No. 23-713

IN THE

Supreme Court of the United States

JOSHUA E. BUFKIN AND NORMAN F. THORNTON,
Petitioners,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,
Respondent.

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Fourteen years after creating the Veterans Court and directing it to perform APA-style review of VA benefits decisions, Congress added a new command: that the Veterans Court "take due account of the Secretary's application of section 5107(b)." 38 U.S.C. § 7261(b)(1). Congress placed this obligation not in section 7261(a), which directs the court to perform enumerated tasks only "when presented" and "to the extent necessary," but in section 7261(b), which is not so limited, and which also provides for the prejudicial-error check the Veterans Court must conduct in every case. So revised, section 7261 establishes an APA-*plus* review framework. Petitioners' Brief (PB) 23-25.

The government nonetheless argues that section 7261(b)(1) merely describes an "aspect" of the APA review already required by section 7261(a). Government Brief (GB) 21-22. The government's reading is incurably atextual. That the Veterans Court must perform its subsection (b) tasks "[i]n making the determinations under subsection (a)" does not somehow convert those separate tasks into a part of subsection (a). Nor does that "in making" clause—which tells the Veterans Court *when* it must perform its subsection (b) obligations—shed light on what degree of account is "due" to the benefit-of-the-doubt issue.

Besides distorting the text, the government's reading violates the fundamental rule that section 7261(b)(1) must have meaning. Under the government's reading, this separately enacted provision requires nothing more than what section 7261(a) already demands. Notably, that is true whether the

"approximate balance" aspect of section 5107(b) is reviewed as a factual matter, as the government wrongly contends, or as a legal matter, like the other evidentiary standards of proof that Petitioners identified and the government ignores. Section 7261(a) already requires review of both factual and legal challenges presented on appeal. The government has no explanation for what section 7261(b)(1) accomplishes under its flawed interpretation, and its attempts at justifying a meaningless legislative enactment are meritless.

The Federal Circuit erred in construing this statute to mean nothing, and the government provides no justification for this Court to repeat the error. The Court should give section 7261(b)(1) the meaning required by its plain text.

ARGUMENT

I. Section 7261(b)(1) Requires The Veterans Court To Review VA's Compliance With Section 5107(b).

A. The statutory text requires benefit-of-the-doubt review in addition to the review mandated by subsection (a).

The APA-plus nature of section 7261 follows directly from the text. Subsection (a) sets out the Veterans Court's standard appellate responsibilities. The Veterans Court must perform these tasks "to the extent necessary to its decision and when presented." 38 U.S.C. § 7261(a). Subsection (b) adds more. It directs the Veterans Court, "[i]n making the determinations

under subsection (a)," to "review the record of proceedings" and "take due account of" two things: (1) "the Secretary's application of section 5107(b)" and (2) "the rule of prejudicial error." *Id*. § 7261(b)(1)-(2). This system is best described as APA-*plus* because it imports standard elements of agency review from the APA—as reflected in subsections (a) and (b)(2)—and also requires a second look at benefit-of-the-doubt issues—as reflected in subsection (b)(1).

1. The government agrees that subsection (b) "is best read to impose a mandatory command." GB21. But it nonetheless disputes that this mandate requires a "freestanding inquiry *separate from*" the review provided for in subsection (a). GB16. Its objection focuses on the phrase "[i]n making the determinations under subsection (a)." GB16-17. According to the government, this language reduces the Veterans Court's mandatory benefit-of-the-doubt review to "*an aspect of*" the court's review under subsection (a). GB16.

This argument effectively rewrites section 7261(b). The statute positions the required benefit-of-the-doubt review in subsection (b)—separate from subsection (a). And, by requiring subsection (b)(1) review "[i]n making the determinations under subsection (a)," the text presupposes that benefit-of-the-doubt review is a separate inquiry, to be performed in addition to and alongside the required subsection (a) analysis. The government's reading would instead suggest that benefit-of-the-doubt review is itself one of the "determinations" to be made under subsection (a), or an integral part of those "determinations." That is, the government reads subsection (b)(1) to tell the

Veterans Court to make certain determinations required under subsection (a) "[i]n making the determinations under subsection (a)." The more natural (and less tautological) reading of the text is Petitioners': the statute positions benefit-of-the-doubt review as an additional mandatory task overlaid atop the Veterans Court's subsection (a) obligations.

