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

BRIEF OF THE FEDERAL CIRCUIT BAR ASSOCIATION AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The Federal Circuit Bar Association ("FCBA") is a national organization for the bar of the United States Court of Appeals for the Federal Circuit. The organization unites different groups across the nation that practice before the Federal Circuit, seeking to strengthen and serve the court. As part of its efforts, the FCBA helps facilitate pro bono representation for veterans appealing decisions of the Department of Veterans Affairs to the Court of Appeals for Veterans Claims and the Court of Appeals for the Federal Circuit, with a view to strengthening the adjudication process at both stages of review. The benefit-of-the-doubt rule at issue in the petition is central to the adjudication of veterans' claims, but its practical benefit to veterans is being eroded by the Federal Circuit's narrow reading of the scope and standard of review available to veterans at the Court of Appeals for Veterans Claims. As a result, FCBA members are unable to secure meaningful enforcement of the rule in their clients' cases.

One of the FCBA's primary purposes is to render assistance to the Federal Circuit in appropriate instances by submitting its views on the legal issues before that court. The FCBA also has an interest in assisting this Court by submitting its views on cases that implicate subject matter within the appellate jurisdiction of the Federal Circuit. These submissions further

[1] No counsel for a party authored any part of this brief, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund its preparation or submission. *Amicus curiae* timely provided notice of intent to file this brief to all parties.

the FCBA's commitment to promoting the health of the legal system in furtherance of the public interest. It is with that interest in mind that the FCBA submits this amicus brief in support of Petitioners.

Because the respondent in this case is part of the federal government, FCBA members and leaders who are employees of the federal government have not participated in the Association's decision-making regarding whether to participate as an amicus in this litigation, developing the content of this brief, or the decision to file this brief.

SUMMARY OF ARGUMENT

The Department of Veterans Affairs ("VA") is required, by statute, to afford claimant veterans the "benefit of the doubt" when the evidence on a material issue is "in approximate balance." 38 U.S.C. § 5107(b). This rule is central to the administration of veterans' claims, as it places the risk of error on the government rather than on the veterans the agency was created to serve. Meaningful judicial enforcement of the rule requires independent review of the evidence before the agency to determine whether there were close issues on which the veteran should have received the benefit of the doubt. The petition here presents the question whether the Court of Appeals for Veterans Claims ("Veterans Court") is required and authorized to undertake an independent, non-deferential review of the record necessary to make that determination.

The language and history of the statute confirm the answer is "yes." Congress codified the benefit-of-the-doubt rule in the same legislation that created the Veterans Court as a specialized Article I tribunal for review of VA decisions. The court became the first and

only forum for veterans to seek independent review of both the VA's compliance with the law and review of the VA's factual findings for clear error. Veterans' Judicial Review Act ("VJRA") §§ 3007(b), 4061, 102 Stat. 4106, 4115 (1988) (codified as amended at 38 U.S.C. §§ 5107(b), 7261). Congress understood that the availability of this review was critical as a check to ensure the risk of error is placed on the government rather than on veterans.

But the Federal Circuit and Veterans Court applied the statute in a manner that limited its impact, with the Federal Circuit concluding that, under the clear error standard of review applicable to the Veterans Court, the Veterans Court had no obligation to independently assess the factual record and that VA findings should not be disturbed if they have any "plausible basis." *See Hensley v. West*, 212 F.3d 1255 (Fed. Cir. 2000); *Wensch v. Principi*, 15 Vet. App. 362, 366-68 (2001). Congress "overrule[d]" those decisions by adding a new provision to the Veterans Court's governing statute. *See* 148 Cong. Rec. 22,597 (2002) (Explanatory Statement On House Amendment to Senate Bill, S. 2237 discussing *Wensch* and *Hensley*); 148 Cong. Rec. 22,913 (2002) (statement of Sen. John Rockefeller IV discussing *Hensley*); S. Rep. No. 107-234, at 16 (2002) (discussing *Hensley*). That provision mandates that in deciding every appeal from the VA's Board of Veterans Appeals ("BVA"), the Veterans Court "*shall* review the record of proceedings before the Secretary and the [BVA]" and "*shall* take due account of the Secretary's application of [the benefit-of-the-doubt statute]." 38 U.S.C. § 7261(b)(1) (emphasis added). According to members of Congress, the provision was adopted to give "full force to the 'benefit of the doubt' provision'" by empowering the Veterans Court to conduct more

"searching appellate review" of VA decisions. 148 Cong. Rec. 22,597 (2002).

