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,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF AMICUS CURIAE, THE NATIONAL LAW SCHOOL VETERANS CLINIC CONSORTIUM IN SUPPORT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. The history and codification of the pro-claimant benefit-of-the-doubt doctrine supports meaningful and robust judicial review of its application 3

A. Origins of the benefit-of-the-doubt doctrine 4

B. Codification of the benefit-of-the-doubt rule 5

C. Title 38, section 5107(b) reflects Congress's nondiscretionary mandate for VA to adjudicate veterans' claims in a pro-claimant manner, and the express citation of § 5107(b) in § 7261(b) indicates that Congress envisioned meaningful judicial review of VA's application of the benefit-of-the-doubt rule 8

II. Title 38, section 7261(b) requires the Veterans Court to consider both the rule of prejudicial-error and the benefit-of-the-doubt rule in the same way 11

TABLE OF CONTENTS – Continued

Page

A. The plain text of 38 U.S.C § 7261(b) requires that the Veterans Court review the full record to determine whether the Board properly applied the benefit-of-the-doubt rule 12

B. Like the Veterans Court's prejudicial-error review, the Court should review the Board's application of the benefit-of-the-doubt rule based on the facts and circumstances of the case..... 13

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Brown v. Gardner, 513 U.S. 115 (1994) 8

Bufkin v. McDonough, Fed. Cir. No. 22-1089 (2023) 13, 14

Cushman v. Shinseki, 576 F.3d 1290 (Fed. Cir. 2009) 10

Davis v. Mich. Dep't of the Treasury, 489 U.S. 803 (1989) 11

Gambill v. Shinseki, 576 F.3d 1307 (Fed. Cir. 2009) 8

Gilbert v. Derwinski, 1 Vet. App. 49 (1990) 3, 4, 9

Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428 (2011) 8

Hodge v. West, 155 F.3d 1356 (Fed. Cir. 1998) 8

King v. St. Vincent's Hosp., 502 U.S. 215 (1991) 8

Mlechick v. Mansfield, 503 F.3d 1340 (Fed. Cir. 2007) 13

Newhouse v. Nicholson, 497 F.3d 1298 (Fed. Cir. 2007) 2, 11-13

Roane v. McDonough, 64 F.4th 1306 (Fed. Cir. 2023) 11

Shinseki v. Sanders, 556 U.S. 396 (2009) 14

Tadlock v. McDonough, 5 F.4th 1327 (Fed. Cir. 2021) 2, 11-13

TABLE OF AUTHORITIES – Continued

Page

STATUTES

38 U.S.C. § 5107(b) 1, 3, 4, 8-11

38 U.S.C. § 5107(b) (2023) 9

38 U.S.C. § 7261(b) 3, 8, 11-14

38 U.S.C. § 7261(b)(1) 2, 9-12, 14

38 U.S.C § 7261(b)(2) 2, 11, 12

REGULATIONS

38 C.F.R. § 2.1075 (1938) 5

38 C.F.R. § 3.31(d) (1949) 5

38 C.F.R. § 3.101 7

38 C.F.R. § 3.102 (2023) 4-7, 9

38 C.F.R. pt. 1 & 3 ..... 4, 5

OTHER AUTHORITIES

50 Fed. Reg. 34,452-02 (Aug. 26, 1985) 4, 5

125 Cong. Rec. 24,756 (1979) 6

134 Cong. Rec. 17,458 (1988) 6

Board of Veterans' Appeals, *U.S. Department of Veterans Affairs search results* 10

H.R. 585 and Other Bills Relating to Judicial Review of Veterans' Claims: Hearings Before the H. Comm. on Veterans' Affairs, 99th Cong. 169 (1986) 7

TABLE OF AUTHORITIES – Continued

Page

H.R. Rep. No. 100-963 (1988) 7

Judicial Review of Veterans' Claims: Hearings Before the Subcomm. on Special Investigations of the H. Comm. on Veterans' Affairs, 96th Cong. 253 (1980).....6, 7

President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865) 3

VA Mission, Vision, and Core Values, U.S. DEP'T OF VETERANS AFF. 3

Veterans' Administration Adjudication Procedure and Judicial Review Act: Hearings Before the Sen. Comm. on Veterans' Affairs, 96th Cong. 135 (1979).....6

INTEREST OF AMICUS CURIAE[1]

The National Law School Veterans Clinic Consortium (NLSVCC) submits this brief in support of the position of Petitioners Joshua E. Bufkin and Norman F. Thornton. The filing of this brief was authorized by the Board of the NLSVCC, a 501(c)(3) organization.

