No.

IN THE

Supreme Court of the United States

JOSHUA E. BUFKIN,

Petitioner,

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,

Respondent.

NORMAN F. THORNTON,

Petitioner,

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

For more than a century, veterans have been entitled to the benefit of the doubt on any close issue relating to their eligibility for service-related benefits. As presently codified, "[w]hen there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary [of Veterans Affairs] shall give the benefit of the doubt to the claimant." 38 U.S.C. § 5107(b).

In 2002, Congress enacted the Veterans Benefits Act. Among other things, the Act supplemented the responsibilities of the U.S. Court of Appeals for Veterans Claims (the "Veterans Court") by requiring it to "take due account of the Secretary's application of section 5107(b)" as part of its review of benefits appeals. 38 U.S.C. § 7261(b)(1).

In these cases, the Federal Circuit held that § 7261(b)(1) "does not require the Veterans Court to conduct any review of the benefit of the doubt issue beyond the clear error review" of underlying factual findings—something already required by the pre-2002 review statute, under 38 U.S.C. § 7261(a). Pet. App. 16a-17a (quoting Pet. App. 8a-11a).

The question presented is: Must the Veterans Court ensure that the benefit-of-the-doubt rule was properly applied during the claims process in order to satisfy 38 U.S.C. § 7261(b)(1), which directs the Veterans Court to "take due account" of VA's application of that rule?

RELATED PROCEEDINGS

Joshua E. Bufkin v. Denis McDonough, Secretary of Veterans Affairs, No. 22-1089 (Fed. Cir. judgment entered Aug. 3, 2023)

Joshua E. Bufkin v. Denis McDonough, Secretary of Veterans Affairs, No. 20-3886 (Vet. App. judgment entered Aug. 18, 2021)

Norman F. Thornton v. Denis McDonough, Secretary of Veterans Affairs, No. 21-2329 (Fed. Cir. judgment entered Aug. 9, 2023)

Norman F. Thornton v. Denis McDonough, Secretary of Veterans Affairs, No. 20-882 (Vet. App. judgment entered July 6, 2021)

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INTRODUCTION

These cases present an important question of statutory interpretation that arises repeatedly; that the Federal Circuit, which has exclusive jurisdiction over the issue, has now definitively resolved in a way that contravenes the statutory text and clear congressional intent; and that will, absent this Court's intervention, deprive untold numbers of veterans of the protections afforded them by law.

There may be no more fundamental precept in the system of veterans' benefits than the rule that the veteran, not the government, receives the benefit of the doubt in a close case. That rule, which has been observed for more than a century, is now codified at 38 U.S.C. § 5107(b): "When there is an approximate balance of positive and negative evidence regarding any issue material to the determination" of a benefits claim, the Department of Veterans Affairs "shall give the benefit of the doubt to the claimant."

When Congress first provided for judicial review of veterans' benefits claims in 1988, it created the Veterans Court and charged that tribunal to apply to VA's decisions a standard of review similar to the one in the Administrative Procedure Act. Like a court reviewing an agency decision under the APA, the Veterans Court must set aside VA benefits decisions found to be arbitrary or capricious, decide relevant questions of law in benefits appeals, set aside erroneous factual findings, and apply a harmless-error rule. 38 U.S.C. § 7261; *see Shinseki v. Sanders*, 556 U.S. 396, 406 (2009).

More recently, in the Veterans Benefits Act of 2002, Congress separately required the Veterans Court to enforce the benefit-of-the-doubt rule codified in § 5107(b). That Act, the principal provision of which is now codified at 38 U.S.C. § 7261(b)(1), requires the Veterans Court to "review the record of proceedings" and "take due account of the Secretary's application of section 5107(b)" as part of its review of benefits appeals.

At issue in these cases is the meaning of that important 2002 statutory amendment. Even though the text of § 7261(b)(1) plainly expands the remit of the Veterans Court by requiring it to review the benefit-of-the-doubt issue, and despite clear evidence that Congress intended the Veterans Court to enforce the benefit-of-the-doubt rule, the Federal Circuit held that § 7261(b)(1) requires nothing beyond what was already provided for by other, pre-2002 provisions governing Veterans Court review.

Specifically, the Federal Circuit held that § 7261(b)(1) requires only that the Veterans Court review VA's factual findings for clear error—something already mandated by § 7261(a)—not that it meaningfully review whether the claimant actually received the benefit of the doubt on close factual issues, as § 5107(b) requires. The Federal Circuit's holding is contrary to text, statutory history, and the overall scheme of veterans' claims adjudication, and it merits this Court's review.

The proper interpretation of § 7261(b)(1) is an important and recurring issue. The statute applies to the Veterans Court's review of every benefits

appeal—many thousands of cases each year. And § 7261(b)(1) is the primary mechanism Congress selected to enforce the benefit-of-the-doubt rule—among the oldest and most fundamental building blocks of the veterans' claims system. If left to stand, the Federal Circuit's decisions will severely narrow the Veterans Court's review, resulting in many veterans being denied benefits which they have earned through their service and to which they are entitled by law.

These cases provide an ideal vehicle to set things right. Petitioner Joshua Bufkin and Petitioner Norman Thornton were each denied benefits despite evidence on material issues that appeared to be in "approximate balance." In other words, in both cases, VA failed to afford Petitioners the benefit of the doubt as required by § 5107(b). The Veterans Court, however, failed to review or remedy these errors on appeal, notwithstanding § 7261(b)(1)'s instruction.

The Federal Circuit considered both appeals simultaneously, invited multiple rounds of briefing on the statutory interpretation issues, and ultimately rejected both Petitioners' claims. In doing so, the Federal Circuit adopted a definitive and erroneous interpretation of § 7261(b)(1) that will govern Veterans Court appeals going forward and that is unlikely to change without this Court's review, as the subject matter falls within the Federal Circuit's exclusive jurisdiction.

This Court's review is urgently needed to correct the Federal Circuit's misinterpretation of a statute of

great importance to our nation's veterans. The Court should grant the petition.

OPINIONS AND ORDERS BELOW

The decision of the Federal Circuit in *Bufkin v. McDonough* is reported at 75 F.4th 1368 and reproduced at Pet. App. 1a-12a. The decision of the Court of Appeals for Veterans Claims is unreported and reproduced at Pet. App. 18a-31a. The decision of the Board of Veterans' Appeals is unreported and reproduced at Pet. App. 55a-67a.

The decision of the Federal Circuit in *Thornton v. McDonough* is unreported and reproduced at Pet. App. 13a-17a. The decision of the Court of Appeals for Veterans Claims is unreported and reproduced at Pet. App. 32a-54a. The decision of the Board of Veterans' Appeals is unreported and reproduced at Pet. App. 68a-92a.

