No. 23-713

In the Supreme Court of the United States

Joshua E. Bufkin,

Petitioner,

v.

Denis R. McDonough, Secretary of Veterans Affairs,

Respondent.

Norman F. Thornton,

Petitioner,

v.

Denis R. McDonough, Secretary of Veterans Affairs,

Respondent.

On Petition for a Writ of Certiorari to United States Court of Appeals for the Federal Circuit

BRIEF *AMICUS CURIAE* OF MILITARY-VETERANS ADVOCACY SUPPORTING PETITIONER

MICHAEL E. JOFFRE
Counsel of Record
ANNA G. PHILLIPS
STERNE, KESSLER, GOLDSTEIN & FOX, P.L.L.C.
1101 K Street, N.W.
10th Floor
Washington, D.C. 20005
(202) 772-8856
mjoffre@sternekessler.com

JOHN B. WELLS
MILITARY-VETERANS ADVOCACY, INC.
P.O. BOX 5235
Slidell, LA 70469-5235

February 2, 2024

TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT.......................... 2

ARGUMENT 4

I. THE BENEFIT OF THE DOUBT RULE IS A CORNERSTONE POLICY USED TO ASSESS VETERANS BENEFITS IN A PRO-CLAIMANT SYSTEM.. 4

A. Failure to apply the benefit of the doubt rule led to judicial review of VA decisions. 5

B. Deference to VA fact findings resulted in failure to apply the benefit of the doubt rule, harming veterans. 9

C. The Federal Circuit's interpretation of § 7261(b)(1) undermines the purpose of the benefit of the doubt rule and Congressional intent.. 11

II. THE PRO-VETERAN CANON SUPPORTS INDEPENDENT ASSESSMENT OF THE BENEFIT OF DOUBT RULE. 14

III. THIS COURT'S REVIEW IS WARRANTED TO CORRECT THE FEDERAL CIRCUIT'S ERROR AND ENSURE THAT CLAIMS RECEIVE APPROPRIATE REVIEW SO VETERANS MAY RECEIVE THE BENEFITS TO WHICH THEIR SERVICE HAS ENTITLED THEM.................. 17

CONCLUSION... 19

TABLE OF AUTHORITIES

Page(s)

Cases

Barrett v. Nicholson,
466 F.3d 1038 (Fed. Cir. 2006)......................14, 17

Barrett v. Principi,
363 F.3d 1316 (Fed. Cir. 2004).............................3

Boone v. Lightner,
319 U.S. 561 (1943)..2, 16

Brown v. Gardner,
513 U.S. 115 (1994)..15

Bufkin v. McDonough,
75 F.4th 1368 (Fed. Cir. 2023) 2

Cannon v. Univ. of Chi.,
441 U.S. 677 (1979)...5

Fishgold v. Sullivan Drydock & Repair Corp.,
328 U.S. 275 (1946)...4

Gambill v. Shinseki,
576 F.3d 1307 (Fed. Cir. 2009) (Bryson, J., concurring) 14

Gilbert v. Derwinski,
1 Vet. App. 49 (1990) 16, 17

Henderson v. Shinseki,
562 U.S. 428 (2011)................................12, 15, 16

Hodge v. West,
155 F.3d 1356 (Fed. Cir. 1998) 14

Jensen v. Brown,
19 F.3d 1413 (Fed. Cir. 1994) 15

King v. St. Vincent's Hosp.,
502 U.S. 215 (1991)..15

Lynch v. McDonough,
21 F.4th 776 (Fed. Cir. 2021) 16

National Org. of Veterans' Advocs., Inc. v. Sec'y of Veterans Affs.,
260 F.3d 1365 (Fed. Cir. 2001) 15

Procopio v. Wilkie,
913 F.3d 1371 (Fed. Cir. 2019) 16

Skoczen v. Shinseki,
564 F.3d 1319 (Fed. Cir. 2009) 12

Thornton v. McDonough,
2023 WL 5091653 (Fed. Cir. Aug. 9, 2023)..2

United States v. LeCoe,
936 F.2d 398 (9th Cir. 1991)..............................5, 7

