No. 23-713

In the Supreme Court of the United States

JOSHUA E. BUFKIN AND
NORMAN F. THORNTON, PETITIONERS

v.

DENIS R. MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Section 5107(b) of Title 38 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 [of Veterans Affairs] shall give the benefit of the doubt to the claimant." 38 U.S.C. 5107(b). Section 7261, in turn, governs review of the Secretary's decisions in the Court of Appeals for Veterans Claims. Section 7261(a) provides that, "to the extent necessary to its decision and when presented," the Court of Appeals for Veterans Claims "shall * * * in the case of a finding of material fact adverse to the claimant * * * hold unlawful and set aside or reverse such finding if the finding is clearly erroneous." 38 U.S.C. 7261(a)(4). Section 7261(b)(1) states that, "[i]n making the determinations under subsection (a), the 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). Finally, Section 7261(c) provides that "[i]n 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." 38 U.S.C. 7261(c). The question presented is as follows:

Whether 38 U.S.C. 7261(b)(1)'s mandate to "take due account" of the Secretary's application of the benefit-of-the-doubt rule when reviewing decisions of the Board of Veterans' Appeals is limited by the scope of review specified in Section 7261(a) and (c).

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OPINIONS BELOW

In *Bufkin*, the decision of the court of appeals (Pet. App. 1a-11a) is reported at 75 F.4th 1368. The decision of the Court of Appeals for Veterans Claims (Veterans Court) (Pet. App. 17a-30a) is unreported, but is available at 2021 WL 3163657. The decision of the Board of Veterans' Appeals (Board) (Pet. App. 53a-65a) is unreported.

In *Thornton*, the decision of the court of appeals (Pet. App. 12a-16a) is unreported, but is available at 2023 WL 5091653. The decision of the Veterans Court (Pet. App. 31a-52a) is unreported, but is available at 2021 WL 2389702. The decision of the Board (Pet. App. 66a-90a) is unreported.

JURISDICTION

In *Bufkin*, the court of appeals entered judgment on August 3, 2023. On October 16, 2023, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 31, 2023. In *Thornton*, the court of appeals entered judgment on August 9, 2023. On October 16, 2023, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 2, 2024. The joint petition for a writ of certiorari was filed on December 29, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. As a general matter, the Department of Veterans Affairs (VA) provides compensation to veterans "[f]or disability resulting from personal injury suffered or disease contracted in line of duty." 38 U.S.C. 1110, 1131 (Supp. III 2021). A veteran's disability is "service-connected," and therefore eligible for compensation by the VA, if "such disability was incurred or aggravated * * * in line of duty in the active military, naval, air, or space service." 38 U.S.C. 101(16) (Supp. III 2021).

The VA has promulgated rules for determining when a veteran has a disability that qualifies as service-connected. See 38 U.S.C. 501(a)(1) (authority of the Secretary to prescribe rules for benefits determinations). As relevant here, to establish a service connection for post-traumatic stress disorder (PTSD), the VA requires a diagnosis of the disorder; medical evidence linking the veteran's symptoms with an "in-service stressor," such as combat experience; and "credible supporting evidence that the claimed in-service stressor occurred." 38 C.F.R. 3.304(f). When the VA finds that a veteran has a service-connected disability, it applies a

rating system reflecting "reductions in earning capacity" upon which it bases "payments of compensation" for "specific injuries or combination of injuries." 38 U.S.C. 1155; see 38 C.F.R. Pt. 4.

b. A veteran seeking disability benefits generally is required to "present and support [his] claim for benefits." 38 U.S.C. 5107(a). The Secretary generally must then "make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim." 38 U.S.C. 5103A(a)(1). Once a record is developed, the Secretary must "consider all information and lay and medical evidence of record" when resolving a claim for benefits. 38 U.S.C. 5107(b).

Most relevant here, Section 5107(b) imposes an evidentiary rule known as the benefit-of-the-doubt rule. Specifically, Section 5107(b) 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). The Secretary's implementing regulation similarly provides that "[w]hen, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant." 38 C.F.R. 3.102. The regulation states that a "reasonable doubt" is "one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim." *Ibid.* That doubt must reflect a "substantial doubt" that is "within the range of probability as distinguished from pure speculation or remote possibility." *Ibid.*

c. The VA's regional offices decide most benefits claims. *Shinseki* v. *Sanders*, 556 U.S. 396, 400 (2009). A claimant who receives an adverse regional office decision may appeal it to the Board. *Ibid.* In the 1988 Veterans' Judicial Review Act, Pub. L. No. 100-687, Div. A, 102 Stat. 4105, Congress established the Veterans Court and granted it exclusive jurisdiction to review Board decisions. 38 U.S.C. 7251; 38 U.S.C. 7252(a). The Veterans Court's review is "limited to the scope provided in [38 U.S.C. 7261]." 38 U.S.C. 7252(b).

