Appeal No. 20-1637

In the United States Court of Appeals for the Federal Circuit

JAMES R. RUDISILL,

Claimant-Appellee,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,

Respondent-Appellant.

On Appeal from the United States Court of Appeals for Veterans Claims No. 16-4134, Judges Schoelen, Bartley, and Allen

EN BANC REPLY BRIEF OF RESPONDENT-APPELLANT DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

PATRICIA M. MCCARTHY
Director

MARTIN F. HOCKEY, JR.
Deputy Director

GALINA I. FOMENKOVA
Trial Attorney
United States Department of Justice
Civil Division
Commercial Litigation Branch
P.O. Box 480 | Ben Franklin Station
Washington, DC 20044
(202) 514-5495

Attorneys for the Secretary

OF COUNSEL

Y. KEN LEE
Deputy Chief Counsel
Office of General Counsel
U.S. Department of Veterans Affairs
810 Vermont Ave NW
Washington, DC 20420

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ARGUMENT

Amidst his continuing attempts to distract from the plain language that defeats his claim, Mr. Rudisill makes two dispositive concessions. First, although the Veterans Court held that § 3327 categorically does not apply to veterans with multiple periods of service, *e.g.*, Appx2, Appx12-13, Mr. Rudisill now agrees that § 3327 applies at least to some veterans "*regardless* of whether the veteran has one or more periods of qualifying service" and that "[t]he relevant trigger is, thus, whether the veteran chooses to 'coordinat[e]' an existing entitlement … *not* whether they have one or more periods of qualifying service." En Banc Resp. 53-54 (emphasis added). Second, Mr. Rudisill agrees, as he must and consistently has throughout this litigation, that "[h]e has 'used, but retains unused' Montgomery entitlement and seeks Post-9/11 benefits," which is all that § 3327(a)(1)(A), and by extension § 3327(d)(2) requires. En Banc Resp. 51 n.15. His attempts to get out from under the consequences of these dispositive—and inescapable—concessions all fail.

Mr. Rudisill's argument that he is nevertheless somehow not "'making an election under' § 3327(a)," and so does not "meet[] the 'parameters' of § 3327(d)(2)," En Banc Resp. 51 n.15, ignores reality—this case began because Mr. Rudisill decided that he wanted to switch to using Post-9/11 benefits rather than keep using his Montgomery benefits. If Mr. Rudisill never made that

election, there would be no need to determine how many months of Post-9/11 benefits he is entitled to in the first place. More globally, his argument tries to limit § 3327 as existing only to undo the election Congress mandated in § 3322(h)(1). That approach is unsupported by logic, history, practical reality, or the language of either provision. This Court should reject it in favor of the straightforward application of the terms of an unambiguous statute.

I. The Court Has Jurisdiction Over This Appeal

At the outset, Mr. Rudisill repeats the jurisdictional argument he made before the panel: that the notice of appeal filed under the express authority of the Attorney General was insufficient because it was filed before the Solicitor General completed his review and authorization of this appeal. Notably, this argument neither disputes that the notice of appeal itself was timely nor that this appeal is in fact authorized by the Solicitor General. *Cf. United States v. Providence Journal Co.*, 485 U.S. 693, 698 (1988) (cited by NVLSP Amicus at 20-21) (dismissal where the Solicitor General specifically *denied* authorization).

The panel correctly, and unanimously, rejected Mr. Rudisill's argument, "discern[ing] no reason to depart from" the other courts who have previously unanimously rejected similar arguments. Maj. Op. 11-13; Dis. Op. 1; *see Hogg v. United States*, 428 F.2d 274, 278 (6th Cir. 1970); *United States v. Hill*, 19 F.3d 984, 991 n.6 (5th Cir. 1994); *see also United States v. Marifat*, 2019 U.S. Dist.

Lexis 65153, at *3 (E.D. Cal. Apr. 16, 2019). And, although Mr. Rudisill continued to press it in his response to the petition for rehearing, Pet. Resp. 9 n.2, the Court did not request further briefing on this issue in the order granting en banc review. To the extent that the en banc Court nevertheless revisits the panel's disposition of this issue, it should continue to reject Mr. Rudisill's unsupported outlier position.