United States v. Oregon,
366 U.S. 643 (1961)..9, 16

Statutes

38 U.S.C. § 5107(b)................................. 1-3, 5, 7, 9-13

38 U.S.C. § 7261(a)(4) 10, 12, 13

38 U.S.C. § 7261(b) 3, 10, 11, 13, 14

38 U.S.C. § 7261(b)(1) 1-2, 4, 11-12, 14-18

Act of Mar. 20, 1933 Pub. L. No. 73-2 § 5, 48 Stat. 8 6

Angela Drake et. al., *Review of Veterans Law Decisions of the Federal Circuit*, 2021 Edition, 71 Am. U. L. Rev. 1619 (2022) 11, 12

Veterans Benefits Act of 2002, Pub. L. No. 107-330, 116 Stat. 2820 (2002) 11, 12, 14

Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988) 8, 9, 12

Other Authorities

38 C.F.R. § 3.102 ....5, 7, 9

134 Cong. Rec. S16632 (Oct. 18, 1988) 9

148 Cong. Rec. H8925 (Nov. 14, 2002) 9, 10, 12, 13, 14

50 Fed. Reg. 34452 (Aug. 26, 1985) 4, 5

Angela Drake et. al., *Review of* 10

H.R. 5288, 100th Cong. (1988) 8

H.R. Rep. No. 100-963 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782 11

Judicial Review and the Governmental Recovery of Veterans' Benefits, 118 U. Pa. L. Rev. 288 (1969) 5

Judicial Review of Veterans' Affairs: Hearing on S.11 and S. 2292 Before the S. Comm. on Veterans' Affairs, 100th Cong. (1988) 8

Judicial Review of Veterans' Affairs: Hearings Before the H. Comm. On Veterans' Affairs, 100th Cong. (1988) 8

Oversight Hearing on the Board of Veterans' Appeals: Hearing Before the Subcomm. On Compensation, Pension and Insurance of the H. Comm. On Veterans' Affairs, 100th Cong. (1988) 8

S. Rep. No. 96-178 (1979) 7

S. Rep. No. 107-234 (2002) 10, 13

VA Administrative Procedure and Judicial Review Act: Hearing on S. 364 Before the S. Comm. On Veterans' Affairs, 95th Cong. (1977) 3, 6, 17

VA. S. Rep. No. 107-234 (2002) 9

INTEREST OF *AMICUS CURIAE* [1]

Military-Veterans Advocacy Inc. (MVA) is a non-profit organization that litigates and advocates on behalf of service members and veterans. Established in 2012 in Slidell, Louisiana, MVA educates and trains service members and veterans concerning rights and benefits, represents veterans contesting the improper denial of benefits, and advocates for legislation to protect and expand service members' and veterans' rights and benefits.

For more than a century, a fundamental precept has governed the veterans' benefits system: in close cases, the veteran—and not the government—receives the benefit of the doubt. And Congress chose to codify that long-standing rule in 38 U.S.C. § 5107(b). Despite this, veterans have historically been denied benefits in close cases.

Congress has spent years attempting to remedy that problem. Indeed, one of the main reasons that Congress instituted judicial review of VA decisions was specifically to police the VA's compliance with the benefit of the doubt rule. But Congress went even further to ensure that veterans received the benefit of the doubt. It enacted 38 U.S.C. § 7261(b)(1), which provides that the Veterans Court should "take due account of the Secretary's application of section

---

[1] The parties were timely notified of MVA's intent to file this brief. No counsel for a party authored any part of this brief, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

5107(b)." In *Bufkin v. McDonough*, 75 F.4th 1368 (Fed. Cir. 2023), and *Thornton v. McDonough*, 2023 WL 5091653 (Fed. Cir. Aug. 9, 2023), the Federal Circuit eviscerated that protection.

According to the Federal Circuit, § 7261(b)(1) does not mandate that the Veterans Court conduct any review of whether the benefit of the doubt rule recited in § 5107(b) was meaningfully applied in any appeal. Rather, the Federal Circuit held that § 7621(b)(1) requires nothing more than that the Veterans Court review the VA's factual findings for clear error—something already provided by other statutes.