JURISDICTION

The Federal Circuit entered judgment in *Bufkin v. McDonough* on August 3, 2023. Pet. App. 1a. On October 17, 2023, this Court extended the due date for a petition for a writ of certiorari in Mr. Bufkin's case to and including December 31, 2023. The Federal Circuit entered judgment in *Thornton v. McDonough* on August 9, 2023. Pet. App. 13a. On October 16, 2023, this Court extended the due date for a petition for a writ of certiorari in Mr. Thornton's case to and including January 2, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

38 U.S.C. § 7261(b) provides in pertinent part:

> In making the determinations under subsection (a), the Court shall review the record of proceedings before the Secretary and the Board of Veterans' Appeals pursuant to section 7252(b) of this title and shall—
>
> > (1) take due account of the Secretary's application of section 5107(b) of this title; and
> >
> > (2) take due account of the rule of prejudicial error.

38 U.S.C. § 5107(b) provides in pertinent part:

> The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.

These statutes and 38 C.F.R. § 3.102 are reproduced in full at Pet. App. 95a-99a.

STATEMENT OF THE CASE

Veterans are entitled to the benefit of the doubt on close issues relating to benefits

It is a longstanding policy in veterans' law that the veteran, not the government, receives the benefit of the doubt on any close issue. The benefit-of-the-doubt rule is among the oldest principles of veterans' claim adjudication. The policy giving veterans the benefit of the doubt in close cases dates "back to the post-Civil War era when determining the extent of a veteran's disability … was done on a case-by-case basis by Bureau of Pension physicians." 50 Fed. Reg. 34452-02, 34454 (Aug. 26, 1985). It has persisted ever since in the formal regulations that govern VA's adjudication of benefits claims. 38 C.F.R. § 3.102. The rule reflects the policy and aspiration to generously ensure decent treatment for veterans, and it is one key example of the non-adversarial nature of the VA disability claims process. *See Sugrue v. Derwinski*, 26 F.3d 8, 12 (2d Cir. 1994) ("A veteran claiming disability benefits from the VA enjoys 'a beneficial non-adversarial system' of adjudicating veterans benefits claims in which the VA is 'to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits.'") (quoting H.R. Rep. No. 100-963, pt. 1, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5795).

The doctrine is currently codified in 38 U.S.C. § 5107(b), which states that, when there is "an approximate balance of positive and negative evidence" regarding any "material" issue, "the Secretary shall give the benefit of the doubt to the claimant." VA's counterpart regulation likewise states that any

"reasonable doubt … will be resolved in favor of the claimant." 38 C.F.R. § 3.102. It defines "reasonable doubt" as "one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim." *Id.*; *see Lynch v. McDonough*, 21 F.4th 776, 781-82 (Fed. Cir. 2021) (en banc), *cert. denied*, 143 S. Ct. 369 (2022) (evidence must "persuasively favor[] one side or the other" to avoid benefit-of-the-doubt rule).

The benefit-of-the-doubt doctrine "is in keeping with the high esteem in which [this] nation holds those who have served in the Armed Services." *Gilbert v. Derwinski*, 1 Vet. App. 49, 54 (1990). And it is one of the "singular characteristics of the review scheme that Congress created for the adjudication of veterans' benefits claims," reflecting longstanding solicitude for veterans and "'plac[ing] a thumb on the scale in the veteran's favor.'" *Henderson v. Shinseki*, 562 U.S. 428, 440 (2011) (citation omitted).

Congress passes the Veterans Benefits Act of 2002, providing for Veterans Court enforcement of the benefit-of-the-doubt rule

Despite its long history and consistent efforts from Congress to mandate VA's compliance, in practice the benefit-of-the-doubt rule has proved illusory for many veteran claimants. In response to an advocacy effort that included, among other things, testimony at congressional hearings that VA was "systematically antagonistic to" and "fail[ed] to accord a reasonable doubt in favor of" veterans, *Judicial Review of Veterans' Affairs: Hearing Before the H.*

Comm. on Veterans' Affairs, 100th Cong. 60 (1988) (statement of Rick O'Dell, Vietnam Veterans of America), Congress passed legislation in 1988 that, for the first time, allowed for judicial review of VA benefits decisions. The Veterans' Judicial Review Act ("VJRA") established the Veterans Court and gave it the authority to "set aside" decisions of the Board of Veterans' Appeals. Pub. L. No. 100-687, § 4061(a), 102 Stat. 4105, 4115 (1988). As noted above, the VJRA set out an APA-style standard of review, complete with a directive for the court to "take due account of the rule of prejudicial error," but it afforded deferential clear-error review (rather than substantial-evidence review) to VA's factfinding. *Id.* § 4061(a)(4), (b). Separately in this same legislation, Congress also codified the benefit-of-the-doubt rule. *Id.* § 3007(b), 102 Stat. at 4106-07.

But the hope that codification and judicial review would lead to more vigorous enforcement of the benefit-of-the-doubt rule was not fulfilled. More than a decade later, various Veterans Service Organizations "voiced frustration with the perceived lack of searching appellate review of [Board] decisions" and the Veterans Court's "large measure of deference" to the Board's factfinding, which, they argued, "may result in failure to consider the 'benefit of the doubt' rule." S. Rep. No. 107-234, at 17 (2002).

In response, Congress passed the legislation directly relevant here, which added § 7261(b)(1), directing the Veterans Court to "take due account of the Secretary's application of section 5107(b) of this title." Veterans Benefits Act of 2002, Pub. L. No. 107-330, § 401, 116 Stat. 2820, 2832. The statutory

changes also permitted the Veterans Court to "reverse," not just "set aside," erroneous factual determinations. *Id.* And they required the Veterans Court to "review the record of proceedings before the Secretary and the Board of Veterans' Appeals." *Id.*

Mr. Bufkin is denied benefits despite close evidence

Petitioner Joshua Bufkin honorably served in the United States Air Force from September 2005 until March 2006. Pet. App. 18a (citing BRBA1487).[1] During this time, Mr. Bufkin sought counseling services to discuss the mental health of his spouse and the effect her health was having on his training. BRBA775. Mr. Bufkin was told that he "had two options": he could either "divorce [his] wife and … stay in the military," or he could "take a General Discharge and leave under a Hardship." BRBA843. In response, Mr. Bufkin submitted a letter seeking termination of his service, and he was discharged. BRBA1487.

