No. _____

In the Supreme Court of the United States

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

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

PETITION FOR A WRIT OF CERTIORARI

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

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

James R. Rudisill v. Denis McDonough, Secretary of Veterans Affairs, No. 20-1637 (Fed. Cir. en banc judgment entered December 15, 2022)

James R. Rudisill v. Denis McDonough, Secretary of Veterans Affairs, No. 20-1637 (Fed. Cir. judgment entered July 8, 2021)

James R. Rudisill v. Robert L. Wilkie, Secretary of Veterans Affairs, No. 16-4134 (Vet. App. judgment entered August 15, 2019)

There are no proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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Since World War II, our Nation has provided veterans with life-changing education benefits in order to incentivize enlistment and re-enlistment in the Armed Forces, and to help with readjustment to civilian life after service. Under each iteration of these "GI Bills," veterans generally can earn 36 months of education benefits from each program for which a period of their service qualifies, with benefits for wartime service historically being more generous than those for peacetime service. With the enactment of each new program, Congress expressly has permitted veterans to earn benefits under multiple programs—based on the veteran's separate and distinct periods of qualifying service—always up to a 48-month aggregate use cap. Never once has Congress required a veteran who qualified for multiple GI Bill programs, based on separate and distinct periods of qualifying service, to first forfeit or exhaust one benefit in order to obtain another, including to receive 48 months of total benefits.

Most recently, Congress enacted the Post-9/11 GI Bill to provide "enhanced educational assistance benefits" for veterans that are more generous than the then-prevailing peacetime Montgomery GI Bill, in recognition of the "especially arduous" wartime service required of veterans after the September 11, 2001 terrorist attacks. Pub. L. No. 110-252, tit. V,

§ 5002, 122 Stat. 2357 (2008) (hereinafter 38 U.S.C. § 3301 note). Congress structured the Post-9/11 GI Bill according to the historical GI Bill framework described above: a veteran may obtain 36 months of education benefits for each period of qualifying service, which months he may use subject to an aggregate 48-month cap across all GI Bill programs.

The Federal Circuit's *en banc* decision below breaks Congress' core promise in the GI Bills for post-9/11 era veterans by, for the first time in our Nation's history, depriving veterans with multiple periods of qualifying service of the full use of the 48 months of education benefits that they have earned. The result is that veterans with multiple periods of qualifying service—including veterans like Petitioner, who first served in peacetime before September 11, 2001, and then re-enlisted after the 9/11 terrorist attacks to serve again in wartime—cannot use the generous Post-9/11 Bill benefits that they earned with their wartime service, unless they first agree to suffer the penalty of giving up the right to a full 48 months of benefits that veterans with multiple periods of service have received for generations. The Federal Circuit never even attempted to explain why Congress would have wanted to adopt such an unprecedented, punitive regime, to the great detriment of our Nation's veterans. Nothing in the Federal Circuit's overreading of a single, isolated administrative statutory provision, 38 U.S.C. § 3327(d)(2), supports

its nonsensical, anti-veteran result. That provision simply allows veterans *without* separate and distinct periods of qualifying service—like many veterans who had enlisted after September 11, 2001, but before 2008, when Congress enacted the Post-9/11 GI Bill—to re-credit equitably otherwise-qualifying service already credited to the less-generous, peacetime Montgomery GI Bill to the more-generous, wartime Post-9/11 GI Bill.

The Question Presented here is unusually important, and this case is the ideal vehicle for resolving it. Under the Federal Circuit's decision, roughly 1.7 million veterans face the same nonsensical penalty that Petitioner faced here, and that number continues to rise as veterans who enlist and re-enlist today continue to establish entitlement to education benefits, including under the Post-9/11 GI Bill program. Further, this case provides the Court with the ideal opportunity to provide all stakeholders with much-needed resolution on this Question. The Department of Veterans Affairs' ("VA") interpretation of the governing statutes, as well as Petitioner's contrary interpretation, were presented vigorously and tested in three rounds of appellate briefing, including before the *en banc* Federal Circuit, with the courts issuing split decisions each time. Given that the Federal Circuit is the only Court of Appeals with jurisdiction over GI Bill cases of this nature, no further percolation of that statutory

question is possible, now that the *en banc* Federal Circuit has ruled.

This Court should grant the Petition.

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), and reproduced at Pet.App.1a–47a. The opinion of the Court of Appeals for Veterans Claims 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 Secretary's timely petition for rehearing *en banc* on February 3, 2022, Pet.App.173a–76a, and then entered its judgment on December 15, 2022,

Pet.App.1a. This Court has jurisdiction to review that 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 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 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. VA regulations 38 C.F.R. §§ 21.9520(a) and 21.9635(w) are reproduced at Pet.App.199a–203a.

STATEMENT

A. The Montgomery GI Bill and the Post-9/11 GI Bill are part of Congress' history since World War II of providing education benefits to veterans through various GI Bills, in recognition of veterans' invaluable service to our Nation. *See* 38 U.S.C. § 3301 note; *see*

also Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284 (original World War II GI Bill); Veterans' Readjustment Assistance Act of 1952, Pub. L. No. 82-550, 66 Stat. 663 (Korean War GI Bill); Veterans' Readjustment Benefits Act of 1966, Pub. L. No. 89-358, 80 Stat. 12 (Vietnam-Era GI Bill); 38 U.S.C. § 3201 *et seq.* (Post-Vietnam Era Veterans Educational Assistance Program); Pub. L. No. 98-525, 98 Stat. 2492, 2553 (codified at 38 U.S.C. § 3001, *et seq.*) (Montgomery GI Bill); Pub. L. No. 110-252, tit. V, §§ 5001-03, 122 Stat. 2357 (2008) (codified at 38 U.S.C. § 3301 *et seq.*) (Post-9/11 GI Bill). Each iteration of the GI Bill since 1944 has provided different financial 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 for veterans in its GI Bills for wartime service:

MAJOR GI BILLS THROUGHOUT THE DECADES, USING INFLATION-ADJUSTED DATA[1]		
GI Bill Program	**Qualifying Service**	**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	Jan. 31, 1955 – Dec. 31, 1976	$10,841
Post-Vietnam Era	Jan. 1, 1977 – June 30, 1985	$5,963
Montgomery	July 1, 1985 – Sept. 30, 2030	$8,656 (annual)[2]
Post-9/11	Sept. 11, 2001 – present day	$15,364 (annual)

[1] Using 2020 dollars or best-available data from Cong. Res. Svc., *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 (all websites last visited Mar. 10, 2023).

[2] For retired programs, the Congressional Research Service provides aggregated total expenditures, while for the active programs, only annual expenditure data is currently available.

The GI Bill programs at issue here are as follows:

The Montgomery GI Bill. Congress enacted the Montgomery GI Bill in 1984. To be eligible for education benefits under this program, an individual must "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." 38 U.S.C. § 3011(a)(1)(A). Then, as relevant, that individual must serve an "obligated period of active duty" of two or three "continuous" years, depending on the individual's particular enlistment contract. *Id.* If those conditions are met, the veteran "is entitled to basic educational assistance," *id.* § 3011(a)(3), obtaining 36 months of benefits at a fixed monthly amount, designed "to help meet, in part" the costs of tuition, books, and fees, without taking into account actual costs, *id.* §§ 3013(a)(1), 3014(a). Like all GI Bill benefits, the 36-month entitlement to Montgomery benefits is subject to the 48-month aggregate use cap in 38 U.S.C. § 3695(a). *Id.* § 3013(a)(1). That is, a veteran who has qualified for 36 months of benefits under Montgomery may use all of those months of benefits if he has used no more than 12 months of education benefits under another GI Bill program. *See id.* §§ 3013(a)(1), 3695(a).

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. To be eligible for Post-9/11 GI Bill education 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." *Id.* §§ 3311(a)–(b) (qualification for maximum benefits level). A veteran meeting those conditions is entitled to 36 months of benefits under the program, *id.* § 3312(a), which are "enhanced" over Montgomery benefits, in recognition of these veterans' wartime service, *id.* § 3301 note; *see supra* p.7 (chart). Specifically, the Post-9/11 GI Bill provides veterans with 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), 3317; 38 C.F.R. § 21.9640(b)(1)(i)–(iii). The Post-9/11 GI Bill benefits are subject to Section 3695(a)'s 48-month aggregate cap on all GI Bill benefits usage. 38 U.S.C. § 3312(a). This again means that a veteran who has qualified for 36 months of Post-9/11 GI Bill benefits may use all of those months if he has used no more than 12 months of benefits under another GI Bill program. *Id.* § 3695(a).

Administrative Provisions. Multiple additional statutory and regulatory provisions govern the administration of the Montgomery and Post-9/11 GI Bills, including the relationship between the two.

Section 3322 of Title 38 prohibits veterans from using a single period of service to qualify for benefits under multiple GI Bill programs (so-called duplication or double-dipping), and from "concurrently" using benefits under multiple GI Bills established through separate and distinct periods of qualifying service. *Id.* §§ 3322(h), 3322(a). Specifically, veterans with "qualifying service . . . that establishes eligibility . . . for educational assistance" under both the Montgomery and Post-9/11 GI Bills "shall elect . . . under which authority such service is to be credited." *Id.* § 3322(h). This "bar" on the "duplication of eligibility based on a single period of service," *id.* (capitalization altered), is necessary because the range of qualifying periods of service for the Montgomery and Post-9/11 GI Bills overlap, *see supra* p.7 (chart); *compare id.* § 3011(a) (Montgomery GI Bill), *with id.* § 3311(b) (Post-9/11 GI Bill). Additionally, an individual "may not receive assistance under [the Montgomery and Post-9/11 GI Bills, among others,] concurrently." *Id.* § 3322(a) (identifying Montgomery as "Chapter 30" and Post-9/11 as "this chapter"). This concurrent-benefits-usage bar makes clear that Congress expected some veterans to obtain and hold both Montgomery and

Post-9/11 GI Bill benefits at the same time, and allowed veterans to use those benefits as they saw fit, so long as they were not used concurrently. The VA's regulations provide more detail on this concurrent-benefits-usage bar. *See* 38 C.F.R. § 21.4022.

Next, Sections 3322(d) and 3327 of Title 38 together create a special election mechanism allowing a veteran with only a *single period of qualifying service*, which period already was credited to the Montgomery GI Bill under Section 3322(h), to "coordinat[e]" his "entitlement to [Montgomery] educational assistance" into entitlement to Post-9/11 benefits. 38 U.S.C. § 3322(d). This allows a veteran who previously elected under Section 3322(h) to credit his only period of service to the Montgomery program to access the more generous Post-9/11 benefits, assuming the veteran otherwise qualifies under the Post-9/11 GI Bill, while simultaneously preventing the veteran from obtaining a windfall of two full benefits from a single period of service. Thus, Section 3322(d) provides that, "in the case of an individual entitled to educational assistance under" the Montgomery and Post-9/11 GI Bills "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"—an uncodified footnote to the Public Law,

now since codified at Section 3327. *Id.* Then, Section 3327 provides that a veteran 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 the veteran otherwise qualifies for the Post-9/11 GI Bill. *Id.* §§ 3327(a), (c)–(d). This election mechanism, therefore, presupposes that some, but not all, veterans will need to "coordinat[e]," *id.* § 3322(d), existing Montgomery entitlement into entitlement to Post-9/11 benefits through an "elect[ion]," *id.* § 3327(a), which election is neither necessary nor required for veterans who qualify for both Montgomery and Post-9/11 benefits with separate and distinct periods of qualifying service, under the broader statutory scheme discussed above.

B. 1. Petitioner spent nearly eight aggregate years in the Army over three separate tours, including several arduous deployments to Iraq and Afghanistan. Pet.App.81a–82a. Petitioner first enlisted in the Army in January 2000. Pet.App.81a–82a. Upon an honorable discharge in June 2002, Petitioner pursued his undergraduate degree using a portion of the 36 months of Montgomery benefits he had just earned. Pet.App.81a–82a. He enlisted for a second time while attending college, 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. Finally, Petitioner was commissioned as an officer in the Army from November 2007 to August 2011, eventually reaching the rank of Captain. Pet.App.20a, 82a. After Petitioner's third honorable discharge, he continued to serve his country as an agent in the FBI's domestic-terrorism unit. Fed.Cir.Dkt.24 at 4–5; *see also* Fed.Cir.Dkt.82 at 6 (Petitioner has also served as an Ensign in the Navy Reserve since 2019). Petitioner received 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 also saved numerous lives during his efforts to repel notable Taliban assaults and suffered battlefield injuries due to suicide attacks and roadside bombs while on duty. Fed.Cir.Dkt.24 at 4.

Petitioner wanted to serve a fourth tour, this time as an Army chaplain. To prepare for that role, Petitioner gained admission to the Yale Divinity School, understanding that he could use Post-9/11 benefits earned from his second and third tours to pay for that expensive degree program. Pet.App.82a–83a. Petitioner correctly understood that while he had earned 36 months of Post-9/11 benefits from his

periods of service, his usage of those months would be limited to 22 months and 16 days because of his prior usage of Montgomery benefits and the 48-month aggregate use cap in Section 3695(a).

In 2015, Petitioner applied to the VA to receive his Post-9/11 benefits. Pet.App.82a; *see* 38 C.F.R. §§ 21.9520(a), 21.4020(a). The VA did not give Petitioner the 22 months and 16 days of Post-9/11 benefits to which he was entitled. Instead, the VA "limited" Petitioner's "entitlement" to Post-9/11 benefits "to the number of months of" his remaining Montgomery entitlement—specifically, 10 months and 16 days. Pet.App.83a; Fed.Cir.Dkt.29 at App.541 (electronic VA Form 22-1990). The VA explained that because Petitioner had not "completely exhaust[ed]" his entitlement to Montgomery benefits when he applied for Post-9/11 benefits, the VA only would allow Petitioner to forfeit and exchange his remaining 10 months and 16 days of Montgomery benefits for an equivalent amount of Post-9/11 benefits under Sections 3322(d) and 3327—even though Petitioner's entitlement to Post-9/11 benefits stems from periods of service that are separate and distinct from the period of service establishing his entitlement to Montgomery. Pet.App.6a–7a, 84a. That is, the VA would *not* allow Petitioner to claim his entire Post-9/11 entitlement, subject to the 48-month aggregate cap based upon his prior usage, and required him to give up his remaining Montgomery entitlement if he

wanted to receive Post-9/11 benefits before exhausting his Montgomery benefits, simply because he had first received some Montgomery benefits.

Petitioner appealed to the Board of Veterans' Appeals ("Board"). The Board 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 U.S. Court of Appeals for Veterans Claims ("Veterans Court"), which reversed in his favor. The Veterans Court concluded 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. The pro-veteran canon eliminated any interpretive doubt that remained, Pet.App.127a, including with respect to Sections 3322(d) and 3327, Pet.App.110a, 113a. Judge Bartley (now Chief Judge) dissented. Pet.App.129a–30a, 148a.

3. On appeal, the Federal Circuit panel majority—Judge Newman writing, joined by Judge Reyna—affirmed. 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 Section 3695(a). Pet.App.65a. Judge Dyk dissented. Pet.App.67a–68a.

4. The *en banc* Federal Circuit granted the Secretary's petition, vacated the panel decision, and ultimately reversed the Veterans Court in another split decision. Pet.App.174a–76a.

The *en banc* majority, authored by Judge Dyk, framed Section 3327(d)(2) as limiting the months of benefits available to all "veterans who switch from Montgomery program to Post-9/11 program benefits without first exhausting their Montgomery benefits." Pet.App.2a. The majority rejected Petitioner's position that Section 3327, in context, "only applies to individuals with a single period of service," reasoning that "Sections 3322(d) and 3327 do not mention periods of service." Pet.App.8a, 15a. The majority then oddly claimed that Petitioner's reading of Sections 3322(d) and 3327 would harm some veterans because, in their view, it would prohibit veterans from "avail[ing] themselves of the benefits of § 3327(f) and (g)," which provide modest additional education benefits under the Post-9/11 program in certain limited circumstances. Pet.App.15a–16a. Finally, the *en banc* majority refused to apply or consider the pro-veteran canon. Pet.App.16a–17a.

Judge Newman, in an opinion joined by Judge Reyna, dissented. Judge Newman explained that "GI Bills since 1968 all provide that a re-enlisting veteran eligible under multiple programs earns aggregate benefits up to the total of 48 months." Pet.App.23a. Judge Newman interpreted Sections 3322(d) and 3327 as applying only "to switching . . . unused benefits *from a given period of service* to Post-9/11 benefits," rather than limiting "Post-9/11 benefits earned by re-enlistment" and resulting separate service. Pet.App.25a, 27a (emphasis added). Judge Newman criticized the *en banc* majority's "absurd" reading, which would treat veterans with multiple periods of service worse than non-veterans, noting that the Post-9/11 GI Bill allows certain *non-veterans* to utilize up to 48 months of total benefits. Pet.App.29a–30a. Finally, Judge Newman also noted the majority's failure to consider the Secretary's implementing regulations, which contemplate a veteran separately qualifying for Montgomery and Post-9/11 benefits with separate and distinct periods of qualifying service. Pet.App.35a–36a.

Judge Reyna, in an opinion joined by Judge Newman, also dissented, challenging the majority's "cursory, legally unsupported conclusion that the pro-veteran canon 'plays no role' when there is no ambiguity." Pet.App.39a (quoting majority). Judge Reyna also explained that "Congress understood, at the time it passed the Post-9/11 Bill, that many

veterans were already enrolled and earning benefits under the existing Montgomery GI Bill," yet Congress still "acted to enhance and expand those educational benefits with the Post-9/11 Bill." Pet.App.46a. Thus, "the statutory framework makes clear that [Petitioner] is entitled to the full benefits subject only to the 'cap' of 38 U.S.C. § 3695." Pet.App.46a.

REASONS FOR GRANTING THE PETITION

I. The Question Of Whether Veterans With Two Distinct Qualifying Periods Of Service May Receive Education Benefits Under Both The Montgomery And The Post-9/11 GI Bills Is Important, Impacting About 1.7 Million Veterans And Billions Of Dollars

Whether an estimated 1.7 million veterans and counting may utilize the entirety of the GI Bill education benefits they earn through their service to our Nation—including wartime service after 9/11—is an exceptionally important question that merits this Court's review. Rule 10(c).[3]

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[3] The VA estimates that by September 2023 there will be 5,219,971 veterans who have served in the post-9/11 era. *See* VA, Table 2L: VetPop2020 Living Veterans By Period of Service, Gender, 2020–2050, available at https://www.va.gov/vetdata/

1. "The United States has a proud history" since World War II "of offering educational assistance to millions of veterans" through its GI Bills, 38 U.S.C. § 3301 note, which are among "the most important measures that have ever come before Congress," 90 Cong. Rec. (Appx.) A1477, A1560 (1944) (statement of Sen. Ernest McFarland). Since Congress enacted the original World War II GI Bill, Congress repeatedly has granted education benefits to those who answered the call to serve in the Armed Forces. These later iterations of the GI Bill include the Korean War GI Bill, the Vietnam-Era GI Bill, the Post-Vietnam Era Veterans Educational Assistance Program, and the Montgomery GI Bill. *See supra* p.7–8.

All told, our Nation's various GI Bills have provided vital educational assistance to "around 25

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docs/Demographics/New_Vetpop_Model/2L_VetPop2020_POS_National_NCVAS.xlsx. And Department of Defense data indicates that approximately one-third of veterans serve for six years or more, under lengthy enlistment or reenlistment contracts, *see* CBO, *Approaches to Changing Military Comp.* at 7 (Jan. 2020) (discussing typical terms of service), available at https://www.cbo.gov/system/files/2020-01/55648-CBO-military-compensation.pdf, which is sufficient to fully earn benefits under both the Montgomery GI Bill and Post-9/11 GI Bill, *see* 38 U.S.C. §§ 3011(a)(1)(A), 3311(b)(1)(A) (establishing minimum service requirements). So, roughly 1.7 million veterans—one-third of 5,219,971—and counting are impacted by the Question Presented.

million beneficiaries." Jennie W. Wenger et al., *The Role of Education Benefits in Supporting Veterans as They Transition to Civilian Life*, RAND Corporation (2022).[4] That vast group of Americans includes: Presidents George H.W. Bush and Gerald Ford; Vice President Al Gore; Senators Bob Dole, John Glenn, and Daniel Inouye; Chief Justice William Rehnquist; Justices John Paul Stevens and Byron White; and, Secretary of State Henry Kissinger. Suzanne Mettler, *How the GI Bill Built the Middle Class and Enhanced Democracy*, Scholars Strategy Network (Jan. 2012);[5] Kenneth E. Cox, *The Greatest Legislation*, American Legion Magazine, June 2004 at 18–20.[6] The GI Bill also enabled World War II veteran Oliver Brown to buy his home near an all-white school, positioning him to become the lead plaintiff in *Brown v. Board of Education*, 347 U.S. 483 (1954), when that school refused to admit his Black daughter. Cox, *supra*, at 18. It allowed former Tuskegee Airman Henry Hervey to continue breaking barriers by enrolling in college and then "join[ing] the Civil Rights movement to 'take on City Hall' to fight discrimination." Mettler, *supra*. More broadly, the GI Bill ultimately launched

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[4] Available at https://www.rand.org/pubs/perspectives/PEA1363-4.html.

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

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

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*, NPR (Sept. 26, 2007).[7] Veterans' education benefits provide life-changing support, serve as an invaluable recruitment tool for the Armed Forces, *see* Wenger, *supra*, at 8, 14, and helped create the modern American middle class, Mettler, *supra*.

The Post-9/11 GI Bill is the spiritual successor to the original GI Bill, offering benefits that "are commensurate with the educational assistance benefits provided . . . to veterans of World War II." 38 U.S.C. § 3301 note. Congress recognized that "[s]ervice on active duty in the Armed Forces has been especially arduous . . . since September 11, 2001." *Id.* Congress concluded that the Montgomery GI Bill—the only GI Bill then-currently on offer for active-duty servicemembers—was an insufficient showing of gratitude for these veterans' sacrifice, as it was "outmoded and designed for peacetime service." *Id.* Thus, Congress sought to compensate post-9/11 veterans for their wartime service by providing the same degree of benefits that the Nation provided to its World War II veterans. *Id.*

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

2. The Question Presented determines whether veterans may obtain the full education benefits to which they are entitled under the Montgomery and Post-9/11 GI Bills, enabling them to secure the promises of a grateful Nation. The Post-9/11 GI Bill allows a veteran to qualify for benefits with one period of qualifying service, even if that veteran has used benefits under the Montgomery GI Bill based on a separate and distinct period of qualifying service, subject to Section 3695(a)'s 48-month aggregate use cap. *Infra* p.27–32. The upshot of that proper understanding of the relationship between these GI Bills is that veterans with separate and distinct periods of qualifying service, including wartime service, would have more Post-9/11 benefits to, for example, finish their undergraduate studies, obtain a graduate degree, or transfer to their children to offset the ever-rising costs of a college education. Fed.Cir.Dkt.88 at 4–13 (*amici* brief of similarly situated veterans); *accord Johnson v. Robison*, 415 U.S. 361, 380 (1974). Unlike Montgomery benefits, Post-9/11 benefits cover the actual cost of college, *and* provide stipends for living expenses, books, and fees—essentially, akin to a full scholarship. Thus, this is an "important" case for "the veterans community," as the VA correctly acknowledged and explained below. Fed.Cir.Dkt.76 at 16.

The GI Bill benefits at stake here have an estimated aggregate value of billions of dollars, given

that the average annual cost per beneficiary under the Post-9/11 GI Bill alone in 2022 was $14,409. VBA, *Annual Benefits Report Fiscal Year 2022* at 11.[8] Moreover, the *individual* financial impact to affected veterans here is significant. As *amici* veterans explained below, some veterans affected by the Question Presented stand to gain or lose $65,000 or more in additional benefits based on which schools they would enroll in, depending on how the Question Presented is answered. Fed.Cir.Dkt.88 at 1–2.

II. This Case Is An Ideal Vehicle For Resolving The Question Presented, And No Further Percolation Is Possible

A. This case is the ideal vehicle for deciding the Question Presented. It is undisputed that Petitioner meets all criteria to be entitled to education benefits under both the Montgomery and Post-9/11 GI Bills, given his multiple periods of qualifying service. Under Petitioner's reading of the law, he is entitled to utilize those benefits, subject only to Section 3695's 48-month aggregate use cap. This interpretation, as well as VA's contrary one, was exhaustively litigated and vetted below. Every argument that is likely to be presented to this Court was vigorously presented

[8] Available at https://www.benefits.va.gov/REPORTS/abr/docs/2022-abr.pdf.

through three rounds of appellate briefing, including in the *en banc* Federal Circuit.

B. No further percolation is possible given that the Federal Circuit has exclusive jurisdiction over disputes of this type. 38 U.S.C. § 7292(c); *see also id.* § 7252(a) (Veterans Court's exclusive jurisdiction to review decisions of the Board of Veterans' Appeals); *id.* § 7104(a) (Board of Veterans' Appeals is sole administrative body for adjudicating questions about veterans' benefits laws—including the Post-9/11 and Montgomery GI Bills).

The Question Presented received extensive percolation on its way to this Court. First, the Veterans Court issued a split decision with Judges Allen and Schoelen in the majority and Judge Bartley in dissent—deciding the case as a panel and after hearing extensive oral argument, which is exceedingly rare for the Veterans Court.[9] The Federal Circuit panel issued another split decision, with Judges Newman and Reyna in the majority and Judge Dyk dissenting. Finally, the *en banc* Federal Circuit issued yet another split decision, with Chief Judge Moore and Judges Lourie, Dyk, Prost, Taranto, Chen, Hughes, Stoll, Cunningham, and Stark in the

[9] *See* Vet. App., Fiscal Year 2021 Annual Report, available at http://www.uscourts.cavc.gov/documents/FY2021Annual Report.pdf.

majority and Judges Newman and Reyna in dissent. So, this case has generated four opinions explaining why Petitioner should win, and three opinions stating why Respondent should prevail—joined by a total of fifteen federal judges, Pet.App.1a, 76a, and no further opinions are likely to arise in the future, given the Federal Circuit's *en banc* holding.

III. The Federal Circuit Wrongly Decided The Question Presented

A. Courts must interpret statutes according to their plain text. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). Courts must also interpret statutory text in context, including "the text of the Act of Congress surrounding the [provisions] at issue" and "the texts of other related congressional Acts," *Rowland v. Cal. Men's Colony*, 506 U.S. 194, 199 (1993); *accord AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011); Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012). In cases involving veterans' benefits statutes, this Court resolves any "interpretive doubt" over the meaning of the statute in favor of the veteran, under the pro-veteran canon. *Brown v. Gardner,* 513 U.S. 115, 118 (1994); *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 441 (2011); *see also Walton v. Cotton*, 60 U.S. (19 How.) 355, 358 (1856) (presuming Congress intended a Revolutionary War veterans' benefit statute to "lead to an equitable and not a

capricious result"); *accord Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410 (1792) (subjoining letter from Chief Justice John Jay, sitting as circuit judge, interpreting Revolutionary War veterans' benefits statute so that "the objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of Congress").

B. Under these statutory-interpretation principles, a veteran like Petitioner—who has served separate and distinct periods of qualifying service—is entitled to receive education benefits under both the Montgomery GI Bill and the Post-9/11 GI Bill, subject only to Section 3695(a)'s 48-month aggregate use cap. Nothing in either GI Bill conditions Petitioner's receipt or use of the generous Post-9/11 benefits, earned with wartime service, on accepting the penalty of forgoing the right to receive and use a full 48 months of benefits under both programs.

According to the text of the Montgomery and Post-9/11 GI Bills, *Robinson*, 519 U.S. at 340, Petitioner is entitled to benefits under both programs based on his separate and distinct periods of qualifying service. Petitioner's first period of service from January 2000 to June 2002 meets all qualifying service criteria under the Montgomery GI Bill. *See* 38 U.S.C. § 3011(a). Petitioner's subsequent periods of intermittent service between June 2004 and August 2011 meet all qualifying service criteria under the

Post-9/11 GI Bill. *See id.* § 3311(a)–(b). The limitations on Petitioner's usage of these separately established entitlements are specifically articulated: Petitioner may not use his Post-9/11 and Montgomery benefits "concurrently," and he cannot use them in "aggregate" in excess of 48 months. *Id.* §§ 3322(a), 3695(a). Because Petitioner previously used 25 months and 14 days of Montgomery benefits for his undergraduate studies, *supra* p.14, he is therefore entitled to use 22 months and 16 days of Post-9/11 benefits, *supra* p.14. There are no additional statutory barriers on Petitioner's entitlement to the full 48 months of education benefits.

The statutory structure, *see Rowland*, 506 U.S. at 199, confirms that there is no additional limitation upon post-9/11 veterans with separate and distinct periods of qualifying service. The Montgomery GI Bill expressly conditions entitlement on a "*first*" period of "continuous" service, whereas the Post-9/11 GI Bill expressly contemplates a veteran establishing entitlement by "*aggregat[ing]*" qualifying service from across multiple periods, if needed, suggesting that benefits under it can be earned through service separate and distinct from the service that establishes entitlement to Montgomery benefits. *Compare* 38 U.S.C. § 3011(a) (emphasis added), *with id.* § 3311(b) (emphasis added). Further, Congress clearly and expressly imposed some limitations on veterans' use of benefits under both GI Bill programs.

Id. §§ 3033(a), 3322(a) (barring concurrent use of both benefits), 3322(h)(1) (barring use of "a single period . . . of service" to qualify for benefits under both GI Bills). The absence of other clear and express limitations strongly supports the conclusion that veterans with separate periods of qualifying service may use Post-9/11 and Montgomery benefits consecutively, in whatever order they choose, without somehow limiting their aggregate entitlement to benefits to something below the 48-month cap. *See id.* §§ 3011(a), 3311(a); *accord* 38 C.F.R. §§ 21.4022, 21.9635(w), 21.9690 (allowing a veteran to switch periodically from receiving Post-9/11 benefits to receiving Montgomery benefits); Pet.App.120a–24a. Allowing veterans with separate and distinct periods of qualifying service to obtain full benefits up to the 48-month aggregate cap is consistent with how Congress traditionally has structured GI Bill programs. *See supra* p.6–7.

The manifest purpose of these GI Bills provides further support. Scalia & Garner, *supra*, at 56; *AT&T Mobility*, 563 U.S. at 344. Congress designed the Montgomery GI Bill to serve limited national needs for "peacetime service" in the years after the Vietnam War. 38 U.S.C. §§ 3001, 3301 note. Congress enacted the Post-9/11 GI Bill to account for the realities of "wartime service," including the "difficult challenges involved in readjusting to civilian life after" such service. *Id.* § 3301 note. Congress thus aimed the two

GI Bills at different objects, with the Post-9/11 GI Bill being more generous. This is reinforced by statements from then-Senators Jim Webb and Chuck Hagel, the Post-9/11 GI Bill's author and co-sponsor, respectively, at the time of enactment that this law was "designed to *expand* the educational benefits" available to veterans, only "barred [veterans] from receiving *concurrent* assistance" under multiple GI Bills, and was "*equit[able]*" in nature. *Hearing on Pending Benefits Legislation: Hearing Before the S. Comm. On Veterans' Affs.*, 110th Cong. 6 (2007) (emphases added); *Hearing on DOD/VA Collaboration And Cooperation On The Education Needs of Returning Servicemembers: Hearing Before the S. Comm. On Veterans' Affs.*, 110th Cong. 3 (2007);[10] *see also* Senators Jim Webb and Chuck Hagel, *A Post-Iraq G.I. Bill*, N.Y. Times (Nov. 9, 2007) ("First-class service to country deserves first-class appreciation.").[11] To this day, Hagel insists that Petitioner's interpretation is "right" and the Post-9/11 GI Bill was meant to enhance the education benefits available to post-9/11 era veterans: "We were sending these men and women back into combat for one, two, three, four tours or more," and "counting on these

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[10] Available at https://perma.cc/FNC9-M4KC.

[11] Available at https://www.nytimes.com/2007/11/09/opinion/09webb.html.

people to go back and back and back." *See* Stephanie Zimmermann, *Decorated vet's last stand: FBI agent wants Supreme Court to make VA stop shortchanging veterans on GI Bill benefits*, Chicago Sun-Times (Mar. 10, 2023) (quoting Hagel).

Finally, while the statutes are clear, to the extent there is any "interpretive doubt," *Brown*, 513 U.S. at 118, the pro-veteran canon compels the adoption of Petitioner's interpretation. Petitioner has presented—at the minimum—a reasonable reading of these statutory provisions, and that reading plainly benefits veterans. This is because Petitioner's reading allows veterans to obtain the benefits of *both* GI Bills by serving separate and distinct periods of qualifying service, *and* lets veterans choose how to use their entitlements based on their educational goals, subject to the 48-month aggregate cap. *Supra* p.27–28. So, under the pro-veteran canon, whatever "interpretive doubt" remains after reviewing the "necessarily dense and complex" statutes here, Pet.App.94a, must resolve in favor of Petitioner. As the Veterans Court poignantly explained, "if *Brown v. Gardner*, 513 U.S. 115, would ever have a real effect on an outcome, it would be here." Pet.App.127a.

C. The contrary position of the *en banc* Federal Circuit is, with all respect, wrong. The Federal Circuit's opinion myopically focuses on only Section 3327(d)(2), reading it to impose an unprecedented,

punitive, forfeit-or-exhaust-first requirement on veterans with separate and distinct periods of qualifying service, without regard to any other relevant statutory text and context. Pet.App.2a, 14a–15a. Under the Federal Circuit's view, for a veteran who qualifies for both Montgomery and Post-9/11 benefits with separate and distinct periods of qualifying service to obtain the full 48 months of benefits to which he is entitled, that veteran must forfeit or exhaust his Montgomery benefits first and then use his Post-9/11 benefits for only 12 months. *See* Pet.App.2a, 14a–15a. The *en banc* Federal Circuit did not even attempt to explain why Congress would have wanted such an unprecedented, anti-veteran regime, and this position is wrong for multiple reasons.