NLSVCC is a collaborative effort of the nation's law school legal clinics dedicated to addressing the unique legal needs of U.S. military veterans on a pro bono basis. NLSVCC's mission is, working with like-minded stakeholders, to gain support and advance common interests with the Department of Veterans Affairs (VA), U.S. Congress, state and local veterans service organizations, court systems, educators, and all other entities for the benefit of veterans throughout the country.

NLSVCC exists to promote the fair treatment of veterans under the law. Clinics in the NLSVCC work daily with veterans, advancing benefits claims through the arduous VA appeals process. NLSVCC is keenly interested in this case in light of the important disability benefits issue presented. It respectfully submits that this case presents the opportunity for the Court to reemphasize the importance of the benefit-of-the-doubt doctrine under 38 U.S.C. § 5107(b) and uphold

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[1] In compliance with Rule 37.2, counsel for amicus curiae provided notice to all parties of its intention to file an amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amicus curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

Congress's intent that the Court of Appeals for Veterans Claims (Veterans Court) play an active role in ensuring VA's compliance with that standard.

SUMMARY OF THE ARGUMENT

This case provides the opportunity to interpret 38 U.S.C. § 7261(b)(1) in a manner that provides meaningful and robust judicial review of the Secretary's application of the benefit-of-the-doubt rule, which is at the heart of the non-adversarial and pro-claimant VA claims adjudication process. The longstanding history and codification of the benefit-of-the-doubt doctrine, taken together with Congress's mandate to the Veterans Court to "take due account" of VA's application of the benefit-of-the-doubt doctrine in 38 U.S.C. § 7261(b)(1), makes it evident that vigorous judicial review of the application of the rule is required. Upholding the Federal Circuit's decisions below would render toothless § 7261(b)(1)'s mandate to "take due account" of the benefit-of-the-doubt rule and deprive veterans of the process they are due. Title 38, section 7261(b)(2) requires that the Veterans Court "shall . . . take due account of the rule of prejudicial error." The phrase "take due account" in § 7261(b)(2) has been held to mean that the Veterans Court must review the full agency record in every case to determine whether a VA error is prejudicial. *Tadlock v. McDonough*, 5 F.4th 1327, 1337 (Fed. Cir. 2021) (citing *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007)). Applying accepted principles of statutory construction to the plain

text of § 7261(b), mandates that the Veterans Court analyze the rule of prejudicial-error and the benefit-of-the-doubt rule in the same manner. Consequently, the Veterans Court must be required to consult the full agency record in every case to determine whether the benefit-of-the-doubt rule in 38 U.S.C. § 5107(b) was properly applied.

ARGUMENT

I. The history and codification of the pro-claimant benefit-of-the-doubt doctrine supports meaningful and robust judicial review of its application.

The claimant-friendly VA benefits scheme is rooted in the government's longstanding recognition of the service and sacrifices of the nation's veterans.[2] One foundational aspect of this pro-claimant system is the benefit-of-the-doubt doctrine, a unique standard of proof that requires VA adjudicators to award benefits to the claimant where the evidence is in "approximate balance." *Gilbert v. Derwinski*, 1 Vet. App. 49, 53-54 (1990). In such cases, where there is an approximate

[2] "To care for him who shall have borne the battle and for his widow and orphan." President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), http://www.bartleby.com/124/pres32.html. The VA continues to honor this commitment to veterans by embodying President Lincoln's pledge into the Department's core mission, vision, and values. *See* "VA Mission, Vision, and Core Values," U.S. DEP'T OF VETERANS AFF., https://www.va.gov/JOBS/VA_In_Depth/mission.asp.

balance of positive and negative evidence, the "tie goes to the runner" and benefits must be granted. *Id*. at 55.

Articulated in 38 C.F.R. § 3.102 and 38 U.S.C. § 5107(b), the benefit-of-the-doubt doctrine is at the heart of the non-adversarial and pro-claimant VA claims adjudication process. By tradition and statute, the benefit of the doubt has and continues to belong to the veteran.

