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

BRIEF OF NATIONAL VETERANS LEGAL SERVICES PROGRAM AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

RENÉE A. BURBANK
ZACHARY R.M. OUTZEN
BARTON F. STICHMAN
NATIONAL VETERANS
LEGAL SERVICES PROGRAM
1100 Wilson Boulevard,
Ste. 900
Arlington, VA 22209
Renee.Burbank@nvlsp.org

LIAM J. MONTGOMERY
Counsel of Record
F. GREG BOWMAN
D. SHAYON GHOSH
ANDREW G. BORRASSO
LUKE R. SÁNDOR
WILLIAMS & CONNOLLY LLP
680 Maine Avenue, S.W.
Washington, DC 20024
(202) 434-5000
LMontgomery@wc.com

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae is the National Veterans Legal Services Program ("NVLSP"). Founded in 1981, NVLSP is a non-profit organization that works to ensure that the Nation's 18 million veterans and active-duty service members have access to federal veterans benefits. NVLSP does so in part by serving as a national support center that recruits, trains, and assists thousands of volunteer lawyers and veterans' advocates. For over two decades, NVLSP has published the 2,400-page *Veterans Benefits Manual*, the leading practice guide on the subject.

The Secretary of Veterans Affairs has recognized NVLSP as a veterans' service organization authorized to assist veterans in the preparation, presentation, and prosecution of veterans' benefits claims. *See* 38 U.S.C. § 5902. NVLSP has represented thousands of veterans in proceedings before the Department of Veterans Affairs ("VA"), the Board of Veterans' Appeals ("Board"), and the Court of Appeals for Veterans Claims ("Veterans Court"). NVLSP also has filed numerous amicus briefs in this Court (and others) in cases that present issues of broad importance to veterans and the VA benefits system. *See, e.g.*, *Arellano v. McDonough*, 143 S. Ct. 543 (2023); *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019); *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162 (2016); *Henderson v.*

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Counsel of record for the parties received timely notice of *amicus*' intent to file this brief.

Shinseki, 562 U.S. 428 (2011); *Shinseki v. Sanders*, 556 U.S. 396 (2009).

Amicus appears in support of petitioners to explain the deep-seated problems with the veterans disability benefit process that Congress—at the urging of NVLSP and others—attempted to remedy through the Veterans Benefits Act ("VBA" or "Act"). The Federal Circuit misinterpreted the Act to ignore the additional duties Congress imposed on the Veterans Court to ensure that veterans get the benefit of the doubt to which they have long been entitled but that too often they have not received.

SUMMARY OF THE ARGUMENT

The veterans disability benefit process is intended to facilitate access to benefits for veterans disabled while serving in the military. This system is uniquely pro-claimant. For example, among other such features, "[w]hen there is an approximate balance of positive and negative evidence regarding any issue material to the determination of the matter, the Secretary [of Veterans Affairs] shall give the benefit of the doubt to the claimant." 38 U.S.C. § 5107(b). Yet in practice, veterans often have not received the benefit of the doubt from the VA. Worse, until 1988, VA benefit decisions were not judicially reviewed, and between 1988 and 2002, the Veterans Court could only undertake APA-style deferential review. Not only was this review ineffective in enforcing the benefit-of-the-doubt rule, but it also contributed to lengthy delays in processing claims as cases bounced between the Veterans Court and the Board.

Congress addressed these issues in 2002 by requiring the Veterans Court additionally to more broadly "review the record of proceedings before the Secretary and the

Board," and "take due account of the Secretary's application of" the benefit-of-the-doubt rule. 38 U.S.C. § 7261(b), (b)(1). As the text and structure of the statute indicate, the "take due account" provision requires the Veterans Court to separately consider the Secretary's application of the benefit-of-the-doubt rule, which would improve outcomes for veterans and reduce delays in the benefits application and review process.

Rather than ensure that veterans are given the benefit of the doubt, as Congress required, the Veterans Court deferentially reviews the agency's application of the rule only for clear error. Case backlogs have increased as remands from the Veterans Court congest the Board's docket, and veterans are forced to wait even longer for resolution. This Brief draws on the experiences of several veterans' decades-long battles with the benefits system to highlight the problems that Congress sought to solve, and how the Veterans Court has largely ignored Congress's command.