First, the Federal Circuit was simply incorrect to conclude that Section 3327(d)(2) extends to veterans who qualify for Montgomery and Post-9/11 benefits with *multiple periods of service*. Rather, Section 3327 applies only to veterans "making an election under subsection (a)" of Section 3327. *See* 38 U.S.C. § 3327 (repeating with slight variations in language this limitation eight different times, including in Section 3327(d)(2) itself). Yet, veterans falling within Section 3327(a) are veterans who have *only a single period of qualifying service* that would entitle them to either Montgomery benefits or Post-9/11 benefits, and who previously elected to credit that single period of

service to Montgomery benefits. *See* 38 U.S.C. § 3327(a); *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 893 (2018) (section headings "supply cues"). For those single-period-of-service veterans, Section 3327 allows, but does not require, them to re-credit that period of service to Post-9/11 benefits, despite having previously credited it to the Montgomery program, as described more fully both above and below. 38 U.S.C. § 3327(a); *see supra* p.11–12 and *infra* p.33–36. Then, if a veteran chooses to re-credit that period of service, Section 3327(d)(2) prevents that veteran from obtaining the windfall of more than 36 months of education benefits *from a single period of service* by limiting that veteran's Post-9/11 benefits after this Section 3327(a) election to the veteran's unused number of months of Montgomery benefits. The Federal Circuit, in contrast, atextually read Section 3327(d)(2) to apply to veterans who have unused Montgomery benefits and who qualify for Post-9/11 benefits *with separate and distinct periods of qualifying service*, but nothing in the text of Section 3327(d)(2) even arguably compels that reading.

Second, the text of provisions related to Section 3327 further demonstrates that it is an enabling provision for veterans with a single period of qualifying service, rather than a restricting provision for veterans with multiple periods of qualifying service, contrary to the *en banc* Federal Circuit's view. The *only* provision of the Post-9/11 GI Bill that

"directs one to the election provisions in section 3327" is Section 3322(d). Pet.App.110a. That section "bears the heading '[b]ar to duplication of educational assistance benefits,'" 38 U.S.C. § 3322, which indicates that Congress crafted the subsections within it to prohibit "'duplication' or double-dipping" of education benefits from a single period of service, Pet.App.102a; *see Merit Mgmt. Grp.*, 138 S. Ct. at 893. So, "if there's no 'duplication'"—such as when a veteran qualifies for Montgomery and Post-9/11 benefits with separate and distinct periods of qualifying service—"there's no cause for concern." Pet.App.102a. Additionally, Section 3322(d) also states that it governs the "coordination" of a veteran's entitlement to Montgomery benefits into "entitlement to" Post-9/11 benefits, 38 U.S.C. § 3322(d), a term that, while not defined in the statute, indicates a "harmonizing" process that merely allows "individuals with a *single* period of service already positioned to use [Montgomery] benefits" to make "a second election" and receive the more-generous Post-9/11 benefits for their wartime service. Pet.App.120a (emphasis added). Thus, Section 3322(d) empowers veterans with one period of service previously credited to the Montgomery program to upgrade those benefits to the Post-9/11 program, without giving them the windfall of a "[d]uplication" of benefits for the same period of service. 38 U.S.C. § 3322(h).

Third, the broader structure of the Montgomery and Post-9/11 GI Bills undermines the *en banc* Federal Circuit's overreading of Section 3327(d)(2). Multiple statutory provisions show that Congress contemplated veterans obtaining both Montgomery and Post-9/11 benefits with separate and distinct periods of qualifying service. Congress authorized veterans with separate and distinct periods of qualifying service to: (a) assign their separate and distinct periods of qualifying service to different GI Bill programs, 38 U.S.C. § 3322(h)(1); (b) earn 36 months of Post-9/11 benefits through service separate and distinct from that used to establish entitlement to Montgomery benefits, *id.* § 3312(a); (c) use their separately established entitlements consecutively, but not concurrently, *id.* § 3322(a); and (d) use their separately established entitlements up to a 48-month aggregate cap, *id.* § 3695(a).

These various statutory provisions "lose[ ] force as a practical matter," under the *en banc* Federal Circuit's view that all veterans with unused Montgomery benefits must first forfeit or exhaust those benefits to receive Post-9/11 benefits. Pet.App.117a (discussing Section 3695 in particular). For example, the *en banc* Federal Circuit's interpretation leaves "only a single route" for a veteran qualifying for both Montgomery benefits and Post-9/11 benefits with separate and distinct periods of qualifying service to obtain the full "48 months of

benefits" under the aggregate cap. Pet.App.124a & n.13. Specifically, that veteran must first exhaust his 36 months of the much less-generous, peacetime Montgomery benefits, which are not pegged to the actual costs of education, and then use only 12 months of the more-generous, wartime Post-9/11 benefits. Pet.App.124a & n.13. Thus, a veteran with separate and distinct periods of qualifying service wishing to use his full 48 months of benefits is locked into one pathway for the consecutive use of those benefits—Montgomery, followed by Post-9/11—which renders Section 3322(a)'s authorization of consecutive use of benefits (as well as the VA's implementing regulations) partially superfluous. Pet.App.124a & n.13. That veteran also necessarily is prohibited from switching from his Post-9/11 benefits to his Montgomery benefits, although that is "clearly" contemplated by Section 3322(a) and the VA's regulations, since he would have exhausted his Montgomery benefits first. Pet.App.121a–23a.

Fourth, and relatedly, for veterans who have qualified for Post-9/11 benefits with one period of service and for Montgomery benefits with a separate and distinct period of qualifying service, the Federal Circuit's interpretation punishes these veterans either by depriving them of their entitlement to an aggregate 48 months of benefits, or by compelling them to accept a nonsensical ordering of those benefits to reach the 48-month cap. *See* Pet.App.14a–

15a. This is because, under the Federal Circuit's view, such a veteran may *not* use his Post-9/11 benefits until he first forfeits or exhausts his Montgomery benefits. *See* Pet.App.14a–15a. But if the veteran *forfeits* his Montgomery benefits in order to use his 36 months of Post-9/11 benefits immediately, he will be deprived of the extra 12 months of benefits to which he is entitled under the 48-month aggregate cap. But if the veteran *exhausts* his 36 months of Montgomery benefits and then uses his Post-9/11 benefits for 12 months to reach the 48-month cap, he will have lost the opportunity to utilize fully the *far more generous* Post-9/11 benefits to pay for his higher education. Nothing in the text or structure of these GI Bills compels that anti-veteran result, which is also unprecedented among Congress' various GI Bills. *See supra* p.6–10. And this forfeit or exhaust-first regime flies in the face of Congress' core promise with the Post-9/11 GI Bill, which was to provide veterans with more generous education benefits than the then-prevailing Montgomery status quo for their wartime service. 38 U.S.C. § 3301 note; *see also* Zimmermann, *supra*.

Fifth, the Federal Circuit stated that, under Petitioner's interpretation, "veterans with multiple periods of service would not be able to avail themselves of the benefits of § 3327(f) and (g)" under the Post-9/11 program, Pet.App.15a–16a, but that is a red herring. Sections 3327(f) and (g) provide

additional, modest benefits to veterans with a single period of service who elect to coordinate their Montgomery benefits into Post-9/11 benefits under certain circumstances. *See* 38 U.S.C. §§ 3327(f) (affording refunds to veterans for monthly contributions to establish Montgomery eligibility while on active duty), 3327(g) (allowing veterans eligible for critical skills incentives and supplemental assistance under the Montgomery program to increase their payments under the Post-9/11 program). While Petitioner's understanding of the statutory scheme precludes veterans with multiple periods of qualifying service from utilizing those subjections—since those veterans never make an election under Section 3327(a), which is a precondition of Sections 3327(f) and (g)—Petitioner's reading comes with far greater monetary benefits to these veterans, because they may use their more generous Post-9/11 benefits without sacrificing their aggregate 48-months of benefits under all GI Bill programs. *See supra* p.27–28. It also gives veterans the flexibility to use their benefits under each program as they see fit, to best meet their educational needs at the time. Thus, Petitioner's position provides a monetary *benefit* to those veterans with separate and distinct periods of qualifying service who, under the *en banc* Federal Circuit's view, would have fallen within Sections 3327(f) or (g).

Finally, the Federal Circuit erred when it concluded that the pro-veteran canon "plays no role." Pet.App.16a–17a. In light of the arguments above, the statutes either plainly support the Petitioner's interpretation or, at a minimum, are ambiguous with respect to the role of Sections 3322(d) and 3327, and those sections' interaction with the broader statutory scheme. Moreover, the *en banc* Federal Circuit's minimization of the venerable pro-veteran canon, *see, e.g.*, *Walton*, 60 U.S. (19 How.) at 358, risks the inconsistent application of that canon in all future cases, arising in countless different contexts—*see, e.g.*, *Travers v. Fed. Express Corp.*, 8 F.4th 198, 200, 203, 208 n.25 (3d Cir. 2021) (applying canon to federal veteran reemployment statute as a "'standard tool[ ] of interpretation'") (quoting *Kisor v. Wilkie*, 139 S.Ct. 2400, 2414–15 (2019)); *Reynolds v. Haulcroft*, 205 Ark. 760, 170 S.W.2d 678, 680 (1943) (interpreting federal veterans' benefit statute enforced in state court); *Lucas v. Casady*, 12 Iowa 567, 569 (1862) (interpreting state veterans' benefit statute)—justifying this Court's review to provide much-needed guidance. Under the pro-veteran canon, a court should not find in the absence of a "clear indication" from Congress that Congress intended for a veterans' benefit statutory provision to carry such "harsh consequences" as the *en banc* Federal Circuit imposed here. *Shinseki*, 562 U.S. at 440. As the Veterans Court explained below, "to interpret the statute [different than Petitioner's interpretation] would be

to ignore the import of the pro-veteran canon of construction, an interpretative tool that has real meaning." Pet.App.127–28a.

* * *

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

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March 2023

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, FILED DECEMBER 15, 2022

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2020-1637

JAMES R. RUDISILL,

Claimant-Appellee,

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,

Respondent-Appellant.

Appeal from the United States Court of Appeals for Veterans Claims in No. 16-4134, Chief Judge Margaret C. Bartley, Senior Judge Mary J. Schoelen, Judge Michael P. Allen.

Decided December 15, 2022

Before MOORE, *Chief Judge*, NEWMAN, LOURIE, DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and STARK, *Circuit Judges*.*

* Circuit Judge O'Malley retired on March 11, 2022, and did not participate.

Appendix A

Opinion for the court filed by *Circuit Judge* DYK, in which MOORE, *Chief Judge*, LOURIE, PROST, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and STARK, *Circuit Judges*, join.

Dissenting opinion filed by *Circuit Judge* NEWMAN, in which *Circuit Judge* REYNA joins.

Dissenting opinion filed by *Circuit Judge* REYNA, in which *Circuit Judge* NEWMAN joins.

DYK, *Circuit Judge*.

This case involves two education programs enacted by Congress for the benefit of veterans—the Montgomery program and the Post-9/11 program. Section 3327(d)(2) of Title 38 limits "the number of months of entitlement . . . to educational assistance" for veterans who switch from Montgomery program to Post-9/11 program benefits without first exhausting their Montgomery benefits. The Secretary of Veterans Affairs appeals from a Court of Appeals for Veterans Claims ("Veterans Court") decision that held that § 3327(d)(2) does not apply to veterans with multiple periods of service. *BO v. Wilkie*, 31 Vet. App. 321 (2019). Because we hold that the plain language of § 3327(d)(2) applies to veterans with multiple periods of service, we reverse.[1]

1. In this context, a period of service is a period of service sufficient to earn education benefits.

Appendix A

BACKGROUND

I

The United States has long offered education benefits to those that have served in the armed forces. In 1944, Congress enacted the "GI Bill" to provide education benefits to World War II veterans. *See* Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284. Over the decades, Congress has offered education benefits to new generations of veterans.[2] At issue in this case are two such programs—the Montgomery GI Bill and the Post-9/11 GI Bill.

Congress enacted the Montgomery GI Bill in 1984. *See* Veterans' Educational Assistance Act of 1984, Pub. L. No. 98-525, 98 Stat. 2492, 2553. Codified in Chapter 30 of Title 38, the Montgomery GI Bill provides education benefits for veterans who serve on active duty between July 1, 1985, and September 30, 2030. *See* 38 U.S.C. § 3011(a)(1)(A). Codified in Chapter 33, the Post-9/11 GI Bill was enacted in 2008 and provides education benefits for veterans who serve on active duty after September 11, 2001. *See* Post-9/11 Veterans Educational Assistance Act of 2008, Pub. L. No. 110-252, 122 Stat. 2323, 2357; 38 U.S.C. § 3311(b).

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2. *See, e.g.*, Veterans' Readjustment Assistance Act of 1952, Pub. L. No. 82-550, 66 Stat. 663; Veterans' Readjustment Benefits Act of 1966, Pub. L. No. 89-358, 80 Stat. 12; Veterans' Education and Employment Assistance Act of 1976, Pub. L. No. 94-502, 90 Stat. 2383; and Veterans' Rehabilitation and Education Amendments of 1980, Pub. L. No. 96-466, 94 Stat. 2171.

Appendix A

Under the Montgomery GI Bill, a veteran is entitled to a maximum of 36 months of benefits. This cap applies no matter how long the veteran has served or how many periods of service the veteran has provided. *See* 38 U.S.C. § 3013(a)(1). The same is true of the Post-9/11 program. The maximum period of benefits that a veteran may earn under the Post-9/11 program is 36 months. *See id.* § 3312(a).

Since both Montgomery and Post-9/11 benefits can be earned for the same period or periods of service, Congress continued and adopted various provisions to limit the benefits under the two programs. First, Congress had previously enacted a 48-month cap on benefits programs generally, 38 U.S.C. § 3695(a), and amended that section to include the Post-9/11 program. Pub. L. No. 110-252, § 5003(b)(1)(B), 122 Stat. 2323, 2375. Second, in enacting the Post-9/11 program, Congress provided that benefits under the two programs could not be received concurrently. *See* Pub. L. No. 110-252, § 5003(a)(1), 122 Stat. 2323, 2373 (codified at 38 U.S.C. § 3322(a)). Third, in 2011, Congress enacted § 3322(h), which was designed to prevent a veteran with a single period of service from earning more than 36 months of benefits under the two programs combined. *See* Post-9/11 Veterans Educational Assistance Improvements Act of 2010, Pub. L. No. 111-377, § 111, 124 Stat. 4106, 4120-21 (2011); S. Rep. 111-346, at 19 (2010).

Fourth, in 2008 as part of the Post-9/11 program, Congress enacted 38 U.S.C. § 3327(d)—the provision

at issue in this case.[3] Section 3327(a) describes various classes of individuals "eligible to elect participation in post-9/11 educational assistance." One such class of individuals includes those who are "entitled to basic educational assistance under [the Montgomery program] and [have] used, but retain[] unused, entitlement under that [program]." 38 U.S.C. § 3327(a)(1)(A). Subsection (d) establishes a "[l]imitation on entitlement" for such individuals. *Id.* § 3327(d)(2). For those individuals, "the number of months of entitlement . . . 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." *Id.* § 3327(d)(2)(A).[4] The veteran here contends, and the Veterans Court concluded, that this limit does not apply to veterans with multiple periods of qualifying service and that he was entitled to a full 48 months of benefits. The court found that Mr. Rudisill had used 25 months and 14 days of Montgomery benefits and was likely entitled to an additional 22 months and 16 days of benefits, which he could take entirely as Post-9/11 benefits.

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3. The relevant provisions of 38 U.S.C. § 3327 were first enacted as part of the Post-9/11 statute (§ 5003(c)) and later codified as § 3327 in 2016. *See* Pub. L. No. 110-252, § 5003(c), 122 Stat. 2323, 2375-78; Jeff Miller and Richard Blumenthal Veterans Health Care and Benefits Improvement Act of 2016, Pub. L. No. 114-315, § 405(a), 130 Stat. 1536, 1555-58.

4. The statute provides for an exception, not at issue here, equal to "the number of months, if any, of entitlement revoked by the individual under subsection (c)(1)," which relates to the transfer of educational assistance to family members. 38 U.S.C. § 3327(d)(2)(B).

Appendix A

II

The facts of Mr. Rudisill's case are straightforward. Mr. Rudisill served three periods of active-duty service between January 2000 and August 2011, totaling nearly 8 years of active-duty service. Mr. Rudisill's first period of service, from January 2000 to June 2002, qualified him for Montgomery education benefits, which he began using for his undergraduate education in 2003. He served again while finishing his undergraduate degree, ultimately using 25 months and 14 days of Montgomery benefits for his undergraduate education.

After leaving military service in 2011, Mr. Rudisill was accepted into Yale Divinity School. Mr. Rudisill filed an application for Department of Veterans Affairs ("VA") education benefits (VA Form 22-1990) online. He applied for "Chapter 33 - Post-9/11 GI Bill" benefits, making a "Chapter 33 in Lieu of Chapter 30 [Montgomery program]" election. In filing the application, Mr. Rudisill acknowledged the following:

> By electing Chapter 33 [Post-9/11 benefits], I acknowledge that I understand the following:
> . . . .
>
> If electing chapter 33 in lieu of chapter 30 [Montgomery benefits], my 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 my election*. However, if I completely exhaust my entitlement under chapter 30 before

> the effective date of my chapter 33 election, I may receive up to 12 additional months of benefits under chapter 33.
>
> My election is irrevocable and may not be changed.

J.A. 585 (emphasis added, formatting altered); *see also* J.A. 708-711 (paper form). Mr. Rudisill listed an effective date of March 18, 2015, and elected to receive "Chapter 33 - Post-9/11" benefits in lieu of "Chapter 30; MGIB." J.A. 583-85.

The VA issued Mr. Rudisill a certificate of eligibility for 10 months and 16 days of Post-9/11 benefits—an amount equal to Mr. Rudisill's remaining Montgomery entitlement. Mr. Rudisill appealed the decision to the Board of Veterans' Appeals ("the Board"), seeking the "full potential amount of education assistance benefits" available under the Post-9/11 program, "instead of being limited to his remaining time under [the Montgomery program]." J.A. 59. The Board denied the appeal, holding that "[a]dditional educational assistance benefits under [the Post-9/11 program] are not allowed because the Veteran made an irrevocable election to receive benefits under [the Post-9/11 program], in lieu of benefits under [the Montgomery program]." J.A. 64.

Mr. Rudisill appealed the Board's decision to the Veterans Court. A split panel agreed with Mr. Rudisill. The majority opinion found the statute ambiguous and held that "Congress's statutory scheme is best interpreted to provide that separate periods of qualifying service allow

a veteran such as [Mr. Rudisill] to receive full benefits under both programs subject to an aggregate cap on all such benefits." J.A. 7. The majority implicitly concluded that 38 U.S.C. § 3327 only "applies to those individuals with a single period of service already positioned to use [Montgomery] benefits." J.A. 25. Then-Judge Bartley[5] dissented. She concluded that 38 U.S.C. § 3327, including its limitation on entitlement for veterans who had used only part of their Montgomery benefits, unambiguously applied to Mr. Rudisill. Since Mr. Rudisill "voluntarily signed an irrevocable election to receive Post-9/11 education benefits . . . section 3327 prescribes that his entitlement to Post-9/11 benefits is limited to 10 months and 16 days, which was the unused remainder of his [Montgomery] entitlement when he filed his section 3327 election." J.A. 30.

The Secretary appealed the Veterans Court's decision to our Court. Initially, a split panel affirmed. *Rudisill v. McDonough*, 4 F.4th 1297, 1299 (Fed. Cir. 2021). The Secretary petitioned for rehearing *en banc*. We granted the Secretary's petition and vacated the panel opinion. *Rudisill v. McDonough*, No. 2020-1637, 2022 U.S. App. LEXIS 3067, 2022 WL 320680 (Fed. Cir. Feb. 3, 2022) (per curiam). We directed the parties to brief the following questions:

> For a veteran who qualifies for the Montgomery GI Bill and the Post-9/11 GI Bill under a separate period of qualifying service, what is the veteran's statutory entitlement to education benefits?

5. Judge Bartley has since become Chief Judge.

> What is the relation between the 48-month entitlement in 38 U.S.C. § 3695(a), and the 36-month entitlement in § 3327(d)(2), as applied to veterans such as Mr. Rudisill with two or more periods of qualifying military service?

2022 U.S. App. LEXIS 3067, [WL] at *1 (formatting modified).

DISCUSSION

I

Mr. Rudisill first argues that we lack jurisdiction to consider this appeal because the government's appeal was not properly authorized by the Solicitor General before the jurisdictional deadline.

Section 7292(a) of Title 38 authorizes the Federal Circuit to review decisions of the Veterans Court "with respect to the validity of a decision of the [Veterans] Court on . . . any statute or regulation . . . or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the [Veterans] Court in making the decision."[6] The notice of appeal

6. The Veterans Court remanded to the Board of Veterans' Appeals. Although we typically do not review remand orders, *Williams v. Principi*, 275 F.3d 1361, 1364 (Fed. Cir. 2002), we nevertheless may review "a clear and final decision on a legal issue that will directly govern the remand proceedings [where] there is a substantial risk that the issue will not survive a remand." *Frederick v. Shinseki*, 684 F.3d 1263, 1265 (Fed. Cir. 2012) (citing *Williams*, 275 F.3d at 1364).

must be filed within 60 days. *Id.; see* 28 U.S.C. § 2107(b). Under regulations promulgated by the Attorney General, the Solicitor General is responsible for "[d]etermining whether . . . appeals will be taken by the Government to all appellate courts." 28 C.F.R. § 0.20(b). In other words, the Solicitor General must authorize all appeals taken by the Department of Justice.

Here, the Veterans Court entered a final judgment on January 7, 2020. The Secretary filed a notice of appeal 59 days later, on March 6, 2020. The Solicitor General did not authorize the appeal until May 27, 2020, 141 days after the Veterans Court's final judgment.

Mr. Rudisill argues that under *Federal Election Commission v. NRA Political Victory Fund*, 513 U.S. 88, 115 S. Ct. 537, 130 L. Ed. 2d 439 (1994) ("*FEC*"), the Solicitor General's authorization was untimely and deprives this court of jurisdiction. In *FEC*, the Federal Election Commission ("FEC") had filed a petition for certiorari before the 90-day deadline had passed. *Id.* at 90. The Solicitor General authorized the petition after the deadline. *Id.* at 98. The Supreme Court held that the FEC did not have independent authority to litigate before the Supreme Court. *Id.* "Because the FEC lacks statutory authority to litigate this case in [the Supreme] Court, it necessarily follows that the FEC cannot independently file a petition for certiorari, but must receive the Solicitor General's authorization." *Id.* Under these circumstances, the Solicitor General's "'after-the-fact' authorization [did] not relate[] back to the date of the FEC's unauthorized filing so as to make it timely." *Id.* at 99.

The *FEC* decision is not applicable here. This case does not involve an agency of the United States without independent litigating authority that has filed its own petition for certiorari or notice of appeal. Rather, here, the Department of Justice—which indisputably has the authority to file its own appeals—has filed an appeal on behalf of the Secretary of Veterans Affairs. When the United States appeals, "the Attorney General and the Solicitor General shall conduct and argue suits and appeals in . . . the United States Court of Appeals for the Federal Circuit" unless "the Attorney General in a particular case directs otherwise." 28 U.S.C. § 518(a). The Attorney General has required Solicitor General authorization for appeals to this court. 28 C.F.R. § 0.20(b). But the Attorney General also delegated his general litigating authority to the Assistant Attorney General for the Civil Division to conduct most civil litigation (including these types of cases) "by and against the United States [and] its agencies . . . in all courts and administrative tribunals to enforce Government rights, functions, and monetary claims." 28 C.F.R. § 0.45(h); *see also id.* § 0.46.

The Assistant Attorney General for the Civil Division has interpreted that authority to extend to filing protective notices of appeals pending a decision by the Solicitor General. Although the Solicitor General is tasked with "conduct[ing], handl[ing], or supervis[ing]" the determination of whether the government will appeal adverse decisions, 28 C.F.R. § 0.20(b), that supervision does not preclude the Assistant Attorney General from filing protective appeals pursuant to his broad grant of authority to conduct civil litigation on behalf of the government.

See Hogg v. United States, 428 F.2d 274, 280 (6th Cir. 1970) ("[N]othing in 28 C.F.R. § 0.20(b) . . . requires the Solicitor General to have authorized the prosecution of an appeal before the filing of the notice of appeal."). This is not to say that the Assistant Attorney General has the authority under 28 C.F.R. § 0.45 to prosecute an appeal after filing a protective notice without the Solicitor General's authorization, which is clearly required by 28 C.F.R. § 0.20(b). *See id.* at 280 (distinguishing "filing of [a] notice of appeal" from "authoriz[ing] the prosecution of an appeal," the latter of which must be done by the Solicitor General). We thus conclude that the Assistant Attorney General for the Civil Division, pursuant to delegated authority, has properly filed a protective notice of appeal pending Solicitor General approval.[7]

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7. Mr. Rudisill argues that § 6 of the DOJ Directive promulgated by the Principal Deputy Assistant Attorney General for the Civil Division only authorizes protective notices of appeal involving "any direct reference or delegated case," 28 C.F.R. Pt. 0, Subpt. Y App. § 6, a category that does not include cases from the Veterans Court. Because we conclude that the Assistant Attorney General had the authority to file the protective appeal in this case pursuant to 28 C.F.R. § 0.45, and the appeal was filed under this authority, *see* ECF No. 1-2, we need not decide whether § 6 also authorizes the appeal. But the language of § 6 concerning protective notices of appeal appears not to be limited to delegated or direct reference cases (like other parts of § 6). It provides that:

> Until the Solicitor General has made a decision whether an appeal will be taken, the Government attorney handling the case must take all necessary procedural actions to preserve the Government's right to take an appeal, including filing a protective notice of appeal when the time to file a notice of appeal is about

The decisions of our sister circuits in *Hogg* and *United States v. Hill*, 19 F.3d 984, 991 n.6 (5th Cir. 1994), support this conclusion. In *Hogg*, the appellee argued that the government's notice of appeal was "fatally defective because it was filed by the United States Attorney at a time when the Solicitor General had not authorized the appeal." 428 F.2d at 277. The Sixth Circuit disagreed, holding that the "Attorney General has plenary power over the conduct of litigation to which the United States is a party" and the United States Attorney filing the notice of appeal was authorized to do so by internal instructions at the Department of Justice requiring protective notices of appeal. *Id.* at 278-80. The Sixth Circuit held that "nothing in 28 C.F.R. § 0.20(b) . . . requires the Solicitor General to have authorized the prosecution of an appeal before the filing of the notice of appeal." *Id.* at 280. Accordingly, there was no defect in the government's notice of appeal. In *Hill*, the Fifth Circuit followed *Hogg. Hill*, 19 F.3d at 991 n.6. Mr. Rudisill points to no case reaching a contrary conclusion.

In this case, the Assistant Attorney General for the Civil Division, pursuant to delegated authority, timely directed the filing of a notice of appeal. We accordingly have jurisdiction over this appeal.

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to expire and the Solicitor General has not yet made a decision. Nothing in the foregoing directive affects this obligation.

28 C.F.R. Pt. 0, Subpt. Y App. § 6.

II

We turn to the merits of the case. The standard of review as to issues of statutory interpretation is *de novo*. *See Sucic v. Wilkie*, 921 F.3d 1095, 1098 (Fed. Cir. 2019). By its plain language, § 3327(d)(2) applies to Mr. Rudisill. Section 3327(d)(2) establishes a limit on education benefits for an individual who "mak[es] an election under subsection (a) who is described by paragraph (1)(A) of that subsection." Paragraph (1)(A) describes an individual who "elect[s] to receive educational assistance under [the Post-9/11 program]" and who "(1) as of August 1, 2009—(A) is entitled to basic educational assistance under [the Montgomery program] and has used, but retains unused, entitlement under [the Montgomery program.]" 38 U.S.C. § 3327(a)(1)(A). Mr. Rudisill is such an individual. He does not dispute that he had "used, but retain[ed] unused" Montgomery benefits and sought Post-9/11 benefits. *See, e.g.*, Appellee's Br. 51 n.15 (Mr. Rudisill "has 'used, but retains unused' Montgomery entitlement and seeks Post-9/11 benefits.") Rather, Mr. Rudisill disputes that he made the election described in § 3327(a) when he chose to forgo his Montgomery benefits and instead seek Post-9/11 benefits. *Id.* But we see no basis for interpreting "election" in § 3327(a)(1)(A) not to cover Mr. Rudisill's election of Post-9/11 benefits instead of exhausting his Montgomery benefits. Given the breadth of the statute, Mr. Rudisill falls under Paragraph (1)(A) as an individual who both "elect[s] to receive educational assistance under [the Post-9/11 program]" and who "(1) as of August 1, 2009—(A) is entitled to basic educational assistance under [the Montgomery program] and has used, but retains unused,

entitlement under [the Montgomery program.]" Section 3327(d)(2) unambiguously limits the "number of months of entitlement" for such an individual to "the number of months of unused entitlement of the individual under [the Montgomery program]."

Mr. Rudisill nonetheless contends that § 3327(d) only applies to individuals with a single period of service. The Veterans Court and the panel majority agreed. But there is no such limit in the language of the provision, nor any suggestion in its legislative history that the section is so limited. Sections 3322(d) and 3327 do not mention periods of service. The only related section that distinguishes veterans with a single period of service from veterans with multiple periods of service is § 3322(h), which was enacted after the provisions at issue here and which was intended to prevent veterans from being able to "exhaust[] entitlement to 36 months of training under the [Montgomery program and] 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. 111-346, at 19.

Moreover, under Mr. Rudisill's interpretation, veterans with multiple periods of service would not be able to avail themselves of the benefits of § 3327(f) and (g), which are both triggered by the same paragraph (a)(1)(A) election as the limit in § 3327(d). Subsection (f) provides additional assistance to veterans who make the § 3327(a)(1)(A) election and who have previously made contributions toward the Montgomery program. Subsection (g) allows veterans making the § 3327(a)(1)(A) election to retain

their recruitment incentives for critical skills. There is no indication that Congress intended to limit these benefits to veterans with a single period of service.

Mr. Rudisill argues that the 48-month limitation on education benefits under 38 U.S.C. § 3695(a) is the only limit that should apply here. Section 3695(a) provides, "The aggregate period for which any person may receive assistance under two or more of the provisions of law listed below [including the Montgomery program and the Post-9/11 program] may not exceed 48 months . . . ." This provision "is not a source of veterans benefits," *Carr v. Wilkie*, 961 F.3d 1168, 1174 (Fed. Cir. 2020), but rather an additional limitation on a veteran's use of education benefits from multiple programs. There is nothing unusual about having multiple benefit limitations in a single statute. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645, 132 S. Ct. 2065, 182 L. Ed. 2d 967 (2012) (holding that where "a general authorization and a more limited, specific authorization exist side-by-side" in a statutory scheme, "[t]he terms of the specific authorization must be complied with"). Section 3695 does not state or imply that the plain language of 38 U.S.C. § 3327(d)(2) is inapplicable to veterans with multiple periods of service.

Mr. Rudisill contends that the pro-veteran canon of interpretation supports the result he favors. Under the proveteran canon, "interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118, 115 S. Ct. 552, 130 L. Ed. 2d 462 (1994). Whatever role this canon plays in statutory interpretation, it plays no role

where the language of the statute is unambiguous—the situation here. It is not our task to rewrite the statute to make it more favorable to veterans when the statutory language is clear.[88]

CONCLUSION

Section 3327 applies to Mr. Rudisill and limits his Post-9/11 benefits to 10 months and 16 days, the amount of his unused Montgomery entitlement.

REVERSED

COSTS

No costs.

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8. Mr. Rudisill suggests that the government's position is contrary to its own regulations implementing the Post-9/11 program. There is no inconsistency. Subsection 21.9550(b)(1) of Title 38 of the Code of Federal Regulations specifically tracks the language of 38 U.S.C. § 3327(d)(2):

> An individual who, as of August 1, 2009, has used entitlement under [the Montgomery program], but retains unused entitlement under that chapter, makes an irrevocable election to receive educational assistance under the provisions of [the Post-9/11 program] instead of educational assistance under the provisions of [the Montgomery program], will be limited to one month (or partial month) of entitlement under [the Post-9/11 program] for each month (or partial month) of unused entitlement under [the Montgomery program] (including any months of [Montgomery program] entitlement previously transferred to a dependent that the individual has revoked).

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2020-1637

JAMES R. RUDISILL,

Claimant-Appellee,

v.

DENIS MCDONOUGH, SECRETARY OF
VETERANS AFFAIRS,

Respondent-Appellant.

Appeal from the United States Court of Appeals for Veterans Claims in No. 16-4134, Chief Judge Margaret C. Bartley, Senior Judge Mary J. Schoelen, Judge Michael P. Allen.

NEWMAN, *Circuit Judge*, with whom REYNA, *Circuit Judge*, joins, dissenting.

The court now holds, *en banc*, that veterans with more than one period of military service who switch their unused Montgomery education benefits to Post-9/11 benefits are not entitled to the aggregate 48 months of education benefits that the statute provides. The court holds: "Section 3327(d)(2) of Title 38 limits 'the number of months of entitlement . . . to educational assistance' for veterans who switch from Montgomery program to Post-9/11 program benefits without first exhausting their Montgomery benefits," thereby capping at 36 months

the total benefits for veteran Rudisill's three separate enlistments. Maj. Op. at 2-3 (ellipses in original). The court holds that a veteran's total education benefits are limited to "the number of months of unused entitlement of the individual under [the Montgomery program]." Maj. Op. at 13 (brackets in original).

Thus the court reverses the decision of the U.S. Court of Appeals for Veterans Claims ("Veterans Court"), and holds that three-time Army veteran James Rudisill is not entitled to the 48 months of total education benefits earned by re-enlistment. The court instead limits him to the 36 months of education benefits from his initial period of military service. This holding is contrary to statute, regulation, and policy. I respectfully dissent.

DISCUSSION

A

Mr. Rudisill has eight years of military service in three enlistments, and is entitled by statute to 48 months of education benefits

Mr. Rudisill served three tours of active duty in the United States Army. His first enlistment, from January 2000 to June 2002, entitled him to 36 months of education benefits under the Montgomery GI Bill—the only bill then applicable. He used 25 months and 14 days of Montgomery benefits for his undergraduate education, leaving 10 months and 16 days of unused benefits from this enlistment period.

He re-enlisted for two additional periods, serving from June 2004 to December 2005, then November 2007 to August 2011. He served in Iraq and Afghanistan and received medals, commendations, and the rank of Captain. He earned 36 months of education benefits for each period of service and is entitled to benefits for all periods, subject to the aggregate cap of 48 months. 38 U.S.C. § 3695(a).

The Post-9/11 GI Bill was enacted in 2008, to provide enhanced education benefits compared with the Montgomery and earlier education bills, including increased support for tuition, housing, books, and supplies. The Post-9/11 Bill was made retroactively applicable to veterans serving after September 11, 2001; such veterans with unused prior benefits were authorized to elect to receive Post-9/11 benefits in place of their prior benefits. Mr. Rudisill made this election for his unused Montgomery benefits.