A. Origins of the benefit-of-the-doubt doctrine.

The origins of this doctrine trace back to the post-Civil War era. *Gilbert*, 1 Vet. App. at 55; *see also* Adjudication of Claims Based on Exposure to Dioxin or Ionizing Radiation, 50 Fed. Reg. 34,452-02 (Aug. 26, 1985) ((to be codified as 38 C.F.R. pt. 1 & 3) (discussing an 1899 Bureau of Pension Report that included the statement "so far as permissible under the laws as they exist and the established practice of the Bureau, the benefit of any doubt has been resolved in favor of the claimant.")). Following World War I, the principle of giving veterans the benefit of the doubt continued to develop. *Gilbert*, 1 Vet. App. at 55. The end of the war brought the promulgation of the first rating schedules which included a statement of commitment to the benefit-of-the-doubt doctrine in its preface. *Id*.; *see also* 50 Fed. Reg. 34,452-02 (Aug. 26, 1985). ("The law must be administered by its broadest interpretation and ratings of disability should be made as generous as possible in consistency with the facts. Wherever a question

of doubt arises the benefit of the doubt must be given to the claimant."). A 1924 opinion of the Veterans Bureau General Counsel laid the foundation for the text of VA's reasonable doubt standard articulated in 38 C.F.R. § 3.102.[3] *See id.*

VA regulations have embodied this principle since before World War II, and VA reaffirmed its commitment to the benefit-of-the-doubt rule in its 1949 regulations. *See*, *e.g.*, 38 C.F.R. § 2.1075 (1938) (noting the "general policy of resolving all reasonable doubts in favor of the claimant"); 38 C.F.R. § 3.31(d) (1949) (providing that the "benefit of every reasonable doubt will be resolved in favor of such veterans"). The benefit-of-the-doubt rule has thus characterized the process for providing benefits to the nation's veterans since the nation first began providing such benefits.

B. Codification of the benefit-of-the-doubt rule.

Recognizing the deep history of the benefit-of-the-doubt doctrine, Congress sought to codify it. By doing so in the same piece of legislation that created the

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[3] The Veterans Bureau General Counsel's opinion concerned a claim for disability benefits submitted by a World War I veteran. There was credible evidence in favor and against his claim. The opinion "outlined the 'benefit of the doubt' policy and explained it was not to be applied if the truth could be established by the preponderance of the evidence; on the other hand, proof 'beyond a reasonable doubt' was never required." Adjudication of Claims Based on Exposure to Dioxin or Ionizing Radiation, 50 Fed. Reg. 34,452-02 (Aug. 26, 1985) (to be codified as 38 C.F.R. pt. 1 & 3).

Veterans Court, Congress affirmed its intent for judicial review of the agency's application of the benefit-of-the-doubt rule. Although Congress codified the rule in 1988, its legislative history traces back to 1979. Throughout the legislative process, Congress clarified that it intended to codify the benefit-of-the-doubt doctrine to guarantee that VA's policy of "construing the evidence liberally in favor of the claimant" was not lost in reaction to the judicial review provisions of the Veterans' Judicial Review Act (VJRA). *See* 125 Cong. Rec. 24,756 (1979). In codifying the standard in 38 C.F.R. § 3.102, known as the benefit-of-the-doubt rule, Congress intended to secure VA's commitment to "making every effort to award a benefit to a claimant." *Id*.

Congress has long recognized that the benefit-of-the-doubt rule is "one of the fundamental principles in the adjudication of a claim for VA benefits." 134 Cong. Rec. 17,458 (1988). During Congressional hearings before the enactment of the VJRA, veterans' groups expressed frustration with VA's frequent failure to properly invoke this rule and supported codifying the benefit-of-the-doubt rule, rather than maintaining its status as a "mere regulation." *Veterans' Administration Adjudication Procedure and Judicial Review Act: Hearings Before the Sen. Comm. on Veterans' Affairs*, 96th Cong. 135, 225 (1979) (statements of William Lawson, Chairman, Board of Directors, American Association of Minority Veterans Program Administrators, and Carlos Soler-Calderon, National Congress of Puerto Rican Veterans); *Judicial Review of Veterans' Claims: Hearings Before the Subcomm. on Special*

Investigations of the H. Comm. on Veterans' Affairs, 96th Cong. 253, 257 (1980) (statements of Arthur A. Bressi, Special Projects Officer, American Defenders of Bataan and Corregidor, Inc., and Stuart A. Steinberg, Clinical Supervisor, Administrative Advocacy Clinic, Georgetown University Law Center); *H.R. 585 and Other Bills Relating to Judicial Review of Veterans' Claims: Hearings Before the H. Comm. on Veterans' Affairs*, 99th Cong. 169, 302 (1986) (statements of Allen J. Lynch, Chief of Veterans Advocacy, Office of the Attorney General, State of Illinois, and Kenneth T. Blaylock, President, American Federation of Government Employees).

In 1988, Congress moved forward with codification without altering the existing VA rule, 38 C.F.R. § 3.102.[4] H.R. Rep. No. 100-963, at 38 (1988).

The longstanding history and codification of the benefit-of-the-doubt doctrine, coupled with the 1988 VJRA that created the Veterans Court and statutorily mandated that Court to "take due account" of VA's application of this rule, demonstrates Congress's ongoing support for meaningful and robust judicial review of the Secretary's application of the benefit-of-the-doubt rule.