This holding conflicts with fundamental pro-veteran principles that trace back to the Civil War. As this Court has long held, veterans-benefits statutes must "always . . . be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943). The holding also ignores Congress's pro-veteran intent in enacting the statute in the first place. And, more fundamentally, the Federal Circuit's decision threatens to make the benefit of the doubt rule a dead letter to the detriment of millions of veterans.

MVA has an interest in ensuring that 38 U.S.C. § 7261(b)(1) is interpreted consistently with Congress's intent and that veterans are not denied the benefit of the doubt in obtaining benefits. This Court should grant the petition and reverse.

SUMMARY OF THE ARGUMENT

"It has always been the policy of [the VA] to assist the claimant . . . and to resolve all reasonable doubt

in favor of the claimant." *VA Administrative Procedure and Judicial Review Act: Hearing on S. 364 Before the S. Comm. On Veterans' Affairs*, 95th Cong. 19 (1977) (statement of VA Administrator Max Cleland).

This policy—while in existence for more than a hundred years—has been inconsistently applied to the detriment of millions of claimants. "Annually hundreds of thousands of veterans, survivors, and dependents apply for benefits and . . . [e]ach year many applications are denied." *VA Administrative Procedure and Judicial Review Act: Hearing on S. 364 Before the S. Comm. On Veterans' Affairs*, 95th Cong. 2 (1977) (Sen. Alan Cranston Opening Statement). In an effort to ensure the pro-claimant benefit of the doubt rule was not an illusory concept, Congress codified the rule (at § 5107(b)) and established the Court of Appeals for Veterans Claims. *Infra* Section I.A. And when the deference afforded to the VA's fact-findings appeared to set aside application of the benefit of the doubt, Congress once again took action, this time, enacting § 7261(b) to ensure the Veterans Court "review[s] the record" as a whole and "take[s] due account" of the benefit of the doubt rule. *Infra* Section I.B.

The history and evolution of § 7261(b) establish that Congress intended this statutory provision to have effect in the pro-claimant schema "designed to award 'entitlements to a special class of citizens, those who risked harm to serve and defend their country.'" *Barrett v. Principi*, 363 F.3d 1316, 1320 (Fed. Cir. 2004); *see infra* Section I.C. But the Federal Circuit's decision turns decades of legislative history and Congressional intent on its head.

Moreover, to the extent there is any doubt about Congress's intent, the history of § 7261(b)(1) must be viewed through the lens of the pro-veteran canon. Absent clear proof to the contrary, Congress must be presumed to be acting "for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). Here, that presumption compels the conclusion that Congress granted meaningful appellate review of whether a veteran actually received the benefit of the doubt. In contrast, the Federal Circuit's decision is decidedly anti-veteran and fails to "liberally construe[]" § 7261(b)(1). *Id.*

ARGUMENT

I. THE BENEFIT OF THE DOUBT RULE IS A CORNERSTONE POLICY USED TO ASSESS VETERANS BENEFITS IN A PRO-CLAIMANT SYSTEM.

"The reasonable doubt policy . . . has always been a rule of [veterans] claims adjudication." 50 Fed. Reg. 34452, 34454 (Aug. 26, 1985). It "goes 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 the Bureau of Pension physicians without reference to uniform guidelines." *Id.* For example, an 1899 Bureau of Pensions report stated that "[s]o far as it was 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." *Id.* (alteration in original).