Mr. Bufkin later submitted a claim for service connection for post-traumatic stress disorder. BRBA904-905. In support, Mr. Bufkin included a letter from his treating physician at his local VA healthcare clinic, Dr. Robert Goos, who had performed a "comprehensive psychiatric evaluation" and conducted follow-up visits for a year. BRBA489. According to Dr. Goos, Mr. Bufkin presented with "avoidance behaviors," "prominent emotional numbing," "prominent hyperarousal," and "nightmares"

[1] Citations to the Record Before the Agency are in the form of "BRBA__" for Mr. Bufkin and "TRBA__" for Mr. Thornton.

caused by the military's ultimatum to "either divorce [his wife] or leave the military." BRBA489-490. Dr. Goos concluded: "It is clear … that in every aspect he meets criteria for Posttraumatic Stress Disorder and it is quite disabling for him." BRBA490. He determined that the "primary stressor" was the "perceived threat to his wife's life" and "this perception that those in power did not care if his wife lived or died." BRBA490.

A VA regional office denied Mr. Bufkin's claim because "[t]he available medical evidence is insufficient to confirm a link between current symptoms and an in-service stressor." BRBA859. Mr. Bufkin sought reconsideration, providing additional documentation including letters from his wife and mother explaining in detail how Mr. Bufkin's "temper, attitude and demeanor totally changed while he was gone." BRBA838-840; *see also* BRBA845. As part of its continued review, VA ordered an examination by a different VA physician, Dr. David Webster, who determined that this was "a very complex case." BRBA183. Dr. Webster confirmed that "onset of the condition was sometime shortly after separation" but determined that there was no "trauma event" meeting the DSM-5 requirements for PTSD. BRBA183-184. He disagreed with Dr. Goos's contrary conclusion, noting that "[s]uicide threats and gestures … do not in [his] opinion represent the PTSD trauma definition of a significant 'threat to life.'" BRBA185.

VA's regional office confirmed and continued its denial of service connection for PTSD based on a lack of evidentiary nexus between Mr. Bufkin's condition and his military service. BRBA400. In doing so, the

agency discounted Mr. Bufkin's lay evidence, credited Dr. Webster's opinion, and did not mention Dr. Goos's contrary opinion. BRBA400.

Mr. Bufkin challenged this decision, arguing (among other things) that VA had "fail[ed] to consider and correctly apply the provisions of 38 U.S.C. § 5107(b)." BRBA357. He then submitted to yet another diagnostic evaluation with yet another VA doctor, who attributed his symptoms to "his wife's medical problems." BRBA274. After "weigh[ing] all three medical statements/opinions regarding [his] claim for posttraumatic stress disorder," VA determined that "the rule regarding benefit of reasonable doubt does not apply, because the preponderance of evidence is unfavorable," and again denied service connection. BRBA248.

Mr. Bufkin appealed his case to the Board of Veterans' Appeals, again arguing that "VA failed to correctly apply the provisions of 38 U.S.C. § 5107(b)." BRBA201. He asserted that his case contained "an approximate balance of positive and negative evidence regarding … whether there is a relationship between Mr. Bufkin's current psychiatric disability and his period of active duty service." BRBA203. In support, he submitted a letter from yet another VA physician, who determined that Mr. Bufkin "suffers from chronic PTSD due to a number of issues, but the primary issue is that he was essentially forced out of the military due to intense family problems that put him in a very difficult psychological situation. … Some examiners do not consider this to be PTSD, but it was clearly traumatic for" Mr. Bufkin. BRBA42.

Despite Mr. Bufkin evening the score at two VA doctors diagnosing him with PTSD and two VA benefits examiners disagreeing, the Board concluded that "the preponderance of the evidence is against the Veteran's claim," so the "doctrine [of benefit of the doubt] is not applicable," and denied his appeal. Pet. App. 66a.

Mr. Thornton is denied benefits despite close evidence

Petitioner Norman Thornton enlisted in the United States Army in October 1988 and was honorably discharged in December 1991. Pet. App. 33a. He then served in the National Guard until 1996. TRBA1998. In 1991, Mr. Thornton was deployed to Kuwait and Saudi Arabia for six months, where he served on a tank crew and as a combat lifesaver, providing advanced first aid and lifesaving procedures to injured soldiers during the first Gulf War. TRBA375; TRBA827; *see also* TRBA1980-1986. While overseas, Mr. Thornton was "exposed to chemicals in the Gulf War with no protective gear," TRBA1490, was enlisted to help with "[b]ody recovery/burial," and was involved in killing enemy soldiers and civilians, including children, TRBA827, TRBA1982, TRBA1984.

Upon his return to civilian life, Mr. Thornton experienced multiple dissociative episodes, TRBA1133, TRBA1986, in addition to many other symptoms, TRBA44-47, which resulted in a diagnosis of "dissociative-type" PTSD from his VA physician, Dr. Kaushalya Kumar, who had treated him for well over a decade. TRBA1099, TRBA1104, TRBA1314.

In 1994, Mr. Thornton sought and received service connection for an "undiagnosed illness"—colloquially known as "Gulf War Syndrome"—with a 40% rating. TRBA1932. In 2005, VA also granted service connection for PTSD with a 10% rating. TRBA1928-1930. The agency noted that Mr. Thornton had "difficulty when working with civilians" and had held "multiple jobs since [his] return from the military," but because he had held a job as a manager at a fast-food restaurant for over two years, a "higher evaluation of 30 percent" was not warranted. TRBA1929-1930.

In 2015, Mr. Thornton requested an increased rating for PTSD, TRBA1678-1680, and underwent a new evaluation, TRBA1304-1313. The VA examiner found that Mr. Thornton suffered from "Depressed mood," "Anxiety," "Chronic sleep impairment," "Mild memory loss," and "Difficulty in adapting to stressful circumstances," and that he experienced occupational and social impairment with reduced reliability and productivity. TRBA1305, TRBA1311. The examiner notably did not identify symptoms that had been observed by other VA doctors, such as "Suicidal ideation," "Impaired impulse control," or "Panic attacks." TRBA1311; TRBA947-948. And, despite acknowledging Mr. Thornton's "traditional dissociative periods," the examiner explicitly disagreed with the diagnosis of Mr. Thornton's treating VA psychiatrist, Dr. Kumar, that his PTSD was "dissociative type," noting that Mr. Thornton also experienced "periods of confusion and memory lapses that do not appear to be trauma-based." TRBA1304.

After reviewing these examinations, a VA regional office found that "[t]he overall evidentiary record shows that the severity of [Mr. Thornton's PTSD] most closely approximates the criteria for a 50 percent disability evaluation." TRBA920; *see also* TRBA1074. VA determined that Mr. Thornton's PTSD had not "increased in severity sufficiently to warrant a higher evaluation." TRBA919.