Mr. Rudisill now seeks to use his education benefits for post-graduate education. He converted his unused Montgomery benefits of 10 months 16 days into Post-9/11 benefits, and sought to also use additional Post-9/11 benefits from his re-enlistment service, up to the cap of 48 months. However, the Veterans Administration ("VA") held that his Post-9/11 benefits are limited to the number of months and days of his unused Montgomery benefits from his initial period of service, capping the total benefits for his three enlistments at 36 months. The VA held that he could not receive additional Post-9/11 benefits.

The Veterans Court reversed the VA, and held that Mr. Rudisill is entitled to the requested total of 22 months

and 16 days of Post-9/11 benefits, that is, the unused 10 months and 16 days from his first period of service plus 12 months of benefits from his re-enlistment, thus meeting the aggregate cap of 48 months.[1] My colleagues now reverse the Veterans Court, and "limit[] his Post-9/11 benefits to 10 months and 16 days, the amount of his unused Montgomery entitlement." Maj. Op. at 15.

Thus this court denies Mr. Rudisill the additional 12 months of Post-9/11 benefits earned by re-enlistment and rules that veterans with multiple periods of service are limited to 36 months total education benefits if they choose to use their unused Montgomery benefits under the Post-9/11 Bill. This ruling is incorrect, as shown by statute, regulations, and the history of GI education bills.

B

The purpose of the Post-9/11 GI Bill is to enlarge and reinforce education benefits for veterans

The Post-9/11 GI Bill was introduced by Senator Jim Webb, a Vietnam veteran, GI Bill beneficiary, and former Secretary of the Navy. The Bill was "designed to enhance" the education benefits for all veterans serving after September 11, 2001, and "to give the appropriate level of recognition and respect to people who have been serving since 9/11 rather than having to rely on the Montgomery GI Bill, which is a peacetime bill." *Hearing on Pending Benefits Legislation: Hearing Before the S. Comm. on Veterans' Affairs*, 110th Cong. 5-6 (2007).

1. *BO v. Wilkie*, 31 Vet. App. 321 (2019) ("Vet. Ct. Op.").

Appendix A

The Post-9/11 Bill assured that veterans with unused Montgomery entitlements could use those entitlements for the enhanced Post-9/11 support, and it preserved the provisions whereby separate periods of qualifying service earn additional months of benefits up to the aggregate total of 48 months. Following is an outline of the principal relevant provisions.

38 U.S.C. § 3695 provides 48 months of total education benefits for re-enlisting veterans

The purpose of providing additional months of benefits to veterans who re-enlist is both to show appreciation of their additional service and to give an incentive to re-enlistment. The 48 months total education benefits for veterans with more than one period of service and qualifying under more than one benefits program is codified at 38 U.S.C. § 3695. Section 3695 is an "administrative provision" applicable to all education programs; the Montgomery and Post-9/11 benefits are listed in subsection (a)(4):

> **38 U.S.C. § 3695. Limitation on period of assistance under two or more programs**.
>
> **(a)** The aggregate period for which any person may receive assistance under two or more of the provisions of law listed below may not exceed 48 months (or the part-time equivalent thereof):
>
> **(1)** Parts VII or VIII, Veterans Regulation numbered 1(a), as amended.
>
> **(2)** Title II of the Veterans' Readjustment Assistance Act of 1952.

> **(3)** The War Orphans' Educational Assistance Act of 1956.
> **(4)** Chapters 30, 32, 33, 34, and 36.
> **(5)** Chapters 107, 1606, 1607, and 1611 of title 10.
> **(6)** Section 903 of the Department of Defense Authorization Act, 1981 (Public Law 96-342, 10 U.S.C. 2141 note).
> **(7)** The Hostage Relief Act of 1980 (Public Law 96-449, 5 U.S.C. 5561 note).
> **(8)** The Omnibus Diplomatic Security and Antiterrorism Act of 1986 (Public Law 99-399).

The 48-month aggregate period has a long history. Under the World War II GI Bill of 1944, veterans were entitled to up to 48 months of education benefits. The Korean War GI Bill reduced the term to 36 months. The Vietnam-era GI Bill provided that veterans eligible under more than one of the World War II, Korean War, and Vietnam War GI Bills would receive up to 48 months of benefits for distinct periods of qualifying service. An estimated 20.7 million veterans furthered their education under these GI Bills alone. Donald J. Spaulding, *The Four Major GI Bills: A Historical Study of Shifting National Purposes and the Accompanying Changes in Economic Value to Veterans* (Dec. 2000) (Ph.D. dissertation, University of North Texas) (available at https://digital.library.unt.edu/ark:/67531/-metadc2692/m2/1/high_res_d/dissertation.pdf).

The GI Bills since 1968 all provide that a re-enlisting veteran eligible under multiple programs earns aggregate education benefits up to the total of 48 months. Yet the

court today holds that re-enlisting veterans are capped at an aggregate total of 36 months if they convert their unused Montgomery benefits into Post-9/11 benefits. This holding cannot be reconciled with any statute.

Under the provisions enacted in the Vietnam-era GI Bill and still codified today, an eligible veteran is authorized to "use at least 12 months of any entitlement that he earned as a result of post-Korean service, notwithstanding the fact that he had previously received a full 36 months of education or training under one or more of the other Veterans' Administration education assistance program or programs." S. Rep. No. 90-1394, 4487 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4484. This Senate Report explains that "if the veteran finds that he does need additional education, such as a master's degree to successfully enter into a teaching profession, the opportunity should be open to him. The notion is that we reward extra service and recognize that further education today may be necessary for adequate readjustment." *Id.*

This long-standing provision is now casually eliminated by my colleagues, as the court *en banc* "limits [Mr. Rudisill's] Post-9/11 benefits to 10 months and 16 days, the amount of his unused Montgomery entitlement." Maj. Op. at 15. The court does not mention these 50+ years of understanding and purpose of the GI Bills. Instead, the court now holds that veterans who re-enlist are capped at an aggregate total of 36 months of entitlement, if they convert their unused Montgomery benefits into Post-9/11 benefits. This holding, which dramatically reduces education benefits for re-enlisting veterans, has no support in any statute.

The Post-9/11 Bill provides for converting unused Montgomery benefits into Post-9/11 benefits, but it does not thereby eliminate additional benefits for re-enlisting veterans, up to the 48-month cap. The VA had taken this position, but the Veterans Court corrected that holding, on thorough statutory review.

The Veterans Court explained that § 3695(a) provides that the benefit-exchange election provisions in the Post-9/11 Bill do not change the total months of entitlement for veterans with multiple periods of service. As the Veterans Court explained, the Post-9/11 statute authorizes veterans with separate entitlements to "switch freely between programs." Vet. Ct. Op. at 341-43 (citing 38 C.F.R. §§ 21.4022, 21.9690, 21.9635(w)). This court now reverses that holding, and rules that if a veteran with unused Montgomery benefits switches to Post-9/11 benefits, the veteran loses the additional months of Post-9/11 benefits earned by reenlistment. No statute supports this ruling.

C

38 U.S.C. § 3322 and § 3327 do not deprive reenlisting veterans of the 48-month cap if the veterans convert unused Montgomery benefits to Post-9/11 benefits

The court erroneously states that 38 U.S.C. § 3322(d) and § 3327 support the present ruling. These provisions relate to switching unused Montgomery or other unused benefits from a given period of service to Post-9/11 benefits. These provisions do not relate to the entitlement

of veterans with multiple periods of service to additional benefits up to the cap of 48 months.

38 U.S.C. § 3322(a) concerns concurrent receipt of separate entitlements for the same period of service. This section, like § 3327, is concerned with prohibiting concurrent benefits provided under different programs. These conditions may arise because the Post-9/11 Bill, although enacted in 2008, grants retroactive entitlement for service since September 11, 2001.

38 U.S.C. § 3322 is captioned "Bar to duplication of educational assistance benefits," and includes:

> **38 U.S.C. § 3322(d). Additional coordination matters.—**
>
> In the case of an individual entitled to educational assistance under chapter 30, 31, 32, or 35 of this title, chapter 107, 1606, or 1607 of title 10, or the provisions of the Hostage Relief Act of 1980, or making contributions toward entitlement to educational assistance under chapter 30 of this title, as of August 1, 2009, coordination of entitlement to educational assistance under this chapter, on the one hand, and such chapters or provisions, on the other, shall be governed by the provisions of section 5003(c) of the Post-9/11 Veterans Educational Assistance Act of 2008.

The referenced § 5003(c) authorizes the exchange of unused benefits available under other programs for the

Post-9/11 benefits. Nothing in any statute or regulation suggests that by making this exchange the veteran forfeits access to the additional re-enlistment Post-9/11 benefits up to 48 months.

The Veterans Court observed that § 3322(d) allows conversion of Montgomery benefits into Post-9/11 benefits for any period of Montgomery service. Vet. Ct. Op. at 342. Section 3322(d) does not concern multiple periods of service. The holding that Mr. Rudisill's conversion of his unused Montgomery benefits bars entitlement to Post-9/11 benefits earned by re-enlistment is contrary to the Post-9/11 statute. The Veterans Court declined to "assume a meaning in subsection (d)'s silence that automatically disadvantages veterans." *Id.* at 339.

The Veterans Court referred to other provisions of the Post-9/11 Bill, such as § 3322(g) which relates to transferred education benefits to dependents and assures preservation of up to 48 month of benefits; and other provisions preserving "extra benefits based on multiple, separately qualifying periods of service." *Id.* at 336-37. Sections 3322 and 3327 provide a mechanism for exchanging benefits previously subject to the Montgomery Bill for benefits under the Post-9/11 Bill for the same period of qualifying service. These provisions are not concerned with whether the veteran has additional periods of qualifying service. *Id.* at 344.

The legislative record shows the congressional intent to facilitate conversion of Montgomery benefits to Post-9/11 benefits, as well as to authorize Post-9/11 re-enlisting veterans to obtain additional months of Post-9/11 benefits

based on re-enlistment. There is no support for the court's holding that veterans can qualify for Post-9/11 benefits for re-enlistment service only after they exhaust their Montgomery benefits.

D

Sections 3322(e) and (g) do not provide that conversion to Post-9/11 benefits results in loss of access to additional months of Post-9/11 benefits

38 U.S.C. § 3322(e) and § 3322(g) bar concurrent receipt of benefits from different programs. Subsection (e) provides:

> **38 U.S.C. § 3322(e). Bar to concurrent receipt of transferred education benefits and Marine Gunnery Sergeant John David Fry Scholarship Assistance.—**
>
> An individual entitled to educational assistance under both sections 3311(b)(9) and 3319 may not receive assistance under both provisions concurrently, but shall elect (in such form and manner as the Secretary may prescribe) under which provision to receive educational assistance.

Subsection (g) is directed to transferred education benefits (such as to children), and also deals with concurrent receipt of benefits:

> **§ 3322(g). Bar to concurrent receipt of transferred education benefits.—**
>
> A spouse or child who is entitled to educational assistance under this chapter based on a transfer of entitlement from more than one individual under section 3319 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.

These provisions are unrelated to whether an election to switch unused Montgomery benefits to Post-9/11 benefits bars access to additional months of Post-9/11 benefits for veterans with multiple entitlements. Such a substantial restriction cannot be inferred from statutory silence. The Veterans Court explained:

> Subsection (g) provides that individuals to whom it applies "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) (emphasis added). Let's assume that, because subsection (a) doesn't include this language verbatim, it must mean something different than subsection (g). Consider how odd it would be if Congress intended to allow an entitled person *who didn't personally serve in the military* to receive up to 48 months of *transferred* benefits under

> subsection (g), mandating only that the person elect the source of the payments at any given time, but—through silence—also intended to prevent a servicemember him-or herself from receiving extra benefits [i.e., 48 total months of benefits] based on multiple, separately qualifying periods of service on the condition of a similar election mechanism. This arguably absurd result should arouse suspicion that such a result is what Congress wanted to achieve.

Vet. Ct. Op. at 336-37 (citing *McNeill v. United States*, 563 U.S. 816, 822, 131 S. Ct. 2218, 180 L. Ed. 2d 35 (2011) (adopting an interpretation that "avoids the absurd results that would follow" from an alternate interpretation); *United States v. Wilson*, 503 U.S. 329, 334, 112 S. Ct. 1351, 117 L. Ed. 2d 593 (1992); *United States v. Turkette*, 452 U.S. 576, 580, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981) ("[A]bsurd results are to be avoided . . . .")).

The Veterans Court correctly rejected the theory now adopted by my colleagues and held that Mr. Rudisill is entitled to switch the unused Montgomery benefits from his first period of service to Post-9/11 benefits, without losing access to the additional Post-9/11 benefits earned by his multiple enlistments—up to the 48-month cap.

E

Section 3327 does not support the court's holding

38 U.S.C. § 3327(d)(1) authorizes "making an election under subsection (a)." Section 3327(d)(2) does not provide that veterans who make this election, like Mr. Rudisill,

lose their entitlement to the additional months of Post-9/11 benefits earned by re-enlistment.

My colleagues hold that § 3327 "unambiguously" provides that a re-enlisting veteran with unused Montgomery benefits, such as Mr. Rudisill, must use those benefits under the Montgomery terms in order to be entitled to Post-9/11 benefits for re-enlistment. Thus the court holds that Mr. Rudisill is limited in total to the 36 months of benefits earned by his initial enlistment. My colleagues attribute this ruling to § 3327(d):

> **38 U.S.C. § 3327(d)(2).—** In the case of an individual making an election under subsection (a) who is described by paragraph (1)(A) of that subsection, the number of months of entitlement of the individual to educational assistance under this chapter shall be the number of months equal to . . . the number of months of unused entitlement of the individual under [the Montgomery GI Bill].

The referenced subsections provide:

> **38 U.S.C. § 3327 (a). Individuals eligible to elect participation in post-9/11 educational assistance**.
>
> An individual may elect to receive educational assistance under [the Post-9/11 GI Bill] if such individual--
>
> **(1)** as of August 1, 2009--
>
> **(A)** is entitled to basic educational assistance under chapter 30 of this title

> [the Montgomery Bill] and has used, but retains unused, entitlement under that chapter;

Section 3327 supports the converse of the court's current interpretation, for this section authorizes election of Post-9/11 benefits to replace unused Montgomery benefits, without even remotely suggesting that such election will forfeit access to additional Post-9/11 benefits based on a separate period of military service.

Other provisions of § 3327 further implement the exchange of unused Montgomery benefits for Post-9/11 benefits. Section 3327 includes benefit-enhancing details such as termination of the monetary contributions that were required by the Montgomery program, as well as ensuring that other incentives are preserved, such as benefits for family members. *See* 38 U.S.C. § 3327(b) (ending "the obligation of the individual to make contributions" required by the Montgomery GI Bill); § 3327(c)(3) (preserving entitlement "that is not revoked" for later use by dependents); § 3327(g) (preserving certain "increased educational assistance or supplemental educational assistance" after the election).

It is inconceivable that Congress intended, through silence, to strip re-enlisting veterans of the education benefits provided for re-enlisting veterans if they convert their unused Montgomery benefits into Post-9/11 benefits. The court errs in holding that by switching his unused Montgomery benefits to Post-9/11 benefits, Mr. Rudisill is now limited to 36 months of total benefits. No statute,

no legislative record, no public policy, suggests that a re-enlisting veteran loses access to the 48-month aggregate entitlement by switching benefit programs.

F

38 U.S.C. § 3322(h)(1) was enacted to clarify the Post-9/11 Bill

38 U.S.C. § 3322(h) was enacted to address reports of uncertainties in the Post-9/11 GI Bill. *See* S. Rep. No. 111-346 (2010), *reprinted at* 2010 U.S.C.C.A.N. 1503. The provision requires veterans with multiple entitlements to choose which benefit to apply. *Id.*

> **38 U.S.C. § 3322(h)(1).—** An individual with qualifying service . . . that establishes eligibility . . . for educational assistance under this chapter . . . shall elect . . . under which authority such service is to be credited.

Section 3322(h)(1) does not provide that veterans who switch from Montgomery to Post-9/11 benefits will lose their entitlement to re-enlistment benefits, as my colleagues now hold.

The Secretary's M22-4 Manual, which provides instructions to VA administrators, explains that veterans are allowed to "point a period of service to one benefit instead of another," but not to receive multiple benefits for the same period of service. Manual at Pt.3, § 3.10, available at https://perma.cc/XUY8-JZSN?type=image; *see also*

Pt.4, § 3.02(a), available at https://perma.cc/9DU8HXPE?-type=image.

Section 3322(h)(1) comports with Mr. Rudisill's election of Post-9/11 benefits for the unused Montgomery entitlement from his first period of service. His right to Post-9/11 benefits for his subsequent qualifying service, subject to the aggregate cap of 48 months of benefits, is not affected by § 3322(h). Additional provisions include 38 U.S.C. § 3312(a), which again refers to § 3695's aggregate of 48 months for veterans with more than one period of qualifying service. The alternative or consecutive use of benefits earned under different programs is recited in 38 U.S.C. § 3033(a).

"The words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000) (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809, 109 S. Ct. 1500, 103 L. Ed. 2d 891 (1989)). This statutory context includes "the purpose of the text" of the statute. Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012). The majority today fails to take into account the purpose of § 3322(h)(1), which is to clarify entitlements arising from a single period of service.

Appendix A

G

The regulations for these education benefits make no mention of any forfeiture by re-enlisting veterans of their additional Post-9/11 benefits, as the court now holds

The regulations are directed primarily to details of the benefit-exchange election that §§ 3322(d) and 3327 make available to all veterans serving after September 11, 2001, with further details in the Secretary's Manual.

For example, 38 C.F.R. § 21.7042(d)(4) states that benefits under the Montgomery GI Bill and the Selective Reserve Montgomery GI Bill may be used "alternatively or consecutively . . . to the extent that the [entitlement to] educational assistance is based on service not irrevocably credited to" another program. *See also* 38 C.F.R. § 21.7540(c).

38 C.F.R. § 21.9635(w) authorizes veterans "in receipt of educational assistance" under the Post-9/11 program and who are "eligible for benefits under another program," to "choose to" alternate back to receiving benefits under the other program at certain intervals, "effective the first day of the enrollment period during which" such choice is made.

38 C.F.R. § 21.4022 and § 21.9690(a) require the veteran to choose which benefit to apply. Section 21.4022 states that a veteran with multiple entitlements may choose to apply Post-9/11 benefits multiple times, with

the restriction that an "individual may choose to receive benefits under 38 U.S.C. chapter 33 at any time, but not more than once during a certified term, quarter, or semester."

38 C.F.R. § 21.9520 further envisions application of Post-9/11 benefits based on a period of service not yet used for educational benefits, as outlined in parts (a)-(b), or based on a conversion of the remaining benefits from one period of service, as provided in part (c).

As the Veterans Court stated, the position taken by the VA, and now by my colleagues, "would render [the Secretary's] own regulations inoperable surplusage, something we can't condone." Vet. Ct. Op. at 342. My colleagues' theory that Mr. Rudisill, by making the choice to use Post-9/11 benefits in place of his unused Montgomery benefits, lost his entitlement to the additional Post-9/11 benefits earned by re-enlistment service, cannot be founded on statutory and regulatory silence. *See Finley v. United States*, 490 U.S. 545, 554, 109 S. Ct. 2003, 104 L. Ed. 2d 593 (1989) ("It will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.") (quoting *Anderson v. Pac. Coast S.S.*, 225 U.S. 187, 199, 32 S. Ct. 626, 56 L. Ed. 1047 (1912)).

CONCLUSION

There is no foundation for this court's holding that when Mr. Rudisill switched benefit programs, as the statute authorizes, he "limit[ed] his Post-9/11 benefits

to 10 months and 16 days, the amount of his unused Montgomery entitlement." Maj. Op. at 15. He did not forfeit his entitlement to the additional months of Post-9/11 benefits earned by re-enlistment, up to the 48-month cap. The court errs in holding that his total benefit is limited to the initial term of 36 months.

I respectfully dissent.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2020-1637

JAMES R. RUDISILL,

Claimant-Appellee,

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,

Respondent-Appellant.

REYNA, *Circuit Judge*, with whom NEWMAN, *Circuit Judge*, joins, dissenting.

Etched in stone at the headquarters of the U.S. Department of Veterans Affairs, a mere stone's throw from the steps of this court, are President Abraham Lincoln's words:

> To care for him who shall have borne the battle
> and for his widow, and his orphan.[1]

These words are more than a mere recitation of the mission statement of the Department of Veterans Affairs. They are a promise manifested in veterans' benefits laws

1. U.S. Dep't of Veterans Affairs, *About VA: Mission Statement*, https://www.va.gov/ABOUT_VA/index.asp (last updated Sept. 15, 2022).

passed by Congress since the founding of this nation. Nothing reflects the benevolence, sincerity, and security of that promise more than the pro-veteran canon of statutory construction.

I dissent for two reasons. First, I disagree with the majority's cursory, legally unsupported conclusion that the pro-veteran canon "plays no role" when there is no ambiguity. Maj. Op. 15. Second, I disagree with the majority's interpretation that 38 U.S.C. § 3327 limits Mr. Rudisill's Post-9/11 benefits to 10 months and 16 days, the amount of his unused Montgomery entitlement. I would affirm the judgment of the U.S. Court of Appeals for Veteran's Claims on this point.

The pro-veteran canon of statutory interpretation ("Veteran's Canon" or "canon") is a traditional tool of statutory construction that assists courts in interpreting statutes and reaching the "best and fairest reading of the law."[2] The canon is simply what its name implies: it is a tool used in the interpretation of veterans' benefits law that mandates favoring the interests of the veteran. The canon is the lockbox that holds the promise expressed in Abraham Lincoln's words, the roots of which feature prominently in America's history.

In 1776, the Continental Congress created a pension for disabled veterans. This was in response to the states' failure to pay soldiers fighting the Revolutionary War and

2. *Kisor v. Wilkie*, 139 S.Ct. 2400, 2430, 204 L. Ed. 2d 841 (2019) (Gorsuch, J., concurring).

the resulting mutinies, protests, and rebellions. George Washington wrote to Alexander Hamilton, explaining that the states could not be "so devoid of common sense, common honesty, & common policy" as to refuse aid after considering the "full, clear, & candid representation of [the] facts from Congress," particularly if they learned about "the inevitable consequences" of failing to support the soldiers. George Washington, *The Papers of Alexander Hamilton*, vol. 3, 1782-1786 (Mar. 4, 1783).

In 1862, the U.S. government established a system for settling veterans' claims for benefits arising from military service. In 1917, Congress created programs for veterans' benefits like compensation, insurance, and rehabilitation. With the goal of improving administration of these benefits, Congress established the Veterans Administration in 1930. In 1944, President Roosevelt signed into law the Servicemen's Readjustment Act of 1944, a "GI Bill of Rights" that was the first iteration of the current VA benefit system. Pub. L. No. 78-346, 58 Stat. 284. This GI Bill unanimously passed in both chambers of Congress and served to provide funds to World War II veterans for education, unemployment insurance, and housing. While this GI bill expired in 1956, it was extended as the Montgomery GI bill, then the Post-9/11 Bill, and, most recently, the Forever GI Bill.

The Supreme Court, too, has long recognized the Veteran's Canon as a legal doctrine that upholds congressional purpose in veterans' benefits law. In 1943, the Supreme Court explained that veterans' benefits laws statutes, like the Soldiers' and Sailors' Civil Relief

Act, should "be liberally construed to protect those who have been obliged to drop their own affairs to take up the burden of the nation." *Boone v. Lightner*, 319 U.S. 561, 575, 63 S. Ct. 1223, 87 L. Ed. 1587 (1943). Justice Douglas wrote that courts should construe separate provisions of an act benefiting veterans as parts of an "organic whole" and give each "as liberal a construction for the benefit of the veteran." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285, 66 S. Ct. 1105, 90 L. Ed. 1230 (1946); *see also Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196, 100 S. Ct. 2100, 65 L. Ed. 2d 53 (1980) (Marshall, J.) ("The statute is to be liberally construed for the benefit of the returning veteran."). Similarly, Justice Souter wrote that "we would ultimately read the provision in [the veteran's] favor under the canon 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, 220-221 n. 9, 112 S. Ct. 570, 116 L. Ed. 2d 578 (1991).

The foregoing illustrates a corollary of the Veteran's Canon: veterans' benefits law should not just be liberally construed in favor of the veteran but also must not be construed in a manner that negates or frustrates the congressional purpose because the veterans' benefits law is remedial by design. *Kisor v. McDonough*, 995 F.3d 1316, 1336 (Fed. Cir. 2021) (Reyna, J., dissenting) (citing *Boone*, 319 U.S. at 575); *see also Corning Glass Works v. Brennan*, 417 U.S. 188, 208, 94 S. Ct. 2223, 41 L. Ed. 2d 1 (1974) (finding the Equal Pay Act to be "broadly remedial and it should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve"); *James-Cornelius v. Sec'y of Health and Human Servs.*,

984 F.3d 1374, 1381 (Fed. Cir. 2021) (instructing the court to keep in mind the "remedial objective" of the Vaccine Act); *PS Chez Sidney, LLC v. U.S. Int'l Trade Comm'n*, 684 F.3d 1374, 1380-81 (Fed. Cir. 2012) (noting that the Byrd Amendment "had the additional benefit of furthering the statute's stated goals of strengthening the remedial purpose of the law."). Accordingly, the Veteran's Canon should have an undiluted application that effectuates the broader purpose of GI Bills that are specifically *designed* to provide benefits to veterans like Mr. Rudisill.

Despite its clear provenance in U.S. veterans' benefits law, there exists a misunderstanding as to how—and when—the canon applies. For example, in this appeal, the majority resolves the merits of the statutory interpretation question and only then decides in a single sentence that the Veteran's Canon has no application in the case because the statute is unambiguous. This declaration of no ambiguity is belied by a number of factors. First, the near entirety of the majority opinion is devoted to classic statutory interpretation. Second, the question before the court has a rich history of litigation. Third, the case has garnered the attention of numerous amici. Fourth, the majority overturns the judgment of the Court of Appeals for Veterans Claims. And fifth, the majority expresses no principled reason why the canon does not apply to the ambiguity question or in its statutory interpretation analysis.

Indeed, it seems to me that an element of *Chevron* deference creeps into some decisions concerning whether to apply the Veteran's Canon. Step one, determine if

there exists an ambiguity without resort to the canon. If the court finds no ambiguity, then the canon does not apply at all. This is wrong. To exclude the canon from the initial—and significantly important—question on whether ambiguity exists in the law effectively bends the law to the favor of, and to the deference of, the agency. I agree with Justice Gorsuch who recently highlighted that, "[t]raditionally, too, our courts have long and often understood that, 'as between the government and the individual[,] the benefit of the doubt' about the meaning of an ambiguous law must be 'given to the individual, not to authority; for the state makes the laws.'" *Buffington v. McDonough*, 214 L. Ed. 2d 206, 2022 WL 16726027, at *10 (U.S. Nov. 7, 2022) (Gorsuch, J., dissenting) (citing *Lane v. State*, 120 Neb. 302, 232 N.W. 96, 98 (1930); *Caldwell v. State*, 115 Ohio St. 458, 460-461, 4 Ohio Law Abs. 605, 4 Ohio Law Abs. 835, 154 N.E. 792 (1926)). To exclude the canon at the outset of a statutory interpretation analysis hobbles the veteran and favors the agency.

In veterans' benefits cases, the agency is not an adversary. It is important to note that the Department of Veterans Affairs "differs from virtually every other agency in being itself obliged to help the claimant develop his claim." *Shinseki v. Sanders*, 556 U.S. 396, 415-16, 129 S. Ct. 1696, 173 L. Ed. 2d 532 (2009) (Souter, J., dissenting). Department of Veterans Affairs proceedings are informal and non-adversarial and, when evaluating claims, the agency itself must give veterans "the benefit of the doubt." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 131 S.Ct. 1197, 1201, 179 L. Ed. 2d 159 (2011); *id.* at 1199 ("Congress' longstanding solicitude for

veterans is plainly reflected in the [act] and in subsequent laws that place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions." (cleaned up)).

The majority, in this case, places its thumb on the side of the scale that favors the agency. In so doing, the court ignores the Supreme Court's recent instruction that courts should exhaust all the traditional tools of construction *before* concluding that a rule is ambiguous. *Kisor*, 139 S.Ct. at 2415. This means that courts should fully employ the pro-veteran canon along with other canons and tiebreaking rules in the "traditional interpretive toolkit" to reach the "best and fairest reading of the law." *Id.* at 2430 (Gorsuch, J., concurring in judgment). Where there is confusion and ambiguity in the statutory scheme, Justice Sotomayor has explained that one should apply the canon. *George v. McDonough*, 142 S.Ct. 1953, 1964, 213 L. Ed. 2d 265 (2022) (Sotomayor, J., dissenting). Thus, it is neither fair nor just for the court to say to the veteran that the pro-veteran canon has no role in the pursuit of her claim because the court finds no ambiguity in the statute. Rather, the canon should apply at the outset of this court's interpretation of veteran's benefits law. Courts should *ab initio* be wary not to defer to a VA interpretation that restricts or limits veteran benefits that Congress has expressly sought to bestow on the veteran.

For example, in this case, Congress clearly sought to expand and enhance education benefits that were already in place through the enactment of the Post-9/11 GI bill, Title 38, Veterans' Benefits. Congress explained:

> The United States has a proud history of offering educational assistance to millions of veterans, as demonstrated by the many 'G.I. Bills' enacted since World War II. Educational assistance for veterans helps reduce the costs of war, assist veterans in readjusting to civilian life after wartime service, and boost States economy, and has a positive effect on recruitment for the Armed Forces.
>
> The current educational assistance program for veterans [MGIB] is outmoded and designed for peacetime service in the Armed Forces.
>
> The people of the United States greatly value military service and recognize the difficult challenges involved in readjusting to civilian life after wartime service in the Armed Forces.
>
> It is 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 and are commensurate with the educational assistance benefits provided by a grateful Nation to veterans of World War II.

Pub. L. No. 110-252, § 5002, 122 Stat. 2358 (2008).

The veteran-friendly nature of this scheme and its remedial nature is arguably the "very raison d'être for

passage" of the bill. *Roby v. McDonough*, No. 20-1088, 2021 U.S. App. LEXIS 23044, 2021 WL 3378834, at *5 (Fed. Cir. Aug. 4, 2021). Senator Jim Webb introduced the Post-9/11 bill, explaining that it was designed to "expand the educational benefits that our Nation offers to the brave men and women who have served us so honorably." Hearing on Pending Benefits Legislation, 110 Cong. 118 (2007) (Statement of Jim Webb); *see, e.g.*, Brief for NVLS as Amicus Curiae Supporting Appellee at 9. Congress wanted to "reemphasize that the *purpose of providing for transferability of benefits* to dependents is to promote recruitment and retention in the uniformed services." S. Rep. No. 111-346, at 17 (2010) (emphasis added); Brief for Affected Veterans as Amicus Curiae Supporting Appellee at 16. Indeed, this is consistent with the legislative history of GI Bills dating back to the Servicemen's Readjustment Act of 1944. Pub. L. No. 78-346, 58 Stat. 284; Brief for NVLS as Amicus Curiae Supporting Appellee at 3.

The foregoing shows that Congress understood, at the time it passed the Post-9/11 Bill, that many veterans were already enrolled and earning benefits under the existing Montgomery GI Bill. Congress then acted to enhance and expand those educational benefits with the Post-9/11 Bill, thereby keeping true to the promise made to this nation's servicewomen and servicemen. When viewed in favor of the veteran, the statutory framework makes clear that Mr. Rudisill is entitled to the full benefits subject only to the "cap" of 38 U.S.C. § 3695. The Veterans Court permissibly and correctly interpreted the provision at issue in favor of Mr. Rudisill.

In conclusion, it bears noting that Mr. Rudisill has already *earned* his educational benefits through his significant service as a three-time Army veteran and Captain who was awarded the Bronze Star, Combat Action Badge, Air Assault Badge, Afghanistan and Iraq Campaign Medals, and Kosovo Campaign Medal. For having borne the burden of the battle, this court is charged to interpret veteran benefits laws in his favor. Because the majority fails in that commitment, I dissent.

APPENDIX B — OPINION AND DISSENT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, DATED JULY 8, 2021

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2020-1637

JAMES R. RUDISILL,

Claimant-Appellee,

v.

DENIS MCDONOUGH, SECRETARY
OF VETERANS AFFAIRS,

Respondent-Appellant.

July 8, 2021, Decided

Appeal from the United States Court of Appeals for Veterans Claims in No. 16-4134, Chief Judge Margaret C. Bartley, Judge Michael P. Allen, Senior Judge Mary J. Schoelen.

Before NEWMAN, DYK, and REYNA, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* NEWMAN.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* DYK.

Appendix B

NEWMAN, *Circuit Judge.*

The United States Court of Appeals for Veterans Claims ("Veterans Court") held that a veteran with multiple periods of qualifying military service is entitled to GI Bill education benefits for each period of service, subject to the legislated limit of a total of 48 aggregate months of education benefits. Applying this holding to veteran James R. Rudisill, the Veterans Court held that he is not limited to the total of 36 months of education benefits set by the Montgomery GI Bill ("Montgomery" or "MGIB") and applicable to his first period of qualifying service, when he also qualifies for later education benefits under a later bill—the Post-9/11 GI Bill.[1] That is, he is entitled to the total of 48 months of aggregate benefits. The Secretary of Veterans Affairs ("Secretary") appeals. On appellate review, we affirm the decision of the Veterans Court.

Background

James R. Rudisill served three periods of active duty military service, as follows: (1) from January 2000 to June 2002 in the Army (30 months); (2) from June 2004 to December 2005 in the Army National Guard (18 months); and, (3) from November 2007 to August 2011 as a commissioned officer in the Army (45 months). He applied for and duly received 25 months and 14 days of education benefits in accordance with the Montgomery GI Bill, 38 U.S.C. § 3011(a), for completion of his college degree.

1. *BO v. Wilkie*, 31 Vet. App. 321 (2019) ("Vet. Ct. Op.").

After his third period of Army service, he applied for education benefits under the Post-9/11 GI Bill, 38 U.S.C. § 3311, to attend the Yale Divinity School graduate program. The Department of Veterans Affairs ("VA") determined that he was entitled to the Post-9/11 benefits, but only for the remaining 10 months and 16 days of the 36 months authorized for Montgomery benefits. The VA held that he was not entitled to benefits beyond a total of 36 months.

