Br.19, 52–53. It is also reinforced by the fact that Subsection 3322(d)'s opening language provides that it applies "[i]n the case of" a type of veteran, 38 U.S.C. § 3322(d), which, in concert with the direction to Section 3327, strongly suggests there are other cases of veterans (like Petitioner) not needing to coordinate entitlement through Section 3327. Petitioner and veterans like him are not trying to "combine" their entitlement to Montgomery and Post-9/11 benefits or engaging in any sort of coordination—they simply want to *use* Post-9/11 benefits that they have separately earned.

But even if the VA were correct as to the meaning of "coordination," that would not help its cause. As the VA admits, Subsection 3322(d) "does not resolve the specific question that is presented in this case, but

it identifies Section 3327 as the provision that does resolve it." Resp.14 (emphasis omitted). And a veteran with two separate periods of qualifying service need not make a Subsection 3327(a) election to use Post-9/11 benefits. *See supra* pp.5–6.

There is a further problem with the VA's reading of Subsection 3322(d), which the VA understands but is unable to resolve. Recall, as discussed above, *see supra* pp.5–6, that the VA concedes that veterans who exhaust their Montgomery benefits can use their Post-9/11 benefits, up to the 48-month cap, without making a Subsection 3327(a) election. But that position is irreconcilable with the VA's view of Subsection 3322(d)'s "coordination" language. After all, if the VA were correct that Subsection 3322(d)'s use of the term "coordination" means that Subsection 3327(d)'s limitation applies to veterans that have an entitlement to "two types of benefits," Resp.14, then veterans would not be able to use the 48 months of benefits that they are entitled to, regardless of the order in which they use those benefits, a position that the VA understandably rejects. *See supra* pp.5–6.

The VA is, of course, aware of this contradiction in its arguments, and puts forward the following preemptive rejoinder: "someone who has exhausted his Montgomery benefits no longer is 'an individual entitled to' Montgomery benefits and therefore no longer has two types of benefits that need to be

'coordinated,'" and thus is not subject to the limitation in Subsection 3327(d). Resp.17 (quoting 38 U.S.C. § 3322(d)). Nice try, but that doesn't work. Under that very same logic, a multiple-period-of-service veteran like Petitioner could disclaim his remaining Montgomery benefits before using the Post-9/11 benefits, thereby defeating the VA's exhaust-or-forfeit regime. Resp.17. In this circumstance, and to use the VA's own words, "[that] individual" would "'no longer ha[ve] two types of benefits that need to be 'coordinated,'" and thus would not be subject to the limitation in Subsection 3327(d) under the VA's logic. Resp.17 (quoting 38 U.S.C. § 3322(d)).

*Third*, the VA is wrong to claim that the Montgomery and Post-9/11 GI Bills deviate from past GI Bills, in that they "run in parallel from September 11, 2001, onward," whereas "previous GI Bills did not overlap in the way [these] GI Bills do." Resp.25–26 (citation omitted). Other GI Bills and veterans' programs have had overlapping qualifying periods of service, and Congress has always allowed veterans to receive benefits under each program in the order of their choice, subject only to the concurrent-usage bar and the statutory aggregate cap. Br.11–13. For example, when enacting the original World-War-II-era GI Bill, Congress acknowledged that qualifying veterans may also be eligible for a separate "benefit . . . payable for training" under an earlier rehabilitation program and allowed those veterans to

"receive assistance under each program" and "elect which benefit he desires" without "exhaust[ing] any prior benefits before gaining access to the new GI Bill education benefits." *Amici* Br. of Senator Tim Kaine & Congresswoman Jennifer McClellan, *et al.*, at 8, 11 (quoting Pub. L. No. 78-346, § 400(b), 58 Stat. 284, 289 (1944)) ("Congressional *Amici* Br."). Similarly, under the Korean Conflict GI Bill, Congress allowed veterans eligible for benefits under the new bill and the original GI Bill to "use benefits provided under each such program." *Id.* at 11–12 (citing Pub. L. No. 82-550, § 214(a), 66 Stat. 663, 665 (1952)); *see also id.* at 12 (providing additional examples for Vietnam Era and Post-Vietnam GI Bills). Absent from any of the GI Bills is a requirement—which the VA incorrectly reads into the Post-9/11 GI Bill—that eligible veterans first exhaust or forfeit certain benefits before using other GI Bill benefits.