The Veterans Court's justification has been that the Board's application of the rule is a factual finding. But that conclusion contradicts the Veterans Court's own precedent, not to mention this Court's instruction to apply well-established standards "that courts ordinarily apply in civil cases." *Sanders*, 556 U.S. at 406. Those standards show the way here: the Veterans Court should review the Board's application of the benefit-of-the-doubt rule as a conclusion of law, based on findings of fact. It is essential that the Veterans Court enforce the benefit-of-the-doubt rule as Congress mandated to ensure that veterans timely receive benefits that they have earned through their service.

ARGUMENT

I. Congress enacted the "take due account" provision to aid veterans in the VA disability benefit process.

The pre-VBA case of Edwin Ramos-Rodriguez illustrates the problem that Congress intended to address in enacting the VBA. Mr. Ramos-Rodriguez's case was one of many subjected to unnecessary remand and unreasonable delay—*a full decade* in his case—before urgently-needed benefits were awarded. The later-enacted Veterans Benefits Act, properly applied, would help veterans like him obtain appropriate and timely relief.

Mr. Ramos-Rodriguez "attempted suicide by cutting his wrists with a razor" while serving in the United States Air Force in 1986. *Ramos-Rodriguez v. Principi*, No. 00-633, 2002 WL 1489434, at *1 (Vet. App. July 10, 2002). A contemporaneous examiner diagnosed him with an "adjustment disorder with mixed emotional features" and recognized he would "need considerable supervision and support." *Id.* Mr. Ramos-Rodriguez was hospitalized after discharge from the military, and was declared mentally disabled by the Social Security Administration in October 1993. That same year he applied to the VA for disability benefits. *Id.* Yet it took 10 years for this veteran to receive the benefits he was so obviously due.

The VA took four years to rule on the veteran's application, only to erroneously deny it. *Id.* In his appeal to the Board, Mr. Ramos-Rodriguez pointed to evidence from the psychiatrist who treated him on a monthly basis for more than four years, and who concluded that he suffered from a schizoaffective disorder, was depressed, and should have been diagnosed with a "serious emotional disorder" while he was in the Air Force. *Id.* at *2. Two years later, the Board denied his appeal, incomprehensibly re-

jecting as not probative the professional opinion of a treating psychiatrist with years of direct clinical experience with the veteran. *Id.*

In June 2000, the Secretary acknowledged in the Veterans Court that the Board had committed errors, and the Secretary moved to remand. *Id.* The veteran argued for *reversal* instead. Even though everyone agreed the Board's decision was unsupportable, the Veterans Court believed it could reverse under pre-VBA law only if "the only permissible view of the evidence of record supports the appellant's position." *Id.* at *3. It therefore remanded to the Board to do the obvious: explain how it could be that the evidence was not at least in equipoise, entitling the veteran to the benefit of the doubt. *Id.* at *5. Remanding (rather than reversing) cost the veteran an additional three years before he was awarded benefits.

Congress enacted the VBA in 2002 in part to empower the Veterans Court to do what it did not in Mr. Ramos-Rodriguez's case: directly review the Secretary's application of the benefit-of-the-doubt rule and, when warranted, reverse and award appropriate and timely relief.

A. The VA disability benefit process was failing veterans before Congress enacted the "take due account" provision.

The Veterans Court has long recognized that the benefit-of-the-doubt rule is a "unique standard of proof." *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990). It is less demanding than even the "fair preponderance" standard which applies in civil trials—both "in keeping with the high esteem in which our Nation holds those who have served in the Armed Services" and "in recognition of our debt to our veterans that society has through legislation taken upon itself the risk of error." *Id.* at 54.

But before the VBA was enacted, the Veterans Court reviewed the Board's application of the benefit-of-the-doubt rule under the "clearly erroneous" standard applicable to the Board's findings of fact. 38 U.S.C. § 7261(a)(4), (b)(1). The court's review thus was "significantly deferential," *Butts v. Brown*, 5 Vet. App. 532, 544 (1993) (Steinberg, J., concurring), largely leaving unchecked the Board's application of the rule. Even when the Veterans Court did find error, the Veterans Court typically remanded for further adjudication. *See id.* at 574 ("Indeed, the remand approach is the one the Court has invariably followed in connection with the . . . application of the benefit-of-the-doubt doctrine." (citations omitted)).