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[4] While the source refers to 38 C.F.R. § 3.101, the existing VA rule that addressed the benefit-of-the-doubt standard is 38 C.F.R. § 3.102.

C. Title 38, section 5107(b) reflects Congress's nondiscretionary mandate for VA to adjudicate veterans' claims in a pro-claimant manner, and the express citation of § 5107(b) in § 7261(b) indicates that Congress envisioned meaningful judicial review of VA's application of the benefit-of-the-doubt rule.

In the "strongly and uniquely pro-claimant" VA benefits scheme, Congress has repeatedly demonstrated its intent to "place a thumb on the scale in the veteran's favor." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 440 (2011); *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998). And this Court has repeatedly upheld the pro-veteran canon. *See*, *e.g.*, *Brown v. Gardner*, 513 U.S. 115, 117-18 (1994) (noting the "rule that interpretive doubt is to be resolved in the veteran's favor"); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991) (noting the "canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor").

The pro-veteran canon affords an "entire complex of protections" to claimants, including the duty to assist veterans in presenting their claims, the duty to liberally construe the claim and relevant laws, the nonadversarial nature of proceedings, and, critically here, the rule that the veteran will be given the benefit of the doubt in close cases. *Gambill v. Shinseki*, 576 F.3d 1307, 1319 (Fed. Cir. 2009); *see also Gardner*, 513 U.S. at 117-18; *Henderson*, 562 U.S. at 440 (recognizing Congress's longstanding "solicitude . . . for veterans").

Throughout the VA claims process, veterans should receive the benefit of the doubt when 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) (2023); *see also* 38 C.F.R. § 3.102 (2023) (requiring that reasonable doubt as to service origin, the degree of disability, or any other point relevant to disability compensation "be resolved in favor of the claimant"). In comparison to other standards of proof, the benefit-of-the-doubt doctrine imposes the least stringent evidentiary threshold needed for a claimant to prevail. *Gilbert*, 1 Vet. App. at 53-54 (holding that "a veteran need only demonstrate that there is an 'approximate balance of positive and negative evidence' . . . entitlement need not be established 'beyond a reasonable doubt,' by 'clear and convincing evidence,' or by a 'fair preponderance of evidence' ").

Congress expressly cited § 5107(b) when it defined the Veterans Court's scope of review in 38 U.S.C. § 7261(b)(1), stating that the Court *shall* "take due account of the Secretary's application of section 5107(b)." In so doing, Congress affirmed the crucial role of judicial review in ensuring that VA properly and consistently applies this doctrine.

The statutory requirement to "take due account of the Secretary's application" of the benefit-of-the-doubt rule demonstrates Congress's intent that the Veterans Court meaningfully review the Secretary's application of this rule, not simply rubber-stamp the Secretary's determinations. The benefit-of-the-doubt rule is

invoked by the Board in thousands of decisions every year: A search for "benefit of the doubt" in Board decisions from 2023 alone yielded 25,747 results. *See* Board of Veterans' Appeals, *U.S. Department of Veterans Affairs search results*, available online at https://search.usa.gov/search/docs?affiliate=bvadecisions&sort_by=&dc=9692&query=%22benefit+of+the+doubt%22 (last accessed Jan. 25, 2024). In the cases at hand, this Court has the opportunity to ensure consistent adjudication of this low evidentiary burden through judicial review.

In 2009, the Federal Circuit held, for the first time, that veterans have a "due process right to fair adjudication" of their claims for service-connected disability benefits. *Cushman v. Shinseki*, 576 F.3d 1290 (Fed. Cir. 2009). The statutory protections at 38 U.S.C. §§ 5107(b) and 7261(b)(1) ensure that this due process right is upheld. Given the pro-claimant nature of the veterans benefits system and the due process rights at stake, claimants would face a procedural disadvantage without meaningful judicial review of the VA's application of § 5107(b). Upholding the Federal Circuit's decisions below would render toothless § 7261(b)(1)'s mandate to "take due account" of the benefit-of-the-doubt rule and deprive veterans of the process they are due.

II. Title 38, section 7261(b) requires the Veterans Court to consider both the rule of prejudicial-error and the benefit-of-the-doubt rule in the same way.