In 38 U.S.C. 7261, Congress defined the relevant scope of review in veterans' benefits cases. The Veterans Court decides "all relevant questions of law," including necessary interpretations of any "constitutional, statutory, and regulatory provisions," and may set aside or reverse "a finding of material fact adverse to the claimant * * * if the finding is clearly erroneous." 38 U.S.C. 7261(a)(1). The court will "hold unlawful and set aside decisions" of the Board determined to be arbitrary, capricious, or contrary to law. 38 U.S.C. 7261(a)(3). The court's review, however, may address issues only "to the extent necessary to its decision and when presented." 38 U.S.C. 7261(a). And "[i]n no event shall findings of fact made by the [Board] be subject to trial de novo by the Court." 38 U.S.C. 7261(c). In 2002, Congress further instructed that, "[i]n making the determinations under subsection (a)," the Veterans Court must "take due account" of the rule of prejudicial error and the Secretary's application of the benefit-of-the-doubt rule. 38 U.S.C. 7261(b); see Pub. L. No. 107-330, Tit. IV, § 401(b), 116 Stat. 2832 (2002).

2. Petitioners are former service members who filed claims for disability benefits with the VA. Petitioners were disappointed with the VA's disposition of those

claims, and they sought review in the Veterans Court and then in the Federal Circuit.

a. Petitioner Joshua Bufkin served in the United States Air Force from September 2005 to March 2006. Pet. App. 2a. In July 2013, he filed a disability-benefits claim with the VA, claiming service connection for several conditions, including PTSD. *Ibid.* In support of his claim, Bufkin provided medical records from his visits with a VA psychiatrist, Dr. Robert Goos, between February and June of 2013. *Ibid.* Dr. Goos's notes stated that Bufkin met the diagnostic criteria for PTSD, but that Dr. Goos could not identify the specific stressor that had caused the PTSD or determine whether the stressor related to Bufkin's military service. *Ibid.* Accordingly, the VA Regional Office rejected Bufkin's claim due to an insufficient link between his symptoms and an in-service stressor. *Id.* at 2a-3a.

Bufkin then underwent three additional VA examinations in June 2015, April 2018, and December 2019. See Pet. App. 57a-60a. Two of the examiners opined that Bufkin's symptoms did not meet the criteria for PTSD. *Id.* at 3a. The third noted that Bufkin "suffers from chronic PTSD due to a number of issues, but [s]ome examiners do not consider this to be PTSD." *Ibid.* VA continued to deny the claim.

Bufkin appealed to the Board, which denied service connection for an acquired psychiatric disorder. Pet. App. 53a-65a. The Board reviewed in detail the various medical opinions and other lay evidence in the record, and it held that the "preponderance of the evidence" did not establish that Bufkin suffered from PTSD. *Id.* at 60a. The Board described the June 2015 VA examiner's findings as "especially persuasive," noting that the ex-

aminer had found Dr. Goos's diagnosis problematic because Dr. Goos had been given no opportunity to review certain records. *Id.* at 61a. The Board then determined that, because "the preponderance of the evidence [was] against the Veteran's claim," the benefit-of-the-doubt rule was "not applicable." *Id.* at 64a.

The Veterans Court affirmed. Pet. App. 17a-30a. The Veterans Court held that the Board had properly weighed the evidence of record, and it concluded that the Board's assessment of the competing evidence was not "clearly wrong." *Id.* at 24a. The Veterans Court further explained that the benefit-of-the-doubt rule was inapplicable because the Board had found that the preponderance of the evidence weighed against Bufkin's claim. *Id.* at 29a-30a. Citing its decision in *Mattox* v. *McDonough*, 34 Vet. App. 61 (2021), aff'd, 56 F.4th 1369 (Fed. Cir. 2023), the court explained that the benefit-of-the-doubt doctrine considers the quality of evidence, not simply the quantity. Pet. App. 29a. Because the Board had found the June 2015 opinion more comprehensive and persuasive than opinions supporting a PTSD diagnosis, and because that finding was not clearly erroneous, the Veterans Court affirmed the Board's decision. *Id.* at 29a-30a.[1]

