No. 22-888

In the Supreme Court of the United States

JAMES R. RUDISILL, PETITIONER

v.

DENIS R. MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

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

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OPINIONS BELOW

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

JURISDICTION

The judgment of the en banc court of appeals was entered on December 15, 2022. The petition for a writ of certiorari was filed on March 13, 2023, and was granted on June 26, 2023. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in the appendix. App., *infra*, 1a-11a.

STATEMENT

A. Legal Background

1. In 1944, Congress enacted a statute, commonly known as the GI Bill, that provided education benefits to veterans returning from the Second World War. See Servicemen's Readjustment Act of 1944, ch. 268, 58 Stat. 284. Congress has since enacted additional GI Bills to provide education benefits to new generations of veterans. See Pet. App. 3a & n.2.

This case concerns two such statutes: the Montgomery GI Bill Act of 1984 (Montgomery GI Bill), Pub. L. No. 98-525, Tit. VII, 98 Stat. 2553 (38 U.S.C. 3001 *et seq.*), and the Post-9/11 Veterans Educational Assistance Act of 2008 (Post-9/11 GI Bill), Pub. L. No. 110-252, Tit. V, 122 Stat. 2357 (38 U.S.C. 3301 *et seq.*). The Montgomery GI Bill—named for its sponsor, Congressman Sonny Montgomery—was enacted in 1984 and assists veterans who have entered the military between July 1, 1985, and September 30, 2030. See 38 U.S.C. 3011(a)(1)(A). The Post-9/11 GI Bill was enacted in 2008 and assists veterans who have served since September 11, 2001. See 38 U.S.C. 3311(b). The statutory provisions involved here refer to the Montgomery GI Bill as chapter 30 and the Post-9/11 GI Bill as chapter 33, based on the two GI Bills' locations in Title 38 of the U.S. Code.

The two GI Bills share many key features. Under each, a veteran who previously served on active duty is eligible for benefits. See 38 U.S.C. 3011(a), 3311(b). Each Bill imposes a 36-month cap on the benefits that an individual may receive under that statute. See 38 U.S.C. 3013(a)(1), 3312(a). That is the equivalent of a

college education: four years multiplied by nine months per academic year. An individual may use the benefits received under either statute to pursue an approved program of education, such as a college degree, a professional degree, or vocational training. See 38 U.S.C. 3014(a), 3313(a).

At the same time, the GI Bills differ in their details. Each statute has its own eligibility criteria, see 38 U.S.C. 3011(a), 3311(b); benefit amounts, see 38 U.S.C. 3015, 3313; time limits for using benefits, see 38 U.S.C. 3031, 3321; and rules for transferring benefits to family members, see 38 U.S.C. 3020, 3319. The Montgomery program, but not the Post-9/11 program, requires service members to make certain contributions (deducted from their military pay) in order to become eligible for benefits. See 38 U.S.C. 3011(b).

Multiple statutory provisions address the overlap among the various federal education-benefits programs (including, but not limited to, the Montgomery and Post-9/11 programs). See 38 U.S.C. 3322. No person may receive more than 48 months of benefits through the various federal programs combined. See 38 U.S.C. 3695(a). An individual who is entitled to benefits under multiple programs "may not receive assistance under two or more such programs concurrently, but shall elect (in such form and manner as the [VA] may prescribe) under which chapter or provisions to receive educational assistance." 38 U.S.C. 3322(a). And under a statutory amendment that took effect in 2011, a service member cannot receive double credit for the same period of service; rather, each period from 2011 onward can count toward benefits under only one program. See 38 U.S.C. 3322(h)(1) and note.

2. This case involves a set of statutory provisions that specifically address the overlap between the Montgomery and Post-9/11 GI Bills. Congress has recodified some of those provisions during the pendency of this case. Like petitioner and the court of appeals, we cite the provisions as currently codified.

A Post-9/11 GI Bill provision titled "ADDITIONAL COORDINATION MATTERS" states: "In the case of an individual entitled to" Montgomery benefits, "coordination of entitlement to [Post-9/11 benefits], on the one hand, and [Montgomery benefits], on the other, shall be governed by [38 U.S.C. 3327]." 38 U.S.C. 3322(d). We refer to that provision as the coordination clause.

Section 3327 in turn provides that veterans who satisfy specified criteria—including veterans who have used some but not all of their Montgomery benefits and qualify for Post-9/11 benefits—may "elect to receive" Post-9/11 benefits. 38 U.S.C. 3327(a). Such an election has both advantages and disadvantages. On the plus side, the veteran starts to receive Post-9/11 benefits, see 38 U.S.C. 3327(d)(1), which are typically "more generous" than Montgomery benefits, *e.g.*, Pet. Br. 24; recoups a prorated portion of any contributions the veteran has made to the Montgomery program, see 38 U.S.C. 3327(f)(1); and receives extra payments in certain circumstances, see 38 U.S.C. 3327(g). On the minus side, a veteran who elects Post-9/11 benefits can no longer receive Montgomery benefits. See 38 U.S.C. 3327(d)(1). Of particular importance here, the veteran also becomes subject to a "limitation on entitlement": "the number of months" of Post-9/11 benefits he can receive is limited to "the number of months of unused" Montgomery benefits to which the veteran was entitled "as of the date of the election." 38 U.S.C. 3327(d)(2)(A)

(capitalization omitted). We refer to the statutory language imposing that cap as the limitation clause.

An election to receive Post-9/11 benefits in lieu of Montgomery benefits is ordinarily "irrevocable." 38 U.S.C. 3327(i). But under a statutory amendment that took effect in 2017, after the election in this case, the Department of Veterans Affairs (VA) may override an election that is "clearly against the interests" of the veteran. 38 U.S.C. 3327(h)(1).

B. Facts And Proceedings Below

1. Petitioner has served in the military over three separate periods totaling nearly eight years. Pet. App. 81a-82a. He first enlisted in the Army in 2000 and served until 2002. *Ibid.* He then started college, interrupted his studies to serve a second time from 2004 to 2005, and completed his degree after that second period of service ended. *Id.* at 82a. He later rejoined the Army as a commissioned officer, serving from 2007 to 2011. *Ibid.* Over those three periods, petitioner served in Iraq and Afghanistan, reached the rank of Captain, and received multiple medals and commendations. *Id.* at 20a (Newman, J., dissenting).