*Fourth*, the VA's reliance on the fact that the Public Law that adopted Section 3327 was entitled "Applicability To Individuals Under Montgomery GI Bill Program," Pub. L. No. 110-252, 122 Stat. 2323 (2008); *see* Resp.13, does not support the VA's position. Subsection 3327(a)'s election mechanism is "[a]pplicabl[e]" to veterans who are under the Montgomery program, because it is veterans' entitlement to Montgomery benefits that allows them to exchange those less-valuable benefits for more-valuable wartime Post-9/11 benefits, which is

unnecessary for multiple-period-of-service veterans who are already statutorily entitled to the maximum 36 months of Post-9/11 benefits.

*Fifth*, the VA's point that there are certain other benefits programs listed in Subsection 3322(a) that are not subject to Subsection 3327(d)(2), Resp.21, is a *non sequitur*. Petitioner's argument is that Section 3327 permits veterans who earn Montgomery benefits with a period of service and have used up some of those benefits to trade their remaining Montgomery benefits, at a 1:1 ratio, for Post-9/11 benefits, while also getting a proportionate share of their monthly Montgomery payments back. Br.34, 48, 52. The VA does not explain why the fact that Subsection 3327(a) also identifies other categories of veterans eligible to make an election under that Subsection—such as those receiving limited benefits under the Selected Reserve version of Montgomery, *see* 38 U.S.C. § 3327(a)(1)—helps its position. To use the VA's label, those other categories of veterans are subject to the "limitations clause" in Subsection 3327(d)(1), but not the "limitations clause" in Subsection 3327(d)(2). Neither "limitations clause" applies if the veteran chooses not to make a Subsection 3327(a) election. So, for example, veterans who are eligible to use benefits under the Selected Reserve version of Montgomery, 10 U.S.C. § 16132(a)–(b), *and* eligible for Post-9/11 benefits through a separate period of service can use their Post-9/11 benefits without making a Subsection

3327(a) election, and thus would not be subject to the "limitations clause" in Subsection 3327(d)(1) (but would still be subject to the 48-month aggregate benefits cap, *see* 38 U.S.C. § 3695(a)(4), (5)).[5]

*Sixth*, the VA also points to Senate Report No. 111-346 (2010), but this is an unhelpful piece of subsequent legislative history. Resp.29–30. Senate Report No. 111-346 discusses Congress' addition of Subsection 3322(h)(1), which addresses the duplication of education benefits for a single period of service. S. Rep. No. 111-346, at *19 (2010); Pub. L. No. 111-377, § 111, 124 Stat. 4106, 4121 (2011). The portion of the Senate Report that the VA cites

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[5] As an aside, and resolving an ambiguity in the VA's briefing that Congressional *Amici* flagged, Congressional *Amici* Br.6 n.2, Subsection 3327(d)(1) is why the VA applies its exhaust-or-forfeit regime through VA Form 22-1990 to veterans who have earned 36 months of Montgomery benefits and 36 months of Post-9/11 benefits with separate periods of service, even if those veterans have not yet used any of their Montgomery benefits. SA7–9. Under the VA's erroneous view, because those veterans have not exhausted their Montgomery benefits, they must make a Subsection 3327(a) election (Subsection 3327(a)(1)(C)) to use their separately earned Post-9/11 benefits, thereby subjecting themselves to the "limitations clause" in Subsection 3327(d)(1). The VA admits that this is the import of its position in the middle of a paragraph on page 4 of Response Brief. Br.4 ("On the minus side, a veteran who elects Post-9/11 benefits can no longer receive Montgomery benefits. *See* 38 U.S.C. § 3327(d)(1).").