The policy persisted, when after World War I, the VA issued the first-ever disability ratings schedule in 1921. The schedule's preface stated "[w]herever a question of doubt arises the benefit of such doubt must be given to the claimant." *Id.* In 1924, the Veterans Bureau General Counsel—the predecessor to the modern VA—applied the benefit of doubt rule to a World War I veteran's application for benefits. The VA reiterated the policy in 1985, stating that "[i]t should be carefully adhered to . . . when there is credible evidence on both sides of a material issue." *Id.*

The benefit of the doubt rule continues today, codified in § 5107(b) and promulgated in current VA regulation 38 C.F.R. § 3.102. That the decidedly pro-veteran benefit of the doubt rule has persisted for over a century and has been enacted into law shows Congress's strong intent to ensure the rule is applied in all cases where the evidence is a close call on material issues to benefits claims. *See, e.g.*, *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696–97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law"); *United States v. LeCoe*, 936 F.2d 398, 403 (9th Cir. 1991) ("Congress is, of course, presumed to know existing law pertinent to any new legislation it enacts.").

A. Failure to apply the benefit of the doubt rule led to judicial review of VA decisions.

When the VA was created in 1933, judicial review of VA decisions was barred by statute. *Judicial Review and the Governmental Recovery of Veterans'*

Benefits, 118 U. Pa. L. Rev. 288, 288 (1969) (citing 38 U.S.C. § 211(a) (1964)); Act of Mar. 20, 1933 Pub. L. No. 73-2 § 5, 48 Stat. 8, 9 ("All decisions rendered by the Administrator of Veterans' Affairs . . . shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review."). By 1976, over 50,000 administrative appeals from VA decisions were filed in the wake of the Vietnam War. *VA Administrative Procedure and Judicial Review Act: Hearing on S. 364 Before the S. Comm. On Veterans' Affairs*, 95th Cong. 2 (1977) (Sen. Alan Cranston Opening Statement). And it was evident that "many active service officers" were "seldom" given "the benefit of the doubt" in their claims for benefits. *Id.* at 269 (Edwin L. Meyers, Veterans of Foreign Wars). So the Senate Committee of Veterans' Affairs reexamined whether VA decisions should be subject to judicial review.

Advocates called for judicial review of VA findings of fact in light of anecdotal evidence that the benefit of doubt rule was seemingly thrown by the wayside. John Edgar Williams of Disabled American Veterans advocated for judicial review "to make the Employees of the VA follow the law and not their own rules which frequently come out contrary to Congressional intent. For instance in the case of any arthritis cases failure to give the veteran the benefit of the doubt in service connection." *Id.* at 267. Carlos M. Soler-Calderon, a veterans' attorney, stated that, due to the lack of judicial review, the VA "has shown a consistent attitude of upholding fiscal considerations over the legal entitlement to veterans' benefits provided by law. This it has done by rejecting the grant of the reasonable doubt in favor of veterans, and rather

applying said doubt against such veterans." *Id.* at 473. The legislative director for Paralyzed Veterans of America favored judicial review of VA decisions simply to make "evident to the VA that they are still bound by the regulation (38 C.F.R. § 3.102 (1972)) to grant a veteran's claim unless a reasonable doubt exists as to its validity." *Id.* at 449–50 (Lawrence W. Roffee, Jr.).

Understanding that the benefit of the doubt rule was not being applied in "actual practice," the Senate proposed a bill that would allow judicial review of VA determinations and would codify the benefit of the doubt rule. *See id.* at 473 (statement of Carlos M. Soler-Calderon); S. Rep. No. 96-178, at 9, 13 (1979). The Senate proposed the following language:

> When, after consideration of all evidence and material of record . . . there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of [a benefits] claim, the benefit of the doubt in resolving each such issue will be given to the claimant.

S. Rep. No. 96-178, at 9 (1979) (§ 3007(b)). The Senate proposed language that is very similar to the current version of § 5107(b). The Senate passed the proposal, but the House did not.