The Board and Veterans Court's own statistics show the hurdles veterans faced when appealing to the Board. In 1999 to 2001, the Board's average response time from receipt of appeal to issuance of decision ranged from 140 to 182 days. Board Annual Report FY 1999, at 40;[2] Board Annual Report FY 2000, at 42;[3] Board Annual Report FY 2001 ("2001 BVA Report"), at 44.[4,5] When the Board finally issued its decisions, the outcomes for veterans were poor. In 1999 to 2001, the Board affirmed the VA's denial of benefits 39.8%, 41.4%, and 27% of the time, respectively. 2001 BVA Report, at 37. The Board issued remands, prolonging cases and adding to the VA's backlog,

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[2] http://tinyurl.com/529yjx2z.

[3] http://tinyurl.com/msephscv.

[4] http://tinyurl.com/4zckmds6.

[5] Getting to the Board took even longer. In 2001, for example, it took 466 days on average for VA field stations to certify an appeal to the Board after the veteran requested one. 2001 BVA Report, at 44.

36.3%, 29.9%, and 48.8% of the time. *Id.* Outright reversals awarding benefits were rare, only occurring about a quarter of the time. *Id.* Veterans were rarely represented by counsel before the Board. *Id.* at 36 (only 8.4% of the time in 2001).

Veterans did not fare much better when they appealed a Board decision denying benefits to the Veterans Court. Between 1999 to 2001 it took the Veterans Court between 340 and 386 days on average to resolve each case. Veterans Court Annual Reports FYs 1998–2007.[6] After those lengthy delays, hamstrung by the deferential nature of its review, the Veterans Court simply remanded cases back to the Board over 60% of the time in 1999 and 2000.[7] *Id.* Those remands further prolonged cases and added to the Board's own substantial backlog.

Veterans raised alarms about these issues, specifically emphasizing the vital role that the Veterans Court should play in enforcing the benefit-of-the-doubt rule, and the harmful trickle-down effects that occurred when it abdicated that responsibility. Veterans service organizations, including NVLSP, testified to Congress that the Veterans Court's deference "may result in failure to consider the 'benefit of the doubt' rule." S. Rep. No. 107-234 at 17 (2002). Veterans "voiced frustrations with the perceived lack of searching appellate review of [Board] decisions," and made clear "that the large measure of deference that

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[6] http://tinyurl.com/4pu5uwau.

[7] The figures for 2001 are not useful due to a legislative change in November 2000.

[the Veterans Court] affords [Board] fact-finding is detrimental to claimants." *Id.*[8]

In short, veterans organizations like NVLSP explained to Congress that the Veterans Court's toothless review of the benefit-of-the-doubt rule regularly resulted in misapplication of that rule and unnecessary remands that cost veterans valuable time.

B. Congress enacted the "take due account" provision to ensure the benefit-of-the-doubt rule was properly applied and to streamline resolution.

Congress enacted the Veterans Benefits Act in 2002 to strengthen the Veterans Court's review and to reduce delays in the system. Understanding the harm caused to veterans by time-consuming remands, Congress provided that the Veterans Court may reverse "clearly erroneous" factual findings, instead of merely remanding back to the Board after finding those errors. *See* Veterans Benefits Act of 2002, Pub. L. No. 107-330, § 401, 116 Stat. 2820, 2832 (VBA); 38 U.S.C. § 7261(a)(4). Moreover, the Act included a separate, stronger provision requiring the Veterans Court to review the Secretary's application of the benefit-of-the-doubt rule of 38 U.S.C. § 5107(b). Specifically, the VBA mandated that the Veterans Court "*take*

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[8] A judge of the Veterans Court itself raised concerns about its overly deferential review of the Secretary's application of the benefit-of-the-doubt rule. *See Gilbert*, 1 Vet App. at 61 (Kramer, K., concurring) ("If this Nation's veterans are truly to have the benefit of independent judicial review . . . it must be real judicial review, not just the appearance thereof. To adopt a framework which is too deferential to the [Board] will be contrary to the congressional intent . . . as it will leave the [Board], not the judiciary, as the final arbiter of 'benefit of the doubt' determinations.").

due account of the Secretary's application of section 5107(b)." VBA § 401 (emphasis added); 38 U.S.C. § 7261(b)(1). Thus, recognizing the critical importance of the benefit-of-the-doubt rule, Congress required that the Veterans Court ensure that the Secretary applied it properly.