As he did before the panel, Mr. Rudisill premises his argument on *FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994). Far from being "on all fours" with the present case, En Banc Resp. 29, it is readily distinguishable (and so also has no effect on the courts' reasoning in *Hogg* and *Hill*, which remain good law, *contra* En Banc Resp. 32-33). Indeed, in its nearly 30-year history, we are aware of no court that has ever applied *FEC* in the way Mr. Rudisill urges here, despite the routine practice of filing protective notices of appeal.[1]

As the Supreme Court made clear, the lack of jurisdiction in that case turned

[1] Mr. Rudisill argues that "[a] practice's illegality [] is not inoculated by regularity," En Banc Resp. 32 n.8, but of course that which is expressly and specifically authorized—indeed mandated—is obviously not illegal. *See* DOJ Directive 1-15, § 6. Nor is the practice of filing protective notices of appeal before the Solicitor General has made a final determination hidden from courts or litigants, *contra* En Banc Resp. 32 n.8, as evidenced both by the cases that have explicitly rejected Mr. Rudisill's theory and the motions for extension that specifically seek to accommodate the completion of that review. In any event, because this internal process is of no jurisdictional significance, there is no need for litigants or courts to police it.

on "whether the [FEC] has statutory authority to represent itself in this case in this Court." *FEC*, 513 U.S. at 90 (alteration in original). The Court concluded that the FEC did not have such authority. Thus, "*[b]ecause* the FEC lacks statutory authority to litigate this case in this Court, it necessarily follows that the FEC cannot independently file a petition for certiorari," and so the Court had to consider whether the Solicitor General's subsequent attempted ratification could rectify that *unauthorized* act. *Id*. at 98.

But that foundational basis to the *FEC* decision is indisputably not applicable here. The Department of Justice—and specifically the Civil Division—is unquestionably authorized to represent the Secretary in this Court, the notice of appeal was filed pursuant to that authority, and no ratification is, therefore, necessary.[2] *See Hogg*, 428 F.2d at 278 ("We reject the contention that the regulation defining the jurisdiction of the Solicitor General forecloses the Attorney

[2] To be sure, the Attorney General did not himself personally file the notice of appeal, but the delegation to and subsequent re-delegation from the Assistant Attorney General of the Civil Division does not change the ultimate source of that authority. Mr. Rudisill's suggestion that the Assistant Attorney General of the Civil Division—who, not accidentally, is in the signature block of the notice of appeal and all of our pleadings—does not have actual authority to litigate cases specifically delegated to the Civil Division is nonsensical. *Contra* En Banc Resp. 31; *see* 28 C.F.R. § 0.45 ("The following-described matters are assigned to, and shall be conducted, handled, or supervised by, the Assistant Attorney General, Civil Division …(h) litigation by and against the United States, its agencies, and officers in all courts … to defend challenged actions of Government agencies and officers, not otherwise assigned[.]").

General from directing that a notice of appeal be filed[.]").

Nor can there be any real dispute that protective notices of appeal are not only authorized by the Attorney General, but indeed specifically required in these circumstances. Although Mr. Rudisill tries to quibble with the DOJ Directive, En Banc Resp. 30, its plain language is unambiguous and unconditional:

> 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. Nothing in the foregoing directive affects this obligation.*

DOJ Directive 1-15, § 6, available at 28 C.F.R. Pt. 0, Subpt. Y, App. (emphasis added). Thus, as in *Hogg*, "[t]he authority for [the] filing [of the notice of appeal here] runs directly from the Attorney General to the [undersigned], independently of the duties of the Solicitor General." 428 F.2d at 279-80.

In short, the Secretary complied with both this Court's jurisdictional statute and all internal directives, including the proper role of the Solicitor General in authorizing this appeal. Consistent with the unanimous view of the other circuits to have addressed the question, this Court should re-affirm the panel's conclusion "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." Maj. Op. 13.

II. Section 3327 Says Nothing About Periods Of Service And Unambiguously Applies To Mr. Rudisill

Mr. Rudisill chastises our brief for "focusing almost exclusively on §§ 3322(d) and 3327," En Banc Resp. 5, but that is where the dispute lies. It is hardly surprising that a brief would focus on the statutory language which, the application or not thereof, controls the outcome of the litigation. What *is* surprising—though telling—is how *little* attention Mr. Rudisill devotes to the actual statutory text.