Mr. Rudisill appealed to the Board of Veterans' Appeals ("BVA"), seeking education benefits up to the statutory cap of 48 months for multiple terms of service. The BVA sustained the VA's ruling that Mr. Rudisill's total benefits were limited to the unused period of his 36-months entitlement under the Montgomery GI Bill. No. 16-01 431, 2016 BVA LEXIS 34562, 2016 WL 4653284 (Bd. Vet. App. July 14, 2016) ("BVA Op."). The BVA held that his "election to use Post-9/11 benefits in lieu of MGIB benefits was irrevocable and limited his eligibility to the unused remainder of his MGIB entitlement." Sec'y Br. 12 (citing BVA Op. at *3).

Concerning the statutory cap of 48 months of aggregate benefits, the BVA acknowledged that "[w]here an individual is eligible for two or more education programs, the aggregate period for which any person may receive assistance may not exceed 48 months." BVA Op. at *3. But the BVA held as to Mr. Rudisill that "[t]here is no provision authorizing 12 additional months of entitlement under Chapter 33 on top of 36 total months of combined benefits under Chapter 30 and Chapter 33."

Id. The BVA reasoned that the entitlement period for Chapter 33 benefits is limited by 38 C.F.R. § 21.9550(b)(1), stating as follows:

> An individual who, as of August 1, 2009, has used entitlement under 38 U.S.C. Chapter 30, but retains unused entitlement under that chapter, makes an irrevocable election to receive educational assistance under the provisions of Chapter 30, will be limited to one month (or partial month) of entitlement under Chapter 33 for each month (or partial month) of unused entitlement under Chapter 30 (including any months of Chapter 30 entitlement previously transferred to a dependent that the individual has revoked). In short, if an individual is eligible for benefits under Chapter 30, and he or she uses some of that entitlement before irrevocably electing to receive Chapter 33 benefits in lieu of benefits under Chapter 30, that individual may be awarded the equivalent of the entitlement that remained unused under Chapter 30. There is no provision authorizing 12 additional months of entitlement under Chapter 33 on top of 36 total months of combined benefits under Chapter 30 and Chapter 33.

BVA Op. at *3 (internal citation omitted).

On Mr. Rudisill's appeal, the Veterans Court reversed the BVA and held that the veteran is entitled to education benefits for each of his periods of separately qualifying

service, and that he is entitled to the aggregate cap of 48 months of benefits. The Secretary appeals, stating that the Veterans Court did not correctly interpret the GI Bill statutes and regulations. As we shall discuss, we conclude that the Veterans Court's interpretation was in conformity with law.

The "GI Bills" have a long and salutary history. The original GI Bill was the Servicemen's Readjustment Act of 1944, to provide education and other benefits for veterans of World War II. The GI Bill provided payment of tuition and designated expenses for college or trade school education. Similar bills were enacted after successive periods of conflict, again to provide education and other benefits for veterans. *See, e.g.*, Veterans' Readjustment Assistance Act of 1952, 66 Stat. 663 ("Korean War GI Bill"); Veterans' Readjustment Benefits Act of 1966, 80 Stat. 12 ("Cold War GI Bill"); the Veterans' Education and Employment Assistance Act of 1976, 90 Stat. 2383 ("Post-Korean Conflict and Vietnam Era GI Bill"); and Veterans' Rehabilitation and Education Amendments of 1980, 94 Stat. 2171 ("Post-Vietnam Era Veterans Educational Assistance Program").

The statutes relevant to this action are the Montgomery GI Bill of 1985, codified at chapter 30 of title 38 United States Code, and the Post-9/11 GI Bill of 2008, codified at chapter 33 of title 38 United States Code. Following are relevant provisions of these GI Bills:

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The Montgomery GI Bill

The Montgomery GI Bill states the purposes of education benefits for veterans in its opening section:

> 38 U.S.C. § 3001. The purposes of this chapter are . . . to aid in the recruitment and retention of highly qualified personnel for both the active and reserve components of the Armed Forces . . . [and] to enhance our Nation's competitiveness through the development of a more highly educated and productive work force.

Section 3011(a) defines the veterans who are entitled to Montgomery GI Bill benefits:

> (a) Except as provided in subsection (c) of this section, each individual—
>
> (1) who—
>
> (A) after June 30, 1985, first becomes a member of the Armed Forces or first enters on active duty as a member of the Armed Forces and—
>
> (i) who (I) in the case of an individual whose obligated period of active duty is three years or more, serves at least three years of continuous active duty in the Armed Forces, or (II) in the case of an individual whose obligated period of active duty is less than three years, serves at

> least two years of continuous active duty in the Armed Forces.

Section 3013(a)(1) provides that veterans are entitled to "36 months of educational assistance benefits under this chapter."

The Montgomery education benefits are provided as a monthly stipend at a fixed rate, regardless of actual tuition costs, and do not include payment for books or living expenses. *See* 38 U.S.C. § 3015. This was the pattern of all the preceding GI Bills.

The Post-9/11 GI Bill

The Post-9/11 GI Bill applies to education costs incurred, starting in 2011, by veterans with an aggregate of at least 36 months of active duty service after September 11, 2001. This Bill "improve[s] educational assistance for veterans who served in the Armed Forces after September 11, 2001." 124 Stat. 4106 (approved Jan. 4, 2011). Section 3311 defines the veterans who are entitled to Post-9/11 GI Bill benefits:

> 38 U.S.C. § 3311(b). Covered Individuals . . . . An individual who—
>
> (A) commencing on or after September 11, 2001, 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); and

> (B) after completion of service described in subparagraph (A)—
>
> (i) continues on active duty; or
>
> (ii) is discharged or released from active duty as described in subsection (c).

Covered veterans may receive up to 36 months of Post-9/11 GI Bill benefits. 38 U.S.C. § 3312(a).

The Post-9/11 GI Bill provided broader benefits than the prior bills, including payment of the actual amount of tuition and fees plus a monthly housing stipend equal to the basic military housing allowance in the area in which the campus is located; plus a lump sum amount for books, supplies, equipment, and other costs. 38 U.S.C. § 3313(c)(1)(B)(iv).

The Post-9/11 GI Bill includes provisions relevant to multiple periods of service, and allows eligible veterans to elect the education assistance under this Bill:

> 38 U.S.C. § 3322(h). Bar To Duplication of Eligibility Based on a Single Event or Period of Service.—
>
> (1) Active-duty service.—
>
> An individual with qualifying service in the Armed Forces that establishes eligibility on the part of such individual for educational assistance under this chapter . . . shall elect

> (in such form and manner as the Secretary may prescribe) under which authority such service is to be credited.
>
> * * *
>
> § 3327(a). Individuals Eligible To Elect Participation in Post-9/11 Educational Assistance.—
>
> An individual may elect to receive educational assistance under this chapter if such individual—(1) as of August, 2009 . . . has used, but retains unused, entitlement under [the Montgomery GI Bill].

Section 3327(d)(2) authorizes veterans who were using previously available GI Bill benefits to switch to the more inclusive Post-9/11 benefits for "the number of months of unused entitlement." However, the Montgomery GI Bill was not terminated and did not expire with enactment of the Post-9/11 GI Bill. The following text of the Post-9/11 GI Bill produced the uncertainty reflected in the rulings of the BVA and the Veterans Court that are the subject of this appeal:

> 38 U.S.C. § 3327(d)(2). Limitation on entitlement for certain individuals.—In the case of an individual making an election under subsection (a) . . . , the number of months of entitlement of the individual to educational assistance under this chapter shall be the number of

> months equal to—(A) the number of months of unused entitlement of the individual under [the Montgomery GI Bill] as of the date of the election[.]

The Post-9/11 GI Bill continued to recite, pursuant to § 3312(a), the aggregate period of 48 months of education assistance for veterans with more than one period of qualifying military service under § 3695:

> 38 U.S.C. § 3695. Limitation on period of assistance under two or more programs.
>
> (a) The aggregate period for which any person may receive assistance under two or more of the provisions of law listed below may not exceed 48 months (or the part-time equivalent thereof).
>
> [listing the eight GI Bills in effect, including the Montgomery GI Bill and the Post-9/11 GI Bill].

After his third period of military service Mr. Rudisill sought further education, and applied for Post-9/11 GI Bill benefits. He had previously received 25 months and 14 days of Montgomery benefits, and in view of the cap of 48 months, he requested 22 months and 16 days of Post-9/11 benefits. He submitted VA Form 22-1990, "Application for VA Educational Benefits," and in the field "education benefit being applied for" he selected "Chapter 33 [Post-9/11] in Lieu of Chapter 30 [Montgomery]." J.A. 541.

The VA determined that he was entitled to only 10 months and 16 days of benefits, measured as the unused

remainder of his 36-month Montgomery entitlement. The VA held that no additional entitlement arose, and that the 48-month statutory cap for veterans with multiple periods of service did not apply. The VA explained:

> Under the regulations which govern the Post 9/11 GI Bill, a client who elects to receive benefit under the Post 9/11 GI Bill and who is eligible for the Montgomery GI Bill (Chapter 30) benefit is required to make an irrevocable election to relinquish his Chapter 30 benefits when claiming the Post 9/11 GI Bill. The law further states that entitlement to the Post 9/11 GI Bill will be equal to the client's remaining entitlement under Chapter 30 on the effective date of the client's irrevocable election . . . . Based on [Mr. Rudisill's] election, the law dictates that the VA grants entitlement under the Post-9/11 GI Bill not to exceed his remaining Chapter 30 entitlement.

J.A. 521 (Decision, denying Mr. Rudisill's request for additional entitlement under the Post-9/11 GI Bill).

Mr. Rudisill appealed to the BVA, arguing that the 48-month total applies by statute to veterans with separate qualifying tours of military service. The BVA rejected that argument, stating that Mr. Rudisill's election (on Form 22-1990) to use Post-9/11 benefits in lieu of Montgomery benefits limited his total eligibility to the unused remainder of his Montgomery 36-month entitlement. BVA Op. at *4 ("[T]he Veteran's completed

online application via VA Form 22-1990 in March 2015 was very clear that he did elect Chapter 33 in lieu of Chapter 30 benefits, that this election was irrevocable and could not be changed, and that his benefits under Chapter 33 would be limited to the time remaining under his Chapter 30 benefits unless he first used all of the benefits under Chapter 30 before electing Chapter 33.").

The Veterans Court reversed the BVA's decision. The Veterans Court held that a veteran with multiple periods of service who uses but does not exhaust Montgomery education benefits, and then applies for Post-9/11 benefits after a separate period of service, is not limited to the total of 36 months provided for the Montgomery program. The Veterans Court explained that "section 3327 does not apply in this case," *i.e.* in cases of "individuals with dual entitlement based on *multiple* periods of service," but rather, applies only in cases of "individuals with dual entitlement based on a *single* period of service." Vet. Ct. Op. at 332-34 (emphases in original). The Veterans Court held that Mr. Rudisill's third period of service separately entitled him to a full term of education benefits under the Post-9/11 GI Bill, subject to the 48-month aggregate cap.

On this appeal, the Secretary argues that the Veterans Court misinterpreted the statute. The Secretary states that "§ 3327(a)(1)(A) authorizes veterans who have used some, but not all, of their [Montgomery] benefits to switch to using Post-9/11 benefits. However, § 3327(d)(2)(A) limits the entitlement to Post-9/11 benefits for that particular subset of veterans to 'the number of months of unused entitlement of the individual under' MGIB 'as of the date of the election.'" Sec'y Br. 9.

Appendix B

DISCUSSION

I

Jurisdiction

Mr. Rudisill supports the decision of the Veterans Court, but challenges our jurisdiction to receive this appeal, based on the Solicitor General's tardy approval of the appeal filing as required by 28 C.F.R. § 0.20(b). Mr. Rudisill states that the appeal was not timely filed.

Federal Circuit jurisdiction of decisions of the Veterans Court is assigned by 38 U.S.C. § 7292(a), which authorizes our review of the "validity of a decision of the [Veterans] Court on a rule of law or of any statute or regulation . . . or any interpretation thereof." The notice of appeal must be filed within 60 days of the final judgment. *Id.*; 28 U.S.C. § 2107(b). When the United States is the appellant, 28 U.S.C. § 518(a) provides that "the Attorney General and the Solicitor General shall conduct and argue suits and appeals in . . . the United States Court of Appeals for the Federal Circuit" unless "the Attorney General in a particular case directs otherwise."

In turn, the Solicitor General is responsible for "[d]etermining whether, and to what extent, appeals will be taken by the Government to all appellate courts." 28 C.F.R. § 0.20(b). The filing of a notice of appeal is deemed to be a determination "whether" an appeal will be taken, which the Solicitor General is required to approve. *Id.*

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Here the Veterans Court entered its final judgment on January 7, 2020. Fifty-nine days later, on March 6, 2020, the Secretary filed a Notice of Appeal, represented by the Attorney General. On May 27, 2020, the Solicitor General filed the requisite approval of the filing of the appeal. This led to a Motion for Extension of Time; *see* Sec'y Reply in Supp. of Mot. for Extension of Time, at 3 (ECF No. 19) ("[T]he Solicitor General has completed his review. On May 27, 2020 undersigned counsel received official authorization to proceed with this appeal.").

Mr. Rudisill argues that this appeal was not timely filed. He states that *Federal Election Commission v. NRA Political Victory Fund*, 513 U.S. 88, 115 S. Ct. 537, 130 L. Ed. 2d 439 (1994) ("*FEC*") requires this result, for the Supreme Court held that the agency's petition for *certiorari* was untimely because it was not authorized by the Solicitor General until after the time for filing the petition had expired, although the petition was filed within the statutory period. The Court applied 28 C.F.R. § 0.20(a), the Supreme Court counterpart of 28 C.F.R. § 0.20(b), and concluded: "[T]he FEC is not authorized to petition for certiorari in this Court on its own, and that the effort of the Solicitor General to authorize the FEC's petition after the time for filing it had expired did not breathe life into it." *Id.* at 90.

The Secretary responds by distinguishing *FEC* on the facts thereof, where the initial filing was not by the Attorney General but by the FEC in its own name. The Secretary cites several circuit court decisions where the Attorney General filed a Notice of Appeal within the

statutory period and the Solicitor General's authorization was permitted to be filed later. For example, in *Hogg v. United States*, 428 F.2d 274 (6th Cir. 1970), Hogg argued that "the Government's timely notice of appeal . . . is fatally defective because it was filed by the United States Attorney at a time when the Solicitor General had not authorized the appeal." *Id.* at 277. The Sixth Circuit rejected this theory, reasoning that the "Attorney General has plenary power over the conduct of litigation to which the United States is a party" and a "regulation defining the jurisdiction of the Solicitor General" does not "foreclose[] the Attorney General from directing that a notice of appeal be filed," *id.* at 278, thereby meeting the jurisdictional requirements.

In *United States v. Hill*, 19 F.3d 984 (5th Cir. 1994), the Fifth Circuit applied the reasoning in *Hogg* to the current version of 28 C.F.R. § 0.20(b), and ruled that any delay in approval by the Solicitor General does not negate the timeliness of a Notice of Appeal filed by the Attorney General, and they have authority to file protective notices of appeal pending the Solicitor General's decision whether to authorize the appeal.

We discern no reason to depart from this rationale. The Secretary explains: "given the extensive and time-consuming process the Government follows in order to pursue affirmative appeals, it is not uncommon for so-called 'protective' notices of appeal to be filed, pending a final decision from the Solicitor General." Sec'y Reply Br. 2 (internal citation omitted). This practice is "routine and consistent with the Solicitor General's role in authorizing

appeals." *Id.* at 3. The Department of Justice Directive 1-15, § 6, at 28 C.F.R. Pt. 0, Subpt. Y., App. states: "Until the Solicitor General has made a decision whether an appeal will be taken, the Government attorney handling the case must take all necessary procedural actions to preserve the Government's right to take an appeal, including filing a protective notice of appeal when the time to file a notice of appeal is about to expire and the Solicitor General has not yet made a decision."

We conclude that the jurisdictional requirement for filing this appeal was met by the filing of the notice of appeal by the Attorney General within 60 days, and its subsequent approval by the Solicitor General.

II

Statutory Interpretation: Veterans With Multiple Periods of Qualifying Service

The Veterans Court stated: "The precise question the Court must answer in this appeal is: how does the law treat a veteran who qualifies for the Montgomery GI Bill under one period of service and the Post-9/11 GI Bill under an entirely separate qualifying period or periods of service?" Vet. Ct. Op. at 9. The government's position is that, for veterans with multiple periods of service, "§ 3327(a)(1)(A) authorizes veterans who have used some, but not all, of their MGIB benefits to switch to using Post-9/11 benefits. However, § 327(d)(2)(A) limits the entitlement to Post-9/11 benefits for that particular subset of veterans to 'the number of months of unused entitlement of the individual

under' MGIB 'as of the date of the election.'" Sec'y Br. 9 (quoting § 3327(d)(2)(A)). That was the ruling of the BVA.

The Veterans Court did not agree. The court reviewed the history and legislative intent of the GI Bills, and concluded that the correct interpretation of § 3327(d)(2)(A) is that "separate periods of qualifying service allow a veteran such as [Mr. Rudisill] to receive full benefits under both programs subject to an aggregate cap on all such benefits." Vet. Ct. Op. at 328. The statute states:

> [T]he number of months of entitlement of the individual to educational assistance under this chapter shall be the number of months equal to—(A) the number of months of unused entitlement of the individual under [the Montgomery GI Bill] as of the date of the election.

38 US.C. § 3327(d)(2). The Veterans Court held that § 3327 does not apply to veterans having periods of intermittent qualifying service; rather, those veterans are subject to the 48-month aggregate cap.

Again on this appeal, the Secretary states that since Mr. Rudisill drew on his first two periods of active service for Montgomery GI Bill benefits, and used 25 months 14 days thereof, he was entitled to only the remaining period of 10 months 16 days for the Post-9/11 GI Bill benefits he elected based on his subsequent qualifying service. The Secretary thus argues that the applicable cap for Mr. Rudisill is the period of entitlement for Montgomery

benefits, that is, 36 months. Sec'y Br. 28 ("Mr. Rudisill's entitlement to Post-9/11 benefits [is] limited to his period of unused [Montgomery] entitlement.").

The Veterans Court did not share the Secretary's statutory interpretation, and we agree. The legislation explicitly provides additional benefits to veterans with multiple periods of qualifying service, whereby each period of service qualifies for education benefits, with the limit that: "The aggregate period for which any person may receive assistance under two or more of the provisions of law listed below may not exceed 48 months (or the part-time equivalent thereof)," codified at 38 U.S.C. § 3695(a). This provision has been in each GI Bill since at least 1968. *See Finley v. United States*, 490 U.S. 545, 554, 109 S. Ct. 2003, 104 L. Ed. 2d 593 (1989) ("Under established canons of statutory construction, 'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.'" (quoting *Anderson v. Pac. Coast S.S. Co.*, 225 U.S. 187, 199, 32 S. Ct. 626, 56 L. Ed. 1047 (1912)).

The statutory pattern does not support the interpretation urged by the Secretary whereby veterans with multiple periods of qualifying service would be limited to the cap applicable to the initial period. The Veterans Court correctly held that each period of service earns education benefits, subject to its cap of 48 aggregate months of benefits.

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CONCLUSION

Mr. Rudisill is entitled to Post-9/11 GI Bill benefits for his graduate education, subject to the cap of 48 aggregate months of benefits including the period for which he received Montgomery benefits.

AFFIRMED

Appendix B

DYK, *Circuit Judge*, concurring in part and dissenting in part.

The majority holds that the Secretary of Veterans Affairs timely filed the notice of appeal in this case. Maj. Op. 13. I agree and join Part I of the majority's opinion.

In Part II, the majority also holds that all "veterans with multiple periods of qualifying service" are entitled to "additional benefits" up to "48 aggregate months of benefits." Maj. Op. 15. This seems to me to be directly contradictory to the statute (38 U.S.C. § 3327), as the government argues. Section 3327 unambiguously limits the educational benefits available to all veterans who switch from using the Montgomery GI Bill ("Montgomery") to the Post-9/11 GI Bill ("Post-9/11"), and who have not exhausted their Montgomery eligibility, to the remaining period of eligibility for Montgomery benefits, which here is less than what the majority allows.

The statute defines the scope of veteran educational assistance. Depending on their service, veterans may be eligible for educational assistance under multiple programs at the same time, including the Montgomery and Post-9/11 programs. By statute, there is an overall 48-month limit on the receipt of educational assistance. 38 U.S.C. § 3695(a). According to the majority, this is the only limit that applies here. However, a second and additional statutory limit also applies when a veteran initially elects to receive assistance under the Montgomery program, but later elects to switch to Post-9/11 assistance while retaining unused entitlement under the Montgomery program. *Id.* § 3327(a)(1)(A). Under this circumstance,

> the number of months of entitlement of the individual to educational assistance under [the chapter governing Post-9/11 entitlement] shall be the number of months equal to . . . the number of months of unused entitlement of the individual under chapter 30 of this title [governing Montgomery benefits], as of the date of the election.

Id. § 3327(d)(2)(A).[2]

Here, Mr. Rudisill is an "individual" entitled to *Post-9/11* benefits because "on or after September 11, 2001," he "serve[d] an aggregate of at least 36 months on active duty" and was later honorably discharged from active duty. *Id.* § 3311(b)(1)(A), (c)(1). He is additionally an "individual" entitled to *Montgomery* benefits because "during the period beginning July 1, 1985, and ending September 30, 2030," he "first enter[ed] on active duty as a member of the Armed Forces" and "serve[d] at least three years of continuous active duty," "complete[d] the requirements of a secondary school diploma . . . before applying for benefits," and was later "discharged from active duty with an honorable discharge." *Id.* § 3011(a). Finally, Mr. Rudisill made the election described in § 3327(a)(1)(A), switching from the Montgomery program to the Post-9/11 program while he had 10 months and 16 days of unused Montgomery entitlement remaining. The

2. The statute provides for an exception, not at issue here, equal to "the number of months, if any, of entitlement revoked by the individual under subsection (c)(1)," which relates to the transfer of basic educational assistance to family members. 38 U.S.C. § 3327(d)(2)(B).

VA correctly determined that under the explicit language of the statute, Mr. Rudisill was limited to 10 months and 16 days of Post-9/11 benefits and not to the 22 months and 16 days he would be allowed if only the 48-month cap applied.

The majority construes § 3327(d)(2) as applying only to veterans with dual eligibility based on a single period of service, and not to veterans like Mr. Rudisill who have earned benefits for multiple periods of service. Maj. Op. 15. However, nothing in the language or history of the relevant statutes remotely justifies such an interpretation, and the majority indeed applies little effort to justify its interpretation. It is not our job to rewrite the statute to achieve a supposedly fair result. I respectfully dissent.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, DATED JANUARY 7, 2020

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

NO. 16-4134

BO,

Appellant,

v.

ROBERT L. WILKIE, SECRETARY
OF VETERANS AFFAIRS,

Appellee.

Before BARTLEY, *Chief Judge*, ALLEN, *Judge*, and SCHOELEN, *Senior Judge*.[1]

ORDER

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

On August 15, 2019, the Court issued a split panel decision in the above-captioned appeal reversing a July

1. Judge Schoelen is a Senior Judge acting in recall status. *In re: Recall of Retired Judge*, U.S. Vet. App. Misc. Order 04-20 (Jan. 2, 2020).

14, 2016, Board of Veterans' Appeals (Board) decision that denied veteran BO entitlement to educational assistance benefits for more than 10 months and 16 days under the Post-9/11 GI Bill. *BO v. Wilkie*, 31 Vet.App. 321 (2019).

On October 7, 2019, the Secretary filed (1) a motion for panel reconsideration or, in the alternative, en banc review; and (2) an opposed motion to stay the precedential effect of the decision pending an appeal to and decision by the U.S. Court of Appeals for the Federal Circuit (Federal Circuit). BO filed his opposition to the latter motion on October 18, 2019. On November 4, 2019, the panel denied reconsideration, and, on December 11, 2019, the Court denied en banc review. Having resolved those matters, we now turn to the motion to stay the precedential effect of the panel decision.

Rule 8 of the Court's Rules of Practice and Procedure (Rules) permits a party adversely affected by a Court decision to file a motion to stay the precedential effect of that decision pending an appeal. U.S. VET. APP. R. 8. The Court considers four factors when deciding whether to exercise its discretion to stay the precedential effect of a decision pending appeal: (1) The movant's likelihood of success on the merits of the appeal; (2) whether the movant will suffer irreparable harm in the absence of a stay; (3) the impact of a stay on the non-moving party; and (4) the public interest. *Ribaudo v. Nicholson*, 21 Vet.App. 137, 140 (2007); *see Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Standard Havens Prod., Inc. v. Gencor Indus., Inc.*, 897 F.2d 511, 512 (Fed. Cir. 1990). "[W]hether a stay is appropriate depends on the totality of the circumstances,"

and the movant bears the burden of demonstrating that such a stay is warranted. *Ribaudo*, 21 Vet.App. at 140.

The Secretary argues that a stay of the precedential effect of the panel decision in this case is warranted because each of the *Ribaudo* factors is met. As to the first factor, the Secretary asserts that he has a strong likelihood of success on the merits given the plain language of 38 U.S.C. §§ 3322(d) and 3327 and his longstanding interpretation of those statutes. *See* Secretary's Motion (Mot.) at 2-5. With respect to the second factor, the Secretary contends that he will suffer irreparable harm without a stay because he will have to expend considerable resources in promulgating regulations and developing technological changes to implement the Court's decision, which, if overturned, would be unrecoverable, and that any erroneous benefits paid to claimants pursuant to the Court's decision prior to it being overturned would have to be recouped and may also be unrecoverable. *See id.* at 5- 7. And, although the Secretary makes no argument as to the third factor because he is "not in a position to determine the impact of the stay on [BO]," he argues that the fourth factor—the public interest—weighs in his favor because "without additional funds to provide the new education benefit created by the Court . . . , veterans across the system will unavoidably experience the effects of re-allocating existing funds and resources." *Id.* at 7. BO disputes each of these contentions and urges the Court to deny the Secretary's motion. Opposition to Mot. at 1-10.

The Court concludes that the Secretary has not carried his burden of demonstrating that a stay of the

precedential effect of our decision is warranted. Although the panel members disagree as to whether the Secretary has a strong likelihood of success on the merits of an appeal, *see post* at 3, we agree that the remaining factors weigh against granting a stay of precedential effect in this case.

Specifically, the Secretary has not shown that he will suffer irreparable harm in the absence of a stay. While it may be true that the Secretary will have to spend time and resources to implement the Court's decision and that, if our decision is ultimately overturned by the Federal Circuit, VA may have to recoup benefits paid pursuant to our interpretation of the law, *see Ribaudo*, 21 Vet.App. at 142-43 (recognizing that, in certain circumstances, imposing additional burdens on the already overburdened veterans benefits adjudication system may constitute irreparable harm), the Secretary has not explained how this case differs from any other statutory interpretation case that we have decided, nor has he submitted any evidence to support his assertions of irreparable harm, *see Vazquez-Flores v. Peake*, 22 Vet.App. 91, 94-95 (2008) (rejecting the Secretary's speculative, unsupported allegations of irreparable harm). Given Rule 8(b)(2)'s requirement that a party seeking a stay of the precedential effect of a Court decision must provide "affidavits or other sworn statements addressing any facts in dispute," U.S. VET. APP. R. 8(b)(2), the Secretary's failure to submit any evidence supporting his allegations of irreparable harm is fatal to his request for a stay. *See Vazquez-Flores*, 22 Vet.App. at 95 (denying Secretary's motion to stay the precedential effect of a Court decision where the

Secretary "present[ed] no evidence beyond his speculative assertions" of irreparable harm).

The Secretary likewise failed to proffer any evidence of the impact of a stay on the nonmoving party. Instead, the Secretary summarily stated that he was "not in a position to determine the impact of the stay on [BO]." Secretary's Mot. at 7. However, *Ribaudo* directs the movant to assess the impact of a stay on "the group that is defined by the law being interpreted," considering "whether the class of benefits involved necessarily corresponds to a class of claimant whose needs are unique or particularly time sensitive." 21 Vet.App. at 143. The Secretary failed to engage in this analysis, much less to provide evidence on the matter. *See* Secretary's Mot. at 7.

We are similarly unpersuaded by the Secretary's argument that the public interest weighs in his favor. Although we acknowledge that claimants awarded benefits pursuant to our decision may be asked to repay those benefits if the decision is ultimately overturned by the Federal Circuit, *see* Secretary's Mot. at 6-7, we do not think that such concern alone justifies issuance of a stay of the precedential effect of our *BO* decision. This concern would be present with any Court decision interpreting a benefits statute. We are also not convinced that, "without additional funds to provide the new education benefit created by the Court . . . , veterans across the system will unavoidably experience the effects of re-allocating existing funds and resources." Secretary's Mot. at 7. This assertion, like the others discussed above, is not supported by any evidence and is wholly speculative. *See Vazquez-Flores*, 22 Vet.App. at 96-97. As such, it is unavailing.

In light of the foregoing, we conclude that the totality of the evidence is against staying the precedential effect of our decision in *BO*. Accordingly, it is

ORDERED that the Secretary's October 7, 2019, opposed motion to stay the precedential effect of *BO v. Wilkie*, 31 Vet.App. 321 (2019), is denied. It is further

ORDERED that, in accordance with Rule 36 of the Court's Rules, judgment is entered and effective the date of this order.

DATED: January 7, 2020 PER CURIAM.

BARTLEY, *Chief Judge*, concurring: Although I agree that the Secretary's motion to stay the precedential effect of the underlying *BO* decision should be denied, I write separately to reiterate that, for the reasons outlined in my dissent to that decision, I believe that the Secretary would have a strong likelihood of success on the merits of an appeal.

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, DATED AUGUST 15, 2019

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

No. 16-4134

BO,[1]

Appellant,

v.

ROBERT L. WILKIE, SECRETARY
OF VETERANS AFFAIRS,

Appellee.

May 2, 2018, Argued;
August 15, 2019, Decided

Before SCHOELEN, BARTLEY and ALLEN, *Judges*.

ALLEN, *Judge*, filed the opinion of the Court. BARTLEY, *Judge*, filed a dissenting opinion.

ALLEN, *Judge*: Congress has been generous in providing a wide array of benefits to those who served

1. For reasons not relevant to the subject of this appeal, the record in this case has been sealed pursuant to Rule 48(b) of the Court's Rules of Practice and Procedure, and the veteran is identified only as "BO."

in the Armed Forces. An example of that generosity is support for veterans' educational endeavors. This appeal calls on us to discuss two such education-related programs. In particular, we address an important interplay between the Montgomery GI Bill education program (MGIB), chapter 30 of title 38 of the United States Code, and the Post-9/11 GI Bill education program (Post-9/11 GI Bill), chapter 33 of that title.

The appellant BO served the Nation honorably in the United States Army. BO had more than one period of service in the Army, having been both an enlisted person as well as an officer. As described in more detail below, BO's separate periods of service independently qualified him to receive benefits under both the MGIB and the Post-9/11 GI Bill. At its core, this case is about whether he, and others like him with two separate periods of qualifying service, may obtain the full benefits of both programs (subject to an overall cap).

In this appeal, which is timely and over which the Court has jurisdiction under 38 U.S.C. §§ 7252(a) and 7266(a), the appellant specifically contests a July 14, 2016, Board of Veterans' Appeals (Board) decision denying him entitlement to educational assistance benefits for more than 10 months and 16 days under the Post-9/11 GI Bill. This was the amount of unused benefits the appellant had under the MGIB. The Board rejected the appellant's argument that he should be entitled to the full amount of Post-9/11 GI Bill benefits because, BO contends, his entitlement under that program was based on a period of qualifying service separate from the one that allowed

him to receive benefits under the MGIB. This matter was referred to a panel of the Court with oral argument to address whether a veteran such as BO with more than one period of separately qualifying service must relinquish or exhaust entitlement under the MGIB program before receiving education benefits under the Post-9/11 GI Bill program. We hold that statutes require neither relinquishment nor exhaustion. Rather, they allow such a veteran to receive entitlement under both programs subject to a 36-month cap on utilization of each of the two separate programs and a 48-month cap overall. The Court will accordingly reverse the Board's decision and remand the matter for further proceedings consistent with this opinion.

I. STATUTORY FRAMEWORK

The Nation has a long history of providing educational benefits to veterans. In 1944, Congress, faced with more than 16 million veterans returning from military service in World War II and reentering civilian life, enacted the Servicemen's Readjustment Act of 1944, Pub. L. 78-346, 58 Stat. 284, better known as the GI Bill. Record (R.) at 1245. This landmark legislation provided veterans with education benefits to avoid high levels of unemployment, aid servicemembers in readjusting to civilian life, and afford returning veterans an opportunity to receive the education and training they could not pursue while serving in the military. *Id.* Since the GI Bill's inception, Congress has established several iterations of education benefits for subsequent generations of veterans. *See* Veterans' Readjustment Assistance Act of 1952, Pub. L.

No. 82-55, 66 Stat. 663 (Korean War GI Bill); Veterans' Readjustment Benefits Act of 1966, Pub. L. No. 89-358, 80 Stat. 12 (Cold War GI Bill); Veterans' Education and Employment Assistance Act of 1976, Pub. L. 94-502, 90 Stat. 2393 (codified at 38 U.S.C. §§ 3201 *et seq.*) (Post Vietnam Era Veterans Educational Assistance Program).

In 1985, Congress, seeking a recruiting tool for an all-volunteer military force, established two versions of the MGIB: one for active-duty service, 38 U.S.C. §§ 3001 *et seq.*, and the other for service in the selected reserve, 10 U.S.C. §§ 16131 *et seq.* Department of Defense Authorization Act of 1985, Pub. L. No. 98-525, 98 Stat. 2492; *see* 38 U.S.C. § 3001 (MGIB benefits serve to "to aid in the recruitment and retention of highly qualified personnel for both the active and reserve components of the Armed Forces" and "to enhance our Nation's competitiveness through the development of a more highly educated and productive work force"). The MGIB provides education benefits to individuals who, among others, first entered on active duty after June 30, 1985, and continued to serve on active duty or received a qualifying discharge or release. 38 U.S.C. § 3011(a). An individual must have served continuously on active duty for 2 to 3 years depending on the obligated period of service. 38 U.S.C. § 3011(a)(1)(A)(i). An individual who meets the basic eligibility requirements is entitled to 36 months of education benefits. 38 U.S.C. § 3013. MGIB education benefits consist of a fixed monthly sum that varies based on length of service and school attendance. 38 U.S.C. § 3015; *see* MGIB Active Duty (chapter 30) Increased Educational Benefit, https://www.benefits.va.gov/GIBILL/resources/benefits_resources/rates /

ch30/ch30rates100117.asp (effective Oct. 1, 2017) (for full-time school attendance and 3 years of continuous active service, the monthly rate is $1,928; for less than 3 years of continuous active service the monthly rate is $1,566).