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[1] The Board and the Veterans Court ruled in Bufkin's case before the Federal Circuit issued its decision in *Lynch* v. *McDonough*, 21 F.4th 776 (2021) (en banc), cert. denied, 143 S. Ct. 369 (2022), which "depart[ed]" from the "'preponderance of the evidence' language" in describing when the benefit-of-the-doubt rule applies. *Id.* at 781. As the Federal Circuit explained, "a finding by 'the preponderance of the evidence'" correctly "reflects that the Board 'has been persuaded' to find in one direction or the other," *ibid.* (citation omitted), such that the benefit-of-the-doubt rule does not apply. But the preponderance language "could confuse because other cases link

The Federal Circuit affirmed. Pet. App. 1a-11a. The court first agreed with Bufkin that "the Veterans Court can review the entire record of proceedings before the Secretary in determining whether the benefit of the doubt rule was properly applied." *Id.* at 9a. But the court disagreed with Bufkin's argument that the Veterans Court has authority to sua sponte "review the entire record to address the benefit of the doubt rule even if there was no challenge to the underlying facts found by the Board or to the Board's application of the benefit of the doubt rule." *Ibid.* The court observed that "Section 7261(a) explicitly prohibits such an expansive interpretation of the Veterans Court's jurisdiction," by providing that "the Veterans Court 'shall decide' issues only 'when presented.'" *Ibid.* (quoting 38 U.S.C. 7261(a)).

The Federal Circuit also rejected Bufkin's argument that "[Section] 7261(b) requires the Veterans Court to conduct a 'de novo, non-deferential' review of the Board's application of the benefit of the doubt rule." Pet. App. 10a. Citing its prior decision in *Roane* v. *McDonough*, 64 F.4th 1306, 1309 (2023), the Federal Circuit explained that "the scope of the Veterans Court's review is limited" by Section 7261(c), which "expressly prohibits de novo review of material facts by the Veterans Court," and by Section 7261(a), which "allows the Veterans Court to review facts only under the clearly erroneous standard." Pet. App. 10a. Reviewing

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'preponderance of the evidence' to the concept of equipoise." *Ibid.* (citation omitted). In *Lynch*, the Federal Circuit reaffirmed that "the benefit-of-the-doubt rule simply applies if the competing evidence is in approximate balance," or is "nearly equal." *Ibid.* The petition for a writ of certiorari does not raise any issue relating to the use of the phrase "preponderance of the evidence."

the Veterans Court's analysis, the Federal Circuit determined that "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." *Id.* at 11a.

b. Petitioner Norman Thornton served in the United States Army from October 1988 to December 1991. Pet. App. 32a. Like Bufkin, Thornton sought benefits for service-connected PTSD. *Ibid.* The VA granted benefits in February 2005, with a disability rating of ten percent. *Id.* at 33a. Ten years later, Thornton applied for an increased rating. *Ibid.* VA examinations in July and December 2015 identified several relevant symptoms, including occupational and social impairment, depressed mood, anxiety, memory loss, sleep impairment, and difficulty adapting to stressful circumstances. *Id.* at 33a-35a. As a result, the VA increased Thornton's PTSD disability rating to 50%, effective July 2015. *Id.* at 34a-35a.

Thornton appealed to the Board, which denied his claim for a PTSD disability rating higher than 50%. Pet. App. 66a-90a. The Board summarized the findings from the two 2015 PTSD evaluations and later treatment records. *Id.* at 79a-82a. In reviewing Thornton's symptoms and the evidence supporting them, the Board first applied the benefit-of-the-doubt rule in Thornton's favor to determine that his memory loss had been caused by his PTSD. *Id.* at 80a-81a. The Board explained that the July 2015 VA examiner had "indicated that the Veteran's memory lapses may not be due to his PTSD, but he did not provide any other potential etiology for such episodes." *Id.* at 80a. Based on the inconclusive statements of the examiner, the fact that "memory issues are known to be associated with

PTSD," and prior medical records showing no other diagnoses that could be related to Thornton's memory loss, the Board "resolv[ed] reasonable doubt in favor of" Thornton, found that his memory loss was "attributable to his PTSD," and considered his memory loss as part of the overall evaluation of his disability rating. *Id.* at 80a-81a.