Mr. Thornton appealed VA's ratings decisions to the Board. Mr. Thornton argued that the agency failed to consider Dr. Kumar's diagnosis of dissociative-type PTSD and how those dissociative episodes had affected his employment history. TRBA37-38. He argued that consideration of those factors, all documented by VA physicians other than the examiners, would have resulted in a rating decision of at least 70%. TRBA38.

The Board denied Mr. Thornton's appeal. It found that his "symptoms have not more nearly approximated the criteria for a rating in excess of 50 percent at any time, and the evidence is not approximately evenly balanced." Pet. App. 85a. It noted Mr. Thornton's "difficulty in adapting to stressful circumstances" as a "symptom enumerated in the 70 percent criteria," but held that "the presence of a single symptom is not dispositive of any particular disability level." Pet. App. 86a-87a. And it determined that "the VA examinations of record are adequate for ratings purposes" because they are "fully informed" and "contained reasoned explanations." Pet. App. 87a. Because "[t]here is no doubt to be resolved[,] a higher rating is not warranted." Pet. App. 88a.

The Veterans Court declines to review whether Mr. Bufkin and Mr. Thornton properly received the benefit of the doubt

Mr. Bufkin and Mr. Thornton both appealed their cases to the Veterans Court.

In Mr. Bufkin's case, the Veterans Court deferred to the Board's assessment of the competing medical evidence. It concluded that the Board's decision to give more weight to Dr. Webster's opinion than to Dr. Goos's was "not clearly erroneous." Pet. App. 30a. And, because the Board had found on that basis that "the preponderance of the evidence weighed against the claim," the Veterans Court affirmed its decision that "the benefit of the doubt doctrine does not apply here." Pet. App. 30a. In other words, upon concluding that the Board had not made a clearly erroneous factual finding, the Veterans Court did not look further into VA's application of the benefit-of-the-doubt doctrine. Mr. Bufkin appealed that decision to the Federal Circuit.

The Veterans Court also affirmed the Board's determination in Mr. Thornton's case. It held that the Board had satisfied its obligations because it "considered Mr. Thornton's symptoms and the resulting level of impairment" and "not only took note of his symptoms, but, crucially, considered their impact on his occupational and social functioning." Pet. App. 40a-41a. The court likewise affirmed the Board's application of the benefit-of-the-doubt rule. It held that "the Board's determination under section 5107(b) … is a factual one that the Court reviews for clear error," and it concluded that no factual error had occurred. Pet. App.

43a-44a. In other words, as it did in Mr. Bufkin's case, the Veterans Court limited its review to applying the clear error standard for factual findings and conducted no further inquiry into VA's application of the benefit-of-the-doubt rule. Mr. Thornton appealed to the Federal Circuit.

The Federal Circuit affirms in both cases, holding the Veterans Court need not review the benefit-of-the-doubt issue

On appeal to the Federal Circuit, both Mr. Bufkin and Mr. Thornton challenged the Veterans Court's interpretation of § 7261(b)(1).

One panel of judges heard argument in Mr. Thornton's case in December 2022. During that argument, the panel acknowledged the significant statutory interpretation questions raised by Mr. Thornton, with one judge calling the issue "important" and "earth-shaking." *Thornton* Oral Argument at 32:26, 35:45, http://tinyurl.com/57nx68j7. The panel probed the parties extensively on what exactly Congress had required by its addition of § 7261(b). After oral argument, the *Thornton* panel formally requested supplemental briefing addressing three questions: (1) whether (and what) "further analysis" is required by § 7261(b)(1), beyond that required by § 7261(a); (2) how the Veterans Court can satisfy § 7261(b)(1) if no factual findings are challenged on appeal; and (3) whether the Veterans Court must "satisfy section 7261(b)(1)" if the parties do not present an issue on appeal "regarding the application of section 5107(b)." CAFC Dkt. 34.

In his supplemental brief, Mr. Thornton explained that § 7261(b)(1) requires the Veterans Court to review the record "to determine whether the Secretary correctly applied § 5107(b)" and "analyz[e] the determinations made by the Secretary against the evidence of record." CAFC Dkt. 38 at 6. This review is required regardless of whether the veteran specifically challenges any factual findings or faults the agency for failing to afford him the benefit of the doubt. *Id.* at 7, 9. It is required by statute in every case. *Id.* at 7, 9-10. The government, in contrast, insisted that "section 7261(b) does not and cannot require any new analysis by the Veterans Court distinct from the court's scope of review under section 7261(a)." CAFC Dkt. 39 at 4. An amicus brief submitted by Military-Veterans Advocacy, Inc., discussed the history and purpose of the 2002 statute enacting § 7261(b)(1). CAFC Dkt. 48.

In February 2023, while this supplemental briefing was underway, a separate panel of judges heard argument in the *Bufkin* case. And the *Bufkin* panel ultimately issued its ruling first, without addressing the supplemental material submitted by the *Thornton* parties. In affirming the Veterans Court's determination, the Federal Circuit in *Bufkin* held that the statutory command that the Veterans Court "take due account" of the benefit-of-the-doubt rule does not require the Veterans Court to conduct any review of the benefit-of-the-doubt issue beyond the clear-error factual review required by § 7261(a). Pet. App. 11a. The Federal Circuit held that, in "conclud[ing] that the Board did not misapply the benefit of the doubt rule" and finding that "the underlying facts supporting the Board's conclusion are not clearly

erroneous," the Veterans Court "applied the appropriate standard of review, clear error, and properly took account of the Board's application of the benefit of the doubt rule." Pet. App. 11a.

The following week, the *Thornton* panel issued its own opinion, deeming itself bound by *Bufkin*: "Because Mr. Thornton's preferred interpretation of § 7261(b)(1) was rejected in *Bufkin,* we must also reject it in this appeal." Pet. App. 17a. Summarizing its combined holding reflecting both cases, the Federal Circuit announced the following interpretation of § 7261(b)(1): "the statutory command that the Veterans Court 'take due account' of the benefit of the doubt rule does not require the Veterans Court to conduct any review of the benefit of the doubt issue beyond the clear error review required by § 7261[(a)], and 'if no issue that touches upon the benefit of the doubt rule is raised on appeal, the Veterans Court is not required to sua sponte review the underlying facts and address the benefit of the doubt rule.'" Pet. App. 16a-17a (quoting Pet. App. 8a-11a).

REASONS FOR GRANTING THE WRIT

I. The Federal Circuit's Decision Is Wrong.

Certiorari is warranted because the Federal Circuit misinterpreted Congress's 2002 mandate requiring the Veterans Court to enforce the benefit-of-the-doubt rule—a decision with significant implications for the nation's veterans and the veterans' benefits review system. By holding that § 7261(b)(1) requires nothing of the Veterans Court beyond the clear error review of VA's factual findings already demanded by

§ 7261(a), the Federal Circuit ignored the plain text of the statute and frustrated Congress's clear intent to provide for enhanced appellate review and enforcement of the benefit-of-the-doubt rule.