Instead, Mr. Rudisill makes his pitch based on some abstract "context," nebulous "purpose," or negative "implication" of other statutory provisions. *E.g.*, En Banc Resp. 5, 23-24, 36-38, 40. Indeed, Mr. Rudisill's brief could be read as suggesting that his interpretation is supported by almost anything *other* than the text of the disputed provision itself.[3] But as even he agrees—in principle if not in practice—"[s]tatutory interpretation begins with the text." En Banc Resp. 35. "When the words of a statute are unambiguous … judicial inquiry is complete." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (citation and quotation omitted). "In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself.

[3] As we explain below, and in our opening brief, Mr. Rudisill is also just wrong that the other statutory provisions conflict with our straightforward interpretation of § 3327. In fact, our interpretation is only further reinforced by this "context." *See* En Banc Op. Section II.B; Section II.B, below.

Where, as here, that examination yields a clear answer, judges must stop." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (citation omitted). There can be no question that the statute's "purpose" may not be used to subvert the actual statutory text.

Unsurprisingly, therefore, the Supreme Court has explicitly rejected Mr. Rudisill's approach to statutory interpretation, noting that "no statute yet known pursues its stated purpose at all costs" and "it is quite mistaken to assume, as petitioners would have us, that whatever might appear to further the statute's primary objective must be the law." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (alteration adopted, quotation and citation omitted).

Instead, as the Supreme Court explained, "[l]egislation is … the art of compromise, the limitations expressed in statutory terms often the price of passage." *Id*. And so, "[f]or these reasons and more besides" the Supreme Court refused to "presume with petitioners that any result consistent with their account of the statute's overarching goal must be the law"—as Mr. Rudisill urges here—but instead "presume[d] more modestly [] 'that the legislature says what it means and means what it says.'" *Id*. (alteration added and removed, quoting *Dodd v. United States*, 545 U.S. 353, 357 (2005)); *see Food Mktg.*, 139 S. Ct. at 2364 ("Even those of us who sometimes consult legislative history will never allow it to be used to muddy the meaning of clear statutory language.") (citation and quotation omitted).

This Court should follow the Supreme Court's lead and assess the application of § 3327 based on what § 3327 *actually says*.[4]

When it comes to the actual language of § 3327 (and § 3322(d)), Mr. Rudisill makes two arguments, one irrelevant and one erroneous: (1) he argues that the election in § 3327(a) is voluntary, and (2) that he somehow is not "coordinating" his Montgomery and Post-9/11 benefits. Neither argument exempts him from the limit imposed by § 3327(d)(2).

A. Although The Election In § 3327(a) Is Voluntary, The Consequences Thereof Are Mandatory

Mr. Rudisill's first argument—that the election in § 3327 is voluntary, En Banc Resp. 49-50—is true, but beside the point. Mr. Rudisill made that voluntary election here. For that reason, Mr. Rudisill's further argument that "nothing in the text of all of Chapter 33, much less §§ 3322(d) and 3327, supports the Secretary's position that Mr. Rudisill could qualify for Post-9/11 benefits only after he exhausts his Montgomery benefits," En Banc Resp. 54, is also a red herring. We never suggested anything of the kind. Mr. Rudisill is—and always has been, Appx57; Appx513—indisputably free to begin using his Post-9/11 benefits without

[4] We do not separately address Mr. Rudisill's (or the NVLSP Amicus) discourse on the history of GI bills not to signal our agreement but because it is fundamentally irrelevant. There is no historical analog of § 3327, but that does not make it any less enforceable. Congress is free to do new things—especially when "faced [with] a novel issue." En Banc Resp. 46. And indeed, each GI bill was different and unique in its own ways.

exhausting his Montgomery benefits.

But the exercise of that indisputably voluntary choice comes with consequences and those consequences are equally indisputably mandatory. That is, while a veteran who has dual entitlement and unused Montgomery benefits remaining "*may* elect to receive educational assistance under" Post-9/11, once he or she does so, "the number of months of entitlement of the individual to educational assistance under [Post-9/11] *shall be* the number of months equal to the number of months of unused [Montgomery] entitlement." § 3327(a) & (d)(2) (emphasis added). In other words, Mr. Rudisill's entitlement to Post-9/11 benefits is limited to the number of months of his unused Montgomery benefits precisely *because* Mr. Rudisill *voluntarily* elected to use Post-9/11 benefits having "used, but retain[ed] unused" Montgomery benefits.[5] [6]

[5] For that reason, the individual amici—really other individual claimants—are simply wrong that "VA wants to cut [anyone] down to 36 months" where they "are rightfully entitled to 48 months of education benefits." *Contra* ECF 88 at 2. First, VA cannot provide benefits contrary to the limits imposed by Congress. Second, while we do not have the records for those individuals here, assuming they do have dual Montgomery and Post-9/11 entitlement, they could obtain 48 months of benefits by exhausting Montgomery before claiming their Post-9/11 benefits.