And so failure to apply the benefit of the doubt to veterans' claims persisted. Rick O'Dell of Vietnam Veterans of America testified before Congress in 1988, stating that the VA "system not only works poorly, but that it is systematically antagonistic to the veteran" and that "[t]here is a failure to accord a reasonable doubt in favor of the veteran." *Judicial*

Review of Veterans' Affairs: Hearings Before the H. Comm. On Veterans' Affairs, 100th Cong. 60 (1988). Others expressed the same sentiments: "The reasonable doubt doctrine . . . is only applied it seems when the overwhelming weight of evidence, in fact, supports the veteran's claim." *Judicial Review of Veterans' Affairs: Hearing on S.11 and S. 2292 Before the S. Comm. on Veterans' Affairs*, 100th Cong. 6 (1988) (Susan D. Bennett, public interest law clinic professor). Even a former VA Board member "was told by the Vice-Chairman that [he] was too allowance-prone, and that it was preferable to deny a case, when in doubt, than to allow it." *Oversight Hearing on the Board of Veterans' Appeals: Hearing Before the Subcomm. On Compensation, Pension and Insurance of the H. Comm. On Veterans' Affairs*, 100th Cong. 102 (1988) (Letter of unnamed retired Board member to Gordon Erspamer, July 19, 1987). Again, veterans advocates beseeched Congress to grant judicial review of VA decisions in order to "greatly benefit veterans." *Id.* at 101.

In response, Congress introduced new legislation to encourage and ensure application of the benefit of the doubt rule. The House introduced a bill proposing to establish the Veterans Court, which would oversee VA benefits decisions (§ 4002), and to codify the benefit of the doubt rule (§ 3003) using the same language previously introduced by the Senate. H.R. 5288, 100th Cong. (1988). The two houses of Congress agreed to a compromise bill, the Veterans' Judicial Review Act (VJRA), which established the Veterans Court to review "all aspects of a claim for benefits as decided by the BVA" and, "most significant[ly]," codified the benefit of the doubt rule provided for in

the regulations, 38 C.F.R. § 3.102. *See* 134 Cong. Rec. S16632, S16638–40 (1988); *id.* at S16659 (Sen. Murkowski).

Important to the issues presented in the petition, the VJRA defined the scope of review over VA decisions, mandating the Veterans Court to "hold unlawful and set aside decisions" and, in the case of findings of material fact, "hold unlawful and set aside such finding if the finding is clearly erroneous." Pub. L. No. 100-687, § 4061(a), 102 Stat. 4105, 4115 (1988). In making such determinations, the Veterans Court "shall take due account of the rule of prejudicial error." *Id.* § 4061(b).

B. Deference to VA fact findings resulted in failure to apply the benefit of the doubt rule, harming veterans.

Even with the codification of the benefit of the doubt rule and judicial review of VA decisions in § 4061—the predecessor to the current § 7261—failure to apply the rule to benefits claims persisted for the next 15 years. Testimony from veterans service organizations expressed "frustration with the perceived lack of searching appellate review of BVA decisions" because there was a "large measure of deference" given by the Veterans Court to the fact-finding of the VA. S. Rep. No. 107-234 at 17 (2002). These advocates found such deference to be "detrimental to claimants and may result in failure to consider the 'benefit of the doubt' rule in 38 U.S.C. § 5107(b)." *Id.* Congress—due to the "solicitude" for veterans—once again attempted to remedy the issue, this time with modifications to the VJRA. *See United States v. Oregon*, 366 U.S. 643, 647 (1961).

In view of the testimony, the Committee on Veterans' Affairs proposed to amend § 7261(a)(4) to change the standard of review of VA fact-findings from a "clearly erroneous" standard to a "substantial evidence" standard and to cross-reference § 5107(b) "to emphasize that the Secretary's application of the 'benefit of the doubt' to an appellant's claim shall be considered" by the Veterans Court on appeal. S. Rep. No. 107-234 at 17–18, 40 (2002). Notably, the proposal would allow the Veterans Court to "set aside or reverse" findings of material fact that were not supported by substantial evidence. *Id.* at 40. These changes were "intended to provide far more searching appellate review of BVA decisions, and thus give full force to the 'benefit of the doubt' provision." *Id.* at 17. These proposals show the Committee intended "to provide for searching judicial review of VA benefits claims encompassing the 'benefit of the doubt' rule." *See id.* at 18.