Petitioners explained the critical purpose served by the phrase "[i]n making the determinations under subsection (a)." This language directs the Veterans Court to review VA's compliance with section 5107(b) with respect to the issues the veteran presses—that is, "[i]n making the determinations" required to assess the validity of the agency rulings that the veteran "present[s]" for review. PB33-34.

The government offers nothing—zero—in response to this straightforward account of the "in making" language. In fact, the government's one gesture toward it misrepresents Petitioners' argument. The government asserts that Petitioners "acknowledge … that *Subsection (a)* 'defines the scope of the review required under subsection (b)(1).'" GB16 (emphasis added). What Petitioners actually said is that *subsection (b)*'s "[i]n making the determinations under subsection (a)" language "defines the scope" of that review in the way just stated. PB33. Petitioners were clear that the subsection (b)(1) review remains separate and independent from subsection (a). PB33-34. The government briefly acknowledges (but has no response to) Petitioners' example illustrating this point: If a veteran is denied benefits after claiming a knee disability and a shoulder disability, but appeals only the knee claim, the Veterans Court need not

examine VA's application of section 5107(b) to the shoulder claim. *Id.*; GB38. The government's avoidance of this point is remarkable given that this clause is central to its theory.

2. The government's flawed interpretation also relies on the word "due" to reduce the benefit-of-the-doubt review required by subsection (b)(1) to a mere "*aspect*" of the Veterans Court's subsection (a) obligations. GB21-22. The government argues that "taking *due* account" of something means giving "the attention or consideration" that is "appropriate in the particular context where the court's review occurs." GB21. Petitioners do not disagree. But the government goes astray when it returns to the same "in making" clause (and the government's flawed understanding of it) to provide the relevant "context." It reasons that, because the Veterans Court must "take due account" of VA's application of section 5107(b) "only '[i]n making the determinations under subsection (a),'" the only account that is "due" to the issue is governed entirely by subsection (a). GB21-22.

The government's logic does not hold up. To begin with, the government provides no explanation for why the "in making" phrase supplies the relevant "context" for construing the effect of the word "due." None is apparent. The "in making" clause tells the Veterans Court *when* it must "take due account" of the Secretary's application of section 5107(b)—namely, when considering the portions of the agency's ruling challenged on appeal. *Supra* 4-5. It does not tell the Veterans Court what "degree of attention" is "properly paid" to the Secretary's benefit-of-the-doubt analysis

when it is subject to scrutiny. *Black's Law Dictionary* 516 (7th ed. 1999).

The government's argument is also contrary to *Shinseki v. Sanders*, 556 U.S. 396 (2009). There, the Court interpreted subsection (b)(2)—the parallel provision requiring the Veterans Court to "take due account of the rule of prejudicial error," also "[i]n making the determinations under subsection (a)." *Id.* at 406-07. If the government were correct, the Court in *Sanders* presumably would have analyzed the word "due" with reference to the "in making" clause, or at a minimum recognized a linkage between these textual components. But the Court did no such thing. Instead, it analyzed the phrase "take due account" with regard to the thing being taken account *of*: there, "the rule of prejudicial error." This led the Court to conclude that "the statute, in stating that the Veterans Court must 'take due account of the rule of prejudicial error,' requires the Veterans Court to apply the same kind of 'harmless-error' rule that courts ordinarily apply in civil cases." *Id.* at 406.

Here too, the relevant "context" for interpreting the word "due" is the thing to be taken account *of*: "the Secretary's application of section 5107(b)." Construing "due" from this perspective demonstrates that the "account" that is "due" is an independent assessment of the Secretary's compliance with section 5107(b). That is because section 5107(b) encodes a mandatory "standard of proof" binding the agency in its exercise of decision-making authority. *Gilbert v. Derwinski*, 1 Vet. App. 49, 53-54 (1990); PB25, 44-46. A reviewing court is "due" to take "account" of the agency's "application" of a binding statute by

ensuring that the agency adhered to that statute. *See Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 172 (2016) (agencies, including VA, "must" adhere to "mandatory dut[ies]" encoded in statute). There is no other way to "take due account" of "the Secretary's application of section 5107(b)" than to assess whether section 5107(b) was correctly applied.