[6] Mr. Rudisill's arguments based on § 3322(a) are similarly irrelevant. The fact that Mr. Rudisill—again undisputedly—can consecutively receive Montgomery and then Post-9/11 benefits implies nothing, negatively or otherwise, about how many months of Post-9/11 benefits he can get. *Contra* En Banc Resp. 40. That question is addressed in other provisions, like § 3327(d)(2).

B. Mr. Rudisill Is Coordinating His Benefits

Mr. Rudisill's second argument—indeed the crux of the interpretation he advances—is that he is not "coordinating" his Montgomery and Post-9/11 benefits because "coordination" is only required if a veteran is trying to *re-credit* the *same* period of service. En Banc Resp. 48-49. That argument is wrong at every step.

First, that is not what "coordination" means. Although Mr. Rudisill repeatedly uses the term "benefit-exchange" to describe what he believes § 3322(d) (and by extension § 3327) are limited to—a term he coined for this brief, but one that does not appear in the statute, regulations, or the Veterans Court's decision—§ 3322(d) states that "*coordination* of entitlement to educational assistance … shall be governed by" § 3327 *not* merely "*exchange* of entitlement." (emphasis added). If Congress wanted to limit the direction in § 3322(d) in the way Mr. Rudisill now claims, it would have said so. It did not. Whatever else, Mr. Rudisill is absolutely trying to "coordinate" the use of his benefits: this case, at its most basic, is over how the use of one program affects the other.[7]

Second, although it forms the foundational basis of Mr. Rudisill's entire theory, there is no such thing as a "vested or inchoate entitlement" to education

[7] Moreover, even if § 3322(d) *did* say "exchange" rather than "coordination" that still would not necessarily dictate the scope of the application of § 3327, which is where the critical limit actually lies. Section 3327, notably, uses neither the term "coordination" nor "exchange," and Mr. Rudisill meets the terms of the statute as written. En Banc Op. Section II.A.1.

benefits (no matter how many times Mr. Rudisill repeats the phrase) that gets credited prior to use. *Contra* En Banc Resp. 47, 14 & n.5. As we explained in our opening brief—and Mr. Rudisill steadfastly ignores in his response—the crediting of a period of service to the Montgomery or Post-9/11 programs occurs at the point of actually applying to *use* benefits. *See* En Banc Op. 36-37. Individuals who merely contribute to Montgomery during their first year of service—as they must to preserve eligibility—have *not* at that point credited that service to Montgomery (and neither § 3011(b) nor § 3012(c) say otherwise). *Contra e.g.*, En Banc Resp. 48, 13-14 & n.5.[8]

Third, the crediting of a period of service to Montgomery or Post-9/11 is required by § 3322(h)(1), which Congress only added in the Post-9/11 Veterans Education Assistance Improvements Act of 2010 and it only became effective August 1, 2011. 111 P.L. 377, 124 Stat. 4106, 4121. But, as we also noted in our opening brief and Mr. Rudisill does not address, the limit now codified in § 3327(d)(2) was enacted with the original Post-9/11 bill and so was in effect for two years before any such crediting was required. *See* En Banc Op. Section II.B.2. If—as Mr. Rudisill claims—the provisions in § 3327 exist only to facilitate *re-crediting* of periods of service, why would Congress have included them when no

[8] Mr. Rudisill notes that the Post-9/11 program does not have the same opt-out option that Montgomery does. En Banc Resp. 11. That is because the Post-9/11 program does not have a contribution requirement; there is nothing to opt-out of.

such crediting occurred? Mr. Rudisill does not say.