The Board ultimately determined that Thornton's symptoms most closely matched the 50% rating criteria. Pet. App. 82a-86a. The Board acknowledged that Thornton's difficulty in adapting to stressful circumstances was a symptom aligned with a 70% rating. *Id.* at 84a. It explained, however, that "the presence of a single symptom is not dispositive of any particular disability level," *ibid.*, and that "[t]he cumulative evidence of record show[ed] that [Thornton's] overall level of occupational and social functioning is consistent with the moderate degree of impairment that is contemplated by a 50 percent rating," *id.* at 85a. With respect to the benefit-of-the-doubt rule, the Board explained that "the evidence [was] not approximately evenly balanced," *id.* at 83a, and that "[t]here [was] no doubt to be resolved" in determining that Thornton did not have symptoms consistent with a higher disability rating for his PTSD, *id.* at 85a.

The Veterans Court affirmed. Pet. App. 31a-52a. The court held that the Board had properly engaged in a holistic analysis, had taken note of Thornton's symptoms, and had "considered their impact on his occupational and social functioning, thus complying with the legal requirements for determining the degree of disability." *Id.* at 40a (citing *Vazquez-Claudio* v. *Shinseki*, 713 F.3d 112, 118 (Fed. Cir. 2013)); see *id.* at 39a-40a. The court further observed that the Board had applied

the benefit-of-the-doubt rule in Thornton's favor to find that his memory lapses were attributable to his PTSD. *Id.* at 42a-43a. The court then summarized the Board's findings and conclusions related to its application of the benefit-of-the-doubt rule to the overall rating decision: "the evidence showed a moderate degree of impairment better contemplated by the 50% rating than by the 70% rating"; "the evidence was not approximately evenly balanced"; and "there was no doubt to be resolved on that issue." *Id.* at 42a. The court concluded that, "[i]n accordance with section 7261(b)(1), the Court takes due account of the Board's application of [S]ection 5107(b)—and finds no error." *Id.* at 43a.

The Federal Circuit affirmed. Pet. App. 12a-16a. The court explained that "[t]he same interpretation questions Mr. Thornton raises in this case recently were presented to and decided by this Court" in *Bufkin*. *Id.* at 15a; see *id.* at 15a-16a.

ARGUMENT

Petitioners primarily contend (Pet. 22-29) that Section 7261(b)(1) of Title 38 "calls for a separate review of the benefit-of-the-doubt issue" that is not limited by the requirements of Section 7261(a) and (c). That argument contravenes the plain text of Section 7261. The Federal Circuit's decision is correct and does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. Section 7261(a) prescribes the scope of review for the Veterans Court. Under that provision, the Veterans Court may decide only issues "necessary to its decision and when presented," and it may set aside a Board factual finding only "if the finding is clearly erroneous." 38 U.S.C. 7261(a) and (a)(4). Section 7261(b), in turn,

states that "[i]n making the determinations under subsection (a)," the Veterans Court shall "take due account of the Secretary's application of [S]ection 5107(b) of this title," *i.e.*, the benefit-of-the-doubt rule. 38 U.S.C. 7261(b)(1). Finally, Section 7261(c) states that "[i]n no event shall findings of fact made by the Secretary or the [Board] be subject to trial de novo by the [Veterans] Court." 38 U.S.C. 7261(c).

The court of appeals correctly held that "the scope of the Veterans Court's review is limited by [Section] 7261(c) and [Section] 7261(a)." Pet. App. 10a. The relevant statutory provisions direct the Veterans Court to "take due account of the Secretary's application of" the benefit-of-the-doubt rule when "making the determinations under subsection (a)," 38 U.S.C. 7261(b), and state that "[i]n no event shall findings of fact made by the Secretary or the Board * * * be subject to trial de novo by the [Veterans] Court," 38 U.S.C. 7261(c). Those provisions confine the scope of the Veterans Court's own consideration of the benefit-of-the-doubt rule.

Specifically, the Veterans Court may consider the Secretary's application of the benefit-of-the-doubt rule only "to the extent necessary to its decision and when presented." 38 U.S.C. 7261(a). "Therefore, 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. 9a. And where an issue that touches on the rule is raised, the Veterans Court's review of the Secretary's application of the benefit-of-the-doubt rule must be situated "[i]n" the court's "determinations under subsection (a)," 38 U.S.C. 7261(b), and cannot include de novo reconsideration of factual findings, 38 U.S.C. 7261(c). As relevant here, that

means that the Veterans Court may determine whether the Board committed clear error in its application of the benefit-of-the-doubt rule. And if the court finds such error, it may, in appropriate circumstances, "reverse" the Board's decision rather than remanding it. 38 U.S.C. 7261(a)(4); see *Thornton* Gov't C.A. Supp. Br. 3-7.