Petitioner's first period of military service earned him 36 months of Montgomery benefits. Pet. App. 82a. He used 25 months and 14 days of those benefits for college, leaving 10 months and 16 days of unused Montgomery benefits. *Id.* at 82a-83a. Petitioner's second and third periods of service also made him eligible for Post-9/11 benefits. *Id.* at 57a-58a, 82a.

After his third period of military service ended, petitioner was accepted for admission to Yale Divinity School. Pet. App. 6a. In March 2015, petitioner filed an application for Post-9/11 benefits with the VA. *Ibid.*; see J.A. 1a-7a. Petitioner acknowledged that, "if [he]

completely exhaust[ed] [his] entitlement under [the Montgomery GI Bill] before the effective date of [his] [Post-9/11] election," he could "receive up to 12 additional months of [Montgomery] benefits." J.A. 1a. He further acknowledged that, because of his election to receive Post-9/11 benefits immediately "in lieu of" Montgomery benefits, his "months of entitlement under [the Post-9/11 GI Bill] w[ould] be limited to the number of months of entitlement remaining under [Montgomery] on the effective date of [the] election." *Ibid.* He also acknowledged that the election was "irrevocable and may not be changed." *Ibid.*

The agency found that petitioner was eligible for Post-9/11 benefits but was subject to the limitation clause. Pet. App. 7a. It calculated that, because petitioner had 10 months and 16 days of unused Montgomery benefits, the statute limited him to 10 months and 16 days of Post-9/11 benefits. *Ibid.*

2. Petitioner challenged the agency's decision, but the Board of Veterans' Appeals (Board) denied his appeal. Pet. App. 161a-172a. The Board found that petitioner had "irrevocably elected to receive" Post-9/11 benefits "in lieu of" Montgomery benefits. *Id.* at 162a. Petitioner argued that he "did not intend to make" such an election. *Id.* at 165a. The Board found, however, that petitioner's application was "very clear that he did elect [Post-9/11 benefits] * * * in lieu of [Montgomery] benefits, that this election was irrevocable and could not be changed, and that his [Post-9/11] benefits * * * would be limited to the time remaining under his [Montgomery] benefits unless he first used all of the [Montgomery] benefits * * * before electing" Post-9/11 benefits. *Id.* at 168a. The Board further determined that, be-

cause petitioner had "made an irrevocable election," he was subject to the limitation clause. *Id.* at 172a.

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

The Veterans Court determined that petitioner was not subject to the limitation clause. Pet. App. 95a-97a. The court held that Section 3327 applied only to veterans who qualified for both Montgomery and Post-9/11 benefits based on "a *single* period of service," not to veterans (like petitioner) with "multiple periods of service." *Id.* at 101a, 127a.

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

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

The panel agreed with the Veterans Court's interpretation of the statute. Pet. App. 63a-65a. Like the Veterans Court, the panel held that Section 3327 does not apply to "veterans with multiple periods of qualifying service." *Id.* at 65a.

Judge Dyk concurred in a jurisdictional holding that is not at issue here, but dissented on the merits. Pet. App. 67a-69a. He stated that "nothing in the language or history of the relevant statutes remotely justifies" reading the limitation clause to apply only to veterans with "a single period of service" and not to veterans with "multiple periods of service." *Id.* at 69a.

5. The Federal Circuit granted the government's petition for rehearing en banc. Pet. App. 173a-176a. By

a vote of 10-2, the en banc court of appeals reversed the Veterans Court's decision. *Id.* at 1a-47a.

The en banc court held that the limitation clause, "[b]y its plain language," applies to petitioner. Pet. App. 14a. The court rejected petitioner's contention that the clause "only applies to individuals with a single period of service," observing that "there is no such limit in the language of the provision." *Id.* at 15a. Petitioner relied in part on the veteran's canon, but the court stated that the canon "plays no role where the language of the statute is unambiguous—the situation here." *Id.* at 16a-17a.

Judge Newman and Judge Reyna, the judges who had formed the panel majority, dissented from the en banc court's decision and joined each other's dissents. Pet. App. 18a-37a (Newman, J., dissenting); *id.* at 38a-47a (Reyna, J., dissenting). Judge Newman reiterated the panel's conclusion that the limitation clause does not apply to "veterans with multiple periods of service." *Id.* at 25a-26a. Judge Reyna argued that the court should have resolved the case by applying the veteran's canon. *Id.* at 39a.

SUMMARY OF ARGUMENT

A. Petitioner could receive Post-9/11 benefits only if he elected them under Section 3327. Section 3327(a) states that a veteran who retains unused Montgomery benefits and who qualifies for Post-9/11 benefits "may elect to receive" Post-9/11 benefits. 38 U.S.C. 3327(a). The statement that such veterans "may elect to receive" Post-9/11 benefits implies that those veterans will receive those benefits only if they elect them. Confirming that interpretation, the coordination clause states that coordination of Montgomery and Post-9/11 benefits "shall be governed" by Section 3327, 38 U.S.C. 3322(d). That clause makes clear that a veteran who qualifies for

both programs may combine them only through Section 3327's election mechanism.

Section 3327 prescribes the consequences of an election. As relevant here, the limitation clause provides: "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 [Post-9/11 benefits] shall be * * * equal to * * * the number of months of unused [Montgomery benefits]." 38 U.S.C. 3327(d)(2)(A).

Petitioner is "an individual making an election under subsection (a)." 38 U.S.C. 3327(d)(2). The record shows that petitioner made an election; the Board of Veterans Appeals found that he had made an election; and the en banc court of appeals agreed that he had made an election. Petitioner also is a person "described by paragraph (1)(A)." *Ibid.* That paragraph refers to a person who "has used, but retains unused," Montgomery benefits, 38 U.S.C. 3327(a)(1)(A), and petitioner fits that description. Petitioner therefore is subject to a "limitation on entitlement," under which "the number of months of [Post-9/11 benefits] shall be * * * equal to * * * the number of months of unused [Montgomery benefits]." 38 U.S.C. 3327(d)(2)(A) (capitalization omitted).