The Senate and House Committees on Veterans' Affairs noted in a joint statement that the VBA required the Veterans Court to place "special emphasis . . . on the benefit of the doubt provisions of section 5107(b) as it makes findings of fact in reviewing [Board] decisions." 148 Cong. Rec. H8925, H9006 (Nov. 14, 2002). The law was "intended to provide for more searching appellate review of [Board] decisions, and thus give full force to the 'benefit of the doubt' provision." *Id.* As veterans' advocates have stated, if full effect is not given to the "take due account" provision, the Veterans Court's power to review the Board's application of the benefit-of-the-doubt rule will remain "nothing more than meaningless rhetoric."[9]

Further, Congress explicitly sought to "modify the requirements of the review the [Veterans] Court must perform when it is making determinations under section 7261(a)," and "expect[ed] the [Veterans] Court to reverse clearly erroneous findings when appropriate, rather than remand the case." 148 Cong. Rec. at H9006. In hearings leading up to the enactment of the VBA, representatives of veterans organizations had urged that such a provision would "address[] a long-standing concern . . . about the years it often takes for a claimant to get their case finally before the Court only to have it remanded back to the

[9] Statement of Kerry Baker, Disabled Veterans of America, United States Senate Committee on Veterans' Affairs (Feb. 13, 2008), http://tinyurl.com/76kj4fcx.

Board, which means further frustration, hardship, and delay." *Pending Legislation: Hearing Before the S. Comm. on Veterans' Affairs*, 107th Cong. 60, 66 (2002) (statement of James Fischl, Director of The American Legion).

The VBA thus, first, required the Veterans Court to review the Secretary's benefit-of-the-doubt analysis, and, second, empowered the Veterans Court to reverse the Board when it errs. Under the VBA, Congress expected the Veterans Court to ensure that veterans like Mr. Ramos-Rodriguez received the benefit of the doubt, and to award benefits rather than force them to slog through more years of litigation.

C. When the "take due account" provision is applied properly, veterans promptly receive the disability benefits they have earned.

In some early cases after the VBA's enactment, the "take due account" provision spurred the Veterans Court to conduct an appropriately non-deferential review of the Board's decision, regardless of the labels used to describe it. For example, in *Padgett v. Nicholson*, the Veterans Court reviewed the Secretary's benefit-of-the-doubt analysis and reversed the Board's benefit-of-the-doubt determination and denial of benefits. 19 Vet. App. 133 (2005) (subsequent history related to other grounds omitted). *Padgett* demonstrates the manner in which the Veterans Court should apply the "take due account" provision to reverse the Board in appropriate circumstances.

Barney O. Padgett was a World War II combat veteran who served tours of duty in Europe, Africa, and the Middle East, and injured his knee "during combat when he jumped into a ditch seeking cover from shell fire." *Id.* at 135. The VA awarded Mr. Padgett disability benefits

for his knee injury, and eventually his knee disability necessitated a hip replacement. *Id.* Mr. Padgett filed another disability claim for his hip, but the VA denied that claim, finding that his knee disability did not cause his hip disorder. *Id.* Mr. Padgett appealed to the Board and submitted evidence from two doctors who supported his claim, but the Board rejected those opinions and sided with two VA doctors who asserted that the disorders were unrelated. *Id.* at 136–37.

Rather than defer to the Board's evaluation of the medical opinions, the Veterans Court applied the "take due account" provision and examined the Board's application of the benefit-of-the-doubt rule. *Id.* at 146–47. The court explained that "the existence of some controverting evidence . . . d[id] not preclude" it from applying the "take due account" provision to the Secretary's benefit-of-the-doubt analysis. *Id.* at 147. The court found that, given the medical evidence in support of his claim, the benefit-of-the-doubt rule required the VA to decide in Mr. Padgett's favor and conclude that sufficient evidence established his hip disability was aggravated by his knee injury. *Id.* at 150. Accordingly, instead of remanding this issue back to the Board, the court issued an outright reversal. *Id.*

When the Veterans Court "take[s] due account" of the Secretary's application of the rule as in *Padgett*, veterans with meritorious claims more promptly receive the benefits that they have earned.

II. The agency and Federal Circuit misinterpret the "take due account" rule to give the benefit of the doubt to the Board rather than veterans.

Over time, the Veterans Court and the Federal Circuit strayed from the proper application of the VBA's "take due account" provision in concluding that the Veterans

Court should review the Board's application of the benefit-of-the-doubt rule for clear error. This conflates the court's review of *facts*, which is subject to clear error review, with the *application* of the benefit-of-the-doubt rule, which is not. The misguided importation of the "clearly erroneous" standard into the Veterans Court's review of whether the Secretary gave the benefit of the doubt to the veteran turns on its head that longstanding rule, guaranteeing that the Board, rather than the veteran, actually receives the benefit of the doubt on appeal. This renders the "take due account" provision a dead letter.