A. Section 7261(b)(1)'s plain text requires the Veterans Court to enforce the benefit-of-the-doubt rule.

Section 7261(b)(1) sets out a simple and categorical mandate to the Veterans Court, supplementing its preexisting review obligations. The main provision of the Veterans Court review statute—section 7261(a)—prescribes certain things the Veterans Court "shall" do, "to the extent necessary to its decision and when presented" in an appeal. Under subsection (a), the Veterans Court must, among other things, set aside clearly erroneous factual findings, decide all relevant questions of law, and set aside decisions found to be arbitrary or capricious. 38 U.S.C. § 7261(a). Section 7261(b)(1) then adds—generally and without qualifications—that the Veterans Court "shall review the record of proceedings before the Secretary and the Board of Veterans' Appeals … and shall … take due account of the Secretary's application of section 5107(b) of this title." 38 U.S.C. § 7261(b)(1). Section 5107(b), in turn, provides that, "[w]hen there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant." 38 U.S.C. § 5107(b).

Together, these provisions require the Veterans Court to perform the subsection (a) tasks when necessary, and also to "review the record" and "take due

account" of whether the claimant received the "benefit of the doubt … regarding any issue material to the determination of a matter" in his appeal.

The added mandate that the Veterans Court "shall review the record" and "shall … take due account of the Secretary's application of section 5107(b)" means that the Veterans Court must ensure that the Secretary correctly applied the benefit-of-the-doubt rule. To "take account of" something means "to give attention or consideration to" it. *Take account of*, Merriam-Webster, https://tinyurl.com/ yhm2rfzx (last visited Dec. 28, 2023). To "take due account of the Secretary's application of section 5107(b)" therefore means to "give attention or consideration" to the Secretary's application of § 5107(b). That means the Veterans Court must give attention and consideration to whether the Secretary correctly performed the tasks § 5107(b) states that he "shall" do—whether the Secretary "consider[ed] all information and lay and medical evidence of record" and "gave the benefit of the doubt to the claimant" in any instance in which "there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter." Thus, § 7261(b)(1)'s mandatory language requires the Veterans Court to ensure that the veteran received the benefit of any doubt regarding any close issue material to the adjudication of his claim.

This simple reading accords with this Court's interpretation of § 7261(b)(1)'s sister provision, which requires the Veterans Court to "take due account of the rule of prejudicial error." 38 U.S.C. § 7261(b)(2). With respect to that parallel provision, this Court

interpreted "take due account of" to mean "apply"—such that the instruction to "take due account of the rule of prejudicial error" means that the Veterans Court must "apply the same kind of 'harmless-error' rule that courts ordinarily apply in civil cases." *Sanders*, 556 U.S. at 406-07.

The Court explained that "tak[ing] due account" of the harmless-error rule requires a "case-specific application of judgment, based upon examination of the record," *id.* at 407—in other words, "attention" and "consideration" to the application of the harmless-error rule in the particular circumstances of the appeal. Merriam-Webster, *supra*. "Tak[ing] due account" of the benefit-of-the-doubt rule requires a similar inquiry. *See FCC v. AT&T Inc.*, 562 U.S. 397, 408 (2011) ("[I]dentical words and phrases within the same statute should normally be given the same meaning.") (citation omitted). Accordingly, the instruction to "take due account" of the application of the benefit-of-the-doubt rule means that the Veterans Court must make a "case-specific application of judgment, based upon examination of the record," *Sanders*, 556 U.S. at 407-08, to ensure that if the evidence on any material issue is in approximate balance, the issue was resolved in the claimant's favor.

Here, that means that the Veterans Court should have "review[ed] the record" in Mr. Bufkin's and Mr. Thornton's cases, assessed whether there were any material issues for which the evidence was in "approximate balance," ensured that those issues were resolved in the veterans' favor, and determined the proper disposition of each appeal in light of that inquiry.

In both cases, however, the Veterans Court did not perform this review for itself, but instead rubber-stamped the Board's resolution of benefit-of-the-doubt issues after simply finding no clear error in any specific factual finding. Both decisions represent an abdication of the Veterans Court's statutory responsibility.

B. The Federal Circuit misunderstood the required review and interpreted § 7261(b)(1) to mean nothing.

1. The Federal Circuit endorsed the Veterans Court's actions here by holding that "the statutory command that the Veterans Court 'take due account' of the benefit of the doubt rule does not require the Veterans Court to conduct *any* review of the benefit of the doubt issue beyond the clear error review required by § 7261[(a)]." Pet. App. 16a-17a (quoting Pet. App. 8a-11a) (emphasis added). This holding is wrong and badly distorts the statute's meaning and intended effect. Subsection (b)(1) calls for separate review of the benefit-of-the-doubt issue, which must be performed in addition to the inquiries already required of the Veterans Court through other parts of the governing statute.

To begin, the text makes clear that § 7261(b)(1) requires the Veterans Court to take an additional step beyond the clear error review of factual findings, which is already required by subsection (a). While subsection (a) enumerates some of the Veterans Court's specific obligations, subsection (b) adds more. It supplements the list by requiring the Veterans Court to "take due account" of both the benefit-of-the-

doubt rule and the rule of prejudicial error. § 7261(b). Because courts must "give effect to every provision of a statute," *Landgraf v. USI Film Prod.*, 511 U.S. 244, 259 (1994), subsection (b)(1) must be read to impose an additional obligation on the Veterans Court. *See also Inhabitants of Montclair Twp. v. Ramsdell*, 107 U.S. 147, 152 (1883) (Courts must "give effect, if possible, to every clause and word of a statute.").

The statutory history confirms that § 7261(b)(1) expands the obligations of the Veterans Court. Before 2002, the Veterans Court was required to do the tasks listed in subsection (a) and to apply the harmless-error rule. Then, in 2002, Congress enacted the Veterans Benefits Act, which added the benefit-of-the-doubt review provision as subsection (b)(1) and moved the harmless-error rule to subsection (b)(2). *See* Pub. L. No. 107-330, § 401(c), 116 Stat. at 2832. Congress's addition of new mandatory language has meaningful effect only if it is construed to add an additional element to the Veterans Court's review. On the Federal Circuit's interpretation, however, the obligations of the Veterans Court were effectively the same before and after December 2002, even though Congress passed legislation to assign an additional obligation to the Veterans Court and expand that court's review.