B. The structure of the statute confirms the independent and categorical nature of subsection (b)(1) review.

The government's position also fails to respect the structure of the statute. Congress placed the benefit-of-the-doubt review obligation within subsection (b)—a separate part of the statute that prescribes two mandatory and freestanding duties distinct from those described in subsection (a). PB26-27. The government's reading utterly fails to account for this legislative choice.

The government's reading particularly fails to respect the parallelism between subsections (b)(1) and (b)(2). Petitioners demonstrated that these two provisions should be read in parallel. PB10-11, 20, 22, 29-30, 51. Subsection (b)(2) has been interpreted to impose a categorical mandate for the Veterans Court "in all cases" to conduct an independent review of "the full agency record" to apply harmless-error principles, regardless of whether the parties specifically dispute harmfulness. *Tadlock v. McDonough,* 5 F.4th 1327, 1334 (Fed. Cir. 2021); *see* NLSVCC Br. 9-10. It follows that subsection (b)(1) should be understood to impose a similar categorical and independent obligation. PB29, 52.

The government strains to respond to this point. It claims the "premise … is incorrect" by suggesting that the Veterans Court might not actually be required to apply harmless-error principles uniformly without regard to party presentation. GB35. But it ignores *Tadlock*—the case on point as to this statute—which holds just that: "[T]he prejudicial error analysis must be performed in every case." 5 F.4th at 1335. And even from its vantage point as a party in virtually all agency cases, the government can identify only two instances from other contexts in which a court "refused to uphold agency action on harmless-error grounds where the government has forfeited reliance on that doctrine." GB35. These examples do not contradict the rule that subsection (b)(2) requires the Veterans Court to enforce harmless-error principles with respect to all issues in all cases. Nor do they undermine the proposition that the same language in subsection (b)(1) should impose the same categorical obligation with respect to ensuring compliance with section 5107(b).

The government observes that subsection (b)(2) was borrowed from the APA, while subsection (b)(1) is "unique to the veterans' context." GB35-36. But this observation supports, rather than undermines, Petitioners' reading of section 7261 as an "APA-*plus*" regime. As Petitioners explained (at PB24-25), this unique review provision enforces a "unique standard of proof," *Gilbert,* 1 Vet. App. at 53, and furthers Congress's "special solicitude for veterans"—something the government acknowledges as a fundamental feature of "the statutory scheme as a whole," GB15. The provision functions as a second-look enforcement mechanism for the agency's compliance with section

5107(b), befitting the Veterans Court's role as a specialized Article I court with the competence to evaluate VA agency records. *See* PB8-9, 25-26; FCBA Br. 5-10. The fact that Congress positioned the benefit-of-the-doubt review obligation within subsection (b) underscores that it should be interpreted in parallel with (b)(2)—not as an "aspect" of subsection (a).

The government also tries to break the parallelism by pointing out that subsection (b)(1) calls for review of "*the Secretary's application of* section 5107(b)," while there is no equivalent language in subsection (b)(2). GB36. But this difference in wording has a ready explanation and does not change the parallel nature of the two provisions. "The Secretary" is required by section 5107(b) to give the veteran the benefit of the doubt. "The Secretary" is not, by contrast, under a statutory obligation to perform harmless-error review of the agency's own rulings. It would make little sense for Congress to require judicial review of "the Secretary's application of the rule of prejudicial error." It does make sense for Congress, as it did in section 7261(b), to direct the Veterans Court to "take due account" of both (1) the Secretary's application of a rule the agency applies in the first instance (benefit-of-the-doubt) and (2) a rule that the court itself applies in the first instance (harmless-error).

C. Benefit-of-the-doubt review is required whether or not a veteran presents a benefit-of-the-doubt error.

For these same reasons, the government is wrong to maintain that the Veterans Court need only review VA's compliance with section 5107(b) if the veteran

specifically raises a benefit-of-the-doubt error on appeal. The government relies on the language in subsection (a) directing the Veterans Court to perform certain tasks only "to the extent necessary … and when presented." GB37. Again, the government's argument violates the text and structure of the statute. The "when presented" and "to the extent necessary" language do not modify subsection (b), which requires a review separate from the review of the veteran's specific claims of error under subsection (a). *See* PB49-52. The government relies on the principle that "prefatory instruction[s]" in statutes are "best read as applying to each of the listed determinations separately." GB39. But that is a reason for applying the clause to each of the determinations listed in subsection (a). The "when presented" language is not "prefatory" to subsection (b)—it is entirely separate.