Today's veterans thus find themselves in no better position than Mr. Ramos-Rodriguez and his peers were before the VBA. Rather than having the Veterans Court apply the benefit of the doubt to their cases, veterans are often subjected to lengthy remands and additional unnecessary factual development that serves only to bolster the agency's original denial—a phenomenon veterans and advocates caustically describe as "develop to deny."[10]

One example is veteran Kevin Donnellan, who served in the Army National Guard for more than thirty years—during which he had a battle with cancer. *Donnellan v. Shinseki*, 24 Vet. App. 167, 169 (2010). After his cancer diagnosis in 1996, and related treatment through April 1998, Mr. Donnellan went on active duty for training in May 1998. *Id.* During training, "he was hospitalized with

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[10] *Cf. Stanphill v. McDonough*, No. 22-2283, 2023 WL 6373807, at *4 (Vet. App. Sept. 29, 2023) ("[T]he Board may not 'develop to deny' the veteran's claim—meaning that the Board 'may not order additional development for the sole purpose of obtaining evidence unfavorable to a claimant.'" (quoting *Turk v. Peake*, 21 Vet. App. 565, 568 (2008))).

fever, chills," and "severe" abdominal pain before undergoing emergency surgery that removed some four feet of his small intestine. *Id.* Mr. Donnellan left the service in February 2000. *Id.* In October 2001, he filed a disability "claim for service connection for a perforated small intestine." *Id.* He submitted in support a 1998 letter from his examining physician opining that the perforation was unrelated to his cancer treatment, since his previous injuries had "healed" before he reentered active duty. *Id.* at 170.

Some six years after Mr. Donnellan applied for benefits, the Board denied his claim. *Id.* In addition to the letter from his treating physician, the Board had before it two additional medical opinions. *Id.* at 169–70. A VA physician had concluded in 2005 that Mr. Donnellan's injuries "resulted from complications of the preservice colon cancer surgeries," *id.* at 169, while an independent physician found in 2006 that "he could have had a setback during his active duty" that aggravated his condition. *Id.* at 170. Despite the evidence on both sides of the ledger—which should have entitled Mr. Donnellan to the benefit of the doubt—the Board concluded that there was "clear and unmistakable evidence that his active duty for training did not aggravate his preexisting condition." *Id.*

The Veterans Court held that the benefit-of-the-doubt rule provided the applicable "standard of proof" in the case. *Id.* at 175. But, unwilling to reverse the Board's benefit-of-the-doubt determination, it remanded—despite a half-decade of record development, including at least three medical opinions of which two supported Mr. Donnellan's claim. *Id.* at 176. After an appeal to the Federal Circuit, resolved against him in 2012, he returned to the Board. There, he submitted to two more medical examinations—15 and 18 years after his original injury—be-

fore the Board finally decided the preponderance of evidence weighed against Mr. Donnellan, and concluded the benefit-of-the-doubt rule did not apply. So ended Mr. Donnellan's 15-year battle for benefits—following thirty years' service to his country—all without ever receiving the benefit of the doubt that Congress promised.

Mr. Donnellan's story highlights the problems exacerbated by the Veterans Court's deferential benefit-of-the-doubt analysis. Neither court has articulated credible reasoning justifying the Veterans Court deferring to the Board's benefit-of-the-doubt analysis. Instead, the deferential approach of applying the court's "clearly erroneous" standard of review to its required benefit-of-the-doubt analysis flouts Congress's commands and is incongruous with other well-established standards of appellate review. Worse, these errors have contributed to an increase in the delay that drove Congress to enact the VBA in the first place.

A. The Veterans Court misused legislative history to rewrite the statute, and the Federal Circuit has acquiesced.

Long before the enactment of the VBA, the Veterans Court properly treated the application of the benefit-of-the-doubt rule as a question of law. Under this construct, the Veterans Court could find error in the Board's application of the benefit-of-the-doubt rule even if the Board's factual findings were not clearly erroneous. *Gilbert*, 1 Vet. App at 57–58.[11]

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[11] In *Gilbert*, for example, the Veterans Court remanded for the Board to explain *both* its "factual findings *and* its *conclusion*"—*i.e.*, its conclusion of law—"that the veteran is not entitled to the 'benefit of the doubt.'" 1 Vet. App. at 59 (emphases added).