2. a. Petitioners contend (Pet. 22) that "Subsection (b)(1) calls for separate review of the benefit-of-the-doubt issue, which must be performed in addition to the inquiries" (such as clear-error review) that are "already required of the Veterans Court through other parts of the governing statute." Petitioners likewise suggest (Pet. 27) that subsection (b)(1) imposes a freestanding requirement that the Veterans Court address the Secretary's application of the benefit-of-the-doubt rule even if the claimant does not raise any issue touching on it. But the Veterans Court is authorized to consider the benefit-of-the-doubt rule only when "making the determinations under subsection (a)," 38 U.S.C. 7261(b), and those determinations may be made only "to the extent necessary" to the Veterans Court's decision "and when presented," 38 U.S.C. 7261(a) and (b); but see Pet. 17 (suggesting that subsection (b) "does not" include a limitation similar to the "when presented" requirement in Section 7261(a)).[2] The petition does not address or acknowledge Congress's decision to nest the Veterans Court's benefit-of-the-doubt review within the existing

[2] Petitioners at times suggest (*e.g.*, Pet. 27) that, under the Federal Circuit's decision, a claimant must specifically raise a benefit-of-the-doubt issue on appeal. That is not what the court of appeals said. Rather, it explained that, "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. 9a; see *id.* at 15a-16a.

scope of the court's authority and under the same standards of review. It therefore does not explain how petitioners' preferred approach can be squared with the plain language of the statute.

b. Petitioners' reliance (Pet. 23-24) on this Court's decision in *Shinseki* v. *Sanders*, 556 U.S. 396 (2009), cannot fill that gap. There the Court addressed the Veterans Court's obligation to "take due account of the rule of prejudicial error," 38 U.S.C. 7261(b)(2), in reviewing Board decisions. This Court held that the statute "requires the Veterans Court to apply the same kind of 'harmless-error' rule that courts ordinarily apply in civil cases," rather than the "complex, rigid, and mandatory" framework the Federal Circuit had adopted for veterans benefits cases. *Sanders*, 556 U.S. at 406-407.

Petitioners emphasize (Pet. 21) the Court's statement that harmless-error analysis requires "case-specific application of judgment, based upon examination of the record." *Sanders*, 556 U.S. at 407. But the Court in *Sanders* contrasted ordinary harmless-error analysis with the Federal Circuit's "use of mandatory presumptions and rigid rules." *Ibid.* Contrary to petitioners' suggestion (Pet. 21), the Court did not hold that the phrase "take due account of" in Section 7261(b) imposes an independent obligation to review the record separate and apart from "making the determinations under subsection (a)." 38 U.S.C. 7261(b).

In any event, while Sections 7261(b)(1) and (2) both use the phrase "take due account of," they impose meaningfully different obligations. Section 7261(b)(1) requires the Veterans Court to take due account of "*the Secretary's* application of [S]ection 5107(b)." 38 U.S.C. 7261(b)(1) (emphasis added). Section 5107(b), in turn, requires the Secretary to "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," and to "give the benefit of the doubt to the claimant" in any case where "there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter." 38 U.S.C. 5107(b). By its plain terms, Section 7261(b)(1) directs the Veterans Court to consider whether *the Secretary* properly applied the benefit-of-the-doubt rule; it does not require that court to assess the facts de novo to determine whether the rule should apply. Indeed, the latter interpretation would create a conflict with subsections (a) and (c), which explicitly limit the scope of the Veterans Court's review and preclude the court from making factual findings in the first instance. See, *e.g.*, *Roane* v. *McDonough*, 64 F.4th 1306, 1310 (Fed. Cir. 2023).

By contrast, Section 7261(b)(2) requires the Veterans Court to "take due account of the rule of prejudicial error." 38 U.S.C. 7261(b)(2). Subsection (b)(2) thus "requires the Veterans Court to apply the same kind of 'harmless error' rule that courts ordinarily apply in civil cases." *Sanders*, 556 U.S. at 406. Like Section 7261(b)(1), however, it does not permit the Veterans Court to countermand decisions of the Secretary that comport with the standards set forth in Section 7261(a).

c. Petitioners' reliance on legislative history (Pet. 23-25) is also unpersuasive. When the "ordinary meaning and structure" of the statute "yield[] a clear answer, judges must stop"; legislative history cannot be used to "'muddy' the meaning of 'clear statutory language.'" *Food Mktg. Inst.* v. *Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (quoting *Milner* v. *Department of the Navy*, 562 U.S. 562, 572 (2011)). Here, Section 7261(b)(1)

requires the Veterans Court to "take due account of the Secretary's application of" the benefit-of-the-doubt rule *"[i]n making the determinations under subsection (a)*," 38 U.S.C. 7261(b)(1) (emphasis added), not by conducting a separate, additional inquiry.