explains that, prior to enactment of Subsection 3322(h)(1), the VA had permitted veterans to duplicate or double dip on education benefits with a single period of service: "an individual, who exhausts entitlement to 36 months of training under the [Montgomery program], can subsequently enroll and receive an additional 12 months of entitlement under the Post-9/11 GI Bill based on the same period of service." S. Rep. No. 111-346, at *19; Resp.29. That is not the issue in dispute here. In any event, the Senate issued Senate Report No. 111-346 in 2010, two years after the adoption of Section 3327, and arguments based on "subsequent legislative history . . . should not be taken seriously." *Sullivan v. Finkelstein*, 496 U.S. 617, 631–32 (1990) (Scalia, J., concurring in part); *accord Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169, n.5 (2001).

*Finally*, for the first time in this long-running case, the VA attempts to hypothesize some reasons why Congress would have wanted to adopt the VA's punitive exhaust-or-forfeit regime—variously invoking concerns about cost, administrability, and retention, Resp.28–29—but each of these falls flat. As to costs, the VA does not explain why Congress would have chosen this complex, unprecedented, exhaust-or-forfeit regime as a method of cost control, rather than, for example, making Post-9/11 benefits less generous, particularly after finding that "enhanced" benefits

were warranted. 38 U.S.C. § 3301 note. The VA's administrability arguments also make no sense, given that Petitioner's position is consistent with all prior historical practice. *See* Br.12 (citing Pub. L. No. 82-550, § 232(h), 66 Stat. 663, 670 (1952)); Congressional *Amici* Br.8, 11–12. And Congress solved the VA's military-retention concerns regarding prior versions of the Post-9/11 GI Bill, *see* Resp.28–29, by allowing veterans to pass their benefits to their children or spouses in exchange for additional service commitments, *see* 38 U.S.C. § 3319. Petitioner's reading thus encourages veterans to stay in the military *longer* to earn *both* Montgomery and Post-9/11 benefits, including so that they can pass those benefits to their children. *Amicus* Br. of 10 Veterans at 16–17. The VA's reading would have the opposite effect—thereby decreasing retention—by limiting veterans' ability to use or pass on the benefits that they could earn from long-term service.[6]

[6] The VA's claim that its position here is consistent with its own regulations is unpersuasive. Resp.33. The VA claims that 38 C.F.R. §§ 21.4022, 21.7143(b), and 21.9635(w) merely "address the interaction among benefits programs in general, not the specific issues raised by this case." Resp.33. Yet, each of these regulations reference the Post-9/11 program (Chapter 33) and the Montgomery program (Chapter 30), and so are directly applicable here. 38 C.F.R. §§ 21.4022(a), (d); 21.7143(b);

## III. If This Court Concludes That The VA's Arguments Raise Any Doubt As To The Proper Resolution Of The Question Presented, This Is An Ideal Case For Resolution Under The Pro-Veteran Canon

A. While the statutory text and context clearly favor Petitioner's reading, *supra* Parts I & II, this Court should resolve any interpretive doubt by applying the pro-veteran canon, Br.58–60. "[T]his Court has expressly recognized the pro-veteran canon for more than 80 years." *Amicus* Br. of Military-Veterans Advocacy, Inc. at 5; *see also Amicus* Br. of the Am. Legion at 4–14 (discussing history of pro-veteran canon); *Amicus* Br. of the Nat'l Inst. of Military Just. at 3–13 (same). Petitioner's position is plainly the pro-veteran one because it would allow veterans to obtain the maximum amount of benefits that they are entitled to under both the Montgomery and Post-9/11 GI Bills, while also allowing veterans to decide how to best use their entitlements based on their educational goals. Br.59–60. Adopting the VA's reading of the statutory scheme would impose a

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21.9635(w). While the VA claims that it has always "understood that a veteran who is 'already entitled to [Montgomery] benefits' 'would have to make an irrevocable election' in order to start receiving Post-9/11 benefits," Resp.33 (quoting Post-9/11 GI Bill, 73 Fed. Reg. 78,876, 78,881 (Dec. 23, 2008) (alteration in original)), the regulations that the VA cites merely parrot the substance of Section 3327 itself.

punitive exhaust-or-forfeit ordering regime on long-serving veterans. Br.60.

