No. 23-713

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The government does not dispute that these cases present a question of statutory interpretation that is exceptionally important and certain to recur. The merits are cleanly teed up for this Court's review. And, without certiorari, the Federal Circuit's erroneous decision will continue to prevent countless veterans from obtaining the benefits they earned through military service.

38 U.S.C. § 7261(b)(1) requires that the United States Court of Appeals for Veterans Claims (the "Veterans Court") enforce the benefit-of-the-doubt rule—a fundamental precept of the veterans' benefits system since the Civil War—by reviewing whether VA properly afforded a veteran the benefit of the doubt on any close evidentiary questions material to their benefits claim. As demonstrated by Petitioners (and by many of the nation's leading veterans' organizations as amici), Congress added this provision to a judicial review statute otherwise modelled on the APA in response to well-documented failures in the veterans' claims process.

In the decisions below, the Federal Circuit gutted this provision and held that it requires nothing that the Veterans Court is not already required to do by other sections of the same statute. In defending these decisions, the government agrees that Congress's 2002 legislation was meaningless. The government advances *no theory* of what § 7261(b)(1) requires and provides *no account* of how the Veterans Court's responsibilities today are different from those before § 7261(b)(1) was enacted. The government's defense

of the Federal Circuit's rulings cannot be squared with the text of the statute, the history and purpose of its enactment, or bedrock principles of statutory interpretation.

The parties' disagreement on the merits is ripe for this Court's review. The government falls back on illusory vehicle objections, but it cannot dispute that these cases squarely present a pure question of statutory interpretation. Contrary to the government's assertions, the question presented is critically important to Mr. Bufkin and Mr. Thornton because its resolution will dictate whether they finally receive the appellate review that Congress provided for. And if they do receive such review, it is reasonably likely that they (and many other veterans) will finally secure the benefits they earned through their service.

The Court should grant the Petition.

I. The Federal Circuit's Decision Is Wrong.

1. Section 7261(b)(1) requires the Veterans Court to meaningfully review whether VA properly applied the benefit-of-the-doubt rule to any issue material to a veteran's claim on appeal. Pet. 19-22. That obligation reflects Congress's judgment that the pre-2002 system had failed countless veterans. Pet. 22-25; *see* Federal Circuit Bar Association (FCBA) Amicus Br. 10-14; Military-Veterans Advocacy (MVA) Amicus Br. 9-11; National Veterans Legal Services Program (NVLSP) Amicus Br. 5-9.

The government doubles down on the Federal Circuit's untenable holding that subsection (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. Pet. App. 15a-16a (emphasis added); *see* BIO 11-12. The government does not dispute Petitioners' showing that benefit-of-the-doubt review is a legal, not a factual, inquiry. Pet. 26. Yet the government does not explain how clear-error review of VA's factfinding could possibly stand in for the legal review mandated by subsection (b)(1). The government also does not dispute that clear-error review of VA's factfinding is separately provided for in subsection (a) and was already part of the review statute before subsection (b)(1) was added. Pet. 22-23. But the government advances no theory of how subsection (b)(1) requires *anything* beyond what was already provided for in the statutory provisions that Congress deemed insufficient and supplemented with its 2002 legislation. *See* FCBA Br. 10-14; MVA Br. 9-11; NVLSP Br. 5-9.

The government's reading cannot be and is not right. Congress added § 7261(b)(1) to the benefits review statute in 2002 in response to systemic failures in veterans' claims adjudication (again, something the government does not dispute). Pet. 7-9, 25. The government's and Federal Circuit's reading fails to give this important enactment any meaningful effect. That interpretation is therefore contrary to "one of the most basic interpretive canons, that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)). The government's misinterpretation is especially egregious here

because "the canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013). Neither the government nor the Federal Circuit provides *any* theory of what § 7261(b)(1) requires beyond the clear-error review already mandated by subsection (a) and already required in the pre-2002 statute.