Soon after Congress enacted the VBA, which strengthened this review, the Veterans Court erroneously weakened it by concluding that the Board's application of the benefit-of-the-doubt rule was a finding of fact subject only to clear error review. *See Roberson v. Principi*, 17 Vet. App. 135, 146 (2003) (per curiam).[12] Without explaining this departure from its own longstanding view, not to mention Congress's then-recent command in the VBA, it simply asserted that it was "not authorized" to "apply the benefit of the doubt doctrine"; it was "empowered only to ensure that the Secretary's determination in that regard is not clearly erroneous." *Id.*

Appellate courts routinely review—*de novo*—trial courts' application of legal tests concerning evidence. By asserting that review of the application of the benefit-of-the-doubt rule entailed a finding of fact, the Veterans Court gave itself a shortcut, and short shrift to the VBA.

To reach this erroneous conclusion, the Veterans Court wrote off the statutory text and misused legislative history. The court seized on the language in § 7252 that the "extent of the [Veterans Court's] review shall be limited to the scope provided in section 7261." *Roberson*, 17 Vet. App. at 140. And the court also focused on the fact that "section 7261 states that the Court shall review the

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A concurring judge elaborated that the Veterans Court's review "as to whether this standard of proof has been correctly applied by the [Board] does not constitute review of a finding of material fact," but rather was "a *separate* review." *Id.* at 60 (Kramer, J., concurring) (emphasis in original).

[12] *Padgett* repeated that standard of review, 19 Vet. App. at 146 (citing *Roberson*, 17 Vet. App. at 146), but nevertheless reversed because the "only plausible resolution of the key factual issue on the record" meant "the Board's decision that the evidence preponderated against this claim must" be "reversed," *id.* at 150.

record of proceedings pursuant to section 7252(b)." *Id.* Because the jurisdictional provision and scope of review provisions referenced each other, the court concluded its "review [was] thus trapped between these two mutually referential provisions," and "there is no clear reading of this provision." *Id.* That (supposed) lack of clarity meant that the court "must turn to the legislative history" to find the statute's meaning. *Id.*

But those two statutory provisions do not create the ambiguity conjured by the Veterans Court.[13] Section 7252 confers "exclusive jurisdiction to review decisions of the Board of Veterans' Appeals," § 7252(a), and sets the scope of review to be "on the record of proceedings before the Secretary and the Board" to the extent "provided in section 7261," § 7252(b).

Section 7261 directs *how* that jurisdiction is to be exercised. Section 7261(a) states the Court "shall" "decide all relevant questions of law" under an APA-style review, while reviewing "finding[s] of material fact adverse to the claimant" under a "clearly erroneous" standard. Subsection 7261(b) then further provides that when the court "review[s] the record of proceedings" to "mak[e] the determinations under subsection (a)," the court "shall" (1) "take due account of the Secretary's application of section 5107(b) [the benefit-of-the-doubt provision]," and (2) "take due account of the rule of prejudicial error." Congress said exactly what the court "shall" do: "take due account of" the benefit-of-the-doubt rule while reviewing the "record of proceedings" before the Board.

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[13] As one Veterans Court judge put it, "I must confess not to find any such wrapping around or trapping of review." *Wells v. Principi*, 18 Vet. App. 33, 40 n.10 (2004) (per curiam) (Steinberg, J., dissenting) (cleaned up).

In *Roberson*, however, the Veterans Court cast aside that unambiguous text and explicitly relied on the legislative history to rewrite the law. 17 Vet. App. at 140. Based on cherry-picked portions of the legislative record, the Veterans Court concluded that "changing this Court's standard of review while doing nothing to enhance the record would compound rather than correct any problems." *Id.* at 140–47. Assuming—again without explanation—that de novo review of the application of the benefit-of-the-doubt rule would entail the finding of facts, the court concluded "deferential, as opposed to de novo, review" was appropriate. *Id.* at 147.

Unfortunately, the Federal Circuit has followed suit, also assuming that "non-deferential review of . . . the Board's application of the benefit of the doubt rule" impermissibly would necessitate "de novo fact-finding." *Roane v. McDonough*, 64 F.4th 1306, 1310–11 (Fed. Cir. 2023). That assumption went unexamined and is incorrect.

In sum, the Veterans Court invented uncertainty in the text that is not there and used legislative history to conclude that the text must mean the opposite of what it says, and the Federal Circuit has gone along with it. The Veterans Court's analysis does not withstand scrutiny.