Finally, Congress added § 3322(h)—a "bar to duplication of eligibility based on a single event or period of service"—specifically to *prevent* veterans from obtaining both Montgomery *and* Post-9/11 benefits based on the *same* period of service. *See* S. Rpt. 111-346 at 19. In other words, under Mr. Rudisill's proffered interpretation—where veterans with a single period of service still get the benefit of dual entitlement even after August 1, 2011—the provisions now codified in § 3327 purportedly enable precisely that which Congress added § 3322(h) to specifically prevent. That is an absurd reading of not one, but two congressional directives.

At bottom, prior to August 1, 2011, veterans did not credit their active-duty service to either Montgomery or Post-9/11 benefits at all and so could use a single period of service to obtain both Montgomery *and* Post-9/11 benefits (including even 48 months of benefits overall if they exhausted their Montgomery benefits first, *see* S. Rpt. 111-346 at 19). But even after August 1, 2011, veterans who merely do not opt out of the Montgomery program—and therefore pay the contribution required from their first-year salary—have *not* credited that period of service under § 3322(h) and can apply for Post-9/11 benefits in the first instance. What they *cannot* do, should they begin actually using Montgomery benefits, is obtain Post-9/11 benefits based on the same period of service. Thus, at best, under

Mr. Rudisill's argument, the provisions now codified in § 3327 either did nothing for the first two years of the program's existence, or they govern a scenario that has since been prohibited; at worst, it is both. Either way, Mr. Rudisill's argument reduces the provisions now codified in § 3327 to a nullity. That cannot be correct.

Moreover, while Mr. Rudisill tries to shift focus to this issue of crediting and potentially re-crediting periods of service to justify his alternate approach to integrating these two programs, it remains a distraction from the core dispute. The possibility (or lack thereof) of re-crediting a period of service does not change the fact that § 3327(d)(2), and (a)(1)(A), make no mention of periods of service at all and simply do not differentiate veterans on that basis. That is, even if § 3322(h)(1) did not prevent veterans from re-crediting the same period of service from Montgomery to Post-9/11 as Mr. Rudisill posits (or in the case of a veteran who served prior to August 1, 2011 where no crediting is required), that does not change to whom § 3327 applies. Section 3327(d)(2), by its plain and unambiguous terms, applies to *all* veterans who elect to use Post-9/11 benefits while having unused Montgomery benefits remaining; that indisputably includes Mr. Rudisill.

C. Section 3695 Is Not The Only Limit That Applies

Mr. Rudisill claims that "veterans who qualify for the Montgomery and Post-9/11 GI Bills under separate periods of qualifying service are entitled to 36 months under each program, subject *only* to 38 U.S.C. § 3695(a)'s 48-month cap."

En Banc Resp. 34 (emphasis added). To be sure, the 48-month cap in § 3695 is *another* limit that could apply to veterans using both Montgomery and Post-9/11 benefits (or any of the other dozen-plus programs enumerated therein). But Mr. Rudisill fundamentally fails to justify why § 3695 would be the *only* applicable limit.

First, Mr. Rudisill argues that "§ 3695(a) clearly contemplates that some veterans will be able to use benefits under [Montgomery and Post-9/11] programs up to the 48-month cap." En Banc Resp. 56. That is, of course, unequivocally true under our interpretation as well. In particular, there is no dispute that veterans who exhaust their Montgomery benefits prior to switching to Post-9/11 benefits could do so. So too could veterans who are entitled to other programs of education benefits beyond Montgomery or Post-9/11. As we explained in our opening brief, the limits in § 3327(d)(2) and § 3695 are cumulative. En Banc Op. Section III.

Second, Mr. Rudisill claims that "[t]here is no 'clear indication that Congress wished to impose the harsh consequence' of 'multi-program beneficiaries' with separate periods of qualifying service being unable to obtain benefits up to the 48-month cap, should they wish to obtain Post-9/11 benefits before exhausting their Montgomery entitlement." En Banc Resp. 57 (emphasis removed); *see also* NVLSP Amicus at 12. But Congress explicitly stated that for individuals who have "used, but retain[] unused, [Montgomery] entitlement," and

elect to receive Post-9/11 benefits, their Post-9/11 entitlement "shall be" limited to "the number of months of unused [Montgomery] entitlement." § 3327(a)(1)(A) & (d)(2)(A). Even assuming that 36 months of education benefits is a "harsh consequence"—and not the plainly presumptive amount Congress intended to give for active-duty service—it is difficult to imagine a clearer indication than that.