2. In stark contrast, Petitioners' "competing interpretation" accounts for "every clause and word" of § 7261, *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 106 (2011) (citation omitted), and describes a "coherent and consistent" "statutory scheme," *Matal v. Tam*, 582 U.S. 218, 232 (2017) (citations omitted); Pet. 26. It is the government's reading—not Petitioners'—that cannot be "squared with the plain language of the statute." BIO 13.

Taken as a whole, § 7261 describes the "[s]cope of review" in the Veterans Court. 38 U.S.C. § 7261 (title). As explained in the Petition (at 19-20), subsection (a) provides the primary list of tasks the Veterans Court "shall" do "to the extent necessary … and when presented." 38 U.S.C. § 7261(a). These tasks comprise the brick and mortar of appellate review and are modelled on the APA—deciding relevant legal questions, ordering VA to take action when legally required, holding unlawful VA decisions that are arbitrary or capricious, and setting aside adverse factual determinations that are clearly erroneous. *Id*. Subsection (b) then lists two other tasks that the Veterans Court "shall" perform "[i]n making the determinations under subsection (a)." 38 U.S.C. § 7261(b). The Veterans Court must "take due account" of (1) VA's application

of the benefit-of-the-doubt rule and (2) the rule of prejudicial error. *Id*. Thus, as the Veterans Court performs its primary appellate functions—reviewing legal and factual questions as "necessary" to resolve issues that are "presented"—it must also ensure that VA gave "the benefit of the doubt to the claimant" on any close questions, 38 U.S.C. § 5107(b), and must also determine whether any errors it finds were prejudicial. 38 U.S.C. § 7261(b).

The Federal Circuit's holding—and now, the government's argument—resists this straightforward understanding of the statutory text. It instead posits that Congress in 2002 went to the trouble of amending § 7261 but meant its amendment to have no substantive effect. Pet. 24.

The government tries to defend this odd conclusion by invoking the language requiring the Veterans Court to perform benefit-of-the-doubt review "[i]n making the determinations under subsection (a)." *See* BIO 11-12. But this language does not eliminate the separate obligation to perform benefit-of-the-doubt review. On the contrary, it means that the Veterans Court must perform that review in every case alongside its subsection (a) responsibilities. As the Veterans Court decides legal questions, reviews factfinding for clear error, evaluates whether VA's actions were arbitrary and capricious, and determines whether to set aside a decision or compel further agency action, it must also ensure that the veteran received the benefit of the doubt on close evidentiary issues underlying VA's determinations. Contrary to the government's description, Congress did not "nest the Veterans Court's benefit-of-the-doubt review within

the existing scope of the court's authority," BIO 12-13, but rather overlaid it atop the Veterans Court's existing APA-like obligations.

The government is also wrong to suggest that Petitioners' reading of subsection (b)(1) is in tension with subsection (c)'s rule that "findings of fact made by the Secretary or the Board of Veterans' Appeals" may not "be subject to trial de novo" in the Veterans Court. *See* BIO 11; 38 U.S.C. § 7261(c). As noted above (at 3), the government does not dispute that the benefit-of-the-doubt review required by subsection (b)(1) is not a factual inquiry, but a legal analysis in which the Veterans Court must determine whether VA properly applied the unique standard of proof in § 5107(b). Pet. 26.

The government does not explain how that legal analysis could possibly interfere with a strict clear-error standard for the Veterans Court's review of factual determinations. Nor could it: Nothing about the review mandated by subsection (b)(1) involves second-guessing established facts themselves. The task is to ensure that the veteran prevails with respect to any material issues on which the evidence is close. Pet. 26. Congress's decision to require such review in no way conflicts with its prohibition against de novo factfinding on appeal.

3. Petitioners' interpretation brings subsection (b)(1) into harmony with its sister provision, which requires the Veterans Court to "take due account of the rule of prejudicial error." 38 U.S.C. § 7261(b)(2). Pet. 20-21. Properly understood, subsections (b)(1) and (b)(2) both identify tasks the Veterans Court must

perform alongside the review described in subsection (a). *See* Pet. 23; National Law School Veterans Clinic Consortium (NLSVCC) Amicus Br. 11-14.