In June 2008, Congress enacted the Post-9/11 Veterans Educational Assistance Act of 2008, which became effective on August 1, 2009. Pub. L. No. 110-252, tit. V, §§ 5001-03, 122 Stat. 2357 (2008) (codified at 38 U.S.C. §§ 3301 *et seq.*). The Post-9/11 GI Bill provides education benefits to each individual who served on active duty after September 11, 2001, and continued to serve on active duty or was discharged or released under specified conditions. 38 U.S.C. § 3311(a), (b). An individual who "serve[d] an aggregate of at least" 1 of 7 periods described in the statute as ranging from 90 days to 36 months is entitled to Post-9/11 education benefits. 38 U.S.C. § 3311(b).[2] An individual who meets the basic eligibility requirements is entitled to 36 months of education benefits. 38 U.S.C. § 3312(a). Post-9/11 education benefits, awarded per school term, include the net cost for in-state tuition and fees; a monthly stipend equal to the basic monthly military housing allowance in the area in which the campus is located; and a lump sum payment for books. 38 U.S.C. § 3313(a); *see* 38 C.F.R. § 21.9640(b) (2019). Because Post-9/11 education benefits include the net cost for in-state tuition and fees, the monthly Post-9/11 education benefits amount generally exceeds the corresponding

2. The amount of benefits an individual receives under the Post-9/11 GI Bill depends on the aggregate amount of his or her service. *See* 38 U.S.C. § 3313(c). Nothing in this appeal turns on this aspect of the program.

amount of monthly MGIB benefits. *See* GI Bill Comparison Tool, https://www.vets.gov/gi-bill-comparison-tool/profile/11800116 (last visited Mar. 26, 2019) (for example, for full-time attendance at the University of Kansas and 3 years aggregate active service, i.e., factors warranting the 100% rate, the per semester rate is $5,412 for tuition and fees, $6,723 for housing allowance, and a $500 book stipend). The Post-9/11 GI Bill also includes several administrative provisions, 38 U.S.C. §§ 3322-27, some of which we will return to below.

Finally, for the moment on the statutory structure, several administrative provisions also guide an individual's entitlement to more than one education benefit program. Two of these provisions are particularly important here. Section 3695 provides that an eligible person may receive education benefits under all programs for a total of 48 months. 38 U.S.C. § 3695 (titled "Limitation on period of assistance under two or more programs"); *see* 38 U.S.C. §§ 3013(c) (explicitly subjecting entitlement to MGIB benefits to section 3695's 48-month limitation); 3312(a) (same for Post-9/11 GI Bill benefits). In addition, section 3681(b)(1) bars the concurrent receipt of education benefits under two or more programs. 38 U.S.C. § 3681(b)(1) (titled "Limitations on educational assistance"); *see* 38 U.S.C. §§ 3033(a)(1) (barring concurrent receipt of MGIB benefits and education benefits for which an individual "is also eligible"), 3322(a) (same for Post-9/11 GI Bill benefits).

II. FACTUAL AND PROCEDURAL HISTORY

The appellant first served on active duty as an enlisted person in the U.S. Army from January 2000 to June

2002. Record (R.) at 109. This service qualified him to receive benefits through the MGIB. From July 2003 to approximately May 2004, he received MGIB education benefits that he applied to expenses for undergraduate studies. R. at 67. From June 2004 to December 2005, he again served on active duty as an enlisted person with an Army National Guard unit, through which he deployed to Iraq. *See* R. at 5, 76, 108. After discharge from this second period of active duty service, the veteran re-enrolled in university studies and received MGIB benefits from July 2003 to May 2007. R. at 67. Combined, these periods during which the appellant received benefits under MGIB total 25 months and 14 days. *Id.* From November 2007 to August 2011, he returned to active duty in the U.S. Army yet again, this time as a commissioned officer, and he deployed to Iraq and Afghanistan. R. at 107. This period of service qualified him for benefits under the Post-9/11 GI Bill. He has an aggregate of nearly 8 years of active duty service. *Id.*

BO left the Army in 2011. According to his brief (and this is not disputed), he hoped to return to the Army for yet another period of service, this time as a chaplain. *See* Appellant's Brief (Br.) at 4. To make that possible, he planned to attend Yale Divinity School, to which he had been admitted by 2015. *Id.*

On March 18, 2015, the appellant filed an electronic application for VA education benefits, VA Form 22-1990 (application), in connection with his plan to return to school. R. at 125. On the application, he stated that he was applying for Post-9/11 GI Bill education benefits "in [l]ieu

of" MGIB benefits and acknowledged that choosing to do so constituted an irrevocable election and that his period of entitlement to Post-9/11 benefits would be limited to his remaining period of entitlement under MGIB. *Id.* On March 20, 2015, VA issued a certificate of eligibility (COE) for Post-9/11 benefits at the 90% level for a period of 10 months and 16 days, the difference between the 36-month MGIB entitlement and the 25 months and 14 days of MGIB benefits that BO had previously used. R. at 76-77.

Later that month, BO sent a congressional inquiry to his U.S. Senator asserting that his separate period of service as a commissioned officer qualified him for "full" Post-9/11 education benefits, including a combined 48-month entitlement, that is, 12 months more than the 36-month entitlement under either the MGIB or the Post-9/11 GI Bill program alone. R. at 72. He further stated that a VA education counselor suggested that he should revoke his claim for Post-9/11 GI Bill benefits and, "contingent upon VA accepting" the revocation, use his remaining 10 months under the MGIB. *Id.* The VA education counselor also informed him that if he exhausted his MGIB benefits he could reapply under the Post-9/11 GI Bill and receive additional months of eligibility under that program. *Id.*

In April 2015, a VA regional office (RO) responded to the congressional inquiry. R. at 67-69. The RO stated that by law those individuals eligible under the Post-9/11 GI Bill who are also eligible for benefits under the MGIB must relinquish their eligibility for that latter program to receive benefits under the Post-9/11 GI Bill, and individuals who qualify for benefits under the Post-9/11

GI Bill are limited to the amount of MGIB entitlement they have remaining. R. at 67. The RO determined that the veteran made an irrevocable election to receive Post-9/11 GI Bill benefits in lieu of MGIB benefits, that he acknowledged the election was irrevocable, and that the election may not be changed. R. at 68. In May 2015, the RO issued another COE determining that the appellant was entitled to 10 months and 16 days of Post-9/11 GI Bill benefits at the 100% level based on an aggregate of his creditable active duty service. R. at 1177-78.

In October 2015, the RO issued a Statement of the Case (SOC) continuing its denial of the appellant's "claim for additional entitlement" to Post-9/11 GI Bill benefits. R. at 27-41. Once again, the RO determined that a claimant eligible for Post-9/11 GI Bill and MGIB benefits and wishing to use the Post-9/11 program is required to make an irrevocable election to relinquish MGIB benefits when seeking benefits under the Post-9/11 GI Bill. R. at 39. The RO found that, based on the veteran's irrevocable election to use Post-9/11 GI Bill benefits, the law dictates that VA grant entitlement under the Post-9/11 GI Bill not to exceed his remaining MGIB entitlement and nothing in the law allowed VA to grant additional entitlement to the veteran that exceeded his remaining MGIB entitlement. *Id.*

In July 2016, the Board issued the decision on appeal. It found that the veteran was qualified for VA educational assistance benefits under both the MGIB and Post-9/11 Bill programs. R. at 4. These are favorable findings that the Court may not disturb. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). However, despite these findings,

the Board rejected the appellant's arguments that he was entitled to additional Post-9/11 benefits. R. at 3-11.

The Board interpreted VA regulations to provide that an individual is only eligible for Post-9/11 GI Bill benefits if he or she meets the minimum service requirements and makes an irrevocable election to receive benefits under the Post-9/11 GI Bill by relinquishing eligibility under the MGIB. R. at 7 (citing 38 C.F.R. § 21.9520(c)(1) (2019)). The Board further stated that if an individual is eligible for benefits under the MGIB and he or she uses some of that entitlement before irrevocably electing to receive Post-9/11 GI Bill benefits in lieu of benefits under the MGIB, then that individual may be awarded the equivalent of the entitlement that remained unused under the MGIB program. *Id.* (citing 38 C.F.R. § 21.9550(b)(1) (2019)). The Board determined that no provision of law authorized additional months of entitlement under the Post-9/11 GI Bill program above the 36 total months of combined benefits under the MGIB and the Post-9/11 GI Bill. R. at 7-8. Therefore, the Board concluded that, as a matter of law, the veteran was ineligible for Post-9/11 GI Bill benefits in excess of 10 months and 16 days, the amount of time BO had remaining under the MGIB. R. at 11.

Furthermore, the Board found that the veteran's application accurately implemented the statutory and regulatory requirements that a veteran explicitly acknowledge that an election to receive Post-9/11 GI Bill benefits in lieu of MGIB benefits is irrevocable. R. at 9-10. The Board determined that, because the veteran submitted a properly completed electronic application for

educational benefits, he had irrevocably elected to receive Post-9/11 benefits "in lieu of" MGIB benefits. *Id.* (citing 38 C.F.R. § 21.9520(c)(2)). This appeal followed.

III. ANALYSIS

We find the Board erred as a matter of law when it denied the appellant educational assistance for more than 10 months and 16 days under the Post-9/11 GI Bill based on his use of MGIB benefits. As we explain below, the statutory scheme Congress enacted is ambiguous. By reviewing the statutory structure, giving full meaning to all the statutory provisions, and relying on the regulatory framework, congressional purpose, and the pro-veteran canon, we determine that Congress's statutory scheme is best interpreted to provide that separate periods of qualifying service allow a veteran such as BO to receive full benefits under both programs subject to an aggregate cap on all such benefits.

A. Principles of Statutory Interpretation

The resolution of this appeal centers on the meaning of the various statutory provisions Congress enacted to provide educational benefits to veterans under the MGIB and the Post-9/11 GI Bill. Statutory interpretation is a pure question of law that the Court reviews de novo. *See Saunders v. Wilkie*, 886 F.3d 1356, 1360 (Fed. Cir. 2018). The basics of statutory interpretation are well established. "In determining the meaning of a statutory provision, 'we look first to its language, giving the words used their ordinary meaning.'" *Artis v. District of Columbia*, 138

S. Ct. 594, 603, 199 L. Ed. 2d 473 (2018) (quoting *Moskal v. United States*, 498 U.S. 103, 108, 111 S. Ct. 461, 112 L. Ed. 2d 449 (1990)); *see Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409, 113 S. Ct. 2151, 124 L. Ed. 2d 368 (1993) ("The starting point in interpreting a statute is its language."). This principle is directed not only to statutory interpretation by courts, but also by administrative agencies. "Where a statute's language carries a plain meaning, the duty of an administrative agency is to follow its commands as written, not to supplant those commands with others it may prefer." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1355, 200 L. Ed. 2d 695 (2018).

Of course, this focus on statutory language does not mean that other indications of congressional intent are off the table. As the Supreme Court recently reminded us, considering the purposes behind a statutory scheme is a useful check on a court's interpretation of a specific statutory provision. *See Hughes v. United States*, 138 S. Ct. 1765, 1774, 201 L. Ed. 2d 72 (2018). Moreover, "the statutory scheme as a whole, the specific context in which [a] word or provision at issue is used, and the broader context of the statute as a whole" all inform any statutory provision's plain meaning. *Hornick v. Shinseki*, 24 Vet. App. 50, 52 (2010); *see also King v. St. Vincent's Hosp.*, 502 U.S. 215, 221, 112 S. Ct. 570, 116 L. Ed. 2d 578 (1991); *Imazio Nursery, Inc. v. Dania Greenhouses*, 69 F.3d 1560, 1564 (Fed. Cir. 1995) (holding that all parts of a statute must be construed together without according undue importance to a single or isolated portion). Accordingly, the Court should construe a statute "so that effect is given to all its provisions, so that no part will be inoperative or

superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error." 2A NORMAN J. SINGER ET AL., SUTHERLAND ON STATUTORY CONSTRUCTION § 46:6 (7th ed. 2007) [hereinafter SUTHERLAND]; *see Splane v. West*, 216 F.3d 1058, 1068-69 (Fed. Cir. 2000).

The goal of this interpretive endeavor is to identify and implement Congress's purpose in enacting a given statute. *See Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68, 102 S. Ct. 1534, 71 L. Ed. 2d 748 (1982) ("[W]e assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.'" (quoting *Richards v. United States*, 369 U.S. 1, 9, 82 S. Ct. 585, 7 L. Ed. 2d 492 (1962))). But there are times when these tools aren't sufficient to divine what Congress meant; in other words, the statute at issue is ambiguous. *See Tropf v. Nicholson*, 20 Vet.App. 317, 321 n.1 (2006) ("[A] statute is ambiguous only when the application of the ordinary meaning of the words and rules of construction to the plain language of the regulation fails to answer the question at issue."). "Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more difference senses." SUTHERLAND § 45.2 at 13. An important indicator of ambiguity is whether a given term is "susceptible to multiple interpretations." *Schertz v. Shinseki*, 26 Vet.App. 362, 367 (2013). Moreover, ambiguity may be created by legislative silence as well as by express statutory language. *See, e.g., Cox v. McDonald*, 28 Vet. App. 318, 323-24 (2016). "Where ambiguity persists after application of the standard tools of statutory construction, legislative history may be used to resolve any such

ambiguity." *Frederick v. Shinseki*, 684 F.3d 1263, 1269 (Fed. Cir. 2012). A court will also consider "preenactment history to determine the circumstances under which the enactment was passed and the problem it was intended to remedy." *Camarena v. Brown*, 6 Vet.App. 565, 567 (1994).

When a statute is ambiguous, and an agency entrusted with implementation of that statute has promulgated a regulation addressing the ambiguity, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). It perhaps goes without saying that if an agency has not promulgated regulations addressing the statutory ambiguity, there is nothing to which a court could defer.

"Where a court concludes that *Chevron* deference is inapplicable, the court proceeds with the task of statutory interpretation guided by the principles of *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944)." *Cook v. Snyder*, 28 Vet.App. 330, 340 (2017); *see Jensen v. Shulkin*, 29 Vet.App. 66, 71 (2017). Pursuant to *Skidmore*, the Court "may properly resort for guidance" to the Secretary's arguments. 323 U.S. at 140. "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* But the bottom line is that *Skidmore* deference (such that it truly is "deference") isn't controlling. *Id.* ("[T]he rulings,

interpretations, and opinions of [the agency] . . . [are] not controlling upon the courts.").

Finally, there is a canon of statutory construction that is unique to veterans. "In the face of statutory ambiguity and the lack of a persuasive interpretation of the statute from the Secretary, the Court applies the rule that 'interpretative doubt is to be resolved in the veteran's favor.'" *Sharp v. Shinseki*, 23 Vet.App. 267, 275 (2009) (quoting *Brown v. Gardner*, 513 U.S. 115, 118, 115 S. Ct. 552, 130 L. Ed. 2d 462 (1994)).

B. The statutory scheme is ambiguous.

The precise question the Court must answer in this appeal is: how does the law treat a veteran who qualifies for the MGIB under one period of service and the Post-9/11 GI Bill under an entirely separate qualifying period or periods of service? Must such a veteran choose between (or as the Secretary insists, irrevocably elect) which program he or she uses? Or, on the other hand, may such a person use one period of service to get the MGIB benefits and the other(s) to obtain Post-9/11 benefits, subject to any applicable aggregate cap? As we will see, Congress has not spoken to this issue, making the statutory structure ambiguous.[3] Before turning to that point, however, we

3. Our dissenting colleague views the statutory scheme quite differently than we do. The different readings explain much of the "ships passing in the night" quality of the majority and dissenting opinions. We have not stopped at every point along the way of our complex analysis to explain that the dissent's different take on a given point is the result of a fundamentally different view of what

address an antecedent question concerning the general relationship between these two educational programs.

1. The MGIB and the Post-9/11 GI Bill co-exist.

While there does not appear to be serious dispute about this issue, the Court makes clear that Congress didn't intend to replace the MGIB program with the Post-9/11 GI Bill program; the programs complement each other. In this regard, the veteran argues that "nothing about the Post-9/11 GI Bill statute deviates" from the statutory scheme that provides for entitlements to multiple educational assistance benefits. Appellant's Br. at 19-20. Specifically, he contends that 38 U.S.C. § 3695 (the provision providing for an aggregate 48-month cap on all education benefits), incorporated by reference in the Post-9/11 GI Bill's statutory scheme, permits entitlement to and the usage of both MGIB and Post-9/11 GI Bill benefits at separate times and therefore he is entitled to a full period of MGIB benefits and another full period of Post-9/11 GI Bill benefits. *Id.* at 16-19. The Secretary argues that, because statutes outlining the parameters of Post-9/11 GI

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the statutes say. As it is said, where you stand depends a lot upon where you sit. We ascribe no ill motive for these differences. This is undoubtedly a complex statute and reasonable minds can—and do—differ about what it means. Do not take our silence as ignoring the dissent. It's just that we would be repeating the same mantra: We read the statutes differently. For example, our dissenting colleague notes that BO made a voluntary choice to irrevocably elect to forego his MGIB benefits in lieu of Post-9/11 benefits. That is a powerful argument if one reads the statute as the dissent does. But if one reads it as we do, the argument is irrelevant because VA presented BO with a choice he was never required to make.

Bill entitlement and payment use the term "individual," additional periods of service add to the eligible Post-9/11 GI Bill benefit level, but do not extend the duration of combined entitlement under the MGIB and Post-9/11 GI Bill programs. Secretary's Br. at 9-10 (citing 38 U.S.C. §§ 3311 and 3313).

The Court agrees, as the veteran argues, Appellant's Br. at 20, that the Post-9/11 GI Bill didn't replace the MGIB program. In enacting the Post-9/11 GI Bill, Congress determined that service on active duty in the Armed Forces since September 11, 2001, "has been especially arduous"; the then-current educational assistance program was "outmoded and designed for peacetime service"; and providing post-9/11 veterans with "enhanced educational assistance benefits that are worthy of such service and are commensurate with the educational assistance benefits provided by a grateful Nation to veterans of World War II" was "in the national interest of the United States." Pub. L. No. 110-252, § 5002. Congress also recognized the increased role undertaken by reservists called to active duty service in the post-9/11 wartime environment. Furthermore, the 2008 Post-9/11 GI Bill made few changes to the statutory language of the MGIB or chapter 36, which concerns administrative chapter matters related to VA education benefits. *Id.*, 122 Stat. 2375.

The intent of Congress is clear that the MGIB and Post-9/11 GI Bill programs co-exist in a broader statutory scheme. *See Chevron U.S.A. Inc.*, 467 U.S. at 842-43. Plain language demonstrates this co-existence. For example, in

the subchapter that guides the overall administration of education benefits, 38 U.S.C. § 3681 lists the MGIB and Post-9/11 GI Bill chapters individually as programs to which an individual may be separately entitled, but barred from receiving benefits concurrently. 38 U.S.C. § 3681(b)(1). Congress also details this statutory bar to concurrent receipt of GI Bill benefits under multiple programs in Chapters 30 and 33, the chapters for MGIB and Post-9/11 GI Bills respectively. *See* 38 U.S.C. §§ 3033(a), 3322(a). An individual who is entitled to Post-9/11 education benefits "who is also eligible" for, inter alia, MGIB education benefits "shall elect" under which program to receive those benefits. 38 U.S.C. § 3322(a)(1) (listing the MGIB education program as a separate program that an individual may "also" be eligible to receive). And vice versa for the MGIB education program. 38 U.S.C. § 3033(a)(1) .

Further evidence of the co-existence of MGIB and Post-9/11 education benefits program is the clear 48-month cap that Congress imposed on the duration of their sequential receipt. In the administrative chapter, chapter 36, similar to the bar on concurrent use discussed above, 38 U.S.C. § 3695 individually lists the MGIB and Post-9/11 GI Bill chapters as programs for which the combination of receipt of benefits may not exceed 48 months. 38 U.S.C. § 3695(a)(4). Chapter 30 and chapter 33 each explicitly subject entitlement to their respective benefits to section 3695's 48-month limitation and identify each other as a separate chapter under which an individual may also be entitled to education benefits. 38 U.S.C. §§ 3013(c), 3312(a).

Accordingly, the statutory language is clear that the MGIB and the Post-9/11 GI Bill co-exist as separate programs. And thus we've established that Congress didn't replace the MGIB with the Post-9/11 Bill. So, the Post-9/11 *program* isn't inherently duplicative of the MGIB *program*. And here it bears repeating that the Board found that BO qualifies under both programs based on all of his periods of service. R. at 4. We turn now to a consideration of the relevant statutes in terms of what they may (or may not) say about the issue we face.

Before diving into the deep statutory and regulatory waters we face, we pause to explain what may appear to be redundancy in our approach. Simply put, there's no good way to wrap one's hands around the web of statutes essential to our analysis. For ease of reference, we've provided several means to review the statutes and regulations at play. First, we're attaching a statutory appendix with the full versions of 38 U.S.C. §§ 3322 and 3327, the statutes that we and the dissent interpret and apply, at the end of the dissenting opinion. This will allow the reader to find those given provisions easily. But we'll also set out specific parts of the statutes and regulations (often more than once) at various places in our discussion so that a particular area of discussion will be more easy to follow. Though possibly redundant at times, this repetition should help ground the unfortunate but necessarily dense and complex analysis to which we now turn.

2. The primary statutory provision, 38 U.S.C. § 3322, is ambiguous.

Recognizing that the appellant is eligible for both the MGIB and the Post-9/11 GI Bill programs based on two separately qualifying periods of service (i.e., the appellant's first period of active service totaling more than 2 years of continuous service, on its own, qualified him to obtain MGIB benefits and his later periods of service, in the aggregate, qualify him to obtain Post-9/11 GI Bill benefits), we turn to logistics, and the question becomes *how* he may tap into those benefits. For our purposes, the key statutory provision concerning how VA will administer someone like the appellant's benefits is 38 U.S.C. § 3322. As Congress described, this section deals with a "[b]ar to duplication of educational assistance benefits." In this portion of our opinion, we will closely dissect this section. That discussion is necessary to understand fully why there is ambiguity here. While we will reproduce the specific subsections of this statute in our discussion below, we provide most of this section upfront now so that our introductory discussion is more accessible.

Before turning to our consideration of section 3322, we must mention one other part of the statutory structure because it is alluded to in this section and is a focus of the Secretary's argument. Section 3327 is entitled "[e]lection to receive educational assistance."[4] Though ultimately we

4. Section 3327 provides:

(a) **Individuals eligible to elect participation in post-9/11 educational assistance**. An individual may elect

never get to this section based on our interpretation of 3322, the Secretary insists that section 3327 is important for this appeal because, as its title suggests, it provides support for making an irrevocable election of a program's assistance at the cost of continued receipt of another program's assistance—which, according to the Secretary, occurred in this case. However, as we will see, our interpretation of section 3322 demonstrates that section

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> to receive educational assistance under this chapter if such individual—(1) as of August 1, 2009—(A) is entitled to basic educational assistance under chapter 30 of this title and has used, but retains unused, entitlement under that chapter; (B) is entitled to educational assistance under chapter 107, 1606, or 1607 of title 10 and has used, but retains unused, entitlement under the applicable chapter; (C) is entitled to basic educational assistance under chapter 30 of this title but has not used any entitlement under that chapter; (D) is entitled to educational assistance under chapter 107, 1606, or 1607 of title 10 but has not used any entitlement under such chapter; (E) is a member of the Armed Forces who is eligible for receipt of basic educational assistance under chapter 30 of this title and is making contributions toward such assistance under section 3011(b) or 3012(c) of this title; or (F) is a member of the Armed Forces who is not entitled to basic educational assistance under chapter 30 of this title by reason of an election under section 3011(c)(1) or 3012(d)(1) of this title; and (2) as of the date of the individual's election under this paragraph, meets the requirements for entitlement to educational assistance under this chapter.

Under section 3327(i), an election made under subsection (a) is irrevocable.

3327 does not apply in this case. To meaningfully address why that is, however, we must return to 38 U.S.C. § 3322, "Bar to duplication of educational assistance benefits":

> **(a) In general**. An individual entitled to educational assistance under this chapter [33] who is also eligible for educational assistance under chapter 30, 31, 32, or 35 of this title, chapter 107, 1606, or 1607 or section 510 of title 10, or the provisions of the Hostage Relief Act of 1980 (Public Law 96-449; 5 U.S.C. 5561 note) may not receive assistance under two or more such programs concurrently, but shall elect (in such form and manner as the Secretary may prescribe) under which chapter or provisions to receive educational assistance.
>
> **(b) Inapplicability of service treated under educational loan repayment programs**. A period of service counted for purposes of repayment of an education loan under chapter 109 of title 10 may not be counted as a period of service for entitlement to educational assistance under this chapter.
>
> **(c) Service in Selected Reserve**. An individual who serves in the Selected Reserve may receive credit for such service under only one of this chapter, chapter 30 of this title, and chapters 1606 and 1607 of title 10, and shall elect (in such form and manner as the Secretary may prescribe) under which chapter such service is to be credited.

(d) Additional coordination matters. In the case of an individual entitled to educational assistance under chapter 30, 31, 32, or 35 of this title, chapter 107, 1606, or 1607 of title 10, or the provisions of the Hostage Relief Act of 1980, or making contributions toward entitlement to educational assistance under chapter 30 of this title, as of August 1, 2009, coordination of entitlement to educational assistance under this chapter, on the one hand, and such chapters or provisions, on the other, shall be governed by [section 3327].[5]

(e) Bar to concurrent receipt of transferred education benefits and Marine Gunnery Sergeant John David Fry Scholarship Assistance. An individual entitled to educational assistance under both sections 3311(b) (9) and 3319 may not receive assistance under both provisions concurrently, but shall elect (in such form and manner as the Secretary may prescribe) under which provision to receive educational assistance.

. . . .

(g) Bar to concurrent receipt of transferred education benefits. A spouse or child who is

5. Brackets replace the following text: "the provisions of section 5003(c) of the Post-9/11 Veterans Educational Assistance Act of 2008." Section 5003(c) of the public law is now codified at 38 U.S.C. § 3327.

entitled to educational assistance under this chapter based on a transfer of entitlement from more than one individual under section 3319 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.

(h) Bar to duplication of eligibility based on a single event or period of service.

(1) Active-duty service. An individual with qualifying service in the Armed Forces that establishes eligibility on the part of such individual for educational assistance under this chapter, chapter 30 or 32 of this title, and chapter 1606 or 1607 of title 10, shall elect (in such form and manner as the Secretary may prescribe) under which authority such service is to be credited.

(2) Eligibility for educational assistance based on parent's service. A child of a member of the Armed Forces who, on or after September 11, 2001, dies in the line of duty while serving on active duty, who is eligible for educational assistance under either section 3311(b)(9) or chapter

> 35 of this title based on the parent's death may not receive such assistance under both this chapter and chapter 35 of this title, but shall elect (in such form and manner as the Secretary may prescribe) under which chapter to receive such assistance.

Section 3322 is ambiguous concerning the question before the Court because reasonably well-informed people can understand it in two or more different senses supporting either party's position. *See* SUTHERLAND § 45.2. We merely summarize these two potential readings of this provision now and then address them in more detail below.

A reasonably well-informed person *could* understand section 3322 to operate like so: subsection (a) bars the appellant "from receiving educational benefits under both Chapter 30 and Chapter 33 and [he] must elect under which chapter to receive educational assistance." Secretary's Br. at 12. On this reading, the statute treats a person with multiple periods of service (like BO) functionally the same as one with a single period of service. Applying to individuals with dual entitlement based on *multiple* periods of service, subsection (d) explicitly allows the appellant to irrevocably elect Post-9/11 benefits via 38 U.S.C. § 3327. Applying to individuals with dual entitlement based on a *single* period of service, subsection (h) forces an election between programs. This reading leads to affirmance.

On the other hand, a reasonably well-informed person *could also* understand section 3322 to operate like so:

subsection (a) bars someone from receiving assistance from more than one program during a single month, semester, or other applicable payment period, but allows that person to switch freely between programs. The subsection does not address the question concerning multiple periods of service. Applying to individuals with dual entitlement based on a *single* period of service, subsection (d) allows someone who already elected MGIB benefits to then irrevocably elect Post-9/11 benefits in the amount of the remaining, unused MGIB benefits for such period. But it says nothing about a person who has more than one period of qualifying service other than to the extent one of the periods qualified him or her for benefits under more than one program. Also, applying to individuals with dual entitlement based on a *single* period of service, subsection (h) imposes an election on an individual who's not yet elected any program attributable to his or her period of service. This reading leads to reversal.

Now let's explore the section in more detail to consider the alternate possibilities. A reasonably well-informed person would know the following information when seeking to understand section 3322's import. People can serve our country in a single period or in multiple blocks of time. Some veterans served, left service, and utilized MGIB benefits before Congress established the Post-9/11 program. Some of those same veterans then returned to service and amassed another period of service. The MGIB and Post-9/11 programs list partially overlapping dates for qualifying service, such that a single period of service on or after September 11, 2001, may meet the basic requirements for both programs. *See* 38 U.S.C. §§ 3011 (MGIB) and 3311 (Post-9/11). Every veteran who

is deemed to have served multiple periods of service necessarily served two or more single periods of service. (This may sound ridiculously self-evident, but it bears repeating for reasons that will become apparent as the analysis proceeds.) Unless properly clarified, "educational assistance" or "benefits" could refer to either a collection of benefits programs, the collection of all periodic payments under a single program, or the money from a discrete check distributed under a single program. Likewise, "election" of such "educational assistance" or "benefits" could refer to a choice between programs themselves or a choice of a single, discrete payment's program source. Congress didn't define these terms in the legislation.[6]

Looking at section 3322 more broadly, we see it bears the heading "[b]ar to duplication of educational assistance benefits." "Although section headings cannot limit the plain meaning of a statutory text, they supply cues as to what Congress intended." *Merit Mgmt. Grp., LP v. FTI Consulting Grp., Inc.*, 138 S. Ct. 883, 893, 200 L. Ed. 2d 183 (2018) (citation and internal quotation marks omitted). We know from this heading that Congress is concerned with "duplication" or double-dipping. But if there's no "duplication," there's no cause for concern.[7]

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6. VA defines "educational assistance" to mean "the monetary benefit payable under 38 U.S.C. chapter 33 to, or on behalf of, individuals who meet the eligibility requirements for pursuit of an approved program of education under 38 U.S.C. chapter 33." 38 C.F.R. § 21.9505. But the use of "educational assistance" at the end of section 3322(a) specifically isn't restricted to chapter 33.

7. "To duplicate" means "to do or cause to be done twice over," "to be a copy of," or "to make several copies of;" as an adjective, "double or twofold" or "exactly like another or several others;"

Considering Congress's word choice in this heading, another way to word the precise question at issue in terms of congressional intent is whether Congress desired to bar the receipt of benefits under both the MGIB and Post-9/11 GI Bill when a veteran has at least two separately qualifying periods of service as "duplication." The face of the statute simply does not clearly answer this question.

For our purposes, section 3322's most important subsections are (a), (d), and (h). But the other portions of the statute provide context essential for our analysis. *See Hornick*, 24 Vet.App. at 52; *see also King*, 502 U.S. at 221; *Imazio Nursery, Inc.*, 69 F.3d at 1564.

a. Section 3322(a)

Let's begin with subsection (a):

> **In general**.--An individual entitled to educational assistance under this chapter [33] who is also eligible for educational assistance under chapter 30, 31, 32, or 35 of this title, chapter 107, 1606, or 1607 or section 510 of title 10, or the provisions of the Hostage Relief Act of 1980 (Public Law 96-449; 5 U.S.C. 5561 note) may not receive assistance under two or more

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as a noun, "a thing that is exactly like another or others" or "a second copy of a form or document." THE NEW LEXICON WEBSTER'S ENCYCLOPEDIC DICTIONARY OF THE ENGLISH LANGUAGE 289 (Deluxe ed. 1991) [hereinafter WEBSTER'S]; *see Nielson v. Shinseki*, 23 Vet.App. 56, 59 (2009) (noting that it is "commonplace to consult dictionaries to ascertain a term's ordinary meaning").

> such programs concurrently, but shall elect (in such form and manner as the Secretary may prescribe) under which chapter or provisions to receive educational assistance.

In isolation, one could read subsection (a) to support either party's views. It doesn't speak in terms of periods of service. Rather, it applies broadly to an "individual" entitled to Post-9/11 benefits "who is also eligible for educational assistance under" a list of other programs (including the MGIB) all connected by the conjunction "or." The only thing subsection (a) prohibits is concurrent receipt: such an individual "may not receive assistance under two or more such programs concurrently."[8]

Note also that subsection (a) provides that such an individual "shall elect (in such form and manner as the Secretary may prescribe) under which chapter or provisions to receive educational assistance." Though the election mechanism relevant to this subsection isn't immediately apparent, one thing is clear: it's not section 3327. The Secretary didn't prescribe section 3327; Congress did. Section 3327 is a square peg to section 3322(a)'s round hole. We'll revisit subsection (a)'s mystery election mechanism later.

There are many questions left after reading subsection (a). For example, as a general matter when it refers to an

8. "Concurrent" means "running alongside, existing or happening together;" "acting together, cooperating;" "directed to, or intersecting in, the same point;" or "having joint, equal authority." WEBSTER'S 203; *see Nielson*, 23 Vet.App. at 59.

"individual . . . eligible for educational assistance . . ." does that mean that all periods of service no matter how distinct are lumped together for such an "individual"? Or does it mean that such an "individual" may be separately "eligible for educational assistance" more than one time based on distinct periods of service? The subsection just does not tell us, and, as we have indicated, either meaning is plausible.

An equally gaping hole in subsection (a) is a frame of reference for the bar on concurrent receipt and mandatory election: about which relevant period are we talking? The entire life of a program, such that one must exhaust a first program before touching the other? Or a single payment period, such as a month or semester, such that an individual only receives payment from one source per payment period? The first option is highly restrictive, and the other allows veterans more freedom of administration. Subsection (a) is ambiguous in this respect as well.

Though subsection (a) leaves us wanting, we can look to other subsections worded similarly to subsection (a) in an attempt to resolve this ambiguity.

b. Section 3322(e) and (g)

> At first glance, subsection (e) looks promising, but it is as impenetrable as subsection (a):
>
> **(e) Bar to concurrent receipt of transferred education benefits and Marine Gunnery Sergeant John David Fry Scholarship**

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> **Assistance**.--An individual entitled to educational assistance under both sections 3311(b) (9) and 3319 may not receive assistance under both provisions concurrently, but shall elect (in such form and manner as the Secretary may prescribe) under which provision to receive educational assistance.