This holding is especially problematic because Congress added the benefit-of-the-doubt review requirement to a statute otherwise modeled on the familiar review provisions of the Administrative Procedure Act. *See Sanders*, 556 U.S. at 406 ("Congress used the same words" from "the Administrative Procedure Act" for the other parts of § 7261.); 5 U.S.C. § 706 (setting out the powers of a court reviewing

agency action and providing that "the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."). While the pre-2002 provisions of § 7261 (subsections (a) and (b)(2)) establish APA-like review in VA cases, subsection (b)(1)'s benefit-of-the-doubt review requirement represents a conspicuous addition to that familiar framework. But the Federal Circuit reads Congress's critical modification of ordinary APA review out of the statute by expressly holding that § 7261(b)(1) provides for nothing more than what is already established in § 7261's other provisions.

The Federal Circuit's holding also frustrates Congress's clear intent. The addition of subsection (b)(1) reflected Congress's desire for the Veterans Court to carefully superintend the agency's compliance with § 5107(b) and ensure that claimants receive the benefit of the doubt on any close issues. The 2002 changes responded to "frustration with the perceived lack of searching appellate review of [Board] decisions" and persistent "failure to consider the benefit of the doubt rule." S. Rep. No. 107-234, at 17 (2002). Congress thus retooled the statute to "modify the requirements of the review the [Veterans] Court must perform," so as to "provide for more searching appellate review," 148 Cong. Rec. H8925, H9006 (Nov. 14, 2002); place "special emphasis during the judicial process on … section 5107(b)," *id.*; and finally "give full force to the 'benefit of the doubt' provision," S. Rep. No. 107-234, at 17. The Federal Circuit's holding, however, nullifies Congress's effort to enhance the Veterans Court's review.

2. The Federal Circuit was also wrong to conclude that the benefit-of-the-doubt review required by § 7261(b)(1) is equivalent to the clear error review of VA's factfinding required by § 7261(a).

Congress intentionally separated the review of factual questions, governed by the clear error standard, from review of the benefit-of-the-doubt issue. In 2002, Congress initially considered addressing its concerns about the "lack of searching appellate review" of benefit-of-the-doubt issues in the Veterans Court by adopting a less stringent standard of review for factual determinations. *See* S. Rep. No. 107-234, at 17-18, 40 (Senate committee proposing language allowing the Veterans Court to overturn factual findings if "unsupported by substantial evidence"). Congress rejected this proposal and instead chose to remedy the pre-2002 failures by mandating a separate and additional review of the benefit-of-the-doubt issue, while preserving the clear error standard for factual determinations. *See* Pub. L. No. 107-330, 116 Stat. at 2832.

The statute, accordingly, separates the clear error review of facts from the benefit-of-the-doubt review. The statute makes clear that VA's findings of fact pertaining to a veteran's benefits claim are reviewed for clear error. *See* 38 U.S.C. § 7261(a)(4) ("[A] finding of material fact adverse to the claimant made in reaching a decision" shall be "set aside or reverse[d]… if the finding is clearly erroneous."); *id.* § 7261(c) ("In no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the Court."). The statute additionally and separately requires the Veterans Court to take due

account of the application of the benefit-of-the-doubt rule and does not prescribe a "clear error" standard for benefit-of-the-doubt review.

In separating these inquiries, the statute establishes a "coherent and consistent" "statutory scheme." *Matal v. Tam*, 582 U.S. 218, 232 (2017) (citation omitted). That is because appellate scrutiny of factfinding is conceptually and functionally different from the benefit-of-the-doubt review contemplated by § 7261(b)(1). Unlike the question whether VA's factual findings are correct, whether the claimant properly received the benefit of the doubt is not a question about the truth or falsity of record evidence. Instead, it is a question of whether the veteran prevails on material issues for which that evidence stands in "approximate balance." That inquiry requires the Veterans Court not to scrutinize the facts themselves, but to review VA's application of § 5107(b)'s "unique" pro-veteran "standard of proof" to the factual record as it was already developed. *Gilbert*, 1 Vet. App. at 53-54; *infra* 31-32. The Federal Circuit's holding, however, conflates the factual with the legal inquiry and erroneously treats them as equivalent.

3. The Federal Circuit also erred in holding that, "if no issue that touches upon the benefit of the doubt rule is raised on appeal, the Veterans Court is not required to … address the benefit of the doubt rule." Pet. App. 17a (quoting Pet. App. 8a-11a).

To discharge its obligations under § 7261(b)(1), the Veterans Court must ensure that claimants receive the benefit of the doubt with respect to any issue

material to the veteran's claims on appeal. The Veterans Court must do so whether or not a veteran specifically identifies a benefit-of-the-doubt error on appeal. Although subsection (a) gives the Veterans Court the power to take action on claims for relief "when presented," subsection (b) does not similarly limit the enforcement of § 5107(b) to circumstances in which a benefit-of-the-doubt issue is explicitly raised. *See Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929, 1939 (2022) ("[D]ifferences in language … convey differences in meaning.") (citation omitted); *Russello v. United States,* 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation omitted).

On the contrary, subsection (b) provides categorically that, "[i]n making the determinations under subsection (a)," the Veterans Court "shall review the record of proceedings" and shall "take due account of the Secretary's application of section 5107(b)." Thus, with respect to a claim raised on appeal, the Veterans Court must independently assess whether, "regarding any issue material to the determination" of that claim, the veteran received the benefit of the doubt if the positive and negative evidence "is [in] approximate balance." 38 U.S.C. § 5107(b). That is so whether or not the veteran explicitly argues that VA violated the benefit-of-the-doubt rule in his case.

That understanding tracks the construction of subsection (b)(1)'s sister provision, categorically requiring the Veterans Court to take due account of the

rule of prejudicial error. 38 U.S.C. § 7261(b)(2). Just as the Veterans Court is "statutorily charged with taking 'due account of the rule of prejudicial error'" in "all cases before it," *Tadlock v. McDonough*, 5 F.4th 1327, 1334 (Fed. Cir. 2021), so too is the court required to review the benefit-of-the-doubt rule in every case, regardless of party presentation. *See also Newhouse v. Nicholson*, 497 F.3d 1298, 1301 (Fed. Cir. 2007) ("[T]he Veterans Court was required to examine whether any errors by VA were prejudicial.").