Finally, Mr. Rudisill argues that the Post-9/11 "entitlement provisions expressly are subject only to § 3695(a)'s 48-month cap, and not … §§ 3322(d) and 3327." En Banc Resp. 23-24; *id*. at 37-38 ("[T]here is no reference to those statutes in §§ 3311 and 3312."). This argument proves either too little or too much. Congress enacted an entire *chapter* of laws related to Post-9/11 benefits most of which are (mercifully) *not* explicitly mentioned in §§ 3311 or 3312. But that does not mean that those provisions do not apply. For example, § 3322(a), which Mr. Rudisill admits applies and prevents veterans from using Montgomery and Post-9/11 benefits concurrently is *also* not referenced in either §§ 3311 or 3312. So too, § 3322(h)(1), which Mr. Rudisill misunderstands, but does not dispute that it applies. Statutory drafting is hard enough without converting it into a byzantine web of cross-references. Section 3327 identifies the universe of veterans it covers—and Mr. Rudisill meets that definition—that is enough.

III. The Pro-Veteran Canon Is Inapplicable Here And Does Not Support Mr. Rudisill's Position Regardless

Mr. Rudisill finally argues that "[t]he Court has before it two dueling

interpretations that are premised on competing tools of statutory construction pulling in opposite directions." En Banc Resp. 65. Consequently, Mr. Rudisill suggests that "the Court should apply the pro-veteran canon to resolve any 'remaining interpretive doubt' about the role of §§ 3322(d) and 3327 within the statutory scheme." *Id*. Mr. Rudisill is wrong on both counts: the statute is not ambiguous and the pro-veteran canon does not apply.

The "dueling interpretations" here are *not both* "premised on competing tools of statutory construction pulling in opposite directions." "A panel majority of this Court, the Veterans Court, [and] Mr. Rudisill" arrive at their interpretation by refusing to grapple with the text of the relevant statute itself. That is not "a reasonable reading of the statutory scheme [] in context and as a harmonious whole." *Contra* En Banc Resp. 65. And the resulting interpretation by definition cannot, and does not, "give effect to all of the statutory language." *Contra id*.

Therefore, although we also disagree with Mr. Rudisill (and the amici) that "statutory analysis should *begin* with Congress's pro-veteran goals in mind" and submit that this case actually illustrates the dangers of doing so, the dispute over the proper role of the pro-veteran canon is not one the Court need resolve here because the actual text of statute leaves no room for "interpretive doubt." *Contra* En Banc Resp. 63-66 & n.20 (emphasis added); *see Kisor v. McDonough*, 995 F.3d 1347 (Fed. Cir. 2021) (denying rehearing en banc) (Prost, C.J. concurring)

(Hughes, J. concurring) (Dyk, J. concurring); *see also Director v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135-36 (1995) ("[T]he proposition that the statute at hand should be liberally construed to achieve its purposes"—the thrust of Mr. Rudisill's argument here—is the "last redoubt of losing causes. … Every statute purposes, not only to achieve certain ends, but also to achieve them by particular means.").[9]

Moreover, even if the pro-veteran canon was considered, Mr. Rudisill ignores the ways in which his interpretation actually hurts veterans who have different educational priorities than he does. *See* En Banc Op. Section II.A.3.[10]

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[9] Mr. Rudisill also claims that it is somehow "telling" that the Secretary does not request *Chevron* deference here, speculating that it signals that VA's implementing regulations "all support Mr. Rudisill's position." En Banc Resp. 64 n.19; *see also* NVLSP Amicus at 13 n.5. Nothing could be further from the truth. No *Chevron* deference is necessary because the statute is clear and unambiguous. *If* Mr. Rudisill was correct that VA's regulations were somehow inconsistent with that unambiguous language, the fault would lie in the regulations, not the other way around. In fact, although unnecessary given the clear statutory language, the relevant regulations are perfectly consistent with our interpretation. *See* 38 C.F.R. § 21.9550(b)(1). The Veterans Court simply ignored them. *See* Appx25-27.