But subsection (g) regarding transferred education benefits (that is, the ability of a veteran with qualifying service to transfer his or her benefits to others, such as children) also deals with this idea of concurrent receipt:

> **(g) Bar to concurrent receipt of transferred education benefits**.--A spouse or child who is entitled to educational assistance under this chapter based on a transfer of entitlement from more than one individual under section 3319 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.

This subsection includes an extra phrase that perhaps sheds lights on subsection (a). Subsection (g) provides that individuals to whom it applies "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) (emphasis added). Let's assume that, because subsection (a) doesn't include this

language verbatim, it must mean something different than subsection (g). Consider how odd it would be if Congress intended to allow an entitled person *who didn't personally serve in the military* to receive up to 48 months of *transferred* benefits under subsection (g), mandating only that the person elect the source of the payments at any given time, but—through silence—also intended to prevent a servicemember him- or herself from receiving extra benefits based on multiple, separately qualifying periods of service on the condition of a similar election mechanism. This arguably absurd result should arouse suspicion that such a result is what Congress wanted to achieve. *See McNeill v. United States*, 563 U.S. 816, 822, 131 S. Ct. 2218, 180 L. Ed. 2d 35 (2011) (adopting an interpretation that "avoids the absurd results that would follow" from an alternate interpretation); *United States v. Wilson*, 503 U.S. 329, 334, 112 S. Ct. 1351, 117 L. Ed. 2d 593 (1992) (citing *United States v. Turkette*, 452 U.S. 576, 580, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981) ("[A]bsurd results are to be avoided . . . .")); *Timex V.I., Inc. v. United States*, 157 F.3d 879, 886 (Fed. Cir. 1998) (applying "the canon that a statutory construction that causes absurd results is to be avoided if at all possible").

Recall the information that a reasonably well-informed person would bring to this analysis. Unclear from subsection (a)'s wording is whether it prohibits someone from tapping into Post-9/11 benefits as a whole program (i.e., the collection of all the months of entitlement) while he or she is tapping into the MGIB benefits as a whole program, or whether it simply prohibits someone from benefiting from two checks from two different programs

in the same payment period. We could word the options thus: (1) Someone who is using one educational assistance program may not receive assistance from another program until he or she has exhausted his or her total entitlement under the first program, but then he or she may start to receive assistance from the second program; or (2) Someone may not receive assistance from more than one program during a single month, semester, or other applicable payment period, but may switch freely between programs as the Secretary provides. Both of these options are feasible; thus section 3322(a) is ambiguous, capable of being understood by reasonably well-informed persons in two or more different senses. *See* SUTHERLAND § 45.2.

c. Section 3322(b) and (c)

Moving to 38 U.S.C. § 3322(b) and (c)—these subsections may seem irrelevant to our inquiry at first glance. But notice that subsection (b) discusses the purposes for which "a period of service" may count, albeit in a very different context.

> **(b) Inapplicability of service treated under educational loan repayment programs**.-- A period of service counted for purposes of repayment of an education loan under chapter 109 of title 10 may not be counted as a period of service for entitlement to educational assistance under this chapter.

Basically, it says that one can't double count a single period of service to get two benefits. In other words, it forbids

double-dipping in benefits based on a single period of service for repayment of an educational loan.

Similarly, subsection (c) requires Selected Reserve servicemembers to choose under which chapter to credit their service, presumably to prevent another manifestation of potential double-dipping based on certain service:

> **(c) Service in Selected Reserve**.--An individual who serves in the Selected Reserve may receive credit for such service under only one of this chapter, chapter 30 of this title, and chapters 1606 and 1607 of title 10, and shall elect (in such form and manner as the Secretary may prescribe) under which chapter such service is to be credited.

Congress clearly and understandably disfavored double-dipping in these respects, but note that no provision indicates that Congress worried more broadly about two full, separate program entitlements (subject to 38 U.S.C. § 3695's 48-month cap) based on *two or more* separate periods of service.

d. Subsections 3322(d) and (h) and Coordination of Benefits

Now let's consider subsection (d):

> **(d) Additional coordination matters**.--In the case of an individual entitled to educational assistance under chapter 30, 31, 32, or 35 of this title, chapter 107, 1606, or 1607 of title 10, or the

> provisions of the Hostage Relief Act of 1980, or making contributions toward entitlement to educational assistance under chapter 30 of this title, as of August 1, 2009, coordination of entitlement to educational assistance under this chapter, on the one hand, and such chapters or provisions, on the other, shall be governed by [section 3327].

This provision is significant because it is the portion of section 3322 that directs one to the election provisions in section 3327. Once again, the subsection does not cure the ambiguity in subsection (a). In fact, it reflects a similar ambiguity. Does section 3322(d) govern the coordination of the appellant's entitlement to desired Post-9/11 benefits tied to one period of service and his entitlement to MGIB benefits tied to another? If so, it supports the Secretary. Or, rather, might it govern the coordination of the appellant's entitlement to MGIB and Post-9/11 benefits tied to a single period entitling him to both, and leave his existing MGIB benefits tied to an entirely different period alone? This would support the appellant.

Both possibilities are feasible. And both possibilities' feasibility indicates ambiguity; section 3322(d) is capable of being understood by reasonably well-informed persons in two or more different senses. *See* SUTHERLAND § 45.2.

The possible relationships between 38 U.S.C. § 3322(d) and (h) also evidence section 3322's ambiguity. Subsection (h)[9] states:

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9. In January 2011, Congress amended the Post-9/11 GI Bill to stop VA's practice of awarding two benefits (under two different

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(h) Bar to duplication of eligibility based on a single event or period of service.--

> **(1) Active-duty service.--**An individual with qualifying service in the Armed Forces that establishes eligibility on the part of such individual for educational assistance under this chapter, chapter 30 or 32 of this title, and chapter 1606 or 1607 of title 10, shall elect (in such form and manner as the Secretary may prescribe) under which authority such service is to be credited.
>
> **(2) Eligibility for educational assistance based on parent's service.--** A child of a member of the Armed

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programs for up to 48 months) for the *same* period of service. *See* S. REP. NO. 111-346, at 19 (2010), *reprinted in* 2010 U.S.C.C.A.N. 1503. VA had been improperly awarding an additional 12 months of Post-9/11 benefits after veterans exhausted Montgomery GI Bill benefits, to award a total of 48 months for a veteran with a single period of service. *See id.* The U.S. Senate Committee on Veterans' Affairs explained that this practice necessitated an amendment because current "law" (i.e., the VA's interpretation) allowed "an individual, who entered into service on September 1, 2002, and who completed three years of service . . . [to establish] eligibility for 36 months of educational assistance under the [Montgomery GI Bill] in addition to eligibility for 36 months of educational assistance under the Post-9/11 GI Bill," subject to section 3695's 48-month cap. *Id.* Thus, Congress added subsection (h) requiring election of authority under which to credit a single period of service. *Id.*

> Forces who, on or after September 11, 2001, dies in the line of duty while serving on active duty, who is eligible for educational assistance under either section 3311(b)(9) or chapter 35 of this title based on the parent's death may not receive such assistance under both this chapter and chapter 35 of this title, but shall elect (in such form and manner as the Secretary may prescribe) under which chapter to receive such assistance.

The Secretary argues that, because subsection (h) explicitly refers to a single period of service, subsection (d)'s silence as to periods of service must necessarily mean that Congress intended it to apply to coordinate entitlements based on at least two periods of service. Oral Argument at 48-50, *BO v. Wilkie*, U.S. Vet. App. No. 16-4134 (argued May 2, 2018), http://www.uscourts.cavc.gov/oral_arguments_audio.php (appearing under the 2018 tab). We disagree and decline to assume a meaning in subsection (d)'s silence that automatically disadvantages veterans in practice.

Subsections (d) and (h) can still co-exist even if they both apply only to a single period of service. As mentioned at the beginning of this discussion, subsection (d) could allow someone who already elected MGIB benefits to irrevocably elect Post-9/11 benefits in the amount of the remaining, unused MGIB benefits for a single period of service. Subsection (h) could impose an election on an

individual who's not yet elected any program attributable to his or her period of service. The co-existence of these two understandings means ambiguity; a reasonably well-informed person could understand their relationship in at least these two senses. *See* SUTHERLAND § 45.2.

The truth is that no matter how closely one reads section 3322, or no matter how one parses its various subsections, it is ambiguous. It is possible to read this provision to require a person like BO with two distinct qualifying periods of service entitling him to benefits under two programs to choose irrevocably between them. But it is equally possible to read the section as being limited to addressing what to do when a person qualifies for two programs based on a single period of service. In sum, Congress hasn't spoken directly to the precise question at issue—at least not clearly. *See Chevron*, 467 U.S. at 842-43. Thus, our inquiry continues.

C. The relevant regulations parrot the ambiguous statutes; therefore, we afford them no *Chevron* deference.

Because we consider section 3322 ambiguous for our purposes, we next consult the implementing regulations to see whether VA adopted a permissible interpretation of such ambiguity, and if so, we defer to it. This is what *Chevron* commands. *See id.* at 844-45.

It turns out that the *Chevron* inquiry is quite straightforward in this case. The implementing regulations that cite section 3322 as authority and could possibly offer

a permissible interpretation of the statutory ambiguity are 38 C.F.R. §§ 21.4022, 21.9635(w), and 21.9690.[10] Neither the Board nor the Secretary cited any of these regulations, much less argued that, through them, VA adopted a permissible interpretation of section 3322's ambiguity that is favorable to the Secretary's position now. Checking them independently for such a permissible interpretation, we find none. At minimum, the regulations essentially "repeat" the silence in the statute about how to treat a veteran with two distinct periods of qualifying service entitling him or her to benefits under different programs. At most, they point toward an interpretation that is more favorable to appellant than the Secretary; we dig deeper into this point in our next section about the best interpretation. Thus, these regulations are not ones to which *Chevron* deference applies, at least with respect to the question before the Court. *See Cook v. Snyder*, 28 Vet.App. 330, 339 (2017) (noting *Chevron* deference is not appropriate when regulation does not resolve statutory ambiguity but merely repeats it), *aff'd sub. nom. Cook v. Wilkie*, 908 F.3d 813 (Fed. Cir. 2018).[11]

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10. The full list of implementing regulations comprises 38 C.F.R. §§ 21.3022, 21.4022, 21.5022, 21.7642, 21.9505, 21.9570, 21.9635, and 21.9690. Of those, the other five aren't directly relevant and can't possibly be read to adopt a clear, permissible interpretation of the statutory ambiguity. *See* §§ 21.3022, 21.5022, and 21.7642 (concerning the relationships between different chapters (i.e., not chapter 30) and chapter 33), 21.9505 (offering a definition for active duty), 21.9570 (concerning transfer of entitlement).

11. In theory, we might have been called on to accord controlling deference to the Secretary's interpretation of his regulations. *See Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905, 137 L. Ed. 2d 79

Because VA didn't adopt regulations addressing the relevant statutory ambiguity, we assume the task of independently determining the best interpretation on the meaning of the statutory scheme. *See Chevron*, 467 U.S. at 844-45. We turn to that endeavor next.

D. Section 3322 is best interpreted to allow BO to receive benefits under both programs.

We have no reason to think that any one of section 3322's provisions is the result of obvious mistake or error, so we have an obligation to construe it so that effect is given to all its provisions; so that no part will be inoperative or superfluous, void or insignificant; and so that one section will not destroy another. *See* SUTHERLAND

(1996). Whatever the continued viability of this doctrine is today, *see Kisor v. Wilkie*, 139 S. Ct. 2400, 204 L. Ed. 2d 841 (2019), no *Auer*-like deference would be due to the Secretary's position in this appeal. Because the Secretary is at most providing his view on the regulations, and the regulations do nothing more than copy the ambiguity in the statute, his interpretation is simply an argument about the statute. That is not subject to *Auer* deference. *See Gonzales v. Oregon*, 546 U.S. 243, 257, 126 S. Ct. 904, 163 L. Ed. 2d 748 (2006) ("An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language."). In terms of deference, this would leave us with *Skidmore*. As we noted above, *see supra* Part III.A, a court may look to an agency's interpretation of a statute for guidance in a looser sense of "deference." The utility of such guidance depends at its core on the persuasiveness of an agency's reasoning. *See Skidmore*, 323 U.S. at 140. As we discuss in the next section, the Secretary's arguments about the meaning of the statutory scheme (as well as his regulations) lack the "power to persuade."

§ 46:06; *see Splane*, 216 F.3d at 1068-69. We conclude that the best interpretation favors the appellant, *see Chevron*, 467 U.S. at 844-45, and that the Secretary's arguments aren't persuasive, *see Skidmore*, 323 U.S. at 140.

We begin by returning to the statutory text. Our interpretation of subsection (a) is the heart of our more global interpretation of section 3322:

> **In general**.--An individual entitled to educational assistance under this chapter [33] who is also eligible for educational assistance under chapter 30, 31, 32, or 35 of this title, chapter 107, 1606, or 1607 or section 510 of title 10, or the provisions of the Hostage Relief Act of 1980 (Public Law 96-449; 5 U.S.C. 5561 note) may not receive assistance under two or more such programs concurrently, but shall elect (in such form and manner as the Secretary may prescribe) under which chapter or provisions to receive educational assistance.

The language of subsection (a) prohibits someone from benefiting from two or more checks from two or more different programs in the same payment period. Recall the options for subsection (a)'s potential meanings we outlined earlier in the analysis. That section could be concerned with preventing "duplication" in terms of programs or "duplication" with respect to multiple payments made during a given period of time. We believe the better reading is that the duplication with which Congress was concerned was the latter. In other words, someone

may not receive assistance from more than one program during a single month, semester, or other applicable pay period, but may switch freely between programs, as the Secretary provides.

We conclude this is the best reading of the statute for several reasons, acknowledging that Congress was silent on this question. First, our interpretation is consistent with and gives meaning to the other parts of section 3322. Second, our reading makes sense in the context of the Secretary's regulations. Indeed, any other meaning makes much of the regulatory framework largely meaningless. Third, this interpretation gives real meaning to the 48-month aggregate cap, something that loses force as a practical matter under an alternate construction of the statute. Fourth, our interpretation is consistent with congressional purpose and the history of the creation of educational benefits programs more generally. And finally, the pro-veteran canon of statutory construction removes any doubt that the ambiguity in this statute should be resolved in the manner we have suggested. We address each of these matters in turn.

1. Giving Meaning to All Statutory Provisions

First, our interpretation of subsection (a) fits comfortably with how we have interpreted the balance of section 3322, thereby giving meaning to all the statute's provisions. A prime example is the relationship between subsections (d) and (h). For ease of reference, here they are again:

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(d) Additional coordination matters.--In the case of an individual entitled to educational assistance under chapter 30, 31, 32, or 35 of this title, chapter 107, 1606, or 1607 of title 10, or the provisions of the Hostage Relief Act of 1980, or making contributions toward entitlement to educational assistance under chapter 30 of this title, as of August 1, 2009, coordination of entitlement to educational assistance under this chapter, on the one hand, and such chapters or provisions, on the other, shall be governed by [section 3327].

(h) Bar to duplication of eligibility based on a single event or period of service.--

(1) Active-duty service.--An individual with qualifying service in the Armed Forces that establishes eligibility on the part of such individual for educational assistance under this chapter, chapter 30 or 32 of this title, and chapter 1606 or 1607 of title 10, shall elect (in such form and manner as the Secretary may prescribe) under which authority such service is to be credited.

(2) Eligibility for educational assistance based on parent's service.--A child of a member of the Armed Forces who, on or after September

> 11, 2001, dies in the line of duty while serving on active duty, who is eligible for educational assistance under either section 3311(b)(9) or chapter 35 of this title based on the parent's death may not receive such assistance under both this chapter and chapter 35 of this title, but shall elect (in such form and manner as the Secretary may prescribe) under which chapter to receive such assistance.

Subsection (h) proclaims a single period of service as its relevant frame of reference when considering elections between programs. But this clarity need not necessitate exclusivity of control over individuals with a single period of service. Subsection (d) may also regulate individuals with a single period of service who qualify for multiple programs. Each subsection applies to individuals with a single period of service at different stages of the educational assistance application process.

For purposes of our discussion, the relevant stages are (1) application, (2) application pending, and (3) decision. *See* U.S. Dep't of Veterans Affairs, *Education and Training: Apply for Benefits*, VA.GOV, https://benefits.va.gov/gibill/apply.asp (last visited Mar. 6, 2019) (providing application options and an "interactive map to find out how quickly your regional office is processing education claims," and summarizing post-decision appeal options). Subsection (h) applies at the application stage to mandate a primary election, an initial choice among programs for those who

haven't yet tried to use educational assistance attributable to a single period of service. Subsection (d) applies to those individuals with a single period of service already positioned to use MGIB benefits, with an application pending for or a decision awarding MGIB benefits, who'd prefer to use Post-9/11 benefits. In other words, individuals who've already made an election who want a second election.

This interpretation is also more faithful than the Secretary's to the spirit of subsection (d)'s subheading "[a]dditional coordination matters." "Additional" suggests that this subsection works secondary to other provisions. To coordinate means "to bring the parts or agents of a plan, process etc. into a common whole, to harmonize." WEBSTER'S 215; *see Nielson*, 23 Vet.App. at 59. In no way does "coordination" denote or connote restriction or limitation. Yet the Secretary's position treats subsection (d) and section 3327 as strings attached to educational assistance received under more than one program. Our interpretation embodies the enabling connotation of "coordination."

2. Regulatory Framework

Next we consider the regulatory structure the Secretary has created to implement these programs, principally 38 C.F.R. §§ 21.4022, 21.9635(w), and 21.9690. The Secretary's regulatory scheme supports our conclusion. Section 21.4022 ("Nonduplication—programs administered by VA") cites 38 U.S.C. § 3322 for its statutory authority and states:

> A veteran . . . who is eligible for educational assistance allowance . . . under more than one of the provisions of law listed in this section [including both MGIB and Post-9/11] . . . cannot receive such benefits concurrently. The individual must choose under which program he or she will receive benefits for the particular period(s) during which education or training is to be pursued. The individual may choose to receive benefits under another program (other than 38 U.S.C. chapter 33 [Post-9/11]) at any time, but not more than once in a calendar month. The individual may choose to receive benefits under 38 U.S.C. chapter 33 [Post-9/11] at any time, but not more than once during a certified term, quarter, or semester.

It's impossible to reconcile § 21.4022 with the Secretary's position concerning the meaning of section 3322. If someone with multiple periods of service has only two options, irrevocable election or exhaustion, he or she could *never* switch between programs, a possibility this regulation clearly contemplates. The Secretary's position thus would render his own regulation inoperable surplusage, something we can't condone. *See* SUTHERLAND § 46:06; *see Splane*, 216 F.3d at 1068-69.

Next, § 21.9635(w), which poses similar problems for the Secretary's position, cites 38 U.S.C. § 3322(a) for its statutory authority and reads:

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> Receipt of educational assistance allowance under another educational assistance program. An individual in receipt of educational assistance under this chapter [33] who is also eligible for educational assistance under [among others, the MGIB program] may choose to receive educational assistance under another program. VA will terminate educational assistance under [Post-9/11] effective the first day of the enrollment period during which the individual requested to receive educational assistance under [among others, the MGIB program].

This regulation presumes that someone receiving Post-9/11 educational assistance can switch and receive MGIB educational assistance. Again, such a reality is impossible in the Secretary's world. Just as with § 21.4022, the Secretary's position thus would render the relevant parts of § 21.9635(w) inoperable surplusage, and, again, we can't condone that. *See* SUTHERLAND § 46:06; *see Splane*, 216 F.3d at 1068-69.

Note also VA's response to public comments on proposed § 21.9635(w), pursuant to the Administrative Procedure Act, which "clarif[ied] that an election to receive benefits under an existing educational assistance program on or after August 1, 2009, does not negate the opportunity to elect or use the Post-9/11 GI Bill at a later date." 74 Fed. Reg. 14,654, 14,661 (Mar. 31, 2009) (emphasis added). Instead, § 21.9635(w) applies to "[i]ndividuals who are eligible for the Post-9/11 GI Bill and another educational assistance program at the same time" and

allows them to "specify under which program they wish to receive payment."[12] *Id.* VA clarified that this regulation contemplates someone like the appellant tapping into either MGIB or Post-9/11 benefits "enrollment period" to "enrollment period," and its logistics support our following interpretation of 38 U.S.C. § 3322(a). *Id.*

Third, we have 38 C.F.R. § 21.9690 ("Nonduplication of educational assistance"), citing 38 U.S.C. § 3322 as authority. This regulation prohibits concurrent, but not consecutive, usage of Post-9/11 and other GI Bill benefits. 38 C.F.R. § 21.9690(a). Under this Post-9/11 GI Bill implementing regulation, VA identifies the notice-in-writing procedure veterans who are "eligible for educational assistance under more than one program" must use to "specify . . . which benefit he or she wishes to receive." § 21.9690(b). Those veterans "may choose to receive payment under another educational assistance program at any time, but may not change which benefit he or she will receive more than once during a term, quarter, or semester." *Id.* Again, this regulation contemplates someone like the appellant enjoying benefits under MGIB and Post-9/11 programs in a way that the Secretary's position precludes. Once more, the Secretary's position thus would render this regulation partially inoperable, and, again, we can't condone that. *See* SUTHERLAND § 46:06; *see Splane*, 216 F.3d at 1068-69.

12. To be clear, we do not address whether § 21.9635(w) conflicts with other provisions such as 38 U.S.C. § 3322(h)(1) (requiring someone eligible for more than one program as of 2011 to credit their service under one authority) and 38 U.S.C. § 3327 (requiring some veterans to irrevocably elect a program in lieu of another) for veterans with a single period of service.

The provisions of § 21.4022 and § 21.9690 together seem to elaborate on section 3322(a)'s bar on concurrent receipt and to prescribe the mystery election mechanisms that section 3322(a) leaves to the Secretary. They allow veterans with multiple periods of service maximum freedom to coordinate their benefits under different programs if they don't double up during the relevant payment period, whether it be a calendar month, term, quarter, or semester. Section 21.9635(w), as a technical implementation of section 3322(a), syncs with section 3322(a) in a similar way.

3. 48-Month Cap Under Section 3695

Moreover, our interpretation gives real meaning to section 3695's 48-month aggregate cap. The Secretary's argument in this case makes the section largely a nullity.[13]

13. The Secretary's position would render section 3695's 48-month aggregate cap largely a nullity because he points to only a single route to 48 months of benefits: someone who's eligible for two programs must exhaust the first's 36 months and then may elect 12 extra months of the second. Oral Argument at 42:04-43:41, *BO v. Wilkie*, U.S. Vet. App. No. 16-4134 (oral argument held May 2, 2018), http://www.uscourts.cavc.gov/oral_arguments_audio.php (appearing under the 2018 tab). To the extent the Secretary asserts a statutory basis for this route, it's less than clear to us. And not only does he provide this single example, but VA has been inconsistent at best in informing veterans of this route. While the appellant's application may have informed him of this option, *see* R. at 125, 1156, a later application version doesn't seem to advise veterans such as the appellant to exhaust the MGIB benefits before applying for Post-9/11 benefits. *See* R. at 1151-52. We do not note this for the purposes of factfinding, but to address the absurdity of the Secretary's position. Indeed, even if the route still exists (exhaustion of 36 months

That is something to be avoided. *See Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1842, 201 L. Ed. 2d 141 (2018). The interpretation we adopt today yields many instances in which the aggregate cap can apply. Indeed, BO's circumstances provide a prototypical example. Our dissenting colleague asserts that a veteran like BO is not barred from reaching the 48-month aggregate cap under section 3695 because a veteran can decide to use his 36months of benefits under the MGIB program and then use 12 months of the Post-9/11 program, indicating that Congress intended for a veteran like BO could use both programs to obtain the full 48 months of benefits under section 3695. However, nowhere in the statute does it state that a veteran may use 36 months under the MGIB program and then use 12 months under the Post-9/11 program. It is unclear where VA or the dissent has found the authority for this interpretation. Our interpretation gives full meaning to section 3695.

4. Congressional Purpose

Our interpretation also dovetails with Congress's statutory purpose to bar duplication. Simply put, no duplication is occurring in the case of someone like the appellant. Again, the Post-9/11 program didn't replace the MGIB program. They co-exist. So, receipt of benefits under one program for one period of service can't possibly constitute benefits duplicative of those received under another program for another period of service. By analogy,

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under one program and then applying for 12 months under another program), the 48-month cap is a practical nullity if no one takes the route because they don't know it's there.

it is difficult to conceive how one could possibly consider "duplication" of benefits to occur when a veteran serves two different periods of service and incurs two different injuries in service, thereby independently qualifying the veteran for entitlement to service connection and ratings under two different diagnostic codes (up to a 100% rating cap). This situation is no different.

The history of other GI bill programs also supports entitlement under more than one program at the same time without election so long as benefits are not used concurrently. Congress's historical practice has been to provide entitlement to benefits under more than one program based on different periods of service up to an aggregate limit. The original World War II GI Bill and the Korean War GI Bill allowed combination of benefits for veterans qualifying under both bills up to the aggregate limit (also 48 months). Korean War GI Bill, Pub. L. No. 82-550, § 214(a)(3), 66 Stat. 663, 665.[14] Congress also prohibited the concurrent, but not consecutive, usage of these benefits. *See* § 232(h), 66 Stat. at 670. The same consecutive use was allowed for the Post-Korean War and Vietnam Era GI Bill if one qualified for both with service up to the aggregate limit. Cold War GI Bill, Pub. L. No. 89-358, §§ 2 & 3(b), 80 Stat. 12, 14, 21 (initially setting the limit at 36 months and barring concurrent usage); Pub. L. No. 90-631, 82 Stat. 1331 (amending the aggregate limit to 48 months). We don't lightly presume Congress

14. This provision of the public law references Part VIII of Veterans Regulation Numbered 1(a), which established the Original GI Bill. Pub. L. No. 78-346 § 400(b), 58 Stat. 287-90 (adding new part VIII to Veterans Regulation Numbered 1(a)).

changed its historical approach when adopting the Post-9/11 program, especially when the change would not be a veteran-friendly one.

Legislative purpose, broadly speaking, also tips in favor of the appellant. If this is about incentives to get people to join the all-volunteer Armed Forces, the appellant's view is more consistent with that purpose. And we get to the same result if we suppose the purpose was to be a reward for or acknowledgement of service. *See Hughes v. United States*, 138 S. Ct. 1765, 1774, 201 L. Ed. 2d 72 (2018) (recognizing that legislative purpose can serve as a useful tool in statutory interpretation).

5. Pro Veteran Canon

Finally, to the extent a question remained, if *Brown v. Gardner*, 513 U.S. 115, 115 S. Ct. 552, 130 L. Ed. 2d 462, would ever have a real effect on an outcome, it would be here. In *Gardner*, the Supreme Court applied the doctrine that interpretative doubt should be resolved in veterans' favor. *Id.* at 117-18. Here, that doctrine counsels in favor of an interpretation of the statutory scheme to allow veterans with multiple periods of service to obtain benefits under both the MGIB and the Post-9/11 GI Bill subject to the aggregate cap of 48 months.[15] To interpret

15. Our dissenting colleague disagrees that our approach is "veteran friendly" and, to that end, argues that our approach treats "individuals with intermittent periods of active duty service [better] than . . . individuals with a continuous period of active duty service." *Post* at 40. But her conclusion rests on the assumption that we have defined "period of service" when we haven't. That question remains open.

the statute otherwise would be to ignore the import of the pro-veteran canon of construction, an interpretative tool that has real meaning. *See Procopio v. Wilkie*, 913 F.3d 1371, 1382-87 (Fed. Cir. 2019) (en banc) (O'Malley, J., concurring) (discussing the importance of the *Brown v. Gardner* canon of construction).[16]

E. Application to BO

Our interpretation has two consequences for the appellant. First, the form the appellant signed irrevocably waiving his benefits attributable to his first period of service under the MGIB program is a nullity.[17] A forced "election" based on an incorrect legal interpretation has no meaning at all. Second, the Board committed legal error warranting reversal and remand. *See Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) (explaining that reversal is appropriate "where the Board has performed the necessary factfinding and explicitly weighed the evidence"); *Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is warranted "where the Board has incorrectly applied the law").

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16. We recently decided *Carr v. Wilkie*, 31 Vet. App. 128, (2019). While *Carr* did not address this specific issue, it states, "Although a recipient may qualify for benefits under more than one program (e.g., chapter), she may not receive assistance under two or more programs at the same time. In such cases, the recipient must choose to proceed under a single program." *Id.* at 130 n.2 (citing 38 U.S.C. § 3322). *Carr*'s note underscores the naturalness of our reading, and our decision in this case elaborates on its dicta.

17. Again, this is because, under our interpretation of section 3322, we never get to section 3327, the irrevocable election section on which the Secretary focuses.

Thus, we reverse the Board's decision and remand with instructions that the Board is to calculate the amount of time for which BO is entitled to benefits under the terms of the Court's decision. It appears, the correct calculation is that BO is entitled to a total of 22 months and 16 days of additional benefits that he could take either (1) all as Post-9/11 chapter 33 benefits or (2) as 10 months and 16 days of MGIB chapter 30 benefits and 12 months of Post-9/11 chapter 33 benefits. But we leave this factual determination to the Board in the first instance.

On remand, the appellant may submit additional evidence and argument, including the arguments raised before the Court and has 90 days to do so from the date of VA's postremand notice. *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order); *see also Clark* v. *O'Rourke*, 30 Vet.App. 92, 97 (2018). The Board must consider any such additional evidence or argument submitted. *Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Board must also proceed expeditiously. 38 U.S.C. §§ 5109B, 7112.

IV. CONCLUSION

After considering the parties' briefs, oral arguments, the record on appeal, and the governing law, the Court REVERSES the July 14, 2016, Board decision and REMANDS the matter for further proceedings consistent with this opinion.

BARTLEY. *Judge*, dissenting: I respectfully dissent from my colleagues' conclusion that the completely

voluntary statutory irrevocable election provision, 38 U.S.C.§ 3327, and its directing statute, 38 U.S.C. § 3322(d), do not apply to veteran BO. He meets the statutes' straightforward requirements and they are not ambiguous. Before he exhausted his full 36 months of MGIB education benefits he voluntarily signed an irrevocable election to receive Post-9/11 education benefits, and was informed on his application form of the drawback of doing so, R. at 1156. Therefore, section 3327 prescribes that his entitlement to Post-9/11 benefits is limited to 10 months and 16 days, which was the unused remainder of his MGIB entitlement when he filed his section 3327 election. Thus, the Board decision should be affirmed.

Before moving further, a short summary of the parts of the Post-9/11 education benefits statutes relevant to veteran BO's case is in order. Although the statutory scheme here is complex, with many moving parts that apply to thousands of servicemembers, veterans, and dependents in their thousands of different situations, this does not equate to ambiguity. After all, "[t]he test for ambiguity is not complexity, but lack of clarity." *Wilson Arlington Co. v. Prudential Ins. Co.*, 912 F.2d 366, 371 (9th Cir. 1990); *see also Atencio v. O'Rourke*, 30 Vet.App. 74 (2018) ("Complexity and ambiguity are distinct concepts.").

A. Summary of Relevant Parts of 38 U.S.C. §§ 3322 and 3327

Because the periods of eligibility for MGIB and Post-9/11 education benefits overlap and the programs were intended to coexist, there are rules that specify how they

coordinate.[18] Section 3322, titled "Bar to duplication of educational assistance benefits," is one of the statutes that provides this interface. The current section 3322, even its title, is patterned on 38 U.S.C. § 3033, which was enacted in 1984 to provide coordination between the MGIB program and, inter alia, the older Veteran's Educational Assistance Program (VEAP). *Compare* 38 U.S.C. § 3033, *with* 38 U.S.C. § 3322. The language that bars concurrent receipt in sections 3033 and 3322 track almost exactly, although the programs involved differ. Subsection 3322(d), titled "Additional Coordination Matters" provides that for individuals who qualify for both MGIB and Post-9/11 education benefits, or for those who qualify for Post-9/11 benefits and are making contributions toward MGIB benefits, "coordination of entitlement" is governed by section 3327. 38 U.S.C. § 3322(d). Section 3327, titled "Election to receive educational assistance," provides that qualifying individuals who want to receive Post-9/11 benefits in lieu of fully exhausting their MGIB entitlement "may" elect to do so.[19] 38 U.S.C. § 3327. As relevant here, section 3327 provides that an eligible elector is one who (1) is otherwise entitled to Post-9/11 GI Bill benefits and (2) retains unused entitlement under the MGIB program. § 3327(a)(1), (2).

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18. I discuss only the MGIB and Post-9/11 programs because they are the education benefits relevant to veteran BO's case. However, the relevant statutes, in particular 38 U.S.C. §§ 3322 and 3327, refer to chapters 31, 32, 35 and 10 U.S.C. § 1606 and 1607 as well.

19. My references to section 3327 are not intended to include subsection (h) of that statute, which applies only as to an individual who submitted an election on or after January 1, 2017, and therefore does not apply to veteran BO.

As the majority correctly notes, some individuals might want to begin receiving Post-9/11 benefits before they exhaust their MGIB benefits because the Post-9/11 program is generally more generous than the MGIB program, particularly for those who served for a longer period and are in the top payment tier for Post-9/11 benefits. The Post-9/11 program covers the net cost of in-state tuition, a housing allowance (so long as the student is not currently on active duty), and a book stipend, items that the MGIB program does not cover.[20] *Compare* 38 U.S.C. § 3313, *with* 38 U.S.C. §§ 3001 *et seq.* However, for other individuals the better option may be continuing to receive MGIB benefits until they are exhausted and then applying to receive Post-9/11 benefits.

Congress arranged that an individual electing Post-9/11 benefits before using their full entitlement to MGIB benefits would face two drawbacks that are relevant here. First, the statutory election of Post-9/11 benefits under section 3327, while the individual still has unused MGIB benefit entitlement, would be irrevocable. *See* 38 U.S.C. § 3327(i). Second, instead of remaining entitled to receive an aggregate 48 months of education benefits, which is the statutory cap applicable to an individual who is entitled to education benefits under two or more programs, an individual who has unused MGIB benefits available but elects to receive Post-9/11 benefits under section 3327 is entitled to Post-9/11 benefits only for the remainder of the

20. Active duty members who enroll in the MGIB program and pay $100 per month for 12 months are entitled to receive a monthly education stipend so long as they have completed a minimum service obligation. 38 U.S.C. § 3011.

period left on their MGIB entitlement, up to a total of 36 months combined. 38 U.S.C. § 3327(d)(2). Of course, an individual who does not voluntarily elect to receive Post-9/11 benefits under section 3327 before exhausting their MGIB benefits may receive the full 36 months of MGIB benefits and then receive an additional 12 months of Post-9/11 education benefits before reaching the 48-month cap. 38 U.S.C. §§ 3327(d)(2), 3695 (section 3695 establishes a 48-month cap on the combined period of educational assistance received under two or more programs and section 3327(d)(2) provides that only those individuals who voluntarily relinquish unused MGIB benefits are subject to the MGIB "remainder" rule). And those with qualifying Post-9/11 service who chose to not pay into the MGIB program and thus have no entitlement to MGIB benefits are entitled to receive 36 months of Post-9/11 benefits. 38 U.S.C. § 3312(a).