In any event, the legislative history does not support petitioners' theory that Congress intended to create a new standard for Veterans Court review of the Board's benefit-of-the-doubt determinations. The Senate Committee on Veterans' Affairs expressed its view that the Veterans Court's clear-error standard for review of the Board's factual findings was too deferential and might "result in failure to consider the 'benefit of the doubt' rule in 38 U.S.C. § 5107(b)." S. Rep. No. 234, 107th Cong., 2d Sess. 17 (2002). The Committee's proposed bill would have "change[d] the standard of review [the Veterans Court] applies to [Board] findings of fact from 'clearly erroneous' to 'unsupported by substantial evidence,'" and it would have "cross-reference[d] [S]ection 5107(b)." *Ibid.* The committee intended that the new standard would "mandate a limited degree of deference to [Board] fact-finding, with substantial deference given to findings of fact based on demeanor evidence," and would "provide for searching judicial review of VA benefits claims encompassing the 'benefit of the doubt' rule." *Id.* at 18.

Further congressional negotiations yielded a "compromise version" of the bill that was ultimately enacted into law. 148 Cong. Rec. 22,912 (2002) (statement of Sen. Rockefeller). Senator Rockefeller stated that the compromise bill would "maintain[] the current 'clearly erroneous' standard of review" but would "provide[] special emphasis during the judicial process to the 'benefit of the doubt' provisions of section 5107(b) as [the

Veterans Court] makes findings of fact in reviewing [Board] decisions." *Id.* at 22,913. A joint explanatory statement of the Senate and House Committees on Veterans' Affairs explained that "[n]ew subsection (b) * * * would not alter the formula of the standard of review on the Court, with the uncertainty of interpretation of its application that would accompany such a change." *Id.* at 22,917. The legislative history thus refutes petitioners' contention that Congress intended to create a different or additional standard of review for the Veterans Court's review of the Secretary's benefit-of-the-doubt determination.

3. Even if the question presented warranted this Court's review, these cases would be poor vehicles in which to address it. To begin, petitioners did not seek rehearing en banc in the court of appeals. Although such a request is not a prerequisite to this Court's exercise of certiorari jurisdiction, petitioners' failure to make it undercuts their suggestion (Pet. 36) that "[n]o other court" can "fix" the error they attribute to the Federal Circuit's decisions.

Moreover, neither petitioner would be entitled to relief even if the question presented were resolved in petitioners' favor. In Bufkin's case, the Board closely reviewed all the relevant evidence, finding that Bufkin did not suffer from PTSD and that the evidence on that issue was not approximately balanced. Pet. App. 54a-62a, 64a. In Thornton's case, the Board closely reviewed the relevant evidence, found that the evidence was approximately balanced on the question of whether his memory loss was related to his PTSD, and applied the benefit-of-the-doubt rule in his favor on that issue. *Id.* at 77a-81a. Ultimately, however, the Board concluded that the evidence weighed in favor of a 50% disability

rating and was not approximately balanced on that point. *Id.* at 81a-86a. In both cases, the Veterans Court found no clear error in the Board's underlying factual findings and held that the Board's application of the benefit-of-the-doubt rule was proper. *Id.* at 20a-25a, 27a-30a, 37a-43a.

Petitioners argue that the Veterans Court should have conducted a separate analysis to determine whether the benefit-of-the-doubt rule applied. But petitioners do not explain how that separate analysis would have helped them. They observe (Pet. 37) that their "cases included both favorable and unfavorable evidence on material issues." But they do not contest the Federal Circuit's separate holding that, "'when conducting a benefit-of-the-doubt-rule analysis, * * * the Board is required to assign probative value to the evidence' rather than simply identifying and labeling each piece of evidence as positive or negative." Pet. App. 5a (quoting *Mattox* v. *McDonough*, 56 F.4th 1369, 1378 (Fed. Cir. 2023)). Nor do petitioners explain how the Board erred in assessing the probative value of particular pieces of evidence, or how the relevant factual findings would be different if the Court adopted their proposed interpretation of Section 7261(b)(1). There is consequently no sound reason to believe that the Veterans Court would have reached a different conclusion than the Board if it had conducted a de novo review of the Board's application of the benefit-of-the-doubt standard.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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