[10] To the extent that the amici can be read as attempting to take up this mantle instead, they also fail. The NVLSP Amicus suggests that it would be up to the *veteran* to decide whether § 3327 applies, ECF 85 at 17-18, but that is not how laws work. And the individual amici merely say that but-for the limit in § 3327 they could have (and so could transfer) 12 more months of Post-9/11 benefits. *See generally* ECF 88. That discussion collapses into nothing more than a policy dispute—the proper audience for which is Congress not this Court. The fact that some veterans would prefer that Congress *not* impose the limit in § 3327(d)(2) does not change the fact that Congress *did* impose it or that other veterans could benefit from the other provisions in § 3327 that Congress coupled with it.

Instead, he premises his argument on a series of "red flags" that simply do not exist.

Most fundamentally, as his response brief makes clear, Mr. Rudisill's "pro-veteran" pitch is premised on his mistaken view that "nearly all new servicemembers [are] crediting their first period of service to Montgomery." En Banc Resp. 67. They are not; at least not unless they specifically want to. As we explain above, Section II.B, merely contributing to Montgomery during your first year of service does *not* credit that service to Montgomery under § 3322(h).

Education benefits are also *not* intended to "assist [the] longest serving veterans"—indeed, both Montgomery and Post-9/11 programs set three-year thresholds, beyond which more service does not beget more benefits under either program. *Contra* En Banc. Resp. 68; *see* §§ 3011(a), 3013(a), 3311(b), 3312(a). In other words, these maximum threshold provisions—which Mr. Rudisill accepts as given—absolutely mean that "whether [a veteran] serve[s] eight or 28 years" they could get the same amount of education benefits. *Cf*. En Banc Resp. 4.

Nor are §§ 3322(d) or 3327 "a trap for the unwary" or "limit[] benefits based on when an application is filed or benefits used." *Contra* En Banc Resp. 68. The statute, regulation, and VA's application form are explicit about the consequences of making the election to use Post-9/11 benefits; and indeed, Mr. Rudisill has never suggested that he misunderstood how the VA actually administered them in

practice. Moreover, as of January 1, 2017, the Secretary is empowered to "make an alternative election on behalf of the individual" if "the Secretary determines [that it] is in the best interests of the individual." § 3327(h)(1). And the limits imposed by § 3327(d)(2) plainly do not depend on *when* benefits were either used or applied for, *contra* En Banc Resp. 67, 68, but rather on *how* a veteran decides to use—or as one might say "coordinate" the use of—their dual entitlement. There is nothing irrational about applying the provisions Congress drafted to the very situations they were enacted to address. *Contra* En Banc Resp. 68-69; *see Conn. Nat'l Bank*, 503 U.S. at 254 ("It would be dangerous in the extreme to infer … that a case for which the words of an instrument expressly provide, shall be exempted from its operation.") (alteration in original, quoting *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202 (1819)).

And Congress was not "taking away benefits available to post-9/11 veterans under other programs, should they want Post-9/11 benefits." *Contra* En Banc Resp. 67. There is no dispute that veterans who wish to use all 36 months of their Montgomery benefits can do so. What Congress was giving veterans was a choice; but the fact that this choice came with consequences or fewer options than Mr. Rudisill would have preferred is not at all "hard to fathom," *contra* En Banc Resp. 67; that is what Congress routinely does.

CONCLUSION

The Veterans Court's plainly results-driven approach to statutory construction—unmoored from the language in the operative statute itself, Appx12-13, 29 n.17—turns Congress's carefully-balanced and explicitly expressed policy choices completely on their head. It is now up to this Court to uphold the plain and unambiguous terms as Congress wrote them. The Veterans Court's decision should be reversed.

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

PATRICIA M. MCCARTHY
Director

/s/ Martin F. Hockey, Jr.
MARTIN F. HOCKEY, JR.
Deputy Director

OF COUNSEL

Y. KEN LEE
Deputy Chief Counsel
Office of General Counsel
U.S. Department of Veterans Affairs
810 Vermont Ave NW
Washington, DC 20420

/s/ Galina I. Fomenkova
GALINA I. FOMENKOVA
Trial Attorney
United States Department of Justice
Civil Division
Commercial Litigation Branch
P.O. Box 480 | Ben Franklin Station
Washington, DC 20044
(202) 514-5495

Attorneys for the Secretary

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(g)(1)

This brief complies with the type-volume limitation of Federal Circuit Rule 32(b)(1). The brief contains 5,080 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b).

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/s/ Galina I. Fomenkova
GALINA I. FOMENKOVA

Attorney for the Secretary