B. The Different Types of Election

Before going further, I note an additional complication regarding the statutory scheme at issue here: Section 3322 references several different types of elections pertinent to Post-9/11 benefits. Mention of election is found in subsections 3322(a), (c), (e), (g), and (h), and all provide that in certain circumstances an individual "*shall elect* [] *in such form and manner as the Secretary may prescribe*[]" the program to which the individual's service will be credited. 38 U.S.C. § 3322(a), (c), (e), (g), (h) (emphasis added). Notably, Congress delegated to VA the authority to determine the form and manner of these elections, essentially establishing a largely regulatory election

process, although authorized by statute, for individuals covered by subsections 3322(a), (c), (e), (g), and (h).

In contrast, subsection 3322(d) doesn't specifically mention election, but instead directs that certain individuals' education benefits entitlements will be coordinated by section 3327.[21] Section 3327(a) sets out the *completely voluntary statutory election process* that veteran BO chose. Although he argues that section 3322(h), which explicitly applies only to individuals with a single period of service, triggers the section 3327(a) voluntary statutory election provision, oral argument at 11:46-50, and thus that section 3327 only applies to individuals with a single period of service, these two provisions have no inherent relationship. Whereas section 3322(h) provides VA with authority to establish a *regulation-based mandatory* election process for those with a single period of service, section 3322(d) doesn't reference the individual's period or periods of service and directs individuals to the section 3327 *statutory voluntary election process*. In effect, the statutory scheme relevant here provides for different election procedures—section 3322(h)'s reference to a single period of service does not impact the voluntary section 3322(d)/3327 statutory election process and there is no indication in the text that

21. Subsection 3322(d) refers to a section 3301 note. In December 2016, Congress enacted a "recodification and improvement of [the] election process for [the] post-9/11 educational assistance program" and the section 3301 note became an entirely new statute, section 3327, which sets forth the voluntary statutory election process at issue here. Pub. L. No. 110-252, title IV, § 405(c), 130 Stat. 1558 (Dec. 16, 2016).

section 3322(d)/3327 applies only to those with multiple education benefit entitlements under a single period of service.

C. The Majority's Framing of the Issue

The majority's various characterizations of the issue in this case demonstrate a misunderstanding of how the MGIB and Post-9/11 education programs interrelate and in framing the issue they pose misleading choices. They view the question at issue as whether a veteran who qualifies for MGIB benefits under one period of service and Post-9/11 benefits under an entirely separate period of service may use one period of service to obtain MGIB benefits and the other period of service to obtain Post-9/11 benefits, subject to any applicable aggregate cap—or must such a veteran choose between, or "irrevocably elect," or be forced to elect which program he or she uses? *Ante* at 15. My colleagues repeat this query in various ways throughout their decision. *Ante* at 10, 15-16, 19-21. But it is perfectly clear that under section 3322(d)/3327 no one is forced to choose between the two programs. As noted above, while section 3322(h) requires a compulsory election as to how to credit a single period of service, the section 3327/3322(d) election that veteran BO chose, which consists of electing Post-9/11 benefits while having unused MGIB entitlement, is entirely voluntary. An individual may continue to use MGIB benefits until those benefits are exhausted and then receive Post-9/11 benefits, subject to the overall statutory cap of 48 months. No election is required.[22]

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22. Contrary to the majority's statement, *ante* at 28, there is a clear statutory basis for concluding that individuals who fully

The majority also asks whether Congress desired to *bar* the receipt of benefits under both MGIB and Post-9/11 when a veteran has at least two separately qualifying periods of service as "duplication." *Ante* at 16. Here again, they frame the issue inappropriately because the statutes are clear that there is no bar to an individual receiving both benefits nonconcurrently. But the majority's questions imply that the Board decision in BO's case would support a bar to receipt of both benefits for veteran BO. It would not—it would simply hold veteran BO to the election that he made to receive Post-9/11 benefits while being entitled to unused MGIB benefits, with the associated drawback that was discussed earlier.

D. The majority ignores the plain language.

As noted, section 3322 is titled "Bar to duplication of educational assistance." The majority reasons that the entire statute is ambiguous because it is unclear what type of duplication is barred and what period the duplication bar would apply to. *Ante* at 21. They conclude that the duplication barred by section 3322 is as to an individual receiving assistance from more than one program during a single month, semester, or other applicable pay period. Then they reason that the best independent interpretation

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exhaust their 36 months of MGIB benefits may then receive 12 months of Post-9/11 benefits. Because these individuals did not make a voluntary section 3322(d)/3327 election, they are not subject to section 3327(d)(2)—which limits the amount of Post-9/11 benefits available to the number of months of unused MGIB benefits—and thus may still obtain 48 months of educational benefits subject to the section 3695 cap.

of section 3322 is that it allows a veteran like BO, with multiple entitlements under separate periods of service, to receive full benefits under both MGIB and Post-9/11 programs, although not at the same time and subject to the 48-month cap. *Ante* at 23. Applying this interpretation, they conclude that subsection (d) doesn't apply to veteran BO.

To answer whether veteran BO's voluntary election under section 3322(d)/3327 is valid and limits him to the remainder of the unused period of his MGIB benefits, we must look to the plain language of the statute. "[A] functioning system of laws must give primacy to the plain language of authorities." *Tropf v. Nicholson*, 20 Vet.App. 317, 322 n.1 (2006); *see also Myore v. Nicholson*, 489 F.3d 1207, 1211 (Fed. Cir. 2007) ("'Statutory interpretation begins with the language of the statute, the plain meaning of which we derive from its text and its structure'" (quoting *McEntee v. Merit Sys. Prot. Bd.*, 404 F.3d 1320, 1328 (Fed. Cir. 2005))).

The majority concludes that section 3322 as a whole, and subsection 3322(d) that directs individuals to the voluntary election process in section 3327, is ambiguous because it can be read to apply to individuals with multiple entitlements under a single period of service as well as multiple entitlements under multiple separate periods of service. *Ante* at 21. I agree that the statute says that, but that does not make it ambiguous. Based on the plain language of the statute, applying the voluntary election process to both classes of individuals was the intent of Congress.

The language of section 3322 is clear and unambiguous—it doesn't refer to an individual's entitlement based on whether they have multiple entitlements under a single period of service or under multiple separate periods of service.[23] Even the majority acknowledges that section 3322 "doesn't speak in terms of periods of service" but "applies broadly to an individual entitled to Post-9/11 benefits who is also eligible for [MGIB benefits]." *Ante* at 17. To me, their characterization demonstrates that, far from being ambiguous, the language of section 3322, including subsection (d), applies broadly to individuals who meet the criteria listed, regardless whether their entitlements to MGIB and Post-9/11 fall under a single period of service or multiple separate periods of service. Based on the plain language of the statute, this is the scheme that Congress intended. After all, "[b]road general language is not necessarily ambiguous when congressional objectives require broad terms." *Diamond v. Chakrabarty*, 447 U.S. 303, 315, 100 S. Ct. 2204, 65 L. Ed. 2d 144 (1980).

As to subsection 3322(d) its language is also plain and unambiguous. As relevant here, it provides that in the case of an individual entitled to MGIB educational assistance, or making contributions toward entitlement to MGIB, coordination of entitlement to Post-9/11 educational assistance and MGIB educational assistance will be governed by 38 U.S.C. § 3327, the voluntary statutory election provision. Instead of acknowledging the plain

23. Subsection (b) mentions period of service and subsection (h) references a single period of service. These provisions are discussed later.

language, the majority finds that subsection (d) applies to individuals with entitlement to both MGIB and Post-9/11 benefits, but based on a single period of service. They conclude that it applies to those with a single period of service who have an application pending for, or a decision awarding, MGIB benefits, who would prefer to use Post-9/11 benefits. *Ante* at 25. Then, applying these criteria to veteran BO's case, they conclude that 3322(d), and consequently section 3327, doesn't apply to him because he was eligible for MGIB benefits under an earlier period of service and Post-9/11 benefits under an entirely separate later period of service.

Because section 3322(d) makes no mention whatsoever of an individual's period or periods of service, let alone whether an individual has entitlement to Post-9/11 and MGIB benefits under separate periods of service, my colleagues' conclusions are insupportable. Under the majority's interpretation, seemingly mutually exclusive classes of individuals—those with multiple education benefits entitlements under a single period of service and those with multiple entitlements under multiple separate periods of service—are not distinct classes because those with multiple periods of service necessarily have single periods of service as well. This adds a layer of confusion to already confusing interface rules between two programs, but their interpretation has problems more significant than mere confusion.

Appendix D

E. Congress intentionally added a single period of service requirement to subsection (h) but did not do so in subsection (d).

Congress demonstrated that it knew how to require that a section 3322 provision apply only to individuals with a single period of service, but it didn't do so in subsection 3322(d). Instead, in subsection 3322(h), titled "Bar to duplication of eligibility based on a single event or period of service," Congress clearly proscribed benefits based on the individual's period of service. But the other 3322 subsections, including subsection (d), do not mention the qualifying individual's number of periods of service.[24] The majority glosses over this fact, asserting that 3322(h)'s single-period-of-service frame of reference "need not necessitate exclusivity of control over individuals with a single period of service." *Ante* at 24. But it is undoubtedly significant that subsection 3322(h) explicitly states that it applies to those with a single period of service while subsection 3322(d) is silent on the matter.

It is well settled that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983)

24. Subsection 3322(b) also references "period of service," providing that a period of service counted for purposes of repayment of an education loan under 10 U.S.C. § 109 may not be counted as a period of service for entitlement to educational assistance under Chapter 33.

(quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir.1972)). The Supreme Court of the United States asserted in *Russello*: "We refrain from concluding here that [] differing language in [] two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship." 464 U.S. at 23; *see also Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 631, 199 L. Ed. 2d 501 (2018) ("Courts are required to give effect to Congress' express inclusions and exclusions, not disregard them.").

Here, there is no reason to suppose that Congress intended 3322(d) to be more restrictive than the plain text. That is, there is no reason to suppose that Congress intended 3322(d) to apply only to individuals with multiple entitlements based on a single period of service but not to those with multiple entitlements based on separate periods of service, but failed to say so. The absence of reference to an individual's period of service in subsection 3322(d) means that the period or periods of service of the qualifying individual are not relevant, and that subsection 3322(d) and its companion statute, section 3327, applied to veteran BO in 2015 when he was still entitled to MGIB benefits but wanted to receive Post-9/11 benefits.

Moreover, the majority concludes that the title of (d), "Additional coordination matters," supports its reading—that the use of "additional" in the title suggests that (d) is "secondary" to other section 3322 provisions. *Ante* at 25. However, "additional coordination matters" indicates that whatever the exact meaning of the section 3322 bar on duplication of education benefits, (d) concerns matters

supplementary or in addition to the coordination-of-programs matters central to section 3322 as a whole. *See* RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 23 (2d ed. 1987) (defining "additional" as "added," "more," or "supplementary"). This is borne out by the text of (d), which merely refers certain individuals to the voluntary election provision and, unlike the other subsections, doesn't set out rules concerning duplication of benefits. Thus, the title of (d) doesn't support their analysis; in fact, the title conveys that it deals with supplementary matters, such that the meaning of the bar on duplication of benefits isn't a specific concern for those affected by (d).

In addition, I find completely unpersuasive the majority's conclusion that subsection (d) can't be restrictive because "coordinate" incorporates the concept of harmonization. While "coordinate" might not connote restriction, it doesn't necessarily connote harmonization either--definitions of "coordinate" include "to place or arrange in proper order or position" and "to assume proper order or relation." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 447 (2d ed. 1987). Contrary to the majority's view, *ante* at 25, it isn't remarkable that rules that effect the coordination and interplay of two complex benefit programs, that place them in proper relation to each other, would include a rule allowing individuals to make a wholly voluntary election to receive a more generous benefit earlier, at a cost.

Appendix D

F. If subsection (d) was being misapplied, Congress would have amended or clarified it in 2010 or 2016.

Congress is presumed to enact legislation with knowledge of the current statutory scheme and its application. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005) (noting presumption that Congress is aware of "settled judicial and administrative interpretation[s]" of terms when it enacts a statute (citing *Comm'r v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159, 113 S. Ct. 2006, 124 L. Ed. 2d 71 (1993))); *Mudge v. United States*, 308 F.3d 1220, 1232 (Fed. Cir. 2002) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute." (citing *Lorillard v. Pons*, 434 U.S. 575, 580, 98 S. Ct. 866, 55 L. Ed. 2d 40 (1978))). For our purposes, this means that after Congress enacted the Post-9/11 education benefits program in 2008, it is presumed to have been fully aware that section 3322 was being applied to individuals such as veteran BO, with entitlements under separate periods of service, as well as to individuals with multiple entitlements under a single period of service. However, when Congress made two subsequent legislative changes relevant to this issue, directly affecting section 3322, it didn't amend the statute to be consistent with the majority's view.

Two years after the Post-9/11 GI Bill was enacted in 2008, Congress passed the Improvements Act of 2010, adding the subsection 3322(h) to bar "duplication of eligibility based on a single event or period of service." 38 U.S.C. § 3322(h). As noted, subsection (h) provides that

an individual with "a single event or period of service" must "elect . . . under which authority such service is to be credited." 38 U.S.C. § 3322(h)(1). Essentially, subsection (h) provides that after August 1, 2011, individuals with a single period of service *must elect*, using rules prescribed by VA, the education benefits program under which their service is to be credited. They will then only be eligible for benefits under that program. 38 U.S.C. § 3322(h). At the time subsection (h) was enacted, Congress was aware of VA's implementation of section 3327 that required that all qualified individuals exhaust or relinquish entitlement of MGIB benefits before receiving Post-9/11 benefits. *See* 2009 VA Post-9/11 GI Bill Outreach Letter, http://www.gibill.va.gov/ documents/CH33_veteran_outreach_letter.pdf (website last updated Nov. 10, 2009) ("Those individuals transferring to the Post-9/11 GI Bill from the Montgomery GI Bill (chapter 30) will be limited to the amount of their remaining chapter 30 entitlement."). And since in subsection (h) they were clarifying that eligibility was restricted for those with a single period of service, it would have made sense for Congress to spell out that subsection (d) as well only applied to those with a multiple entitlements due to a single period of service. But nothing in the language or legislative history of that statute indicated that Congress saw fit to modify, alter, clarify, or otherwise affect the classes of individuals who at that time were being included in the voluntary section 3322(d)/3327 election process.[25]

25. As noted, the subsection 3322(h) election process is mandatory, is left to VA to prescribe, and makes no reference to section 3327. Thus, that election process is not the one directly at issue in veteran BO's case.

Even more significant though, is the fact that, as noted earlier, in December 2016 Congress enacted a "recodification and improvement of [the] election process for [the] post-9/11 educational assistance program. " With this change Congress moved the section 3301 note providing for the voluntary election process referenced in subsection 3322(d) to an entirely new statute, section 3327. *See* Pub. L. 110-252, title IV, § 405(c), 130 Stat. 1558 (Dec. 16, 2016). Given that the purpose of that enactment was to improve the post-9/11 election process, Congress, aware of the fact that individuals with multiple entitlements based on separate periods of service could make a voluntary election under section 3322(d)/3327, would certainly have amended or clarified that subsection (d) was only applicable to individuals with multiple entitlements under a single period of service if the majority's interpretation of the statute were correct. Instead, Congress made no change to subsection 3322(d).

Congress did not see the need, either in 2010 or in 2016, to clarify that the section 3322(d)/3327 election process applies only to individuals with multiple entitlements based on a single period of service. This confirms that Congress did not believe that it was erroneous to apply the plain language of the statute to include veterans like BO.

G. The 48-Month Aggregate Cap

My colleagues assert that their interpretation of section 3322 gives "real meaning" to the 48-month aggregate cap on receipt of benefits from two different education benefit programs. *Ante* at 23, 27. If the process

worked as the Secretary argues, they say, the 48-month cap would be "a nullity" without meaning and would end up applying to no one. *Ante* at 27. As noted, the section 3322(d)/3327 election is completely voluntary and veterans may determine that they would be better off exhausting 36 months of entitlement to MGIB benefits and then making use of their 12 months of Post-9/11 benefits. For them, the cap is not a nullity. And the Secretary during oral argument pointed out instances where it might benefit an individual to continue to use MGIB benefits instead of converting that entitlement to Post-9/11 benefits. Oral argument at 46:30-47:16. Although admittedly many individuals may voluntarily choose to receive Post-9/11 benefits without fully exhausting their MGIB entitlement, resulting in fewer veterans being subject to the 48-month cap and greater numbers of individuals, through voluntary choice, being subject to the 36-month cap under section 3327, that does not render the 48-month cap null. In fact, it appears to accomplish its intended purpose.

H. The majority's interpretation is not more "veteran-friendly."

My colleagues assert that their interpretation is more veteran-friendly than the plain language of the statute. *Ante* at 29. But their approach ends up assigning greater value and additional benefits to an individual with intermittent periods of active duty service than to individuals with a continuous period of active duty service. There is no indication, based on the text of the relevant statutes, that Congress intended this outcome or that it is more veteran-friendly. Congress set out only one

situation in section 3322 in which it is relevant whether an individual served for a single period or multiple separate periods—in section 3322(h) Congress in 2010 specifically established a bar to duplication of *eligibility based on a single period of service*, which applies to individuals with service qualifying for Post-9/11benefits and, inter alia, MGIB benefits. No other subsection in section 3322 differentiates between individuals with a single period of service and those with multiple separate periods of service. If Congress did not explicitly, except in section 3322(h), provide for differing treatment based on such a distinction, this Court should not create or sanction such differing treatment. But the majority interprets section 3322 in a way that would entrench in law differing education benefit entitlement between a servicemember with a single continuing active duty period of five years, for example, and a reservist who has been activated multiple times during that same five-year period. If Congress establishes such differing treatment, so be it. But this Court should not, out of a misplaced sense of justice, construct differing treatment that is not contemplated by the law.[26]

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26. Although my colleagues state that my conclusion in this regard is based on the assumption that they defined "period of service" when they haven't, *ante* at 29 n.15, their whole analysis hinges on their finding that BO had multiple periods of service. *See, e.g., ante* at 1-2 ("BO's separate periods of service independently qualified him to receive benefits under both the MGIB and the Post 9/11 GI Bill. At its core, this case is about whether he, and others like him with two separate periods of qualifying service, may obtain the full benefits of both programs (subject to an overall cap)."), 2 (stating that the issue in this case is "whether a veteran such as BO with more than one period of separately qualifying service must relinquish

In sum, whether an individual has multiple entitlements based on a single or multiple periods of service is not a factor for consideration under section 3322, including subsection (d). In this case, the plain language of subsection 3322(d) directed veteran BO to section 3327, the statutory election process, which allowed him in a totally voluntary manner to choose to elect Post-9/11 benefits while he still had unused MGIB benefits. He was informed that making that choice while he had unused MGIB benefits would have drawbacks. He accepted those drawbacks and so became entitled to 10 months and 16 days of Post-9/11 benefits. That being the case, I respectfully dissent from my colleagues' opinion.

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or exhaust entitlement under the MGIB program before receiving education benefits under the Post-9/11 GI Bill program" and holding that "the relevant statutes require neither relinquishment nor exhaustion" for such a veteran), 14-15 (rejecting an interpretation that "treats a person with multiple periods of service (like BO) functionally the same as one with a single period of service").

Appendix D

STATUTORY APPENDIX

§3322. Bar to duplication of educational assistance benefits

(a) IN GENERAL.—An individual entitled to educational assistance under this chapter who is also eligible for educational assistance under chapter 30, 31, 32, or 35 of this title, chapter 107, 1606, or 1607 or section 510 of title 10, or the provisions of the Hostage Relief Act of 1980 (Public Law 96-449; 5 U.S.C. 5561 note) may not receive assistance under two or more such programs concurrently, but shall elect (in such form and manner as the Secretary may prescribe) under which chapter or provisions to receive educational assistance.

(b) INAPPLICABILITY OF SERVICE TREATED UNDER EDUCATIONAL LOAN REPAYMENT PROGRAMS.—A period of service counted for purposes of repayment of an education loan under chapter 109 of title 10 may not be counted as a period of service for entitlement to educational assistance under this chapter.

(c) SERVICE IN SELECTED RESERVE.—An individual who serves in the Selected Reserve may receive credit for such service under only one of this chapter, chapter 30 of this title, and chapters 1606 and 1607 of title 10, and shall elect (in such form and manner as the Secretary may prescribe) under which chapter such service is to be credited.

(d) ADDITIONAL COORDINATION MATTERS.—In the case of an individual entitled to educational assistance under chapter 30, 31, 32, or 35 of this title, chapter 107, 1606, or 1607 of title 10, or the provisions of the Hostage Relief Act of 1980, or making contributions toward entitlement to educational assistance under chapter 30 of this title, as of August 1, 2009, coordination of entitlement to educational assistance under this chapter, on the one hand, and such chapters or provisions, on the other, shall be governed by the provisions of section 5003(c) of the Post-9/11 Veterans Educational Assistance Act of 2008.

(e) BAR TO CONCURRENT RECEIPT OF TRANSFERRED EDUCATION BENEFITS AND MARINE GUNNERY SERGEANT JOHN DAVID FRY SCHOLARSHIP ASSISTANCE.—An individual entitled to educational assistance under both sections 3311(b)(9) and 3319 may not receive assistance under both provisions concurrently, but shall elect (in such form and manner as the Secretary may prescribe) under which provision to receive educational assistance.

(f) BAR TO RECEIPT OF COMPENSATION AND PENSION AND MARINE GUNNERY SERGEANT JOHN DAVID FRY SCHOLARSHIP ASSISTANCE.—The commencement of a program of education under section 3311(b)(9) shall be a bar to the following:

(1) Subsequent payments of dependency and indemnity compensation or pension based on the death of a parent to an eligible person over the age of 18 years by reason of pursuing a course in an educational institution.

(2) Increased rates, or additional amounts, of compensation, dependency and indemnity compensation, or pension because of such a person, whether eligibility is based upon the death of the parent.

(g) BAR TO CONCURRENT RECEIPT OF TRANSFERRED EDUCATION BENEFITS.—A spouse or child who is entitled to educational assistance under this chapter based on a transfer of entitlement from more than one individual under section 3319 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.

(h) BAR TO DUPLICATION OF ELIGIBILITY BASED ON A SINGLE EVENT OR PERIOD OF SERVICE.—

(1) ACTIVE-DUTY SERVICE.—An individual with qualifying service in the Armed Forces that establishes eligibility on the part of such individual for educational assistance under this chapter, chapter 30 or 32 of this title, and chapter

1606 or 1607 of title 10, shall elect (in such form and manner as the Secretary may prescribe) under which authority such service is to be credited.

(2) ELIGIBILITY FOR EDUCATIONAL ASSISTANCE BASED ON PARENT'S SERVICE.—A child of a member of the Armed Forces who, on or after September 11, 2001, dies in the line of duty while serving on active duty, who is eligible for educational assistance under either section 3311(b)(9) or chapter 35 of this title based on the parent's death may not receive such assistance under both this chapter and chapter 35 of this title, but shall elect (in such form and manner as the Secretary may prescribe) under which chapter to receive such assistance.

§3327. Election to receive educational assistance

(a) INDIVIDUALS ELIGIBLE TO ELECT PARTICIPATION IN POST-9/11 EDUCATIONAL ASSISTANCE.—An individual may elect to receive educational assistance under this chapter if such individual—

(1) as of August 1, 2009—

(A) is entitled to basic educational assistance under chapter 30 of this title and has used, but retains unused, entitlement under that chapter;

(B) is entitled to educational assistance under chapter 107, 1606, or 1607 of title 10 and has used, but retains unused, entitlement under the applicable chapter;

(C) is entitled to basic educational assistance under chapter 30 of this title but has not used any entitlement under that chapter;

(D) is entitled to educational assistance under chapter 107, 1606, or 1607 of title 10 but has not used any entitlement under such chapter;

(E) is a member of the Armed Forces who is eligible for receipt of basic educational assistance under chapter 30 of this title and is making contributions toward such assistance under section 3011(b) or 3012(c) of this title; or

(F) is a member of the Armed Forces who is not entitled to basic educational assistance under chapter 30 of this title by reason of an election under section 3011(c)(1) or 3012(d)(1) of this title; and

(2) as of the date of the individual's election under this paragraph, meets the requirements for entitlement to educational assistance under this chapter.

(b) CESSATION OF CONTRIBUTIONS TOWARD GI BILL.—Effective as of the first month beginning on or after the date of an election under subsection (a) of an individual described by paragraph (1)(E) of that subsection, the obligation of the individual to make contributions under section 3011(b) or 3012(c) of this title, as applicable, shall cease, and the requirements of such section shall be deemed to be no longer applicable to the individual.

(c) REVOCATION OF REMAINING TRANSFERRED ENTITLEMENT.—

(1) ELECTION TO REVOKE.—If, on the date an individual described in paragraph (1)(A) or (1)(C) of subsection (a) makes an election under that subsection, a transfer of the entitlement of the individual to basic educational assistance under section 3020 of this title is in effect and a number of months of the entitlement so transferred remain unutilized, the individual may elect to revoke all or a portion of the entitlement so transferred that remains unutilized.

(2) AVAILABILITY OF REVOKED ENTITLEMENT.—Any entitlement revoked by an individual under this subsection shall no longer be available to the dependent to whom transferred, but shall be available to the individual instead for educational assistance under chapter 33 of this title in accordance with the provisions of this section.

(3) AVAILABILITY OF UNREVOKED ENTITLEMENT.—Any entitlement described in paragraph (1) that is not revoked by an individual in accordance with that paragraph shall remain available to the dependent or dependents concerned in accordance with the current transfer of such entitlement under section 3020 of this title.

(d) POST-9/11 EDUCATIONAL ASSISTANCE.—

(1) IN GENERAL.—Subject to paragraph (2) and except as provided in subsection (e), an individual making an election under subsection (a) shall be entitled to educational assistance under this chapter in accordance with the provisions of this chapter, instead of basic educational assistance under chapter 30 of this title, or educational assistance under chapter 107, 1606, or 1607 of title 10, as applicable.

(2) LIMITATION ON ENTITLEMENT FOR CERTAIN INDIVIDUALS.—In the case of an individual making an election under subsection (a) who is described by paragraph (1)(A) of that subsection, the number of months of entitlement of the individual to educational assistance under this chapter shall be the number of months equal to—

(A) the number of months of unused entitlement of the individual under

chapter 30 of this title, as of the date of the election, plus

(B) the number of months, if any, of entitlement revoked by the individual under subsection (c)(1).

(e) CONTINUING ENTITLEMENT TO EDUCATIONAL ASSISTANCE NOT AVAILABLE UNDER POST-9/11 EDUCATIONAL ASSISTANCE PROGRAM.—

(1) IN GENERAL.—In the event educational assistance to which an individual making an election under subsection (a) would be entitled under chapter 30 of this title, or chapter 107, 1606, or 1607 of title 10, as applicable, is not authorized to be available to the individual under the provisions of this chapter, the individual shall remain entitled to such educational assistance in accordance with the provisions of the applicable chapter.

(2) CHARGE FOR USE OF ENTITLEMENT.—The utilization by an individual of entitlement under paragraph (1) shall be chargeable against the entitlement of the individual to educational assistance under this chapter at the rate of 1 month of entitlement under this chapter for each month of entitlement utilized by the individual under paragraph (1) (as determined as if such entitlement were utilized under the provisions of

chapter 30 of this title, or chapter 107, 1606, or 1607 of title 10, as applicable).

(f) ADDITIONAL POST-9/11 ASSISTANCE FOR MEMBERS HAVING MADE CONTRIBUTIONS TOWARD GI BILL.—

(1) ADDITIONAL ASSISTANCE.—In the case of an individual making an election under subsection (a) who is described by subparagraph (A), (C), or (E) of paragraph (1) of that subsection, the amount of educational assistance payable to the individual under this chapter as a monthly stipend payable under paragraph (1)(B) of section 3313(c) of this title, or under paragraphs (2) through (7) of that section (as applicable), shall be the amount otherwise payable as a monthly stipend under the applicable paragraph increased by the amount equal to—

(A) the total amount of contributions toward basic educational assistance made by the individual under section 3011(b) or 3012(c) of this title, as of the date of the election, multiplied by

(B) the fraction—

(i) the numerator of which is—

(I) the number of months of entitlement to basic

educational assistance under chapter 30 of this title remaining to the individual at the time of the election; plus

(II) the number of months, if any, of entitlement under chapter 30 of this title revoked by the individual under subsection (c)(1); and

(ii) the denominator of which is 36 months.

(2) MONTHS OF REMAINING ENTITLEMENT FOR CERTAIN INDIVIDUALS.—In the case of an individual covered by paragraph (1) who is described by subsection (a)(1)(E), the number of months of entitlement to basic educational assistance remaining to the individual for purposes of paragraph (1)(B)(i)(II) shall be 36 months.

(3) TIMING OF PAYMENT.—The amount payable with respect to an individual under paragraph (1) shall be paid to the individual together with the last payment of the monthly stipend payable to the individual under paragraph (1)(B) of section 3313(c) of this title, or under paragraphs (2) through (7) of that section (as applicable), before the exhaustion of the individual's entitlement to educational assistance under this chapter.

(g) CONTINUING ENTITLEMENT TO ADDITIONAL ASSISTANCE FOR CRITICAL SKILLS OR SPECIALTY AND ADDITIONAL SERVICE.—An individual making an election under subsection (a)(1) who, at the time of the election, is entitled to increased educational assistance under section 3015(d) of this title, or section 16131(i) of title 10, or supplemental educational assistance under subchapter III of chapter 30 of this title, shall remain entitled to such increased educational assistance or supplemental educational assistance in the utilization of entitlement to educational assistance under this chapter, in an amount equal to the quarter, semester, or term, as applicable, equivalent of the monthly amount of such increased educational assistance or supplemental educational assistance payable with respect to the individual at the time of the election.

(h) ALTERNATIVE ELECTION BY SECRETARY.—

(1) IN GENERAL.—In the case of an individual who, on or after January 1, 2017, submits to the Secretary an election under this section that the Secretary determines is clearly against the interests of the individual, or who fails to make an election under this section, the Secretary may make an alternative election on behalf of the individual that the Secretary determines is in the best interests of the individual.

(2) NOTICE.—If the Secretary makes an election on behalf of an individual under this subsection,

the Secretary shall notify the individual by not later than seven days after making such election and shall provide the individual with a 30-day period, beginning on the date of the individual's receipt of such notice, during which the individual may modify or revoke the election made by the Secretary on the individual's behalf. The Secretary shall include, as part of such notice, a clear statement of why the alternative election made by the Secretary is in the best interests of the individual as compared to the election submitted by the individual. The Secretary shall provide the notice required under this paragraph by electronic means whenever possible.

(i) IRREVOCABILITY OF ELECTIONS.—An election under subsection (a) or (c)(1) is irrevocable.

APPENDIX E — OPINION OF THE BOARD OF VETERANS' APPEALS, DEPARTMENT OF VETERANS AFFAIRS IN WASHINGTON, DC 20420, DATED JULY 14, 2016

BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

DOCKET NO. 16-01 431

IN THE APPEAL OF
JAMES R. RUDISILL

DATE
July 14, 2016 KHW

On appeal from the
Department of Veterans Affairs Regional Office
in Buffalo, New York

THE ISSUE

Entitlement to educational assistance benefits in excess of 10 months and 16 days under Chapter 33, Title 38, United States Code (Post 9/11-GI Bill).

INTRODUCTION

The Veteran had multiple periods of service in the U.S. Army National Guard and in the U.S. Army, including honorable periods of active duty from January 2000 to June 2002, June 2004 to December 2005, and November 2007 to August 2011.

Appendix E

This case comes before the Board of Veterans' Appeals (Board) from a March 2015 administrative determination by the Education Center at the Department of Veterans Affairs (VA) Regional Office (RO) in Buffalo, New York, as the Agency of Original Jurisdiction (AOJ). The AOJ issued a Certificate of Eligibility (COE) to the Veteran for Chapter 33 educational assistance benefits in March 2015, followed by updated COEs after clarification of the Veteran's qualifying periods of service. The October 2015 Statement of the Case addressed the COEs on appeal herein.

This appeal has been advanced on the Board's docket pursuant to the appellant's motion. 38 U.S.C.A. § 7107(a)(2) (West 2014); 38 C.F.R. § 20.900(c) (2015).

FINDINGS OF FACT

1. The Veteran is qualified for VA educational assistance benefits under both 38 U.S.C.A. Chapter 33 (Post-9/11 GI Bill) and Chapter 30 (Montgomery GI Bill); he previously used all but 10 months and 16 days of Chapter 30 benefit entitlement.

2. In March 2015, the Veteran submitted a properly completed electronic application for educational benefits; he irrevocably elected to receive benefits under Chapter 33 in lieu of benefits under Chapter 30, effective as of March 18, 2015.

Appendix E

CONCLUSION OF LAW

The criteria for VA educational assistance benefits in excess of 10 months and 16 days under the Chapter 33 (Post-9/11 Bill) program have not all been met. 38 U.S.C.A. §§ 3301-3324 (West 2014); 38 C.F.R. § 21.9520 (2015).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The undisputed facts render the claimant ineligible for the claimed benefit under the law in this case; thus, VA has no further duty to notify or assist the Veteran in this appeal. Moreover, the Veteran and his attorney representative have been notified multiple times of the requirements to substantiate his claim; and they have submitted detailed arguments indicating knowledge of the requirements. Thus, no further notice or assistance would be likely to assist in substantiating the appeal.

Effective as of August 1, 2009, the U.S. Congress established an additional educational assistance program under 38 U.S.C.A. Chapter 33 (known as the Post-9/11 GI Bill) for individuals with qualifying active duty service on or after September 11, 2001. *See* 38 U.S.C.A. §§ 3301-3324; 38 C.F.R. § 21.9500.