The Senate passed the Committee bill, but the House made some changes to the proposal. While the resulting compromise bill did not adopt the "substantial evidence" standard, it did amend § 7261(a) to grant the Veterans Court power to reverse or set aside VA fact-findings. 148 Cong. Rec. H8925, H9002 (Nov. 14, 2002) (§ 401(a)). The proposal also amended § 7261(b) to explicitly require the Veterans Court to "take due account of the Secretary's application of section 5107(b)," the language at issue in the petition. *Id.* (§ 401(b)).

Representative Evans stated that the compromise bill "clarifies the authority of the Court of Appeals for Veterans Claims to reverse decisions of the Board of Veterans Appeals in appropriate cases and requires

the decisions be based upon the record as a whole, taking into account the pro-veteran rule known as the 'benefit of the doubt.'" *Id.* at H9003. In particular, the amendment to § 7261(b) "would require the [Veterans] Court to examine the record of proceedings before the Secretary and BVA and the special emphasis during the judicial process on the benefit of the doubt provisions of section 5107(b) as it makes findings of fact in reviewing BVA decisions." *Id.* at H9006. These amendments were enacted into law by the Veterans Benefits Act of 2002, Pub. L. No. 107-330, 116 Stat. 2820, 2832.

C. The Federal Circuit's interpretation of § 7261(b)(1) undermines the purpose of the benefit of the doubt rule and Congressional intent.

The benefit of the doubt rule is "considered one of the most integral aspects of the non-adversarial nature of veterans law." Angela Drake et. al., *Review of Veterans Law Decisions of the Federal Circuit*, 2021 Edition, 71 Am. U. L. Rev. 1619, 1621 (2022). The purpose of the rule is "to provide a distinct advantage to veterans" in the claims process and is likely borne out of the sentiment expressed by President Lincoln after the Civil War: "[T]o care for him who shall have borne the battle, and for his widow and orphans." *See id.*; Second Inaugural Address of Abraham Lincoln (Saturday, March 4, 1865).

To that end, Congress has taken steps to "maintain a beneficial non-adversarial system of veterans benefits." H.R. Rep. No. 100-963, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5795.

But the case law has made it "difficult" to apply, "hinder[ing] proper application of the benefit of the doubt doctrine." 71 Am. U. L. Rev. at 1629.

The Federal Circuit's interpretation of § 7261(b)(1) only worsens that problem. Specifically, the Veterans Court is not required to review VA decisions beyond the clear error review required by § 7261(a)(4), including whether the VA applied the benefit of the doubt rule pursuant to §§ 5107(b) and 7261(b)(1). Pet. Br. at 18. In so doing, "it is highly unlikely that the Veterans Court will reverse any finding in which the Board was 'persuaded' by the evidence that a veteran's claim should not be granted." 71 Am. U. L. Rev. at 1630. This is the exact problem that Congress attempted to remedy with the VJRA and the Veterans Benefit Act of 2002. *See Henderson v. Shinseki*, 562 U.S. 428, 441 (2011) (describing VJRA as legislation that was "decidedly favorable to veterans").

Yet, despite Congress's efforts, the problem remains. Between 2001 and 2021, the Veterans Court considered hundreds of VA decisions concerning application of the benefit of the doubt rule. *See* 71 Am. U. L. Rev. at 1630. In only *five* cases did the Veterans Court find clear error. *Id.* The Federal Circuit's decisions here will only continue this trend and will serve to frustrate Congress's intent to enhance appellate review of VA decisions and make clear "the requirements of the review the Court must perform when it is making determinations under section 7261(a)." 148 Cong. Rec. H8925, H9006 (Nov. 14, 2002); *see also Skoczen v. Shinseki*, 564 F.3d 1319, 1328 (Fed. Cir. 2009) ("For [the Federal Circuit] to disregard in our analysis the uniquely pro-veteran, non-adversarial nature of the veterans' claims process

would be wrong.") (citing H.R. Rep. No. 100-963, at 13).