The government asserts that this Court has not to date held subsection (b)(2) to "impose[] an independent obligation to review the record separate and apart from 'making the determinations under subsection (a).'" BIO 13. But the Federal Circuit has held exactly that. *Tadlock v. McDonough*, 5 F.4th 1327, 1334 (Fed. Cir. 2021) ("In reviewing the Board's decision for prejudicial error, the Veterans Court … must … consult the full agency record, including facts and determinations that could support an alternative ground for affirmance" alongside its subsection (a) review.). Subsection (b)(1) should be read to impose a parallel obligation to enforce the benefit-of-the-doubt rule. The Federal Circuit's contrary holding puts the Veterans Court in the untenable position of performing only one of the two tasks mandated by subsection (b).

The government also oddly claims that, even though "Sections 7261(b)(1) and (2) both use the phrase 'take due account of,' they impose meaningfully different obligations" because subsection (b)(1) "directs the Veterans Court to consider whether *the Secretary* properly applied the benefit-of-the-doubt rule," not to "assess the facts de novo to determine whether the rule should apply." BIO 13-14. But benefit-of-the-doubt review *is* considering whether "the Secretary" properly gave the benefit of the doubt to a veteran where required by law. Doing so does not involve "assess[ing] the facts de novo" for any purpose. *Supra* 6; Pet. 26.

In Mr. Bufkin's case, for example, four VA-affiliated doctors submitted medical reports reaching different conclusions. Pet. 11-12. The question for the Veterans Court when conducting benefit-of-the-doubt review is not whether any of those medical reports is correct, but whether the collective assortment of opinions acknowledged by VA puts the material evidence in "approximate balance" such that Mr. Bufkin is legally entitled to prevail under § 5107(b). Properly understood, therefore, subsections (b)(1) and (b)(2) impose obligations that are similar in kind—examining whether the facts as already determined justify relief under applicable law—and should be construed in parallel.

4. The government is also wrong about § 7261's statutory history, which plainly demonstrates that Congress intended subsection (b)(1) to supplement the Veterans Court's review. Congress added subsection (b)(1) to the veterans' review statute in 2002, converting a review scheme that was previously an adaptation of the APA into an "APA-plus" system, expressly requiring consideration of the benefit-of-the-doubt issue alongside typical judicial review. Pet. 23-24; *see also* FCBA Br. 12-13; MVA Br. 10-11; NVLSP Br. 8-9. As explained above (at 3-4), this material change to the language of the statute must be read "to have [a] real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995).

The government wrongly asserts that "[t]he legislative history … 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."

BIO 16. The proposed Senate bill would have changed the standard of review under § 7261(a) to a "substantial evidence" standard, but the compromise bill instead maintained the "clear error" review for § 7261(a), *while imposing a separate inquiry under § 7261(b)*. *See* Pet. 25-26; NVLSP Br. 20-22 (explaining that "[t]o 'take due account' of a legal rule requires more than clear-error review"); MVA Br. 14 (same). The history thus makes clear that Congress sought to require separate and independent review of VA's benefit-of-the-doubt determinations.

As for the government's protestation that "legislative history cannot be used to 'muddy' the meaning of 'clear statutory language,'" BIO 14 (quoting *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019)), this objection is wholly off base. First, it is the statute's history of enactment that requires specific meaning attributable to § 7261(b), not mere "statements from witnesses in congressional hearings." *Food Mktg.*, 139 S. Ct. at 2364. Second, the statutory language and history both support the same reading: that the Veterans Court must take an additional step and perform benefit-of-the-doubt review in addition to its subsection (a) responsibilities. *See, e.g.*, *United States v. Windsor*, 570 U.S. 744, 746 (2013) (statute's "history of enactment and its own text demonstrate that" proposed statutory interpretation "was more than an incidental effect of the federal statute. It was its essence."). And neither of those conclusions is inconsistent with the government's cherry-picked statements from individual lawmakers, BIO 15-16, which confirm that the § 7261(a) standard itself remained unchanged but do not deny the addition of § 7261(b)(1).