B. Veterans now endure *more* delay.

As explained above, the VBA was intended to and should have had the effect of reducing delay in the veterans benefit system. But in light of the courts' erroneous interpretation of the VBA, delays actually have gotten worse. For instance, the Board's average time from receiving an appeal to issuing a decision is now 743 days—nearly two years. Board Annual Report FY 2022 ("2022

BVA Report"), at 41.[14] That is far from a recent outlier. In 2020 the time was 576 days. Board Annual Report FY 2020, at 30.[15] And in the 2021 report, the tally was 618 days. Board Annual Report FY 2021, at 44.[16] In other words, compared to the three years before the VBA's enactment, delays are now a whopping 3.5 to 4 *times* longer.

Making matters worse, those times are only to a decision—not necessarily a final resolution of the veteran's case. For instance, of judicial appeals "returned to the Board after remand, 59% of them have been remanded at least twice, 30% have been remanded 3 times or more, 15% have been remanded at least [4] times, and 7% have been remanded 5 times or more." 2022 BVA Report, at 36. That sort of ping-ponging does no favors for veterans. And it may help explain why over one-third of veterans who have received a remand decision "report they do not 'trust' the appeals system 'to fulfill our country's commitment to Veterans and their families.'" *Id.*

Delays for veterans do not stop at the Board. The Veterans Court now also takes far longer to resolve appeals. In 2022, the average time from filing an appeal to a disposition was either 456 days (single judge) or 672 days (multi-judge panel). Veterans Court FY 2022 Annual Report, at 5.[17] Those numbers in 2021 were 459 days and 767 days, respectively. Veterans Court FY 2021 Annual Report, at 5.[18] And in 2020: 428 days and 647 days. Veterans Court FY 2020 Annual Report, at 5.[19] Compare the recent

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[14] http://tinyurl.com/4k7fbvuc.

[15] http://tinyurl.com/38pvvwcf.

[16] http://tinyurl.com/3bz3ywwc.

[17] http://tinyurl.com/2xhpx4b8.

[18] http://tinyurl.com/2t49kzc9.

[19] http://tinyurl.com/yu3knfbv.

delays to those that prompted the enactment in 2002 of the Veterans Benefits Act:

Board of Veterans Appeals Disposition Delay

Pre-VBA (2002)		Recent	
Year	**Delay (days)**	**Year**	**Delay (days)**
1999	140	**2020**	576
2000	172	**2021**	618
2001	182	**2022**	743

Veterans Court Disposition Delay (Days)

Pre-VBA		Recent		
Year	**Court**	**Year**	**Single-Judge**	**Multi-Judge**
1999	364	**2020**	428	647
2000	386	**2021**	459	767
2001	340	**2022**	456	672

The lower courts' reading of the VBA exacerbates these demoralizing delays. That is because the deference paid to the Board serves to increase the number of remands and decrease the number of reversals. According to the 2022 Report, less than 5% of appeals are reversed by the Veterans Court. 2022 BVA Report, at 14. "Court remands" exacerbate docket pressure: "It is important to note that remanded appeals returned to the Board for re-evaluation by a Board judge is a key factor in keeping Board judges from considering over 30,000 other original Legacy appeal cases that have never been previously evaluated by a Board judge." *Id.*

Delays do not stop there. According to a study of a sample of cases the Veterans Court remanded in 2020, the median time that it took the VA to reach a final decision after remand was 352 days. *See Examining the VA Appeals Process; Ensuring High-Quality Decision-Making*

for Veterans' Claims on Appeal, Statement from Bergmann & Moore, LLC to the Subcomm. on Disability Assistance and Mem'l Affs. of the H. Comm. on Veterans Affs. at 4 (Nov. 27, 2023).[20] Although the Board's median time to decision was 199 days, oftentimes the Board remanded the case further, causing months of further delays. *Id.* Many of those cases were *still* not resolved on remand and returned back to the Board, taking on average 554 days from Veterans Court remand to final Board decision. *Id.* Eight percent of cases remanded by the Veterans Court still did not have a final determination after three years. *Id.* at 3.

If the Veterans Court heeded the VBA's command and took "due account" of the benefit-of-the-doubt rule, far fewer veterans would be forced to endure years-long delays for the Board and VA to award benefits on remand, or waiting for the Veterans Court to decide on their appeals. With more meaningful oversight, the Board would likely apply the benefit-of-the-doubt rule more consistently and correctly. This would lead to better outcomes for veterans at the Board, drastically reduce the number of veterans appealing to the Veterans Court, and decrease delays for all veterans who apply for the benefits they have earned.