B. Petitioner cannot overcome the statute's plain text. He argues that Section 3327 applies only to veterans with a single period of service, not to those who qualify for Montgomery and Post-9/11 benefits based on separate periods of service. But he identifies no language in Section 3327 that even arguably draws that distinction. Section 3327 prescribes, in detail, the criteria that a veteran must satisfy in order to make an election and the consequences that an election entails. The inclusion of

those express criteria implies the exclusion of additional unstated criteria relating to periods of service.

Petitioner next invokes a statutory provision that limits each veteran to a maximum of 48 months of aggregate benefits from various federal programs combined. But the fact that petitioner could receive additional months of Post-9/11 benefits while still satisfying the aggregate cap does not justify ignoring the distinct restriction imposed by the limitation clause.

Petitioner also argues that applying the limitation clause here would produce results that Congress could not have intended. But a statute's meaning turns on the enacted text, not on speculation about congressional intent. The limitation clause in any event produces a sensible result. Even after electing to receive Post-9/11 benefits in lieu of his unused Montgomery benefits, petitioner was entitled to 36 months of benefits—the equivalent of a college education—across the Post-9/11 and Montgomery programs combined. And petitioner could have received up to 12 months of additional benefits if he had exhausted his Montgomery entitlement before seeking benefits under the Post-9/11 GI Bill. That exhaustion requirement could reflect a desire to limit the programs' cost, a preference for administrative simplicity, or a congressional judgment about how best to address the concern that higher benefits levels could prompt too many service members to leave the military in order to pursue educational opportunities. A congressional committee report also specifically refers to that exhaustion requirement, refuting petitioner's claim that the requirement is so anomalous that Congress could not have intended it.

Finally, petitioner invokes the veteran's canon. But that canon cannot overcome the clear statutory text lim-

iting the benefits payable to petitioner. Petitioner's interpretation, in any event, is not unambiguously pro-veteran. An election under Section 3327 carries several advantages, such as the ability to recoup a portion of past Montgomery contributions and eligibility for extra payments in certain circumstances. Petitioner's reading would preclude veterans with multiple periods of service from making elections under Section 3327 and thus would deprive them of the opportunity to obtain those advantages.

ARGUMENT

A. When Petitioner Elected To Receive Post-9/11 Benefits In Lieu Of His Unused Montgomery Benefits, 38 U.S.C. 3327(d)(2) Limited The Amount Of Post-9/11 Benefits To Which He Was Entitled

Because petitioner retained unused Montgomery benefits, he could obtain Post-9/11 benefits only by electing them under Section 3327(a). That election, in turn, triggered a limitation on benefits under Section 3327(d)(2). Petitioner received clear notice that he could have avoided that limitation by exhausting his Montgomery benefits before using Post-9/11 benefits, but petitioner chose not to do so.

1. Petitioner could obtain Post-9/11 benefits only by electing them under Section 3327

Because petitioner had used, but retained unused, Montgomery benefits, he could receive Post-9/11 benefits only by electing them under Section 3327. That conclusion follows from Section 3327 itself, from Section 3322(a), and from the coordination clause.

a. The Montgomery and Post-9/11 GI Bills overlap, with the former covering veterans who enter active duty between 1985 and 2030, and the latter covering veterans

who serve after September 11, 2001. Multiple provisions of the Post-9/11 GI Bill address that overlap. See 38 U.S.C. 3322, 3327.

One such set of provisions, Section 3327, is titled "Election to receive educational assistance." 38 U.S.C. 3327. Subsection (a) identifies "individuals eligible to elect participation in Post-9/11 educational assistance." 38 U.S.C. 3327(a) (capitalization altered). Under paragraph (1)(A), a veteran who "has used, but retains unused," Montgomery benefits and who "meets the requirements for entitlement" to Post-9/11 benefits "may elect to receive" Post-9/11 benefits. 38 U.S.C. 3327(a)(1)(A) and (2).

In ordinary parlance, the statement that a person "may elect" something implies that it will happen if, but only if, he chooses it. If an airline tells its passengers that they "may elect to receive" kosher meals, passengers who do not elect such meals will not receive them. And if a hotel tells its guests that they "may elect to receive" wake-up calls, guests who do not elect such calls will not be woken up. In the same way, the statement that a veteran who retains unused Montgomery benefits "may elect to receive" Post-9/11 benefits means that such a veteran will receive Post-9/11 benefits only if he elects them.

Section 3327(a)'s structure confirms that reading. Section 3327(a) states that a veteran may elect Post-9/11 benefits if he (1) "has used, but retains unused," Montgomery benefits *and* (2) "meets the requirements for entitlement to" Post-9/11 benefits. 38 U.S.C. 3327(a)(1)(A) and (2). Section 3327(a) thus applies specifically to veterans like petitioner—*i.e.*, veterans who qualify for both Montgomery and Post-9/11 benefits. It allows them to receive Post-9/11 benefits by making an election, sub-

ject to the terms specified in the rest of Section 3327. Allowing such veterans to receive Post-9/11 benefits immediately *without* making an election, and accepting the consequences that follow, would drain Section 3327 of meaning.

Statutory context reinforces that interpretation. Congress originally created the election mechanism in a section of the Post-9/11 GI Bill titled "APPLICABILITY TO INDIVIDUALS UNDER MONTGOMERY GI BILL PROGRAM." Post-9/11 GI Bill § 5003(c), 122 Stat. 2375-2378. That title shows that the election mechanism governs the "applicability" of the Post-9/11 program to veterans who, like petitioner, are also "under" the "Montgomery GI Bill." *Ibid.* (capitalization altered).

b. Another provision of the Post-9/11 GI Bill, Section 3322(a), confirms that petitioner could receive Post-9/11 benefits only by electing them. It states:

> An individual entitled to educational assistance under [the Post-9/11 GI Bill] who is also eligible for educational assistance under [certain other programs, including the Montgomery GI Bill] 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.

38 U.S.C. 3322(a) (emphasis added).

Petitioner acknowledges (Br. 40) that he is subject to Section 3322(a)'s "bar on concurrent benefits usage," and therefore cannot receive Montgomery and Post-9/11 benefits simultaneously. But if petitioner is subject to that restriction, he is surely subject as well to the closely related rule, which follows immediately in the same sentence, that a veteran who is entitled to multiple types of benefits "shall elect" which benefits to receive.