The government claims that Petitioners are "capaciously" seeking open-ended review of "every issue relevant to" a benefits claim. GB38. But the government recognizes that, under Petitioners' interpretation, the Veterans Court's subsection (b)(1) review must be conducted only as to claims the veteran has otherwise raised on appeal. GB38; *see* PB33-34, 51-52. The government does not articulate any troubling burden on the Veterans Court that would result from simply considering whether the agency complied with one statutory obligation before denying a particular request for benefits. The Veterans Court is already under an obligation to "review the record" pertinent to the issues on appeal in applying the harmless-error rule under subsection (b)(2). Meaningful benefit-of-the-doubt review does not require the Veterans Court to turn more pages; it simply requires the Veterans

Court to ensure the agency's compliance with section 5107(b) with respect to the material already at issue in the appeal.

The government instead mainly urges this Court not to consider this issue at all—ostensibly because both veterans here raised section 5107(b) challenges in their respective appeals. GB38; *see* PB49 n.4. But the question is critical to the proper interpretation of the statute. If the Federal Circuit and the government were correct that a veteran must affirmatively raise benefit-of-the-doubt challenges on appeal, then section 7261(b)(1) would be devoid of meaning. If a veteran asserts a failure to comply with section 5107(b) as a specific error for review on appeal, the Veterans Court is already required to examine that issue under subsection (a)—whether as part of its factual review under (a)(4) (in the government's view) or its legal and procedural review under (a)(1) and (a)(3). *See* GB39-40. If subsection (b)(1) were triggered only when a veteran raises a benefit-of-the-doubt issue, subsection (b)(1) would achieve nothing beyond subsection (a), and Congress's 2002 legislation would have no effect.

That cannot be and is not right. "The Government's reading is … at odds with one of the most basic interpretive canons, that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn,* 542 U.S. 88, 101 (2004)).

II. The Government, Like The Federal Circuit, Interprets Section 7261(b)(1) To Mean Nothing.

The government provides no persuasive answer to this problem: Its reading reduces section 7261(b)(1) to surplusage—effectively nullifying an important act of Congress—because it construes subsection (b)(1) to require nothing more than what is already provided for in subsection (a). PB38-42. As the Court recently emphasized, "[w]hen a statutory construction thus 'render[s] an entire subparagraph meaningless,' … the canon against surplusage applies with special force." *Pulsifer v. United States*, 601 U.S. 124, 143 (2024) (citation omitted). The government acknowledges that its interpretation may result in "perceived superfluity." GB29. But the superfluity is not merely "perceived," it is actual.

None of the government's conjectures about the function of section 7261(b)(1) overcome (or even acknowledge) the presumption that, "[w]hen Congress acts to amend a statute, … it intends its amendment to have real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995).

A. Contrary to the government's account, the Federal Circuit effectively nullified section 7261(b)(1).

As an initial matter, the government cannot avoid the reality that the Federal Circuit interpreted subsection (b)(1) to mean nothing. PB39-42. The *Thornton* ruling summarized this point, explaining the *Bufkin* panel's holding that section 7261(b)(1)

"does not require the Veterans Court to conduct any review of the benefit of the doubt issue beyond the clear error review" of section 7261(a)(4). Pet. App. 15a. The government contends otherwise only by distorting *Bufkin* and claiming that Petitioners overread *Thornton*. GB41-43.

The government attempts to explain away the Federal Circuit's restrictive language by asserting that, in these cases, Petitioners challenged only "the Board's weighing of the evidence"—that is, its application of the approximate-balance standard. GB42. In the government's view, that aspect of section 5107(b) presents a question of fact. *But see infra* Part III. So, says the government, the Federal Circuit's "point was that, when a claimant challenges the Secretary's determination that the evidence on a material issue is not in approximate balance, the Veterans Court reviews that determination only for clear error." GB41.