Similarly, a veteran need not claim factual errors to trigger the Veterans Court's benefit-of-the-doubt review. As noted above (at 25-26), the benefit-of-the-doubt review is different from the clear error review of underlying facts. Thus, subsection (b)(1) requires the Veterans Court to ensure that a veteran received the benefit of any doubt, even if the claimant does not challenge factual findings and even if the Veterans Court finds no clear error in the agency's factual findings themselves. The two inquiries are not redundant. For example, VA does not commit a clear error of fact by choosing between "two permissible views of the evidence," *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985). But if there are two permissible views, then the evidence does not "persuasively favor[] one side or the other"—and the benefit-of-the-doubt-rule must govern. *Lynch*, 21 F.4th at 782. In this circumstance, VA might not commit a clear error of fact in finding against the veteran, but it does commit a legal error in doing so, because § 5107(b) mandates that the veteran receive the benefit of the doubt. And § 7261(b)(1) requires the Veterans Court to correct that error in applying § 5107(b). By equating the benefit-of-the-doubt review required by subsection

(b)(1) with the clear error review of challenged factual findings required by subsection (a), the Federal Circuit disregarded Congress's intent that the Veterans Court perform a hard look to make sure the veteran received the benefit of any doubt on any close issues material to his claim.

4. Finally, the Federal Circuit's holding clashes with the underlying purposes of the VA benefits system, which is designed to affirmatively help veterans obtain the benefits they are entitled to by law. Congress's policy requiring the Veterans Court to ensure that the veteran received the benefit of the doubt is consistent with the overall policy of the VA benefits system, which is to make sure that veterans receive everything they have earned through their service. Congress designed the veterans' benefits adjudication process to be "a nonadversarial, ex parte, paternalistic system." *Collaro v. West*, 136 F.3d 1304, 1309 (Fed. Cir. 1998); *see also Bradley v. Peake*, 22 Vet. App. 280, 294 (2008) (VA "is required to maximize" benefits). Congress's goal has long been to assist veterans and resolve close questions in their favor throughout the "course of administrative and judicial review of VA decisions," *Henderson*, 562 U.S. at 440—a review system that is "strongly and uniquely pro-claimant." *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998). By reducing the Veterans Court's obligation to enforce the benefit-of-the-doubt rule to a duplicative form of clear error review, the Federal Circuit's decisions undermine Congress's "long standing … solicitude" for veterans. *Henderson*, 562 U.S. at 440.

II. The Question Presented Is Recurring And Important.

The question presented is certain to recur and exceptionally important. At stake is whether Congress's deliberate decision to augment the existing judicial review statute to require specific review of the benefit-of-the-doubt rule has any effect. The Federal Circuit has now conclusively rejected what § 7261(b)(1) commands—that the Veterans Court enforce the benefit-of-the-doubt rule.

1. Not only does the Federal Circuit's decision subvert Congress's mandate to the Veterans Court, but its decision will affect countless veterans' benefits claims. The benefit-of-the-doubt rule governs every claim to veterans' benefits, and it favors the claimant when the evidence on any material issue is in "approximate balance." 38 U.S.C. § 5107(b). The rule therefore affects every close case with a factual dispute or a mixed question of law and fact. And there are large numbers of veterans' claims filed each year. In 2022, for example, veterans filed more than 1.7 million disability and pension claims, 100,000 appeals to the Board, and 7,000 appeals to the Veterans Court. *See* VA, *Veterans Benefits Administration Reports*, https://tinyurl.com/mw4zpt7h; Board of Veterans' Appeals, *Annual Report Fiscal Year 2022* 55, https://tinyurl.com/25jtkve2; U.S. Court of Appeals for Veterans Claims, *Fiscal Year 2022 Annual Report* 1, https://tinyurl.com/3uwz9xy7. The benefit-of-the-doubt rule is potentially outcome-determinative in each of those claims. And the question of what review is demanded by § 7261(b)(1) is relevant to each of the thousands of annual Veterans Court appeals.

2. The meaning of § 7261(b)(1) is also exceptionally important—not just to the thousands of appeals the Veterans Court receives each year, but to veterans' benefits law as a whole. VA's application of the benefit-of-the-doubt rule in close cases, and judicial oversight of the agency's adherence to that rule, are issues that go to the very foundation of the veterans' benefits system.

The benefit-of-the-doubt rule reflects a core societal judgment that it is better to err on the side of providing benefits to those who sacrificed their own interests on behalf of the nation. As this Court has explained, a standard of proof is essentially a judgment about which party should bear the risk of a fact-finder getting things wrong in a case with mixed evidence. "The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington v. Texas*, 441 U.S. 418, 423 (1979); *see also Santosky v. Kramer*, 455 U.S. 745, 755 (1982) (selection of standard of proof is a "societal judgment about how the risk of error should be distributed between the litigants"). Section 5107(b) provides a "[u]nique standard of proof," unlike any other in civil or criminal litigation. *Gilbert*, 1 Vet. App. at 53-54. Through this veteran-friendly standard, our nation has "taken upon itself the risk of error" in veterans' benefits determinations. *Id.* at 54.

Beyond being a "recognition of our debt to our veterans," *id.*, this allocation of risk is a recognition of the practical realities veterans face in pursuing the benefits guaranteed to them by law. Demonstrating not only the existence of an in-service injury or

disease, but also its causal link to a veteran's current disability, is a burdensome task given the frequent gaps in record-keeping and retention and the medical uncertainty surrounding many conditions common to veterans. *See, e.g.*, Carlissa R. Carson, *Welcome to the Burn Pit: Where the Black Goo Oozes and the Green Ponds Glow*, 82 La. L. Rev. 677, 693-95 (2022) (explaining that, for many veterans, "proving in-service events is unusually challenging," as is overcoming "the sometimes insurmountable obstacle" of showing "a direct link or causation between the current disability and an in-service event"); Jessica Lynn Wherry, *Interminable Parade Rest: The Impossibility of Establishing Service Connection in Veterans Disability Compensation Claims When Records are Lost or Destroyed*, 83 Brook. L. Rev. 477, 480-81 (2018) ("Lost records are a well-known and widespread challenge to veterans seeking disability compensation."); *id.* at 494 ("[V]eterans typically face an insurmountable burden in cases where service medical records have been lost or destroyed."). That difficulty is only compounded by the "layers of procedural complexity" that are the hallmark of pursuing a VA claim—"a process that can seem interminable" for veterans attempting to navigate it. James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. Ann. Surv. Am. L. 251, 295-96 (2010); *cf. Martin v. O'Rourke*, 891 F.3d 1338, 1349 (Fed. Cir. 2018) (Moore, J., concurring) (lamenting the "fundamentally flawed program that is the veterans' disability benefits system," where "many veterans find themselves trapped for years in a bureaucratic labyrinth, plagued by delays and inaction").

Nearly all claimants lack legal representation at the outset of this daunting process, because attorneys cannot charge for legal services until after an initial VA decision on a veteran's claim. *See* 38 U.S.C. § 5904(c)(1). Even once a case is on appeal within the agency, less than a quarter of claimants have legal counsel to help them demonstrate to the Board how agency adjudicators committed legal and factual errors in assessing their cases. *See* Board of Veterans' Appeals 2022 Annual Report, *supra*, at 35.