38 U.S.C. 3322(a). Section 3322(a) thus confirms that petitioner was required to "elect" Post-9/11 benefits in order to receive them. *Ibid.*

c. A third provision that addresses the overlap between Montgomery and Post-9/11 benefits, the coordination clause, states:

> ADDITIONAL COORDINATION MATTERS.—In the case of an individual entitled to educational assistance under [the Montgomery GI Bill], * * * 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 [38 U.S.C. 3327].

38 U.S.C. 3322(d). The coordination clause does not resolve the specific question that is presented in this case, but it identifies Section 3327 as the provision that *does* resolve it.

In everyday usage, "coordinate" means "to bring into proper order or relation." *Webster's New World College Dictionary* 320 (4th ed. 2009) (emphasis omitted); see *Oxford English Dictionary* (2023) ("to bring into proper combined order as parts of a whole") (emphasis omitted). And in legal usage, "coordination of benefits" includes determining the "order of payment" when multiple benefits programs overlap. *United Benefit Life Insurance Co.* v. *United States Life Insurance Co.*, 36 F.3d 1063, 1064 (11th Cir. 1994). The directive that "coordination of entitlement" "shall be governed by" Section 3327 thus means that Section 3327's election mechanism controls how veterans may combine the two types of benefits. Veterans may not bypass Section 3327 and coordinate the programs in their own way by using the benefits "in whatever order they choose." Pet. Br. 3.

2. Petitioner's election of Post-9/11 benefits under Section 3227 subjected him to the limitation clause

Section 3327 specifies the consequences of an election of Post-9/11 benefits. See 38 U.S.C. 3327(d)-(g). The provision at issue here, the limitation clause, states:

> 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 [the Post-9/11 GI Bill] 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, plus
> >
> > (B) the number of months, if any, of entitlement revoked by the individual under subsection (c)(1).

38 U.S.C. 3327(d)(2). By that provision's plain terms, a veteran is subject to the specified "limitation on entitlement" if he is "an individual making an election under subsection (a)" and is "described by paragraph (1)(A) of that subsection." *Ibid.* (capitalization omitted).

Petitioner is "an individual making an election under subsection (a)." 38 U.S.C. 3327(d)(2). He signed a form stating that he was "electing [Post-9/11 benefits]" and acknowledging that his "election is irrevocable and may not be changed." J.A. 1a. Citing that form, the Board of Veterans Appeals made a factual finding that petitioner had "elected to receive" Post-9/11 benefits "in lieu of [Montgomery] benefits." Pet. App. 162a. The Board stated that the form was "very clear that he did elect" those benefits. *Ibid.* The en banc court of appeals

agreed that petitioner had made an "election of Post-9/11 benefits." *Id.* at 14a.

Petitioner also is "described by paragraph (1)(A)" of subsection (a). 38 U.S.C. 3327(d)(2). That paragraph refers to someone who "is entitled to basic educational assistance under [the Montgomery GI Bill] and has used, but retains unused, entitlement under that [statute]." 38 U.S.C. 3327(a)(1)(A). The Board found that petitioner was entitled to Montgomery benefits, that he had "previously used" some of those benefits, and that he retained unused "10 months and 16 days" of those benefits. Pet. App. 162a. Petitioner "does not dispute that he had 'used, but retained unused' Montgomery benefits." *Id.* at 14a (brackets and citation omitted).*

Petitioner thus is "an individual making an election under subsection (a) who is described by paragraph (1)(A) of that subsection." 38 U.S.C. 3327(d)(2). He therefore is subject to a "limitation on entitlement," under which the "number of months" of his Post-9/11 entitlement "shall be" equal to the "number of months of unused" Montgomery entitlement. 38 U.S.C. 3327(d)(2)(A) (capitalization omitted).

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* Section 3327(a)(1) begins with the phrase "as of August 1, 2009." The VA interprets that phrase to mean that Section 3327(a)(1) takes effect starting from that date, not to mean that the veteran must have retained unused Montgomery benefits *on* that date. See Bryan A. Garner, *Garner's Modern English Usage* 75 (4th ed. 2016) ("as of" "frequently signifies the effective date of a document"). Petitioner would be subject to Section 3327(a) under either reading, however, since he retained unused Montgomery benefits on August 1, 2009. See p. 5, *supra*.

3. Petitioner could have avoided the limitation clause by exhausting his Montgomery benefits before using any Post-9/11 benefits, but he chose not to do so

Notwithstanding the limitation clause, petitioner could have first exhausted his Montgomery benefits and then received an additional 12 months of benefits under the Post-9/11 Bill. Under the coordination clause, Section 3327 governs coordination of benefits "[i]n the case of an individual entitled to" Montgomery benefits. 38 U.S.C. 3322(d). But someone who has exhausted his Montgomery benefits no longer is "an individual entitled to" Montgomery benefits and therefore no longer has two types of benefits that need to be "coordinated." The limitation clause also applies only to persons "described by paragraph (1)(A)," 38 U.S.C. 3327(d), and that paragraph in turn refers to a person who "retains unused" Montgomery benefits, 38 U.S.C. 3327(a)(1)(A). A veteran who has exhausted his Montgomery benefits no longer "retains unused" benefits.

A veteran who first exhausts his Montgomery benefits is still subject to a separate provision that limits each veteran to a maximum of 48 months of benefits under the various federal education-benefits programs combined. See 38 U.S.C. 3695(a). Given that aggregate cap, a veteran who exhausts all 36 months of his Montgomery benefits could still receive up to 12 months of Post-9/11 benefits.