The government acknowledges, as it must, that the Federal Circuit did not actually say this. GB42. And the government elsewhere acknowledges that Petitioners broadly argued that section 7261(b)(1) requires an independent, comprehensive review of the agency's application of section 5107(b). GB9, 13; *see* Pet. App. 10a, 15a. But even if the government's characterization were accurate, the fundamental problem remains. The gloss the government adds to the Federal Circuit's opinion is that, if an appellant raises a legal challenge implicating section 5107(b), the Veterans Court would review that argument under section 7261(a)(1). GB42. Even on that reading, section 7261(b)(1) still would require nothing that was not already covered by *something* in section 7261(a). *See*

GB43 (acknowledging subsection (b)(1) would simply be "clarifying and emphasizing" what was already in subsection (a)).

The Federal Circuit's actual reasoning is even more problematic. The Federal Circuit first rejected the argument that section 7261(b)(1) requires something separate from section 7261(a) in *Roane v. McDonough*, 64 F.4th 1306 (Fed. Cir. 2023). The court gave two reasons, both clearly limiting section 7261(b)(1) to a clear-error factual review: (1) "review under § 7261(b) is tied to § 7261(a)," such that "the Veterans Court can review facts *only* under the clearly erroneous standard when considering the Board's benefit of the doubt determination," and (2) independent review under section 7261(b)(1) "would directly violate § 7261(c)," which bars the Veterans Court "from engaging in de novo fact finding." *Id.* at 1310-11. Contrary to the government's suggestion, GB43, Petitioners do "take issue with" that reasoning from *Roane*, just as they object to the *Bufkin* panel's reliance on the same flawed reasoning (and the *Thornton* panel's recitation of it). *See* PB39-49; Pet. App. 9a-10a, 15a-16a.

B. The government articulates no theory on which section 7261(b)(1) has meaningful force.

Congress intentionally added section 7261(b)(1) to enhance the review veterans would receive in the Veterans Court and hold the agency to its statutory mandate under section 5107(b). Congress enacted section 7261(b)(1) fourteen years after the first iteration of section 7261, adding this separate directive on top

of subsection (a) to allow for "more searching appellate review" of the Board's benefit-of-the-doubt determinations, thereby giving "full force" to the rule. PB8-11, 35-36; NVLSP Br. 6-10. Congress surely intended this new statute to mean something. PB39-41; *see Stone*, 514 U.S. at 397 ("The reasonable construction is that the amendment was enacted" to provide for something new, "not just to state an already existing rule.").

The government has no credible theory for what that "something" is. The government hypothesizes that Congress enacted subsection (b)(1) to "eliminate[] any doubt" that the Veterans Court should review challenges to the Secretary's approximate-balance determination. GB29, 31. But there was no "doubt" to "eliminate": Before 2002, the Veterans Court was already required under subsection (a) to address an argument "presented" by the appellant that the Secretary had violated section 5107(b). PB50. The government offers nothing to suggest that any doubt about this obligation existed (or that Congress thought it did). *Compare O'Gilvie v. United States*, 519 U.S. 79, 89 (1996) (identifying legal uncertainty that Congress was clarifying). On the contrary, the Veterans Court routinely addressed all manner of challenges that veterans presented regarding the Secretary's application of section 5107(b). *E.g.*, *Wade v. Derwinski*, 3 Vet. App. 70, 72 (1992) (finding legal error when Board applied higher standard of proof than section 5107(b) requires); *Cohen v. Brown*, 10 Vet. App. 128, 151-52 (1997) (remanding because Board "did not specifically discuss the benefit-of-the-doubt rule" despite "significant evidence in favor of the … claim").

The problem that Congress was trying to solve in enacting section 7261(b)(1) was not that the Veterans Court was refusing to review benefit-of-the-doubt determinations at all; the problem was that the Veterans Court was often "employ[ing]" a particularly "high level of deference" in doing so. S. Rep. No. 107-234, at 16 (2002); *see also* FCBA Br. 11-16; *Wensch v. Principi*, 15 Vet. App. 362, 367 (2001). Under the government's view, that approach was correct—no legislative intervention would have been needed.