As discussed above, *see supra* §§ I.A and I.B, the history and evolution of § 7261(b) shows that Congress intended the benefit of the doubt review to be a mandatory analysis conducted separate and apart from the clear error review in § 7261(a)(4). Under § 7261(b), the Veterans Court must "review the record of proceedings" and assess whether there were material issues for which there was an "approximate balance" of evidence regarding any material issue. *See* §§ 5107(b) and 7261(b); Pet. at 19–20, 22. The "clearly erroneous" inquiry, however, is set forth in a separate provision: § 7261(a). The distinct roles of these provisions are highlighted in the discussion and history of § 7261 that is ignored by the Federal Circuit.

For example, as discussed above, Congress rejected the proposed "substantial evidence" standard of review for findings of fact, instead retaining the "clearly erroneous" standard when it became apparent that the VA failed to consider the benefit of the doubt rule. *See, e.g.*, S. Rep. No. 107-234, at 17 (2002). Instead, Congress *added* § 7261(b) to "*require* the Court to examine the record of proceedings" with "special emphasis during the judicial process on the benefit of the doubt provisions of section 5107(b) as it makes findings of fact in reviewing BVA decisions." 148 Cong. Rec. H8925, H9006 (Nov. 14, 2002) (emphasis added). Congress explicitly stated that these changes "would not alter the formula of the standard of review on the Court," and were intended "to provide for more searching appellate review of

BVA decisions, and thus give full force to the 'benefit of doubt' provision." *Id.* at H9006.

The Federal Circuit's interpretation of § 7261(b), however, essentially collapses the benefit of the doubt inquiry into the "clearly erroneous" review, making it more difficult for benefits claims to be granted while also ignoring all the reasons for, and amendments to, the legislation that resulted in the creation of the Veterans Benefits Act of 2002. *See* Pub. L. No. 107-330, 116 Stat. 2820, 2832; *Hodge v. West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998) ("in the context of veterans' benefits where the system of awarding compensation is so uniquely pro-claimant, the importance of systemic fairness and the appearance of fairness carries great weight"). This cannot be the correct interpretation of § 7261(b)(1).

II. THE PRO-VETERAN CANON SUPPORTS INDEPENDENT ASSESSMENT OF THE BENEFIT OF DOUBT RULE.

To the extent there were any doubt about the history and purpose of § 7621(b)(1), they must be viewed through the lens of the pro-veteran canon of statutory construction. "Congress's intent in crafting the veterans benefits system [was] to award entitlements to a special class of citizens, those who risked harm to serve and defend their country" and, consequently, the "entire scheme is imbued with special beneficence from a grateful sovereign." *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006) (internal quotations omitted); *see also Gambill v. Shinseki*, 576 F.3d 1307, 1316 (Fed. Cir. 2009) (Bryson, J., concurring) (Supreme Court and Federal Circuit "have long recognized that the character of the

veterans' benefits statutes is strongly and uniquely pro-claimant"). Accordingly, this Court has "long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" *Henderson*, 562 U.S. at 441 (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220–21, n.9 (1991)).

Interpretation of § 7621(b)(1) and its legislative history must be construed accordingly. Just as the benefit of the doubt rule serves as a tie-breaker when evidence is in "approximate balance," the pro-veteran canon dictates that, to the extent there is any "interpretive doubt" about the purpose and history of § 7261(b)(1), it should "be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 117–18, (1994); *see also Jensen v. Brown*, 19 F.3d 1413, 1417 (Fed. Cir. 1994). Indeed, this Court has "presume[d] congressional understanding of" interpretive principles like the pro-veteran canon and that Congress enacts laws with this understanding. *King*, 502 U.S. at 220–21, n.9 (citing *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991)). It is no different in the context of the legislative history. If there is any doubt about the purpose and intent of Congress in enacting § 7621(b)(1), it should be resolved in the veteran's favor.

The Federal Circuit has previously considered the pro-veteran canon in the context of the legislative history. *E.g.*, *National Org. of Veterans' Advocs., Inc. v. Sec'y of Veterans Affs.*, 260 F.3d 1365, 1377–78 (Fed. Cir. 2001). And it makes sense to do so. Because such a "well-established rule of statutory construction" is a standard tool used to interpret

statutes—laws enacted by Congress—the same canon of construction should apply to the reasoning behind enacting such laws. *See Procopio v. Wilkie*, 913 F.3d 1371, 1382–84 (Fed. Cir. 2019) (J. O'Malley, concurrence) (stating the pro-veteran canon is a traditional tool of statutory interpretation) (citing *Henderson*, 562 U.S. at 441).