Petitioner was given clear notice of the options available to him. In his March 2015 application, petitioner acknowledged that, if he elected to receive Post-9/11 benefits immediately "in lieu of" Montgomery benefits, his "months of entitlement under [the Post-9/11 GI Bill] [would] be limited to the number of months of entitlement remaining under [the Montgomery GI Bill] on the

effective date of [his] election." J.A. 1a. Petitioner further acknowledged, however, that if he "completely exhaust[ed] [his] entitlement under [the Montgomery GI Bill]," he could "receive up to 12 additional months of benefits under [the Post-9/11 GI Bill]." *Ibid.*

Petitioner declined to exhaust his Montgomery benefits and instead elected to begin receiving Post-9/11 benefits. That election benefited petitioner by allowing him to receive the larger monthly Post-9/11 benefits immediately. See, *e.g.*, Pet. Br. 24 (referring to "the more generous Post-9/11 benefits"). But under the statute's plain terms, the election also subjected petitioner to the limitation clause. Having reaped his election's advantages, petitioner must accept the drawbacks as well.

B. Petitioner's Contrary Arguments Lack Merit

None of petitioner's arguments can overcome the statute's plain text.

1. Section 3327 does not distinguish between veterans with multiple periods of service and veterans with one period of service

Petitioner argues (Br. 35, 43-44) that Section 3327 applies only to veterans with "a single period of service," not to those with "multiple periods of service." He describes (Br. 33) Section 3327 as a "benefit-exchange mechanism" through which veterans with a single period of service can "convert lesser Montgomery benefits into more generous Post-9/11 benefits." He asserts (Br. 35) that Section 3327 "has no relevance for veterans with multiple periods of service." That is incorrect.

a. Although petitioner argues (Br. 35) that Section 3327 excludes veterans with "separate and distinct qualifying periods of service," his brief does not define that critical term. Petitioner himself had three *discontinu-*

ous periods of military service, separated by periods of civilian life. But it is unclear whether petitioner's theory is limited to that scenario, or whether it also applies to a veteran with six continuous years of military service, if discrete increments of that service would independently entitle the veteran to Montgomery and Post-9/11 benefits. The Veterans Court, which adopted petitioner's reading, stated that the "question remains open." Pet. App. 127a n.15. Congress usually answers such questions when enacting rules that turn on periods of service. See 38 U.S.C. 3011(a)(1)(A)(i) ("continuous" service); 38 U.S.C. 3311(b)(1)(A) ("aggregate" service). But Section 3327 does not address the issue—because it does not refer to periods of service in the first place.

b. Section 3327 does not distinguish between veterans with one period of service and veterans with multiple periods of service. Petitioner acknowledges (Br. 46) that Section 3327(a) "does not state that its election mechanism is limited to veterans with only a single period of service," yet infers such a limit anyway. But courts "ordinarily resist reading words or elements into a statute that do not appear on its face." *Bates* v. *United States*, 522 U.S. 23, 29 (1997).

Petitioner's interpretation also conflicts with Section 3327's structure. Section 3327(a) identifies six categories of veterans who may make elections, and it describes each category in painstaking detail. See, *e.g.*, 38 U.S.C. 3327(a)(1)(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 * * * under section 3011(b) or 3012(c) of this title"). In particular, Section 3327(a)(1)(A) refers to an individual who "is entitled to basic educational assistance under [the Montgomery GI Bill] and has used, but

retains unused, entitlement under that [Bill]." 38 U.S.C. 3327(a)(1)(A). That class of veterans unambiguously includes petitioner. Under the familiar interpretive principle known as *expressio unius est exclusio alterius*, the inclusion of those express criteria implies the exclusion of other, unstated criteria relating to periods of service. See *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 844 (2018). Section 3327(a)'s precision bolsters that inference: "The more specific the enumeration, the greater the force of the [*expressio unius*] canon." Antonin Scalia & Bryan A. Garner, *Reading Law* § 10, at 108 (2012).

By contrast, other statutory provisions governing veterans' benefits do refer to periods of service. One provision imposes a "bar to duplication of eligibility based on a single event or period of service." 38 U.S.C. 3322(h) (capitalization omitted). Another provision makes a veteran eligible for certain pension benefits if he has served "for an aggregate of ninety days or more in two or more separate periods of service." 38 U.S.C. 1521(j)(4). A third provision states that a "period of service counted for purposes of [a different program] may not be counted as a period of service for entitlement to [Post-9/11 benefits]." 38 U.S.C. 3322(b). "Atextual judicial supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision." *Rotkiske* v. *Klemm*, 140 S. Ct. 355, 361 (2019).

Section 3327's text and structure likewise refute petitioner's claim (Br. 33) that Section 3327 simply allows veterans with a single period of service to "convert lesser Montgomery benefits into more generous Post-9/11 benefits." A veteran can make an election under Section 3327 only if he "meets the requirements for entitlement" to Post-9/11 benefits. 38 U.S.C. 3327(a)(2).

Section 3327 thus applies only to veterans who *already* qualify for Post-9/11 benefits. It does not allow individuals who are otherwise ineligible for Post-9/11 benefits to receive them anyway by trading in Montgomery benefits.

Section 3327 also encompasses veterans with unused benefits under four different federal programs (one of which is the Montgomery GI Bill). See 38 U.S.C. 3327(a)(1)(A) and (B). Yet the limitation clause applies only to veterans "described by paragraph (1)(A)"—*i.e.*, only veterans with unused *Montgomery* benefits. 38 U.S.C. 3327(d)(2). It does not apply to veterans with unused benefits under the other three programs. That pattern defeats petitioner's contention (Br. 52) that the limitation clause's sole purpose is to ensure that benefits "trade[s]" occur at "a 1:1 ratio." The limitation clause instead serves the purpose stated in its caption: imposing a "limitation on entitlement for certain individuals." 38 U.S.C. 3327(d)(2) (capitalization omitted).

c. Petitioner's theory conflicts with the coordination clause as well. That clause states that Section 3327 applies "[i]n the case of an individual entitled to [Montgomery benefits]." 38 U.S.C. 3322(d). Petitioner effectively rewrites the clause to state that Section 3327 applies only "in the case of an individual entitled to Montgomery benefits *based on the same period of service that entitles him to Post-9/11 benefits*." The coordination clause also states that Section 3327 coordinates "entitlement to educational assistance under [the Post-9/11 GI Bill], on the one hand, and [the Montgomery GI Bill], on the other." *Ibid.* That text indicates that Section 3327 applies to the very group that petitioner would exclude from it: veterans who qualify for both types of benefits.