In the face of this focused congressional action, the Federal Circuit has construed Congress's instruction in § 7261(b)(1) as essentially hortatory, holding that the Veterans Court's authority to enforce the benefit-of-the-doubt rule is limited to the deferential, clear-error review of the VA's factual findings already provided for in the statute pre-amendment. Thus, in each of the Petitioners' cases, the Federal Circuit held that the Veterans Court rightly affirmed the BVA's findings merely because it had given a sufficiently plausible explanation for why it was "persuaded" by the evidence against the veteran; according to the Federal Circuit, the Veterans Court was neither required nor authorized to independently consider whether there was an approximate balance in the underlying evidence that should have led the VA to afford the benefit-of-the-doubt to the veteran. Pet. App. 10a-11a, 15a-16a.

In reaching its narrow reading of the Veterans Court's authority under § 7261(b)(1), the Federal Circuit assumed that the same considerations normally constraining Article III appellate courts from making determinations entrusted to an agency should extend to the Veterans Court. But Congress created the Veterans Court and deliberately vested specialized, narrow, and exclusive jurisdiction in that Article I tribunal to avoid the limitations of Article III review of agency action. And while Congress made clear that the Veterans Court was not a "trial" court authorized to take additional evidence "de novo," the court is expressly authorized to "reverse" the VA's findings based on the court's review of the evidence before the agency without remanding to the agency for new findings—a power

generally not available to Article III courts. *See* 38 U.S.C. §§ 7261(c), 7261(a)(4); *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 88 (1943). All this is consistent with Congress's choice to entrust the Veterans Court with the authority in every appeal to review the record before the VA and assess the approximate balance of the evidence without blind deference to the VA's conclusion that the evidence cut against the veteran.

The Federal Circuit's decisions here undermine Congress's judgment in enacting § 7261(c) and deprive veterans of a meaningful independent review of the VA's findings in denying their claims. The Court should grant certiorari now to clarify the meaning of § 7261(b)(1) and restore the Veterans Court's authority and obligation to meaningfully enforce the benefit-of-the-doubt rule.

ARGUMENT

I. Congress Created the Veterans Court to Protect Veterans Through Meaningful Review of the Factual Record in Individual Cases.

This Court has acknowledged the "singular characteristics of the review scheme that Congress created for the adjudication of veterans' benefits claims," central to which is the solicitude for veterans reflected in laws placing "a thumb on the scale in the veteran's favor." *Henderson v. Shinseki*, 562 U.S. 428, 440 (2011). In the Veterans' Judicial Review Act of 1988, Congress codified into statute a long-standing principle that the VA must afford veterans "the benefit of any doubt" in adjudicating the factual elements of their claims. 38 U.S.C. § 5107. This provision reflected Congress's in-

tent that veterans be afforded the full scope of benefits to which they can reasonably be found to be entitled, and the government should bear the cost of uncertainty and error in the system. *See Gilbert v. Derwinski*, 1 Vet. App. 49, 54 (1990) ("It is in recognition of our debt to our veterans that society has through legislation taken upon itself the risk of error…").

The VJRA was the culmination of decades of hearings and reports emphasizing the need for judicial review of VA determinations. While the VA maintained that the agency's non-adversarial, pro-veteran system of adjudication was incongruent with the adversarial posture of judicial review, Congress ultimately concluded that outside review was needed to hold the VA accountable to its obligations to veterans, including the duty to afford veterans the benefit of the doubt. This was especially critical in the face of competing structural incentives within the agency.