The Federal Circuit "recognizes the remedial nature of veterans' benefits law, as intended by Congress—including through its statutory expression of the veterans' benefit-of-the-doubt rule." *Lynch v. McDonough*, 21 F.4th 776, 782 (Fed. Cir. 2021) (J. Reyna, concurrence-in-part). Thus, veterans benefits provisions should be interpreted with "a thumb on the scale in the veteran's favor." *Henderson*, 562 U.S. at 440. Here, however, the Federal Circuit's decision flies in the face of this Court's admonition that veterans' statutes must "be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation," *Boone*, 319 U.S. at 575, and "fails to account for the purpose underlying the entire statutory scheme providing benefits to veterans." *Procopio*, 913 F.3d at 1385. The reading of § 7621(b)(1) advocated by Petitioners is the correct one because it effectuates the purpose of the benefit of the doubt rule—to ensure that the veteran prevails in the event there is a close case. *See Gilbert v. Derwinski*, 1 Vet. App. 49, 54 (1990). To require the Veterans Court to enforce the benefit of the doubt rule under § 7621(b)(1) as an inquiry separate and apart from "clear error" review aligns with Congress's "solicitude" for veterans, *United States v. Oregon*, 366 U.S. 643, 647 (1961), and is "in recognition of our debt to our veterans that society has through legislation

taken upon itself the risk of error when, in determining whether a veteran is entitled to benefits, there is an 'approximate balance of positive and negative evidence.'" *Gilbert*, 1 Vet. App. at 54; *see also VA Administrative Procedure and Judicial Review Act: Hearing on S. 364 Before the S. Comm. On Veterans' Affairs*, 95th Cong. 3 (1977) ("I want all veterans to be served with compassion, fairness, and efficiency" and "each individual veteran to receive from our Government every benefit and service to which he or she may be entitled.") (Sen. Alan Cranston Opening Statement).

The Federal Circuit's incorrect interpretation of § 7621(b)(1) should be reversed so "that justice shall be done, that all veterans so entitled receive the benefits due to them." *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006).

III. THIS COURT'S REVIEW IS WARRANTED TO CORRECT THE FEDERAL CIRCUIT'S ERROR AND ENSURE THAT CLAIMS RECEIVE APPROPRIATE REVIEW SO VETERANS MAY RECEIVE THE BENEFITS TO WHICH THEIR SERVICE HAS ENTITLED THEM.

As explained in Mr. Bufkin's and Mr. Thornton's petition, the question presented here is recurring and important. Pet. 30–36. More than 7,000 appeals were filed before the Veterans Court in 2022 alone. Pet. at 30. The benefit of the doubt rule has the potential to affect the outcome of each of those appeals, but, as history has shown, the risk that the rule is ineffectively applied—or not applied at all—is very real. To require the Veterans Court to independently

assess whether the benefit of the doubt rule was properly applied in each claim for benefits where there is a close call should not be in question, given the remedial purpose of veterans benefits provisions.

The history and purpose of § 7621(b)(1), Congressional intent, and the pro-veteran canon show that the decision below is wrong and in contravention to the stated purpose of the benefit of the doubt rule. This Court's intervention is needed to correct the Federal Circuit's mistake and ensure that veterans receive the benefit of the doubt in all applicable cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL E. JOFFRE
Counsel of Record
ANNA G. PHILLIPS
STERNE, KESSLER, GOLDSTEIN & FOX, PLLC
1101 K Street, N.W.
10th Floor
Washington, D.C. 20005
(202) 772-8856
mjoffre@sternekessler.com

JOHN B. WELLS
MILITARY-VETERANS ADVOCACY, INC.
P.O. Box 5235
Slidell, LA 70469-5235

Counsel for Amicus Curiae