The coordination clause also provides that Section 3327 governs "coordination," 38 U.S.C. 3322(d)—a term that, as explained above, encompasses determining the order in which benefits are used. See p. 14, *supra*. Petitioner treats "coordinate" as a synonym for "convert," stating that Section 3327 allows veterans with a single period of service to "'coordinate' Montgomery benefits into Post-9/11 benefits." Pet. Br. 50; see *id.* at 34 ("coordinate their peacetime benefits to more generous Post-9/11 benefits"); *id.* at 50 ("'coordinate' existing benefits into the newer Post-9/11 program") (brackets and citation omitted). But "coordinate" does not mean "convert." If it did, currency exchanges would "coordinate" dollars into euros, solar panels would "coordinate" sunlight into electricity, and missionaries would "coordinate" people to new religions.

Petitioner emphasizes that the coordination clause appears in a section titled "Bar to duplication of educational assistance benefits," 38 U.S.C. 3322, and argues that no "duplication" occurs when a veteran receives both Montgomery and Post-9/11 benefits based on separate periods of service. Pet. Br. 52-53 (citation omitted). Section headings, however, "are not meant to take the place of the detailed provisions of the text"; rather, they "can do no more than indicate the provisions in a most general manner." *Railroad Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 528 (1947). The title of Section 3322 refers most specifically to the rule, set forth in the first subsection of that provision, that a veteran entitled to educational benefits under more than one of various enumerated federal programs "may not receive assistance under two or more such programs concurrently." 38 U.S.C. 3322(a). But the coordination clause's reference to "an individual entitled to educa-

tional assistance under chapter 30 [the Montgomery GI Bill]" unambiguously covers petitioner, and the clause does not distinguish between veterans with one period of service and veterans with many. 38 U.S.C. 3322(d). And since the specific restriction imposed by the limitation clause appears in Section 3327 rather than in Section 3322, it is particularly unsurprising that Section 3322's title does not allude to it.

2. The 48-month aggregate cap imposed by 38 U.S.C. 3695(a) does not supersede the distinct limit imposed by the limitation clause

a. Petitioner relies in part (Br. 39-40) on 38 U.S.C. 3695(a), which limits a veteran to 48 months of educational benefits under various federal programs combined. That provision begins:

> 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):

Ibid. The provision then lists 16 different programs to which the cap applies. *Ibid.* Petitioner reads (Br. 42) that provision to give him a "statutory right to 48 months of benefits" and argues that the limitation clause should not be read to deprive him of that "right." That argument is mistaken.

Section 3695(a) does not confer a "right" to receive benefits, but instead limits the aggregate amount of VA educational benefits that an individual may receive. It directs that a person's benefits "may not exceed 48 months," 38 U.S.C. 3695(a)—not that a person "is entitled to 48 months" of benefits or "has a right to 48 months" of benefits. And it bears the caption "Limitation on period of assistance under two or more pro-

grams," 38 U.S.C. 3695—not, say, "right to assistance under two or more programs."

The limit imposed by the aggregate cap is separate from and independent of the restriction imposed by the limitation clause. The fact that petitioner could receive more Post-9/11 benefits while still satisfying the aggregate cap does not justify disregarding the limitation clause's distinct requirements. "When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at liberty to pick and choose among congressional enactments and must instead strive to give effect to both." *Epic Systems Corp.* v. *Lewis*, 138 S. Ct. 1612, 1624 (2018) (citation and internal quotation marks omitted).

Adherence to that principle is especially apt here because the aggregate cap addresses the interaction among 16 different federal programs, see 38 U.S.C. 3695(a)—including programs for veterans, 38 U.S.C. 3695(a)(4); officers and reservists, 38 U.S.C. 3695(a)(5); war orphans, 38 U.S.C. 3695(a)(3); former captives, 38 U.S.C. 3695(a)(8); and survivors of the Iran hostage crisis, 38 U.S.C. 3695(a). The limitation clause, in contrast, specifically addresses the overlap between the Montgomery and Post-9/11 programs. See 38 U.S.C. 3327(d)(2). Even if the two provisions conflicted, the specific limitation clause would control over the general aggregate cap. See *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012).

b. Petitioner argues (Br. 11) that previous GI Bills have allowed veterans to combine benefits from different programs in any order, subject only to the 48-month aggregate cap. He asserts (Br. 2) that Congress would not have taken the "unprecedented" step of adopting a different rule in the Post-9/11 GI Bill.

That argument is unsound. "The starting point in discerning congressional intent is the existing statutory text, * * * and not the predecessor statutes." *Lamie* v. *United States Trustee*, 540 U.S. 526, 534 (2004) (citation omitted). The existing statutory text subjects veterans like petitioner to a "limitation on entitlement." 38 U.S.C. 3327(d)(2) (capitalization omitted). Petitioner cannot avoid that limitation "by comparing the present statute with its predecessor[s]." *Lamie*, 540 U.S. at 533-534.

In any event, previous GI Bills did not overlap in the way the Montgomery and Post-9/11 GI Bills do. The original GI Bill covered veterans who served during the Second World War; the second, those who served during the Korean War; the third, those who served from 1955 to 1976; the fourth, those who served from 1977 to 1985; and the Montgomery GI Bill, those who served from 1985 to 2030. See Katherine Kiemle Buckley & Bridgid Cleary, *The Restoration and Modernization of Education Benefits under the Post-9/11 Veterans Assistance Act of 2008*, 2 Veterans L. Rev. 185, 187-198 (2010); p. 2, *supra*. "[T]here was essentially just one kind of GI Bill" for veterans who served at any given time, "and you signed up for it and you got it." Joseph B. Keillor, Note, *Veterans at the Gates: Exploring the New GI Bill and Its Transformative Possibilities*, 87 Wash. U. L. Rev. 175, 186 n.76 (2009) (citation omitted).

The Montgomery and Post-9/11 GI Bills, in contrast, run in parallel from September 11, 2001, onward. See p. 2, *supra*. A witness at a committee hearing on the Post-9/11 GI Bill thus explained that the new program "directly competes * * * with the Montgomery GI Bill" and "creates a dilemma of a new GI Bill operating alongside the current [Montgomery GI Bill]." *Pending Montgomery GI Bill Legislation: Hearing Before the Sub-*

comm. on Economic Opportunity of the House Comm. on Veterans' Affairs, 110th Cong., 2d Sess. 5, 39 (2008). It makes sense that Congress would adopt new coordination rules to address that novel temporal overlap.