III. To "take due account" of a legal rule requires more than clear-error review.

The VBA requires the Veterans Court to review the Board's application of the benefit-of-the-doubt rule as a conclusion of law by the Board, which is based on the Board's underlying findings of fact. The Veterans Court

[20] http://tinyurl.com/yhare63z.

and the Federal Circuit held to the contrary below, erroneously concluding that "clear error" factual review applies to the Veterans Court's requirement to "take due account of the Secretary's application" of the benefit-of-the-doubt rule.

The Federal Circuit was not writing on a blank slate in interpreting the VBA's "take due account" provision. As Petitioners explain, *see* Pet. 24-25, this Court previously interpreted a parallel "take due account provision" previously enacted by Congress. In interpreting that provision, this Court found it instructive to analogize to well-established standards "that courts ordinarily apply in civil cases." *Sanders*, 556 U.S at 406.

The Veterans Court and Federal Circuit should have followed this Court's lead in interpreting the "take due account" provision at issue in this case. Had it done so, it would have found an instructive analog in the Federal Rules of Civil Procedure.

Rule 50 empowers a court—including after a jury trial—to find "that a reasonable jury would not have a legally sufficient evidentiary basis" to find for a party on an issue, and to enter judgment for the other party. Rule 50 thus requires district courts to determine—as a matter of law—whether the evidence meets the applicable evidentiary standard.[21]

Similarly, the requirement to "take due account" requires the Veterans Court to determine—as a matter of law—whether the evidence underlying the Board's determination of an issue meets the applicable standard, which in this case comes from the benefit-of-the-doubt rule. The

[21] At least one Veterans Court judge thought this is how benefit-of-the-doubt review should work, even before the VBA. *Gilbert*, 1 Vet. App. at 61 (Kramer, J., concurring).

Federal Circuit erred in conflating the Veterans Court's evaluation of the sufficiency of evidence in light of the benefit-of-the-doubt standard, on the one hand, with the Veterans Court's limited review of the Board's underlying factual findings, on the other.

It is clear that the sufficiency of evidence determination by courts under Rule 50 is "solely a question of law" requiring an "independent assessment of the sufficiency" of the evidence. Wright & Miller, 9B Fed. Prac. & Proc. Civ. § 2524 (3d ed. 2023). Indeed, federal courts of appeal review district court's judgment-as-a-matter-of-law decisions *de novo*. Wright & Miller, *supra*, § 2536.

The Veterans Court's review should work the same way: analyzing whether the Board, in applying the benefit-of-the-doubt rule, had *legally* sufficient evidence to grant the veteran's claim. Such a review would not require the Veterans Court "to make de novo findings of fact or otherwise resolve matters that are open to debate." *Roane*, 64 F.4th at 1310 (quoting *Tadlock v. McDonough*, 5 F.4th 1327, 1337 (Fed. Cir. 2021)).

In short, to "take due account of" the benefit-of-the-doubt rule requires a *de novo* review of whether the Board correctly applied the rule—not a clear-error review of the Board's findings of material fact. This Court should not let this error plague our Nation's veterans any longer.

CONCLUSION

Congress enacted the Veterans Benefits Act of 2002 to "make improvements in procedures relating to judicial review of veterans' claims for benefits." Pub. L. No. 107-330. One of those improvements commanded the Veterans Court to "take due account" that the benefit of the doubt was given to veterans. The Veterans Court and the Federal Circuit have in effect reversed that directive. By

interpreting § 7261(b)(1) to require only "clear error" review, they have ensured that it is the agency that gets the benefit of the doubt—not veterans. That interpretation of the VBA is incorrect, and it exacerbates the very problems Congress sought to solve through its enactment. Such a result heaps insult on top of veterans' injuries.

The Court should grant the Petition for Certiorari, find for Petitioners, and reverse the Federal Circuit.

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Respectfully submitted,

RENÉE A. BURBANK
ZACHARY R.M. OUTZEN
BARTON F. STICHMAN
NATIONAL VETERANS LEGAL SERVICES PROGRAM
1100 Wilson Blvd., Ste. 900
Arlington, VA 22209
Renee.Burbank@nvlsp.org

LIAM J. MONTGOMERY
Counsel of Record
F. GREG BOWMAN
D. SHAYON GHOSH
ANDREW G. BORRASSO
LUKE R. SÁNDOR
WILLIAMS & CONNOLLY LLP
680 Maine Avenue, S.W.
Washington, DC 20024
(202) 434-5000
LMontgomery@wc.com