In committee hearings, veterans organizations testified about the tendency for VA decisions "during periods of fiscal restraint" to be "shaped more through the influence of the Office of Management and Budget and blatant political pressure than the intent of Congress."[2] Legislators echoed concerns that VA decisions may be motivated by executive branch pressures to reduce costs to the detriment of the veterans served by the agency.[3] One representative explaining the need for

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[2] *Judicial Review of Veterans' Affairs: Hearing Before the H. Comm. on Veterans' Affs.*, 100th Cong. 319 (1988) (statement of Gordon Mansfield, Associate Exec. Dir. for Gov't Relations, Paralyzed Veterans of America).

[3] *Judicial Review Legislation: Hearing Before the S. Comm. on Veterans' Affs. on S.11 & S.2292*, 100th Cong. 109-122 (1988)

judicial review pointed to a quota system implemented by the BVA that provided its judges with a 5 percent salary increase for completing an average of at least 40 cases per week, incentivizing them to dispose of cases without any meaningful engagement with the full record.[4] Against this backdrop, legislators recognized the need to provide "outside review by the independent branch of government established in our constitutional framework with the special responsibility of determining whether governmental action is legal and whether it is fundamentally fair."[5]

But while recognizing a need for judicial review, veterans service organizations and several representatives of the judiciary raised concerns about vesting the already over-burdened Article III courts with conducting that review, especially because most appeals would be predominated by highly detailed questions of fact idiosyncratic to veterans benefits law.[6] One solution proposed by an early Senate bill was to substantially narrow the standard of review applied to factual issues. Under the Senate proposal, courts could only set

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(statement of Sen. Alan Cranston, Chairman, S. Comm. on Veterans' Affs.).

[4] *Judicial Review of Veterans' Affairs: Hearing Before the H. Comm. on Veterans' Affs.*, 100th Cong. 191 (1988) (opening statement of Rep. James J. Florio).

[5] *Judicial Review Legislation: Hearing Before the S. Comm. on Veterans' Affs. on S.11 & S.2292*, 100th Cong. 114 (1988) (opening statement of Sen. Alan Cranston, Chairman, S. Comm. on Veterans' Affs.).

[6] *Judicial Review of Veterans' Affairs: Hearing Before the H. Comm. on Veterans' Affs.*, 100th Cong. 193 (1988) (prepared statement of Hon. Morris S. Arnold and Hon. Stephen G. Breyer on behalf of the Judicial Conference of the United States).

aside a VA finding "so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result"—a standard that legal commentators suggested would likely never be met in practice. S. 11, 100th Cong. (1988); 134 Cong. Rec. 17,448-17,483 (1988) (Senate consideration of S. 11).

Congress ultimately rejected that proposal, opting instead for a compromise that would vest primary review of VA determinations in a new specialized Article I court limited to review of appeals from the VA. The new court would be an independent tribunal that rested within the judiciary and would not be beholden to the VA's budget. Judges would serve 15-year terms and would be appointed by the President subject to Senate confirmation. 38 U.S.C. § 7253. Litigants could appeal the Veterans Court's decisions to the Federal Circuit, but that court's review would be limited to legal and constitutional questions, not the review of factual findings or the application of law to facts. 134 Cong. Reg. 31,465 (1988).

Congress expected that the new court "would quickly acquire expertise in the subject matter of benefits' appeals and should be able to make decisions more quickly and on the basis of a better understanding of the record than a court of general jurisdiction."[7] In

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[7] *Judicial Review of Veterans' Affairs: Hearing Before the H. Comm. on Veterans' Affs.*, 100th Cong. 215 (1988) (prepared statement of Hon. Morris S. Arnold and Hon. Stephen G. Breyer on behalf of the Judicial Conference of the United States); *see also* 134 Cong. Rec. 31,765-31,790 (1988) (House concurrency to the Senate amendment to S. 11 with additional amendments); 134 Cong. Rec. 31,770 (1988) (statement of Rep. G.V. Montgomery, "The new Court of Veterans' Appeal (CVA) established by the compromise agreement would not be burdened with matters which often require a district court to delay a decision in a case.

supporting the compromise, one Congressman explained that the new court, "because of its special focus, is in a far better position to assess whether the BVA properly understood its statutory obligation and acted correctly" and could perform this function "with a full understanding of the informal and generous nature of the VA's adjudication system and of the responsibilities assigned to the VA by the Congress." 134 Cong. Rec. 31,771 (1988) (statement of Rep. G.V. Montgomery).