The deviation from past practice reflected in Section 3327(d)(2) is also less extreme than petitioner suggests. Each of the two laws at issue here—the Montgomery GI Bill and the Post-9/11 GI Bill—imposes a 36-month cap on the benefits available under that law standing alone. See pp. 2-3, *supra*. Under the VA's longstanding approach, however, petitioner could have received up to 48 months of aggregate benefits under the two programs combined if he had exhausted his Montgomery benefits before using Post-9/11 benefits. See pp. 17-18, *supra*. That approach gives veterans in petitioner's position additional benefits based on their simultaneous qualification under both programs, while respecting the unambiguous terms of the limitation provision.

c. Petitioner's acknowledgment that he is subject to Section 3695(a)'s 48-month aggregate benefits cap is itself significant. Section 3695(a) states that "[t]he 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)." 38 U.S.C. 3695(a). Chapters 30 and 33 (the Montgomery and Post-9/11 GI Bills) are among the provisions listed in Section 3695(a). See 38 U.S.C. 3695(a)(4).

Section 3695(a) does not confirm in so many words that the 48-month aggregate cap applies to veterans whose entitlement to benefits under different programs is based on multiple periods of service. Rather, that conclusion follows from two facts: (1) Section 3695(a)'s language unambiguously encompasses such persons, and

(2) no language in that provision even arguably excludes them. But the same is true of the statutory provisions—Sections 3322(d), 3327(a)(1)(A), and 3327(d)(2)—that more specifically address the proper treatment of veterans who are entitled to both Montgomery and Post-9/11 benefits. Petitioner does not explain why veterans with multiple periods of service (however defined) should be exempted from those provisions if they are covered by Section 3695(a).

3. Petitioner's speculation about congressional intent cannot override the enacted text

a. Petitioner asserts that applying the limitation clause here would produce "an absurd and unjust result which Congress could not have intended." Pet. Br. 54 (citation omitted). Courts should review such assertions with skepticism. It is Congress's prerogative to decide how federal programs should work, and Congress's job to enact statutory text that accurately reflects those decisions. A court's "task is to apply the text, not to improve upon it." *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U.S. 120, 126 (1989). A court "cannot replace the actual text with speculation as to Congress' intent." *Henson* v. *Santander Consumer USA Inc.*, 582 U.S. 79, 89 (2017) (citation omitted).

Adherence to the text is especially appropriate here because the Appropriations Clause entrusts Congress, not the courts, with the power of the purse. See U.S. Const. Art. I, § 9, Cl. 7. A court may not override statutory limits on public spending simply because it regards them as "unjust." If "hardships are to be remedied by payment of Government funds, it must be at the instance of Congress." *OPM* v. *Richmond*, 496 U.S. 414, 434 (1990).

The Constitution also empowers Congress, not the courts, to "raise and support Armies" and to "provide and maintain a Navy." U.S. Const. Art. I, § 8, Cls. 12, 13. When Congress was considering the Post-9/11 GI Bill, President George W. Bush raised the concern that increased benefits could "harm retention rates within the armed forces" by prompting service members to leave in order to pursue educational opportunities. George W. Bush, The American Presidency Project, *Statement of Administration Policy: H.R. 2642—Supplemental Appropriations Bill of 2008* (May 20, 2008). The Department of Defense likewise warned that the legislation could "have a sharp effect on retention" and prompt "an exodus" of personnel. Gerry J. Gilmore, American Foreign Press Service, *Pentagon Endorses Transfer of GI Bill Benefits to Spouses, Children* (May 16, 2008). Senator John McCain expressed similar fears. See Keillor 178. Judicial augmentation of the benefits prescribed by the text would distort Congress's judgment about how best to accommodate that concern.

b. In any event, the VA's understanding of the statutory scheme is neither "absurd" nor "unjust." Pet. Br. 54 (citation omitted). The Montgomery GI Bill limits a veteran to 36 months of Montgomery benefits, no matter how long or how many times he serves. See 38 U.S.C. 3013(a)(1). The Post-9/11 GI Bill similarly limits a veteran to 36 months of Post-9/11 benefits, no matter how long or how many times he serves. See 38 U.S.C. 3312(a). Petitioner presumably does not regard those caps as "absurd and unjust." Pet. Br. 54 (citation omitted).

Congress had "plausible reason[s]" (Pet. Br. 56) to allow veterans who are entitled to benefits under both Bills to obtain more than 36 months of assistance if, but

only if, they exhaust their Montgomery benefits before using their Post-9/11 benefits. That arrangement could reflect concern about cost. As petitioner points out (*e.g.*, Br. 24), Post-9/11 benefits are ordinarily "more generous" than Montgomery benefits. Congress could reasonably have decided that veterans who seek more than 36 months of benefits, based on their simultaneous entitlement under both programs, should receive that assistance primarily through the less expensive Montgomery program.

The statute's design also could reflect a preference for administrative simplicity. When multiple programs overlap, "deciphering precisely what level of benefits one is eligible for [can be] 'perplexing' for veterans and the university clerical workers that play a vital role in benefits processing." Keillor 186-187 (citation omitted). Congress could have decided to simplify matters by requiring veterans who seek both Montgomery and Post-9/11 benefits to receive them in a fixed order.

Petitioner's speculation about congressional intent is particularly inapt given the statute's legislative history. In 2010, a committee report accompanying proposed amendments to the Post-9/11 GI Bill stated:

> Under current law, an individual entering active duty may establish eligibility for the [Montgomery GI Bill] * * * and the Post-9/11 GI Bill based on the same period of service. * * * [T]his means that an individual, *who exhausts entitlement to 36 months of training under the [Montgomery GI Bill]*, can subsequently enroll and receive an additional 12 months of entitlement under the Post-9/11 GI Bill based on the same period of service.