Petitioner has, at the minimum, presented a reasonable interpretation of the statutory text, "[a]nd unless the statute unambiguously forecloses [Petitioner]'s reading of the statute, then the pro-veteran canon commands the result that Congress intended: to provide [Petitioner], and numerous veterans like him, the benefits that they need to pursue their education." *Amici* Br. of the Commonwealth of Va., *et al.*, at 14; *see Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 441 (2011). As the Court of Appeals for Veterans Claims correctly explained below, if the pro-veteran canon would ever "ha[ve] a real effect on an outcome, it would be here." Pet.App.127a.

B. The VA's suggestion that, in applying the pro-veteran canon here, this Court would violate the Appropriations Clause, Resp.27–28, is without merit. "Congress enacts veteran-benefits statutes against the interpretive backdrop of the pro-veteran canon" "know[ing] that *courts* will apply the pro-veteran canon to the veteran-benefits statutes it enacts." Congressional *Amici* Br.26; *see also* NVLSP *Amici* Br.18; *Amicus* Br. of the Veterans for Foreign Wars of the U.S. at 24; *Amicus* Br. of the Nat'l Inst. of Military Just. at 23. Thus, in applying the pro-veteran canon, this Court "does not place its *own* thumb on the scale

in favor of a veteran beneficiary," but merely "faithfully applies *Congress's* longstanding solicitude for veterans, recognizing that Congress has already placed *its own* 'thumb on the scale in the veteran's favor in the course of . . . judicial review of VA decisions.'" Congressional *Amici* Br.24 (quoting *Henderson*, 562 U.S. at 440). This "self-reinforcing" canon "is effectively woven into the text" of veterans' benefits laws, and this Court honors congressional intent by applying it here. *Id.* at 26.

The VA also repeats its erroneous assertion that Petitioner's reading is not "unambiguously pro-veteran" because some veterans might, perhaps, do better under the VA's position, Resp.31–32, a point that Petitioner already rebutted in its Opening Brief, Br.56–57, 60. To support this point, the VA invokes the NVLSP *Amici*'s view that multiple-period-of-service veterans can use Subsection 3327(a), a point that Petitioner addressed above. *See supra* p.10. As the NVLSP *Amici* properly explain, while the VA "speculat[es] that some [multiple-period-of-service] veterans *might* wish to trade a year of Montgomery benefits for a contribution-refund . . . or critical skills assistance," "[i]t is not clear that real-world veterans would choose that tradeoff given the value of the forgone year of education benefits." NVLSP *Amici* Br.20 n.3. This is because the VA's assumption "vastly underestimates the tremendous worth of Post-9/11 GI Bill benefits, which far outweigh the limited

benefits the [VA] cites." Congressional *Amici* Br.27 n.5; *see* Pet.23. In any event, as noted above, Petitioner has no quarrel with NVLSP *Amici*'s view that a multiple-period-of-service veteran who would benefit from making a Subsection 3327(a) election can do so. *See supra* p.10. Petitioner's practical point is that—so far as Petitioner is aware—no such veteran exists, rendering Subsection 3327(a)'s benefit-election option irrelevant for such veterans. *Id.*

The critical point under the pro-veteran canon is that the VA's exhaust-or-forfeit regime is harmful to veterans, which is why no veteran has ever filed in support of the VA's position. Meanwhile numerous veterans' groups and individual veterans have filed in support of Petitioner's pro-veteran position. *See Amicus* Br. of the Am. Legion; NVLSP *Amici* Br.; *Amicus* Br. of the Veterans for Foreign Wars of the U.S.; *Amicus* Br. of the Nat'l Inst. of Military Just.; *Amicus* Br. of Military-Veterans Advocacy Inc.; *Amicus* Br. of 10 Veterans; *Amicus* Br. of Iraq & Afghanistan Veterans of Am.

## CONCLUSION

This Court should reverse the Federal Circuit.

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