With its combination of independence and specialized expertise, Congress entrusted the new court with a more rigorous standard of review than generalist Article III courts. In voting in favor of the compromise, legislators noted that prior concerns over "maintaining the BVA's role as expert arbiter" became less compelling given the new court's very limited jurisdiction that consisted entirely of reviewing the VA's benefits decisions. 134 Cong. Rec. 31,459 (1988) (statement of Sen. George Mitchell). Congress thus enacted a "markedly wider" standard of review over factual questions than the earlier Senate proposal. *Id.* at 31,478 (Explanatory Statement on the Compromise Agreement on S.11, as Amended, the Veterans' Judicial Review Act). The resulting "clearly erroneous" standard of review was chosen because it was "not [ ] particularly restrictive" and permitted courts to engage in a "more expansive" and "full and fair review of BVA decisions on factual issues." *Id.* at 31,461, 31,471, (statements of Sen. Arlen Specter and Sen. Alan Cranston). And while no "trial

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The sole function of this court is to decide, on the record, whether the VA and the BVA decided a matter correctly; the court will develop expertise on such matters and its decisions will be uniform.").

de novo" was permitted, the Veterans Court would be authorized to "conduct a full review of the decision based on the BVA record," and could "modify or reverse" the BVA decision based on the existing record. *Id*. at 31,470.

II. Congress Enacted § 7261(b)(1) to Overturn Case Law Unduly Restricting the Veterans Court's Independent Review of the Factual Record.

In the decade following enactment of the VJRA, both the Veterans Court and the Federal Circuit substantially narrowed the scope of the Veterans Court's ability to fully review the underlying evidentiary record and serve as a meaningful independent check on the VA's factual findings. One report by the Senate Committee on Veterans Affairs described the courts' unexpected narrowing of clear error review with concern:

> More than a decade of experience with [the Veterans Court's] application of the "clearly erroneous" standard suggests that [the Veterans Court] is not consistently performing thorough reviews of BVA findings and that the Congressional intent for a broad standard of review has often been narrowed in application.

S. Rep. No. 107-234, at 16 (2002). The Senate committee was particularly concerned with the Federal Circuit's holding in *Hensley v. West*, 212 F.3d 1255, 1264 (Fed. Cir. 2000), which criticized the Veterans Court for "dissecting the factual record in minute detail" and affirming the BVA decision based on the court's inde-

pendent review of the evidence rather than remanding to the BVA. The Federal Circuit deemed such independent analysis problematic because it believed the Veterans Court, as an appellate tribunal, was limited to reviewing BVA findings with "substantial deference" and could not make independent factual determinations based on its own review of the record. 212 F.3d at 1263.

Legislators were also troubled by the Veterans Court's decision in *Wensch v. Principi*, 15 Vet. App. 362 (2001). *See* 148 Cong. Rec. 22,597 (2002) (Explanatory Statement on House Amendment to Senate Bill, S.2237 discussing *Wensch*). There, the record contained conflicting evidence over whether the veteran's debilitating back pain was connected to scarring from a gunshot wound to his left leg. *Wensch*, 15 Vet. App. at 36366. The BVA found that a VA examiner's report finding no service connection was more probative than multiple reports by independent examiners that supported a service connection. *Id.* at 366. Without independently evaluating the balance of the evidence, the Veterans Court affirmed the VA's finding because the agency had adequately articulated a plausible basis in the record for favoring one medical opinion over others. *Id.* at 366-68. The court held that it was the VA's prerogative alone to weigh the entirety of the evidence under § 5107(b) and determine "whether the evidence supports the [appellant's] claim," "is in relative equipoise," or "whether a fair preponderance of the evidence is against the claim." *Id.* at 367.