II. These Cases Are Ideal Vehicles.

The government cannot dispute that these cases present a clean opportunity to squarely decide the meaning of § 7261(b)(1) and that future opportunities to address the provision will be rare. Pet. 36-37. Nor can it contest that these decisions exemplify the types of close cases for which Congress guaranteed a second look on appeal to ensure that veterans received the benefit of the doubt. Pet. 37. Instead, the government conjures two purported vehicle problems, neither of which presents an obstacle to review.

1. The government halfheartedly suggests that this Court's review is somehow inappropriate because "petitioners did not seek rehearing en banc in the court of appeals." BIO 16. As the government acknowledges, however, "such a request is not a prerequisite to this Court's … jurisdiction." *Id.* En banc review would likely have been futile here given that two separate panels rendered the decisions at issue. Between these two cases, five of the twelve active judges on the Federal Circuit have already rejected Petitioners' arguments, and the others reviewed the precedential *Bufkin* opinion before it issued. *See* Fed. Cir. Internal Operating Procedure No. 10.5 (2022) (precedential opinions circulated to full court pre-issuance). These dynamics make certiorari all the more necessary, because it is highly unlikely that the Federal Circuit itself will "fix" its "error" now or in the future. *Contra* BIO 16.

2. The government next asserts that "neither petitioner would be entitled to relief even if the question presented were resolved in [their] favor"

because (in its view) the *Board* "closely reviewed the relevant evidence" and determined that certain evidence "was not approximately balanced." BIO 16-17. But Petitioners' argument is that the *Veterans Court*—not just the Board—is required to ensure that the benefit-of-the-doubt rule was properly applied. That never happened here. The government's purported "vehicle problem" reduces to a restatement of its merits position that subsection (b)(1) permits the Veterans Court to rubber-stamp the Board's application of the benefit-of-the-doubt rule without meaningful independent review. *See* BIO 12-13; Pet. 22-24.

On the merits, such review could well lead to a different outcome. The government does not dispute that Petitioners' cases "included both favorable and unfavorable evidence on material issues." BIO 17 (citation omitted). Indeed, Mr. Bufkin showed that his was a "very complex case," BRBA 183, with competing VA medical opinions regarding the relationship between his current psychiatric disability and his active-duty service. Pet. 9-12. And Mr. Thornton, who had already demonstrated a prior error in VA's evaluation of the severity of his PTSD, TRBA920, was denied a higher rating because a VA medical examiner disagreed with Mr. Thornton's treating VA psychiatrist regarding the severity of his PTSD symptoms. Pet. 12-15.

Thus, it is wholly plausible—indeed, very likely—that the Veterans Court could find that the evidence was in approximate balance on material issues and determine that the benefit-of-the-doubt rule requires a favorable resolution of Petitioners' claims. Instead

of making such a determination, however, the Veterans Court affirmed the denial of benefits in both cases for the sole reason that it found no clear error of fact below. Pet. 15-16. Those decisions can stand only if the flawed analysis endorsed by the Federal Circuit is upheld.

III. The Question Presented Is Important And Recurring.

The government does not dispute or even address the exceptional importance and certain recurrence of the question presented. Pet. 30-36. The question was described by the *Thornton* panel as "earth-shaking." Oral Arg. at 35:45. It affects thousands of veterans every year. Pet. 30-31; MVA Br. 17-18; NLSVCC Br. 10. And it will dictate not only whether they receive the benefits they are due, but also how long it takes for the Board to decide their cases. NVLSP Br. 17-20.

The benefit-of-the-doubt rule is "central to the administration of veterans' claims." FCBA Br. 2. VA's application of the rule, and the scope of judicial oversight of its adherence to that rule, are issues that speak to the foundation of the veterans' benefits system. Amici describe the Federal Circuit's holding and the inadequate review available in its wake as a "deep-seated problem[]," NVLSP Br. 2, which "threatens to make the benefit-of-the-doubt rule a dead letter," MVA Br. 2, and to "render [the rule] toothless," NLSVCC Br. 2. The Court should grant the Petition, repudiate the Federal Circuit's construction of Congress's amendment as a nullity, and restore the critical protection Congress provided for our nation's veterans.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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