In these circumstances, affording veterans the benefit of the doubt on close evidentiary issues is crucial to mitigating the risk that deserving claimants will erroneously be denied benefits. So important is the benefit-of-the-doubt rule, in fact, that it was part of the driving force behind the passage of the VJRA and the end of the "splendid isolation" that had previously shielded VA's benefits system from judicial scrutiny. *Brown v. Gardner*, 513 U.S. 115, 123 (1994) (quoting H.R. Rep. No. 100-963, pt. 1, at 10); *see supra* 7-9. And, of course, Congress has more recently singled out the benefit-of-the-doubt rule for judicial supervision, through the enactment of § 7261(b)(1) in 2002.

Judicial oversight might not be so important—and statutes like § 7261(b)(1) might not be necessary—if the VA claims system were working as intended. But the agency's track record underscores the need for a check on the system. VA has a notoriously high error rate. In 2022, for example, the Veterans Court reversed or remanded, in whole or in part, more than 80% of the Board decisions it reviewed. *See* Veterans Court 2022 Annual Report, *supra*, at 3. Most

astoundingly, claimants were awarded Equal Access to Justice fees—meaning VA's litigating position was deemed not "substantially justified," 28 U.S.C. § 2412—in nearly 80% of appeals. *See* Veterans Court 2022 Annual Report, *supra*, at 4. Despite this high rate of error, "the Board has not systematically assessed [its] adjudicative decisions for consistency, such as whether there are common misunderstandings of policy, regulation, or the law." U.S. Government Accountability Office, *VA Disability Benefits: Board of Veterans' Appeals Should Address Gaps in Its Quality Assurance Process* 22, https://tinyurl.com/mujtjxft (Nov. 29, 2023). The Federal Circuit's effective erasure of a mechanism Congress carefully selected to address this dire breakdown in the veterans' claims process makes certiorari in these cases critically important.

3. The question presented is also an important one meriting the Court's review because it concerns issues of statutory interpretation that have vexed the Federal Circuit—the only court of appeals that will ever be presented with the task of interpreting § 7261(b)(1), given its exclusive jurisdiction to review the Veterans Court.

The Federal Circuit has repeatedly been asked to interpret the benefit-of-the-doubt rule and its role throughout the claims process. *See, e.g.*, *Roane v. McDonough*, 64 F.4th 1306, 1308 (Fed. Cir. 2023) (evaluating Board's obligations when determining whether benefit-of-the-doubt rule applies); *Mattox v. McDonough*, 56 F.4th 1369, 1376-77 (Fed. Cir. 2023) (similar); *Lynch*, 21 F.4th at 781 (explaining that claimants receive the benefit of the doubt "if the

positive and negative evidence is in approximate balance"); *Ortiz v. Principi*, 274 F.3d 1361, 1366 (Fed. Cir. 2001) (holding that the benefit-of-the-doubt rule does not apply if the "evidence preponderates in one direction"), *holding modified by Lynch*, 21 F.4th 776.

It has also repeatedly been asked to determine the scope of judicial review under the VJRA. *See, e.g.*, *Bowling v. McDonough*, 38 F.4th 1051, 1057 (Fed. Cir. 2022) (affirming Veterans Court's refusal to consider extra-record material); *Tadlock*, 5 F.4th at 1340 (concluding that "the Veterans Court exceeded its authority in making a fact finding in the first instance"); *Euzebio v. McDonough*, 989 F.3d 1305, 1309 (Fed. Cir. 2021) (considering whether material was part of administrative record).

Recognizing the potentially "earth-shaking" implications of the question presented, Oral Arg. at 35:45, the *Thornton* panel appeared poised to seriously address it. During oral argument, the panel decided to request supplemental briefing, which the parties and an amicus later provided. *Supra* 16-17. But the panel never addressed this additional briefing because the *Bufkin* panel, which heard argument after the *Thornton* panel did, issued its own opinion first, without addressing the supplemental material. The *Thornton* panel then deemed itself bound by *Bufkin*: "Because Mr. Thornton's preferred interpretation of § 7261(b)(1) was rejected in *Bufkin*, we must also reject it in this appeal." Pet. App. 17a.

As demonstrated above, the *Bufkin* panel's interpretation—which the *Thornton* panel followed—defies Congress's command and purpose, renders

§ 7261(b)(1) statutory surplusage, and will substantially blunt the protective force of the benefit-of-the-doubt rule. No other court but this one can fix the problem, as the Federal Circuit has exclusive subject matter jurisdiction over Veterans Court appeals. 38 U.S.C. § 7292(c). This Court's intervention is thus amply warranted and urgently needed.

III. These Cases Provide An Ideal Vehicle To Set Things Right.

These cases provide an ideal opportunity for the Court to correct the Federal Circuit's misinterpretation of § 7261(b)(1).

The Federal Circuit issued a clear prospective rule summarizing its holding in both cases that squarely tees up this Court's review: Section 7261(b)(1), according to the court of appeals, "does not require the Veterans Court to conduct *any* review of the benefit of the doubt issue beyond the clear error review" of underlying factual findings. Pet. App. 16a-17a (citing Pet. App. 8a-11a) (emphasis added). And, because the Federal Circuit definitively limited the scope of appellate review by the Veterans Court, it is unlikely that future veteran claimants will raise the issue again. These cases thus present the best opportunity for the Court to take up this important issue. Moreover, the question presented was thoroughly aired in the *Bufkin* and *Thornton* opinions, which lay out the issues for this Court's review.

The question presented is also critically important for these two Petitioners and outcome determinative in both cases. The Federal Circuit's narrow

reading of § 7261(b)(1) was the sole basis for its decisions in *Bufkin* and *Thornton*. Should this Court reverse that narrow reading, both Mr. Bufkin and Mr. Thornton would be entitled to seek benefits under the proper scope of review on remand. The correct interpretation of § 7261(b)(1) is thus of the utmost importance to Mr. Bufkin and Mr. Thornton, as it is for every other veteran appealing the denial of disability benefits.

Indeed, these cases exemplify the circumstances that call for the Veterans Court's benefit-of-the-doubt review. Like many veterans' cases, Mr. Bufkin and Mr. Thornton's cases included both favorable and unfavorable evidence on material issues. Congress recognized that this circumstance is common for veterans and affirmatively "place[d] a thumb on the scale in the veteran's favor." *Henderson*, 562 U.S. at 440. It did so both by requiring that veterans obtain the benefit of the doubt throughout the VA process and by requiring the Veterans Court to take a hard look to ensure that veterans actually received that protection. The Federal Circuit, however, misconstrued Congress's mandate and deprived Petitioners of the benefit of the doubt precisely when it was most needed.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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