As noted above, the Veteran had multiple periods of military service, including honorable periods of active duty from January 2000 to June 2002, June 2004 to December 2005, and November 2007 to August 2011. His active duty service qualified him for VA educational assistance under

two programs: 38 U.S.C.A. Chapter 33 (the Post-9/11 GI Bill) and Chapter 30 (the Montgomery GI Bill).

The Veteran previously utilized some, but not all, of his entitlement under the Chapter 30 program. In March 2015, he submitted an application for Chapter 33 educational benefits by completing an online (electronic) VA Form 22-1990.

The AOJ processed the Veteran's application and, in March 2015, issued a Certificate of Eligibility (COE) for 10 months and 16 days under Chapter 33. Although the AOJ initially indicated that the Veteran was entitled to Chapter 33 benefits at the 90-percent level, the AOJ subsequently notified the Veteran in updated COEs that he was entitled to benefits at the 100-percent level, after clarification of his qualifying service dates. The AOJ's determinations were based on the Veteran's remaining benefits under Chapter 30 and his length of service.

The Veteran's minimum eligibility for Chapter 33 benefits is not in dispute, nor does the Veteran dispute the calculation of the amount of benefits remaining under the Chapter 30 program of 10 months and 16 days, or the 100-percentage level of benefits under Chapter 33 based on his qualifying service. The Veteran's attorney has asserted that the none of COEs listed all of the Veteran's active duty service dates after September 11, 2001; however, he acknowledged that each COE identified at least 36 months of qualifying service for Chapter 33 benefits at the 100-percent level. Thus, any such defect is not harmful to this appeal.

Appendix E

The Veteran seeks an award of entitlement to the full potential amount of educational assistance benefits of 36 months under Chapter 33, instead of being limited to his remaining time under Chapter 30. He wishes to be able to use both his full Chapter 30 benefits and his full Chapter 33 benefits. The Veteran believes that this is warranted because his Chapter 30 eligibility stemmed from a prior period of enlisted service, and he was claiming Chapter 33 benefits based on a subsequent period of service as a commissioned officer after college. The Veteran states that, standing alone, his subsequent commissioned service meets all qualifications for Chapter 33 benefits, based on his understanding information he reviewed as to these programs. *See, e.g.*, March 2015 letter from Veteran to Congressman.

In addition, the Veteran and his attorney have asserted at times that he did not make, or did not intend to make, an irrevocable election of Chapter 33 benefits in lieu of Chapter 30 benefits in his March 2015 application. Nevertheless, the attorney also stated at times that the Veteran was "forced" by VA regulations to elect Chapter 33 benefits in lieu of Chapter 30 benefits in order to utilize his Chapter 33 benefits. Otherwise, the Veteran and his attorney have primarily argued that VA should not have required the Veteran to make such an irrevocable election, and that he intended to apply for Chapter 33 benefits based on his separate periods of service after September 1, 2011; and to maintain his remaining eligibility under Chapter 30 from his period of service prior to September 1, 2011. The Veteran and his attorney believe that he should be entitled to the remaining 10 months and 16 days of benefits based

on his converted entitlement from Chapter 30 to Chapter 33 benefits, plus an additional 36 months of Chapter 33 benefits based on his subsequent period of service after September 1, 2011. These arguments are based on their interpretation of the legislative history for Congress's enactment of the Chapter 33 program and regulatory language, as contrasted with VA's procedural manual and historical application of the statutes and regulations. *See, e.g.*, March 2015 letter to Congressman; December 2015 VA Form 9; May 2016 appellate brief.

VA's implementing regulations for the Chapter 33 program provide that an individual is eligible for Chapter 33 benefits if he or she meets minimum service requirements, and makes an irrevocable election to receive benefits under 38 U.S.C. Chapter 33 by relinquishing eligibility under either 38 U.S.C. Chapter 30, or 10 U.S.C. Chapter 106a, 1606, or 1607. *See* 38 C.F.R. § 21.9520(c)(1)(i).

Subject to the provisions of 38 C.F.R. § 21.4020, an eligible individual is entitled to a maximum of 36 months of educational assistance (or its equivalent in part-time educational assistance) under 38 U.S.C.A. Chapter 33. 38 C.F.R. § 21.9550(a). Where an individual is eligible for two or more education programs, the aggregate period for which any person may receive assistance may not exceed 48 months (or the part-time equivalent). 38 C.F.R. § 21.4020. However, the entitlement period for Chapter 33 benefits is limited by 38 C.F.R. § 21.9550(b)(1) as follows:

> An individual who, as of August 1, 2009, has used entitlement under 38 U.S.C. Chapter

> 30, but retains unused entitlement under that chapter, makes an irrevocable election to receive educational assistance under the provisions of 38 U.S.C. Chapter 33 instead of educational assistance under the provisions of Chapter 30, will be limited to one month (or partial month) of entitlement under Chapter 33 for each month (or partial month) of unused entitlement under Chapter 30 (including any months of Chapter 30 entitlement previously transferred to a dependent that the individual has revoked).

In short, if an individual is eligible for benefits under Chapter 30, and he or she uses some of that entitlement before irrevocably electing to receive Chapter 33 benefits in lieu of benefits under Chapter 30, that individual may be awarded the equivalent of the entitlement that remained unused under Chapter 30. *Id.* There is no provision authorizing 12 additional months of entitlement under Chapter 33 on top of 36 total months of combined benefits under Chapter 30 and Chapter 33.

As noted above, the Veteran submitted a VA Form 22-1990 using VA's online application process (VONAPP) in March 2015. In the field "education benefit being applied for," he selected "Chapter 33 in Lieu of Chapter 30" benefits. He specified that this election should be made effective as of March 18, 2015. This application included the Veteran's full identifying information, as well as other pertinent information, and it was electronically signed and dated by the Veteran.

Furthermore, a copy of this completed application is associated with the claims file, including as submitted by the Veteran's attorney. The application clearly stated:

> By electing Chapter 33, I acknowledge that I understand the following:
>
> • I may not receive more than a total of 48 months of benefits under two or more programs.
>
> • If electing chapter 33 in lieu of chapter 30, my 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 my election. However, if I completely exhaust my entitlement under chapter 30 before the effective date of my chapter 33 election, I may receive up to 12 additional months of benefits under chapter 33.
>
> • My election is irrevocable and may not be changed.

Thus, the Veteran's completed online application via VA Form 22-1990 in March 2015 was very clear that he did elect Chapter 33 in lieu of Chapter 30 benefits, that this election was irrevocable and could not be changed, and that his benefits under Chapter 33 would be limited to the time remaining under his Chapter 30 benefits unless he first used all of the benefits under Chapter 30 before electing Chapter 33.

Moreover, VA's regulation only requires that a VA Form 22-1990 be properly completed for irrevocability of the election of Chapter 33 benefits in lieu of Chapter 30 benefits to take effect. There is no requirement for an explicit statement from the Veteran on this form acknowledging that his election for benefits under the Post-9/11 GI Bill program in lieu of benefits under the Montgomery GI Bill program is irrevocable. Rather, the regulation only requires that the Veteran must explicitly acknowledge that his election for Chapter 33 benefits in lieu of Chapter 30 benefits is irrevocable if he or she opts to submit a written statement seeking Chapter 33 benefits. This is an alternative to properly completing the VA Form 22-1990 or submitting a transfer-of-entitlement designation under Chapter 33 to the Department of Defense. *See* 38 C.F.R. § 21.9520(c)(2) (setting forth three options for election); *see also* 38 C.F.R. § 21.9625 (providing criteria for the beginning date of an award or increased award of educational assistance under Chapter 33). As such, because the Veteran submitted a properly completed online application via VA Form 22-1990, he made an irrevocable election as of the chosen effective date.

The Veteran has stated that, after receiving his COE, he called VA and was told that he might want to try to rescind his claim for Post 9/11 (Chapter 33) benefits and say that he wanted to exhaust his remaining time under Chapter 30. He was told that, if he exhausted his Chapter 30 benefits, then he could reapply under Chapter 33 and receive an additional 20 months under Chapter 33. The Veteran acknowledged that he was informed that this

additional entitlement would be contingent upon VA accepting his request to rescind his claim for Chapter 33 benefits and allowing him to reapply for benefits under Chapter 30. *See* March 2015 letter to Congressman.

As the AOJ explained in an April 2015 letter, VA may not grant a request to withdraw or rescind an election for Chapter 33 benefits in lieu of other benefits, or amend the chosen effective date for such election, after VA has processed the initial election and informed the Veteran of his or her eligibility to Chapter 33 benefits. In this case, the Veteran did not request to withdraw or rescind his election of Chapter 33 benefits until after he received his March 2015 COE notifying him of his Chapter 33 eligibility for less than the full amount of time. Thus, the request may not be rescinded, and the effective date may not be amended in this case.

The Veteran's attorney has argued, including in May 2016, that VA Form 21-1990 does not accurately implement the Chapter 33 requirements as set forth in Congress's statutory scheme and VA's implementing regulations. However, there is a presumption of regularity to all VA processes and procedures. *See Woods v. Gober*, 14 Vet. App. 214, 220 (2000) (citing *INS v. Miranda*, 459 U.S. 14, 18 (1982), and *United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926)). Thus, VA's electronic application program is deemed to have been properly developed to comply with the legal requirements for Chapter 33 benefits, including the irrevocable election requirements under 38 C.F.R. § 21.9520(c)(1)(i).

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The arguments by the Veteran and his attorney as to the propriety of VA's regulations and application form are not under the Board's jurisdiction. Otherwise, the Veteran has essentially indicated that he did not understand the requirements and restrictions prior to applying for benefits under Chapter 33, and he did not intend to limit himself to only the time remaining from his Chapter 30 benefits.

In this regard, a lack of intent or understanding of applicable statutes and regulations does not constitute a basis for the relief sought. All individuals dealing with the government are charged with knowledge of federal statutes and lawfully promulgated agency regulation. *See Morris v. Derwinski*, 1 Vet. App. 260, 265 (1991) (citing *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947)).

Further, "no equities, no matter how compelling, can create a right to payment out of the United States Treasury which has not been provided for by Congress." *Office of Personnel Management v. Richmond*, 496 U.S. 414, 426 (1990); *Smith v. Derwinski*, 2 Vet. App. 429, 432-33 (1992). The eligibility requirements for VA educational assistance benefits are controlled by statutes enacted by Congress and regulations promulgated by the Armed Forces and VA; neither the AOJ nor the Board is free to disregard these laws. 38 U.S.C.A. § 7104(c); 38 C.F.R. § 20.101(a); *see also Harvey v. Brown*, 6 Vet. App. 416, 424 (1994) (stating that the remedy for breach of an alleged obligation cannot involve payment of benefits where the statutory eligibility requirements for the benefits are not met).

In sum, as explained above, the election irrevocability requirements under 38 C.F.R. § 21.9520(c)(2) were completed in the Veteran's March 2015 online application for Chapter 33 benefits in lieu of Chapter 30 benefits. Thus, there is no basis under the law to amend the election or effective date. Additional benefits under Chapter 33 are not warranted as a matter of law, and the Veteran's appeal must be denied.

ORDER

Additional educational assistance benefits under Chapter 33, Title 38, United States Code (Post 9/11-GI Bill) are not allowed because the Veteran made an irrevocable election to receive benefits under 38 U.S.C.A. Chapter 33, in lieu of benefits under 38 U.S.C.A. Chapter 30, effective March 18, 2015; and the appeal is denied.

JAMES G. REINHART
Veterans Law Judge, Board of Veterans' Appeals

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, FILED FEBRUARY 3, 2022

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2020-1637

JAMES R. RUDISILL,

Claimant-Appellee,

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,

Respondent-Appellant.

Appeal from the United States Court of Appeals for Veterans Claims in No. 16-4134, Senior Judge Mary J. Schoelen, Chief Judge Margaret C. Bartley, Judge Michael P. Allen.

ON PETITION FOR PANEL REHEARING
AND REHEARING EN BANC

Before Moore, *Chief Judge*, Newman, Lourie, Dyk, Prost, O'Malley, Reyna, Taranto, Chen, Hughes, Stoll, and Cunningham, *Circuit Judges*.

Per Curiam.

Appendix F

ORDER

Appellee, the Secretary of Veterans Affairs ("Secretary"), filed a Combined Petition for Panel Rehearing and Rehearing en banc. A response to the petition was invited by the court and filed by Appellant James R. Rudisill. The petition and response were considered by the panel that heard the appeal and thereafter referred to the circuit judges in regular active service. A poll was requested and taken, and the court decided that the appeal warrants en banc consideration.

Accordingly,

IT IS ORDERED THAT:

(1) The petition for panel rehearing is denied.

(2) The petition for rehearing en banc is granted.

(3) The panel opinion in *Rudisill v. McDonough*, 4 F.4th 1297 (Fed. Cir. 2021) is vacated, and the appeal is reinstated.

(4) The parties are requested to file new briefs. The briefs should address the following questions:

    a. For a veteran who qualifies for the Montgomery GI Bill and the Post-9/11 GI Bill under a separate period of qualifying service, what is the veteran's statutory entitlement to education benefits?

b. What is the relation between the 48-month entitlement in 38 U.S.C. § 3695(a), and the 36-month entitlement in § 3327(d)(2), as applied to veterans such as Mr. Rudisill with two or more periods of qualifying military service?

(5) The Secretary's en banc opening brief is due 60 days from the date of this order. Mr. Rudisill's en banc response brief is due within 45 days of service of the Secretary's en banc opening brief, and the Secretary's reply brief within 30 days of service of the response brief. The court requires 30 paper copies of all briefs and appendices provided by the filer within 5 business days from the date of electronic filing of the document. The parties' briefs must comply with Fed. Cir. R. 32(b) (1).

(6) The court invites the views of amici curiae. Any amicus brief may be filed without consent and leave of court. Any amicus brief supporting Mr. Rudisill's position or supporting neither position must be filed within 14 days after service of Mr. Rudisill's en banc opening brief. Any amicus brief supporting the Secretary's position must be filed within 14 days after service of the Secretary's en banc response brief. Amicus briefs must comply with Fed. Cir. R. 29(b).

(7) Oral argument will be held at a time and date to be announced later.

Appendix F

FOR THE COURT

February 3, 2022	/s/ Peter R. Marksteiner
Date	Peter R. Marksteiner
	Clerk of Court

APPENDIX G — STATUTES AND REGULATIONS

38 U.S.C. § 3011 – BASIC EDUCATIONAL ASSISTANCE ENTITLEMENT FOR SERVICE ON ACTIVE DUTY

(a) Except as provided in subsection (c) of this section, each individual—

(1) who—

(A) during the period beginning July 1, 1985, and ending September 30, 2030, first becomes a member of the Armed Forces or first enters on active duty as a member of the Armed Forces and—

(i) who

(I) in the case of an individual whose obligated period of active duty is three years or more, serves at least three years of continuous active duty in the Armed Forces, or

(II) in the case of an individual whose obligated period of active duty is less than three years, serves at least two years of continuous active duty in the Armed Forces; or

(ii) who serves in the Armed Forces and is discharged or released from active duty

(I) for a service-connected disability, by reason of a sole survivorship discharge (as that term is defined in section 1174(i) of title 10), for a medical condition which preexisted such service on active duty and which the Secretary determines is not service connected, for hardship, or for a physical or mental condition that was not characterized as a disability and did not result from the individual's own willful misconduct but did interfere with the individual's performance of duty, as determined by the Secretary of each military department in accordance with regulations prescribed by the Secretary of Defense or by the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy;

(II) for the convenience of the Government, if, in the case of an individual with an obligated period of service of two years, the individual completes not less than 20 months of continuous active duty under that period of obligated service, or, in the case

of an individual with an obligated period of service of at least three years, the individual completes not less than 30 months of continuous active duty under that period of obligated service; or

(III) involuntarily for the convenience of the Government as a result of a reduction in force, as determined by the Secretary of the military department concerned in accordance with regulations prescribed by the Secretary of Defense or by the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy;

* * *

is entitled to basic educational assistance under this chapter.

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38 U.S.C. § 3013 – DURATION OF BASIC EDUCATIONAL ASSISTANCE

(a)

(1) Subject to section 3695 of this title and except as provided in paragraph (2) of this subsection, each individual entitled to basic educational assistance under section 3011 of this title is entitled to 36 months of educational assistance benefits under this chapter (or the equivalent thereof in part-time educational assistance).

(2) Subject to section 3695 of this title and subsection (d) of this section, in the case of an individual described in section 3011(a)(1)(A)(ii)(I) or (III) of this title who is not also described in section 3011(a)(1)(A)(i) of this title or an individual described in section 3011(a)(1)(B)(ii)(I) or (III) of this title who is not also described in section 3011(a)(1)(B)(i) of this title, the individual is entitled to one month of educational assistance benefits under this chapter for each month of continuous active duty served by such individual after June 30, 1985, as part of the obligated period of active duty on which such entitlement is based in the case of an individual described in section 3011(a)(1)(A)(ii)(I) or (III) of this title, or in the case of an individual described in section 3011(a)(1)(B)(ii)(I) or (III) of this title, after June 30, 1985.

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* * *

38 U.S.C. § 3301 – NOTE (FINDINGS)

Pub. L. 110–252, title V, § 5002, June 30, 2008, 122 Stat. 2357, provided that:

"Congress makes the following findings:

"(1) On September 11, 2001, terrorists attacked the United States, and the brave members of the Armed Forces of the United States were called to the defense of the Nation.

"(2) Service on active duty in the Armed Forces has been especially arduous for the members of the Armed Forces since September 11, 2001.

"(3) The United States has a proud history of offering educational assistance to millions of veterans, as demonstrated by the many 'G.I. Bills' enacted since World War II. Educational assistance for veterans helps reduce the costs of war, assist veterans in readjusting to civilian life after wartime service, and boost the United States economy, and has a positive effect on recruitment for the Armed Forces.

"(4) The current educational assistance program for veterans is outmoded and designed for peacetime service in the Armed Forces.

"(5) The people of the United States greatly value military service and recognize the difficult challenges involved in readjusting to civilian life after wartime service in the Armed Forces.

"(6) It is 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 and are commensurate with the educational assistance benefits provided by a grateful Nation to veterans of World War II."

* * *

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38 U.S.C. § 3311 – EDUCATIONAL ASSISTANCE FOR SERVICE IN THE ARMED FORCES COMMENCING ON OR AFTER SEPTEMBER 11, 2001: ENTITLEMENT

(a) ENTITLEMENT.—

Subject to subsections (d) and (e), each individual described in subsection (b) is entitled to educational assistance under this chapter.

(b) COVERED INDIVIDUALS.—An individual described in this subsection is any individual as follows:

(1) An individual who—

(A) commencing on or after September 11, 2001, 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); and

(B) after completion of service described in subparagraph (A)—

(i) continues on active duty; or

(ii) is discharged or released from active duty as described in subsection (c).

* * *

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38 U.S.C. § 3312 – EDUCATIONAL ASSISTANCE: DURATION

(a) In General.—

Subject to section 3695 and except as provided in subsections (b) and (c), an individual entitled to educational assistance under this chapter is entitled to a number of months of educational assistance under section 3313 equal to 36 months.

* * *

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38 U.S.C. § 3322 – BAR TO DUPLICATION OF EDUCATIONAL ASSISTANCE BENEFITS

(a) In General.—

An individual entitled to educational assistance under this chapter who is also eligible for educational assistance under chapter 30, 31, 32, or 35 of this title, chapter 107, 1606, or 1607 or section 510 of title 10, or the provisions of the Hostage Relief Act of 1980 (Public Law 96–449; 5 U.S.C. 5561 note) may not receive assistance under two or more such programs concurrently, but shall elect (in such form and manner as the Secretary may prescribe) under which chapter or provisions to receive educational assistance.

(b) Inapplicability of Service Treated Under Educational Loan Repayment Programs.—

A period of service counted for purposes of repayment of an education loan under chapter 109 of title 10 may not be counted as a period of service for entitlement to educational assistance under this chapter.

(c) Service in Selected Reserve.—

An individual who serves in the Selected Reserve may receive credit for such service under only one of this chapter, chapter 30 of this title, and chapters 1606 and 1607 of title 10, and shall elect (in such form and manner as the Secretary may prescribe) under which chapter such service is to be credited.

(d) Additional Coordination Matters.—

In the case of an individual entitled to educational assistance under chapter 30, 31, 32, or 35 of this title, chapter 107, 1606, or 1607 of title 10, or the provisions of the Hostage Relief Act of 1980, or making contributions toward entitlement to educational assistance under chapter 30 of this title, as of August 1, 2009, coordination of entitlement to educational assistance under this chapter, on the one hand, and such chapters or provisions, on the other, shall be governed by the provisions of section 5003(c) of the Post-9/11 Veterans Educational Assistance Act of 2008.

(e) Bar To Concurrent Receipt of Transferred Education Benefits and Marine Gunnery Sergeant John David Fry Scholarship Assistance.—

An individual entitled to educational assistance under both section 3319 and paragraph (8), (9), or (10) of section 3311 of this title may not receive assistance under both provisions concurrently, but shall elect (in such form and manner as the Secretary may prescribe) under which provision to receive educational assistance.

(f) Bar To Receipt of Compensation and Pension and Marine Gunnery Sergeant John David Fry Scholarship Assistance.—The commencement of a program of education under paragraph (8), (9), or (10) of section 3311 of this title shall be a bar to the following:

(1) Subsequent payments of dependency and indemnity compensation or pension based on the death of a parent to an eligible person over the age of 18 years by reason of pursuing a course in an educational institution.

(2) Increased rates, or additional amounts, of compensation, dependency and indemnity compensation, or pension because of such a person, whether eligibility is based upon the death of the parent.

(g) Bar To Concurrent Receipt of Transferred Education Benefits.—

A spouse or child who is entitled to educational assistance under this chapter based on a transfer of entitlement from more than one individual under section 3319 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.

(h) Bar To Duplication of Eligibility Based on a Single Event or Period of Service.—

(1) Active-duty service.—

An individual with qualifying service in the Armed Forces that establishes eligibility on the part of such individual for educational assistance under this chapter, chapter 30 or 32 of this title,

and chapter 1606 or 1607 of title 10, shall elect (in such form and manner as the Secretary may prescribe) under which authority such service is to be credited.

(2) ELIGIBILITY FOR EDUCATIONAL ASSISTANCE BASED ON PARENT'S SERVICE.—

A child of a member of the Armed Forces who, on or after September 11, 2001, dies in the line of duty while serving on active duty, who is eligible for educational assistance under either chapter 35 or paragraph (8), (9), or (10) of section 3311 of this title based on the parent's death may not receive such assistance under both this chapter and chapter 35 of this title, but shall elect (in such form and manner as the Secretary may prescribe) under which chapter to receive such assistance.

* * *

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38 U.S.C. § 3327 – ELECTION TO RECEIVE EDUCATIONAL ASSISTANCE

(a) INDIVIDUALS ELIGIBLE TO ELECT PARTICIPATION IN POST-9/11 EDUCATIONAL ASSISTANCE.—An individual may elect to receive educational assistance under this chapter if such individual—

(1) as of August 1, 2009—

(A) is entitled to basic educational assistance under chapter 30 of this title and has used, but retains unused, entitlement under that chapter;

(B) is entitled to educational assistance under chapter 107, 1606, or 1607 of title 10 and has used, but retains unused, entitlement under the applicable chapter;

(C) is entitled to basic educational assistance under chapter 30 of this title but has not used any entitlement under that chapter;

(D) is entitled to educational assistance under chapter 107, 1606, or 1607 of title 10 but has not used any entitlement under such chapter;

(E) is a member of the Armed Forces who is eligible for receipt of basic educational assistance under chapter 30 of this title

and is making contributions toward such assistance under section 3011(b) or 3012(c) of this title; or

(F) is a member of the Armed Forces who is not entitled to basic educational assistance under chapter 30 of this title by reason of an election under section 3011(c)(1) or 3012(d)(1) of this title; and

(2) as of the date of the individual's election under this paragraph, meets the requirements for entitlement to educational assistance under this chapter.

(b) CESSATION OF CONTRIBUTIONS TOWARD GI BILL.—

Effective as of the first month beginning on or after the date of an election under subsection (a) of an individual described by paragraph (1)(E) of that subsection, the obligation of the individual to make contributions under section 3011(b) or 3012(c) of this title, as applicable, shall cease, and the requirements of such section shall be deemed to be no longer applicable to the individual.

(c) REVOCATION OF REMAINING TRANSFERRED ENTITLEMENT.—

(1) ELECTION TO REVOKE.—

If, on the date an individual described in paragraph (1)(A) or (1)(C) of subsection (a) makes an election under that subsection, a transfer

of the entitlement of the individual to basic educational assistance under section 3020 of this title is in effect and a number of months of the entitlement so transferred remain unutilized, the individual may elect to revoke all or a portion of the entitlement so transferred that remains unutilized.

(2) AVAILABILITY OF REVOKED ENTITLEMENT.—

Any entitlement revoked by an individual under this subsection shall no longer be available to the dependent to whom transferred, but shall be available to the individual instead for educational assistance under chapter 33 of this title in accordance with the provisions of this section.

(3) AVAILABILITY OF UNREVOKED ENTITLEMENT.—

Any entitlement described in paragraph (1) that is not revoked by an individual in accordance with that paragraph shall remain available to the dependent or dependents concerned in accordance with the current transfer of such entitlement under section 3020 of this title.

(d) POST-9/11 EDUCATIONAL ASSISTANCE.—

(1) IN GENERAL.—

Subject to paragraph (2) and except as provided in subsection (e), an individual making an

election under subsection (a) shall be entitled to educational assistance under this chapter in accordance with the provisions of this chapter, instead of basic educational assistance under chapter 30 of this title, or educational assistance under chapter 107, 1606, or 1607 of title 10, as applicable.

(2) Limitation on entitlement for certain individuals.—In the case of an individual making an election under subsection (a) who is described by paragraph (1)(A) of that subsection, the number of months of entitlement of the individual to educational assistance under this chapter shall be the number of months equal to—

(A) the number of months of unused entitlement of the individual under chapter 30 of this title, as of the date of the election, plus

(B) the number of months, if any, of entitlement revoked by the individual under subsection (c)(1).

(e) Continuing Entitlement to Educational Assistance Not Available Under Post-9/11 Educational Assistance Program.—

(1) In general.—

In the event educational assistance to which an individual making an election under subsection

(a) would be entitled under chapter 30 of this title, or chapter 107, 1606, or 1607 of title 10, as applicable, is not authorized to be available to the individual under the provisions of this chapter, the individual shall remain entitled to such educational assistance in accordance with the provisions of the applicable chapter.

(2) CHARGE FOR USE OF ENTITLEMENT.—

The utilization by an individual of entitlement under paragraph (1) shall be chargeable against the entitlement of the individual to educational assistance under this chapter at the rate of 1 month of entitlement under this chapter for each month of entitlement utilized by the individual under paragraph (1) (as determined as if such entitlement were utilized under the provisions of chapter 30 of this title, or chapter 107, 1606, or 1607 of title 10, as applicable).

(f) ADDITIONAL POST-9/11 ASSISTANCE FOR MEMBERS HAVING MADE CONTRIBUTIONS TOWARD GI BILL.—

(1) ADDITIONAL ASSISTANCE.—In the case of an individual making an election under subsection (a) who is described by subparagraph (A), (C), or (E) of paragraph (1) of that subsection, the amount of educational assistance payable to the individual under this chapter as a monthly stipend payable under paragraph (1)(B) of section 3313(c) of this title, or under paragraphs (2) through (7) of

that section (as applicable), shall be the amount otherwise payable as a monthly stipend under the applicable paragraph increased by the amount equal to—

(A) the total amount of contributions toward basic educational assistance made by the individual under section 3011(b) or 3012(c) of this title, as of the date of the election, multiplied by

(B) the fraction—

(i) the numerator of which is—

(I) the number of months of entitlement to basic educational assistance under chapter 30 of this title remaining to the individual at the time of the election; plus

(II) the number of months, if any, of entitlement under chapter 30 of this title revoked by the individual under subsection (c)(1); and

(ii) the denominator of which is 36 months.

(2) Months of remaining entitlement for certain individuals.—

In the case of an individual covered by paragraph (1) who is described by subsection (a)(1)(E), the number of months of entitlement to basic educational assistance remaining to the individual for purposes of paragraph (1)(B)(i)(II) shall be 36 months.

(3) Timing of payment.—

The amount payable with respect to an individual under paragraph (1) shall be paid to the individual together with the last payment of the monthly stipend payable to the individual under paragraph (1)(B) of section 3313(c) of this title, or under paragraphs (2) through (7) 1 of that section (as applicable), before the exhaustion of the individual's entitlement to educational assistance under this chapter.

(g) Continuing Entitlement to Additional Assistance for Critical Skills or Specialty and Additional Service.—

An individual making an election under subsection (a)(1) who, at the time of the election, is entitled to increased educational assistance under section 3015(d) of this title, or section 16131(i) of title 10, or supplemental educational assistance under subchapter III of chapter 30 of this title, shall remain entitled to such increased educational

assistance or supplemental educational assistance in the utilization of entitlement to educational assistance under this chapter, in an amount equal to the quarter, semester, or term, as applicable, equivalent of the monthly amount of such increased educational assistance or supplemental educational assistance payable with respect to the individual at the time of the election.

(h) Alternative Election by Secretary.—

(1) In general.—

In the case of an individual who, on or after January 1, 2017, submits to the Secretary an election under this section that the Secretary determines is clearly against the interests of the individual, or who fails to make an election under this section, the Secretary may make an alternative election on behalf of the individual that the Secretary determines is in the best interests of the individual.

(2) Notice.—

If the Secretary makes an election on behalf of an individual under this subsection, the Secretary shall notify the individual by not later than seven days after making such election and shall provide the individual with a 30-day period, beginning on the date of the individual's receipt of such notice, during which the individual may modify or revoke the election made by the Secretary on the

individual's behalf. The Secretary shall include, as part of such notice, a clear statement of why the alternative election made by the Secretary is in the best interests of the individual as compared to the election submitted by the individual. The Secretary shall provide the notice required under this paragraph by electronic means whenever possible.

(i) IRREVOCABILITY OF ELECTIONS.—

An election under subsection (a) or (c)(1) is irrevocable.

* * *

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38 U.S.C. § 3695 – LIMITATION ON PERIOD OF ASSISTANCE UNDER TWO OR MORE PROGRAMS

(a) The aggregate period for which any person may receive assistance under two or more of the provisions of law listed below may not exceed 48 months (or the part-time equivalent thereof):

(1) Parts VII or VIII, Veterans Regulation numbered 1(a), as amended.

(2) Title II of the Veterans' Readjustment Assistance Act of 1952.

(3) The War Orphans' Educational Assistance Act of 1956.

(4) Chapters 30, 32, 33, 34, and 36.

(5) Chapters 107, 1606, 1607, and 1611 of title 10.

(6) Section 903 of the Department of Defense Authorization Act, 1981 (Public Law 96–342, 10 U.S.C. 2141 note).

(7) The Hostage Relief Act of 1980 (Public Law 96–449, 5 U.S.C. 5561 note).

(8) The Omnibus Diplomatic Security and Antiterrorism Act of 1986 (Public Law 99–399).

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38 C.F.R. § 21.9520 BASIC ELIGIBILITY.

An individual may establish eligibility for educational assistance under 38 U.S.C. chapter 33 based on active duty service after September 10, 2001, if he or she -

(a) Serves a minimum of 90 aggregate days excluding entry level and skill training (to determine when entry level and skill training may be included in the total creditable length of service, see § 21.9640(a)) and, after completion of such service, -

(1) Continues on active duty;

(2) Is discharged from service with an honorable discharge;

(3) Is released from service characterized as honorable and placed on the retired list, temporary disability retired list, or transferred to the Fleet Reserve or the Fleet Marine Corps Reserve;

(4) Is released from service characterized as honorable for further service in a reserve component; or

(5) Is discharged or released from service for -

(i) A medical condition that preexisted such service and is not determined to be service-connected;

(ii) Hardship, as determined by the Secretary of the military department concerned; or

(iii) A physical or mental condition that interfered with the individual's performance of duty but was not characterized as a disability and did not result from the individual's own misconduct;

(b) Serves a minimum of 30 continuous days and, after completion of such service, is discharged under other than dishonorable conditions due to a service-connected disability; or

(c)

(1) After meeting the minimum service requirements in paragraph (a) or (b) of this section -

(i) An individual makes an irrevocable election to receive benefits under 38 U.S.C. chapter 33 by relinquishing eligibility under either 38 U.S.C. chapter 30, or 10 U.S.C. chapter 106a, 1606, or 1607;

(ii) A member of the Armed Forces who is eligible for educational assistance under 38 U.S.C. chapter 30 and who is making contributions towards such educational assistance under 38 U.S.C. 3011(b) or 3012(c) makes an irrevocable election to receive benefits under 38 U.S.C. chapter 33; or

(iii) A member of the Armed Forces who made an election not to receive educational assistance under 38 U.S.C. chapter 30 in accordance with 38 U.S.C. 3011(c)(1) or 3012(d)(1) makes an irrevocable election to receive benefits under 38 U.S.C. chapter 33.

(2) An individual may make an irrevocable election to receive benefits under this chapter by properly completing VA Form 22-1990, submitting a transfer-of-entitlement designation under this chapter to the Department of Defense, or submitting a written statement that includes the following -

(i) Identification information (including name, social security number, and address);

(ii) If applicable, an election to receive benefits under chapter 33 in lieu of benefits under one of the applicable chapters listed in paragraph (c)(1)(i) of this section (e.g., "I elect to receive benefits under the Post-9/11-GI Bill in lieu of benefits under the Montgomery GI Bill - Active Duty (chapter 30) program.");

(iii) The date the individual wants the election to be effective (e.g., "I want this election to take effect on August 1, 2009."). An election request for an effective date prior to August 1, 2009, will automatically be effective August 1, 2009; and

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(iv) An acknowledgement that the election is irrevocable (e.g., "I understand that my election is irrevocable and may not be changed.").

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38 C.F.R. § 21.9635 DISCONTINUANCE DATES.

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(w) *Receipt of educational assistance allowance under another educational assistance program.* An individual in receipt of educational assistance under this chapter who is also eligible for educational assistance under 10 U.S.C. chapter 106a, 1606, or 1607, or under 38 U.S.C. chapter 30, 31, 32, or 35, or the Hostage Relief Act of 1980, may choose to receive educational assistance under another program. VA will terminate educational assistance under 38 U.S.C. chapter 33 effective the first day of the enrollment period during which the individual requested to receive educational assistance under 10 U.S.C. chapter 106a, 1606, or 1607, or under 38 U.S.C. chapter 30, 31, 32, or 35, or the Hostage Relief Act of 1980.

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