Reflecting on the state of the case law, a representative of the veterans service organization Disabled American Veterans ("DAV") lamented that "under current law…, a veteran can be deprived of benefits when-

ever there is some slight evidence that gives the Government a plausible reason for denial, and it renders the benefit of the doubt rule meaningless." *Pending Legislation: Hearing Before the S. Comm. on Veterans' Aff.,* 107th Cong. 47 (2002) (statement of Joseph A. Violante, Nat'l Legis. Dir., Disabled American Veterans).[8] This echoed a general concern among veterans service organizations over the "lack of searching appellate review of BVA decisions" and the general observation that "the large measure of deference that [the Veterans Court] affords BVA fact-finding is detrimental to claimants" and undermined consideration of benefit-of-the-doubt rule. *See* S. Rep. No. 107-234, at 17 (2002).

Veterans service organizations also expressed broader frustration with the Veterans Court's apparent reluctance under prevailing case law to "actually decid[e]" individual claims on the merits of the facts, opting instead to "decid[e] finer points of law that it can elucidate in scholarly discourse or … send[] cases back to BVA on procedural grounds." *Pending Legislation: Hearing Before the S. Comm. on Veterans' Aff.,* 107th Cong. 49 (2002) (statement of Joseph A. Violante, Nat'l Legis. Dir., Disabled American Veterans).

In 2002, Congress responded by "modify[ing] the requirements of the review the court must perform when making determinations under section 7261(a) of

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[8] *See also Pending Benefits Legislation: Hearing Before the S. Comm. on Veterans' Affairs.,* 107th Cong. 6970 (2001) ("[I]f it only takes that much to uphold a factual finding when they are supposed to rule in favor of the veteran unless a preponderance of the evidence is against the veteran, then that makes that standard unenforceable and, thus, in some instances, meaningless.") (Testimony of Mr. Surrat (DAV)).

title 38." 148 Cong. Rec. 22,913 (2002). In the Veterans Benefits Act, legislators made clear that new language added to § 7261 was intended to "overrule the recent U.S. Court of Appeals for the Federal Circuit decision of *Hensley v. West*, which emphasized that [the Veterans Court] should perform *only limited, deferential review of BVA decisions, and stated that BVA fact-finding 'is entitled on review to substantial deference.'*" *Id.* at 22,913, 22,917 (emphasis added). The amendments sought "to provide for more searching appellate review of BVA decisions, and thus give full force to the 'benefit of doubt' provision." *Id.*

Under the new provision, the Veterans Court "would be specifically required to examine the record of proceedings—that is, the record on appeal before the Secretary and BVA," and the "judicial process" would place "special emphasis" on the benefit-of-the-doubt provision when the Veterans Court "makes findings of fact in reviewing BVA decisions." *Id*. at 22,917. The Veterans Court's duty—under § 7261(b)(1) to "take due account" of the VA's application of § 5107 —would parallel the court's earlier-enacted duty under § 7261(b)(2) to take due account of the rule of prejudicial error. Under both provisions, the Veterans Court would independently review the record before the agency to assess the role that different pieces of evidence played in the outcome of the proceedings.

At the same time, Congress clarified the Veterans Court's authority to decide factual issues on the merits by reversing rather than remanding cases based on its review of the factual record. Congress added the words "or reverse" after "and set aside" in § 7261(a)(4) "to emphasize that [the Veterans Court] should reverse clearly erroneous findings when appropriate, rather

than remand the case." 148 Cong. Rec. 22,913 (2002); 38 U.S.C. § 7261(a)(4); Veterans Benefits Act of 2002, Pub. L. No. 107-330, § 401, 116 Stat. 2820, 2832.