S. Rep. No. 346, 111th Cong., 2d Sess. 19 (2010) (emphasis added).

The quoted passage recognized both (1) that the statutory scheme in its then-current form allowed a veteran to receive double credit for the same period of service, and (2) that a veteran seeking to use more than 36 months of benefits under the two programs combined would exhaust his Montgomery benefits before using Post-9/11 benefits. Congress changed the former rule, amending the statute to deny double credit for the same period of service from 2011 onward. See 38 U.S.C. 3322(h) and note. But Congress left the latter rule intact. That history disproves petitioner's claim that the regime produced by the text is so "absurd" that Congress "could not have intended" it. Pet. Br. 54 (citation omitted).

c. Petitioner additionally argues (Br. 55) that the government's reading is absurd because it treats non-veterans better than veterans. In particular, he claims (*ibid.*) that, if a veteran transfers his benefits to a non-veteran, see 38 U.S.C. 3020, 3319, the government's reading would allow the non-veteran to combine the benefits without invoking Section 3327's election mechanism and thus without triggering the limitation clause.

Petitioner's argument is incorrect; the government's reading applies equally to veterans and non-veteran beneficiaries. Section 3327(a) refers to an "individual" who retains unused Montgomery benefits, 38 U.S.C. 3327(a), and the limitation clause similarly refers to "an individual making an election," 38 U.S.C. 3327(d)(2). Those terms encompass both veterans and non-veteran beneficiaries. The Montgomery and Post-9/11 GI Bills also provide that a non-veteran beneficiary receives benefits "in the same manner as the individual from whom the entitlement was transferred," 38 U.S.C. 3020(h)(2), 3319(h)(2)(A), and that such a beneficiary

"shall be treated as the eligible individual for purposes of" the statutes' "administrative provisions," 38 U.S.C. 3020(h)(6), 3319(h)(7). A non-veteran beneficiary thus stands in the shoes of the transferring veteran; he would not be treated better than that veteran.

4. Petitioner's reliance on the veteran's canon is misplaced

Petitioner invokes (Br. 58-60) the "veteran's canon," *i.e.*, a presumption that Congress usually legislates with "solicitude" for veterans. *Henderson* v. *Shinseki*, 562 U.S. 428, 440 (2011). That canon provides no basis for adopting petitioner's proposed reading of Section 3327.

a. The veteran's canon "cannot overcome text and structure," *Arellano* v. *McDonough*, 598 U.S. 1, 14 (2023), but instead applies only in cases of "interpretive doubt," *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). No such doubt arises in this case. The limitation clause applies by its terms to petitioner, and the coordination clause confirms its applicability. The judges who dissented from the en banc court of appeals' decision argued that the veteran's canon applies even "when there is no ambiguity." Pet. App. 39a (Reyna, J., dissenting). But that view would transform the canon from a clue to congressional intent into a tool for overriding it.

b. In any event, petitioner's reading is not unambiguously pro-veteran. While a Section 3327 election entails some disadvantages, such as triggering the limitation clause, it has advantages as well. Such an election allows a veteran to recoup a prorated portion of contributions he has previously made to the Montgomery program. See 38 U.S.C. 3327(f). It also allows veterans who possess certain "critical skills" to receive extra benefits. 38 U.S.C. 3327(g) (capitalization omitted). As petitioner concedes (Pet. 37), his "understanding of the

statutory scheme precludes veterans with multiple periods of service from utilizing those [provisions]." That may explain why some of petitioner's amici reject his view (Br. 35) that Section 3327 "has no relevance for veterans with multiple periods of service." See Nat'l Veterans Legal Servs. Program Amici Br. 6 n.2 ("Veterans with multiple periods of service are free to [make an election] under § 3327, if they think the election is in their best interest.").

Petitioner argues (Br. 57) that, even though his reading would deprive veterans with multiple periods of service of the advantages associated with Section 3327 elections, it would still give them a "better deal" overall by allowing them to obtain 36 months of Post-9/11 benefits and 12 months of Montgomery benefits. But that response assumes that other veterans share petitioner's educational priorities—*i.e.*, that they, too, would like to attend graduate school and so would find it useful to have 48 months of benefits. Many veterans who seek educational benefits under the Montgomery or Post-9/11 GI Bill do not wish to attend graduate school, and at least some of those veterans would be worse off on petitioner's reading. For example, a veteran with two periods of service who wants to use a few months of benefits for vocational training may be better off under the statute as written (which allows him to make an election that boosts his monthly stipend) than under the statute as revised by petitioner (which would preclude him from making an election and would instead give him additional months of benefits that he does not wish to use). The veteran's canon does not entitle courts to pick winners and losers among veterans in that way.

5. The VA's interpretation of the statute is consistent with its regulations

Finally, petitioner argues in passing (Br. 54 & n.20) that the VA's interpretation of the statute conflicts with its own regulations. But as the en banc court of appeals recognized, "[t]here is no inconsistency." Pet. App. 17a n.8. Ever since Congress enacted the Post-9/11 GI Bill in 2008, the VA has understood that a veteran who is "already entitled to [Montgomery] benefits" "would have to make an irrevocable election" in order to start receiving Post-9/11 benefits. *Post-9/11 GI Bill*, 73 Fed. Reg. 78,876, 78,881 (Dec. 23, 2008). The VA has also understood that a veteran who makes such an election becomes subject to the limit specified in the limitation clause: the veteran "will be limited to one month [of Post-9/11 benefits] for each month * * * of unused [Montgomery benefits]." 38 C.F.R. 21.9550(b)(1). The regulations on which petitioner relies (Br. 54 n.20) address the interaction among benefits programs in general, not the specific issues raised by this case. See, *e.g.*, 38 C.F.R. 21.4022 (addressing the interaction among ten different programs).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 38 U.S.C. 3322 provides:

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 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.

2. 38 U.S.C. 3327 provides:

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.

3. 38 U.S.C. 3695 provides:

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).

(b) No person may receive assistance under chapter 31 of this title in combination with assistance under any of the provisions of law cited in subsection (a) of this section in excess of 48 months (or the part-time equivalent thereof) unless the Secretary determines that additional months of benefits under chapter 31 of this title are necessary to accomplish the purposes of a rehabilitation program (as defined in section 3101(5) of this title) in the individual case.

(c) The aggregate period for which any person may receive assistance under chapter 35 of this title, on the one hand, and any of the provisions of law referred to in subsection (a), on the other hand, may not exceed 81 months (or the part-time equivalent thereof).