"[W]ords of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of the Treasury*, 489 U.S. 803, 809 (1989). Likewise, identical words and phrases within the same statute are given the same meaning, "especially when they appear in the same statutory sentence." *Roane v. McDonough*, 64 F.4th 1306, 1310 (Fed. Cir. 2023). Title 38, section 7261(b)(2) requires that the Veterans Court "shall . . . take due account of the rule of prejudicial error." The phrase "take due account" requires that the Veterans Court review the full agency record to determine whether a VA error is prejudicial in every case. *Tadlock*, 5 F.4th at 1337 (citing *Newhouse II*, 497 F.3d at 1302). The sister provision to § 7261(b)(2) is § 7261(b)(1), which requires the Veterans Court "take due account" of the-benefit-of-the-doubt rule established in 38 U.S.C. § 5107(b). As these two requirements are part of the same statutory sentence, the phrase "take due account" must be read in the same way. Thus, as with the prejudicial-error rule, the Veterans Court must review the entire record in every case to ensure the benefit of the doubt required by 38 U.S.C. § 5107(b) is provided to the veteran.

When Congress instructs the Veterans Court to "take due account" of both the benefit-of-the-doubt rule and the rule of prejudicial error, the Court must consider these rules in the same way. 38 U.S.C. § 7261(b).

To interpret 38 U.S.C § 7261(b)(1) and (2) differently makes no sense from a statutory construction or common-sense standpoint.

A. The plain text of 38 U.S.C § 7261(b) requires that the Veterans Court review the full record to determine whether the Board properly applied the benefit-of-the-doubt rule.

Section 7261(b) states that "the Court *shall review the record of proceedings* before the Secretary and the Board of Veterans' Appeals . . . and shall (1) take due account of the Secretary's application of [the benefit-of-the-doubt rule]; and (2) take due account of the rule of prejudicial error." 38 U.S.C. § 7261(b) (emphasis added).

When the Veterans Court reviews the Board's decision for prejudicial error, it "[must] consult the full agency record, including facts and determinations that could support an alternative ground for affirmance." *Tadlock*, 5 F.4th at 1337 (citing *Newhouse II*, 497 F.3d at 1302).

Section 7261(b)'s plain text requirement that "the Court shall review the record of proceedings" applies to prejudicial error and its sister provision, the benefit-of-the-doubt rule. Given this clear statutory framework, it would be illogical to interpret and apply § 7261(b)(1) (benefit-of-the-doubt rule) in any manner that is different than § 7261(b)(2) (prejudicial-error rule).

The plain text of § 7261(b), together with the requirements established by caselaw as to how the Veterans Court must conduct the prejudicial-error review, mandate a clear methodology for analyzing whether the benefit-of-the-doubt rule was properly applied. In *Tadlock*, the Federal Circuit reiterated its previous conclusion, "[recognizing] that the prejudicial error analysis must be performed in every case and must be done so on the record made before the agency." *Tadlock*, 5 F.4th at 1335 (citing *Newhouse II*, 497 F.3d at 1301 and *Mlechick v. Mansfield*, 503 F.3d 1340, 1345 (Fed. Cir. 2007)). As such, the Veterans Court must review the entire record in every case to ensure compliance with the benefit-of-the-doubt rule.

B. Like the Veterans Court's prejudicial-error review, the Court should review the Board's application of the benefit-of-the-doubt rule based on the facts and circumstances of the case.

The Veterans Court misconstrued the statutory mandate to "take due account" of the application of the benefit-of-the-doubt rule when it failed to consider the facts and circumstances of these cases. In both Mr. Bufkin's and Mr. Thornton's cases, the Federal Circuit stated that the Veterans Court may consider the facts and circumstances of the case when it reviews the Board's application of the benefit-of-the-doubt rule, but it has no statutory duty to do so unless reviewing the Board's application of the rule for clear error. *Bufkin v. McDonough*, Fed. Cir. No. 22-1089 (2023). The Court

held that the statutory scheme of § 7261(b)(1) does not require the Veterans Court "to *sua sponte* review the underlying facts and address the benefit-of-the-doubt rule." *Id*. at 8.

As this Court held in *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009), what a reviewing court might consider harmless in some circumstances may be harmful in a veteran's case. The Veterans Court review of the circumstances of the case is fundamental to the statutory mandate to "take due account" of the rule of prejudicial error and the Secretary's application of the benefit-of-the-doubt rule. *Id.* Accordingly, like the prejudicial-error rule, the Veterans Court should review the Board's application of the benefit-the-doubt rule in every case based on the facts and circumstances of the case.

CONCLUSION

Requiring the Veterans Court to review the record in every case to ensure compliance with the benefit-of-the-doubt rule is consistent with the history and codification of the doctrine in the non-adversarial and pro-claimant VA claims adjudication process. Such a requirement, as is required with the prejudicial-error rule, is proper given the statutory framework of 38 U.S.C § 7261(b). Accordingly, *Amici*

respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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