Altogether, the text and history of the Veterans Benefits Act make clear Congress's intent that deference to the VA's findings should not preclude the Veterans Court from meaningfully reviewing the record for itself, including to ensure the benefit-of-the-doubt rule is honored. Rather, Congress chose to entrust the Veterans Court with the authority to review the VA's application of the benefit-of-the-doubt rule based on the Veterans Court's own searching, independent review of the agency record.

III. The Federal Circuit's Reading of § 7261(b)(1) Undermines the Veterans Court's Intended Role in Enforcing the Benefit-of-the-Doubt Rule.

The Federal Circuit's interpretation of § 7261(b)(1) has undermined Congress's intended role for the Veterans Court. By holding that the provision's mandate is satisfied by ordinary clear-error review of the BVA's findings and by prohibiting the Veterans Court from conducting an "independent, non-deferential review" of the record, the Federal Circuit shields from meaningful review the very cases that the benefit-of-the-doubt rule was meant to address.

Petitioners' cases are illustrative. In each case, the record contained multiple medical reports offering competing opinions on the veteran's diagnosis and its connection to his service. The BVA declined to afford the benefit of any doubt to either veteran because it found the reports of the independent examiners supporting the veterans' claims less persuasive than the

reports of the VA medical examiner. The Veterans Court affirmed in each case without independently considering the balance of evidence because it found no clear error in the BVA's explanations for why it was persuaded by the VA examiner's reports. According to the Federal Circuit, the Veterans Court satisfied its obligation to review the record and take "due account" of the benefit-of-the-doubt rule by "not[ing]" the BVA's "consideration of conflicting medical opinions" and its "conclusion that the [medical opinion showing no diagnosis] is more persuasive than the opinion showing a diagnosis" and finding no clear error in that determination. Pet. App. 10a-11a.

But as numerous veterans service organizations recognized in urging enactment of § 7261(b)(1), this thin review of the BVA's reasoning leaves the agency's decision to place the risk of error on the veteran essentially unchecked. When there is probative evidence on both sides, the agency can nearly always articulate some plausible basis for finding the evidence on one side more persuasive. And these cases evade review because the agency has no obligation or incentive to explain that "the case was in fact a close call" when it "determines that the evidence 'persuasively' forecloses a veteran's claim." *Lynch v. McDonough*, 21 F.4th 776, 783 (Fed. Cir. 2021) (Reyna, J., dissenting). A standard of review that asks only whether the agency's finding is plausibly justified sidesteps the core question of whether the relevant evidence was close enough for the government to bear the risk of error, as Congress directed.

The Federal Circuit's narrow reading of § 7261(b)(1) rests on flawed assumptions dating back to precedent from before the Veterans Benefits Act was enacted, in-

cluding in the *Hensley* decision that Congress expressly sought to overturn.

First, the Federal Circuit has erroneously interpreted § 7261(c) to prohibit the Veterans Court from making independent determinations based on that court's own reading of the record. *See* Pet. App. 10a (citing *Roane v. McDonough*, 64 F.4th 1306, 1310 (Fed. Cir. 2023) (construing § 7261(c) as precluding Veterans Court from conducting its own "additional and independent non-deferential review" of the record)); *Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) (construing § 7261(c) as precluding the Veterans Court from independently deciding whether a claim was "well-grounded" and requiring remand to the VA). But the provision only prohibits "*trial* de novo" of the VA's factual findings. 38 U.S.C. § 7261(c) (emphasis added). And Congress made clear in passing the Veterans Benefits Act that the provision's purpose was merely to prevent the Veterans Court from taking *new* evidence as a trial court. *See* 148 Cong. Rec. 22,913 (2002) ("[N]othing in this new language [at § 7261(b)(1) and (a)(4)] is inconsistent with the existing section 7261(c), which precludes the court from *conducting trial de novo* when reviewing BVA decisions*, that is, receiving evidence that is not part of the record before BVA*." (emphases added)). Properly construed, nothing in the bar against conducting trial de novo prohibits the Veterans Court from making independent determinations based on the record before the agency. The later-enacted § 7261(b)(1) confirms the point by expressly directing the Veterans Court to conduct its own review of the record in enforcing the benefit-of-the-doubt rule.

Second, the Federal Circuit has assumed, contrary to the text and history of the § 7261, that determining

whether record evidence is close enough to trigger the benefit-of-the-doubt rule in a given case is "committed to the discretion of the agency" and lies outside the "purview" of the Veterans Court as an "appellate court." *Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013); *Hensley*, 212 F.3d at 1263. In *Hensley*, the Federal Circuit referenced the *Chenery* doctrine in holding that the Veterans Court, as an appellate body, cannot affirm or reverse a VA decision based on its own findings from a detailed examination of the factual record. *See* 212 F.3d at 1263-64 & n.7. This was based on the principle in *Chenery* that "an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency" in affirming or reversing an agency's orders. *Chenery*, 318 U.S. at 88. Since then, the Federal Circuit has repeatedly relied on the same principle in concluding that the Veterans Court is precluded from making independent determinations in various contexts, including when enforcing the benefit-of-the-doubt rule. *See Deloach*, 704 F.3d at 1380 (citing *Hensley,* 212 F.3d at 1264, in holding that the Veterans Court lacked authority to "independently weigh the evidence" and reverse the VA's decision); *Roane*, 64 F.4th at 1310 (citing *Deloach* in holding that the Veterans Court, as an appellate tribunal can only "*review* the Board's weighing of the evidence" and "may not weigh any evidence itself.") (emphasis in original); Pet. App. 10a (citing *Roane*, 64 F.4th at 1310).

But in applying the *Chenery*-based principle to the benefit-of-the-doubt rule, the Federal Circuit never analyzed whether Congress intended for the determination of the rule's applicability to fall within the VA's exclusive domain. The court has not squared its application of *Chenery* with § 7261 (b)(1), whose text and

history show that Congress intended for the Veterans Court to share in that domain and provide a robust check on the agency's determinations.

Notably, the Federal Circuit's approach to this issue conflicts with its application of analogous language in § 7261(b)(2), which directs the Veterans Court to review the agency record and "take due account" of the rule of prejudicial error. In cases interpreting that provision, the court has recognized that the Veterans Court's "statutory obligation" under § 7261(b)(2) "permits the Veterans Court to go outside of the facts as found by the [VA] to determine whether an error was prejudicial by reviewing 'the record of the proceedings before the Secretary and the Board.'" *Mlechick v. Mansfield*, 503 F.3d 1340, 1345 (Fed. Cir. 2007) (citing *Newhouse v. Nicholson,* 497 F.3d 1298, 1302 (Fed. Cir. 2007)). The court concluded that this authority did not violate the *Chenery* principle because the statutory mandate in § 7261(b)(2) made clear that the prejudicial error determination was not one "which the VA alone is authorized to make." *Newhouse*, 497 F.3d at 1301. Thus, the Veterans Court could "give[ ] effect to the choices Congress made in crafting the applicable judicial review provisions" by undertaking the independent determination authorized by Congress. *Mlechick*, 503 F.3d at 1345.

This same reasoning should apply to the Veterans Court's authority under § 7621(b)(1). Congress created the Veterans Court as a tribunal particularly suited to evaluating the proper allocation of the risk of error on a given agency record. Indeed, this Court has previously acknowledged the Veterans Court's unique experience in reviewing "sufficient case-specific raw material in veterans' cases" to make these types of "empiri-

cally based" judgments in an informed way. *Shinseki v. Sanders*, 556 U.S. 396, 412 (2009). And to remove all doubt over the Veterans Court's intended role, Congress enacted § 7261(b)(1) to expressly charge the court with reviewing the agency record in enforcing the benefit-of-the-doubt rule. That history should remove any *Chenery*-based concerns over the scope of the Veterans Court's authority.

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The current misinterpretation of § 7261(b)(1) erodes both the scope of meaningful judicial review available to veterans and the substantive protections of the benefit-of-the-doubt rule in precisely the close cases in which the rule is intended to apply. This Court should grant certiorari and reverse to protect Congress's intent and the substantive rights of veteran claimants.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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