The government alternatively suggests that "[l]awmakers often enact provisions that emphasize, clarify, or confirm the proper application to specific circumstances of more general pre-existing statutory language." GB29. But the government provides no examples of Congress ever doing this in any context. *See* GB28-31. Instead, it offers one idiosyncratic circumstance that is not relevant here. The government is correct that a legislative resolution of a circuit split will "have only a clarifying effect" in the circuits with which Congress ultimately agrees. GB30. But it fails to explain how this scenario is relevant to a statute, like section 7261, that governs a single court with exclusive jurisdiction.[1]

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[1] The government's other examples involved statutes that had some substantive effect. *See Kawashima v. Holder*, 565 U.S. 478, 487-88 (2012) (because not all tax crimes require "fraud or deceit," clause adding tax crimes as deportable offense was not "surplusage"); *Scheidler v. Nat'l Org. for Women, Inc.*, 547 U.S. 9, 17-22 (2006) (statutory phrasing did some "additional work" under the interpretation most consistent with its text and history).

The government also fails to explain why "the phrase 'take due account of' in Subsection (b)(1) would more naturally be used to emphasize an existing duty than to create a new one." GB30. The "existing duty" implicated by the statutory text is the Secretary's duty to follow section 5107(b). Telling a court to "take due account of" an agency's performance of its statutory duty is not an "odd way" of creating a review responsibility. *Contra* GB30. It is the same approach Congress used in both the APA and section 7261 itself to mandate harmless-error review in appeals from agency proceedings. *See supra* 6. The government's logic would have Congress passing legislation to say that it "really means" what it said in a preexisting statute. That is not how Congress legislates.

Nor can the government avoid the problem that its interpretation effectively nullifies Congress's purposeful enactment by arguing that the statutory history is not "to be considered" at all. GB31 (citing *Azar v. Allina Health Servs.,* 587 U.S. 566, 579 (2019)). Unlike in *Allina*, the history here supports what the text suggests: that section 7261(b)(1) requires a separate and independent review of the Board's benefit-of-the-doubt determinations. *See Loper Bright Enters. v. Raimondo,* 144 S. Ct. 2244, 2262 (2024).[2] In equal measure, the government's reading gives no practical effect to Congress's enactment and assigns no legal meaning to the statutory text.

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[2] To the extent the Court perceives any ambiguity, the statute should be construed in the veterans' favor. PB37; *see* MVA Br. 6-9, 19-21.

The government also tries to sow doubt about Congress's intent, but this is not an instance in which the legislative history is "inconclusive." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381 n.11 (1969). To begin with, what is most relevant here is not statements of congressional intent or legislative inaction but Congress's ultimate *action* in adding section 7261(b)(1) to the statute in 2002, long after section 7261(a) had been in place. But even the government's attempts to poke holes in Petitioners' demonstration of congressional intent fail. Congress chose not to incorporate the new benefit-of-the-doubt provision into subsection (a)(4) but to make it a separate statutory requirement altogether. PB10-11. The government has no explanation for how the word "due" or the "in making" clause undercut that clear structural choice. GB32; *see supra* Part I.A. And even if the Senate was incorrect to suggest that a change to substantial-evidence review would provide less deference to agency factfinding, GB33, the fact remains that, instead of adjusting the Veterans Court's factual review obligation, Congress created an entirely new review obligation. The government's theory gives that new provision no force.

III. Section 7261(b)(1) Review Is A Legal Inquiry.

To reinforce its position that section 7261(b)(1) requires nothing beyond the review provided in section 7261(a), the government offers another flawed argument. It insists that "[t]he Secretary's approximate-balance determination [under section 5107(b)] is itself a factual finding" subject only to clear-error review under section 7261(a)(4). GB23. From this premise,

the government reasons that the Veterans Court can provide all the consideration "that is 'due'" to the Secretary's application of section 5107(b) by conducting clear-error review of the agency's factual findings. GB26.

The government's account is both incomplete and wrong. Section 7261(b)(1) directs the Veterans Court to review "the Secretary's application of section 5107(b)." Section 5107(b), in turn, requires the Secretary to "consider all information and lay and medical evidence of record" and, "[w]hen there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter," to "give the benefit of the doubt to the claimant." The Secretary's "application of section 5107(b)" includes the agency's application of the approximate-balance standard, but it is not limited to that question. And the government admits that at least some aspects of the Secretary's application of section 5107(b) present legal questions for the Veterans Court to review de novo. GB26-27, 39. Therefore, even if the government were correct that the question whether the evidence stands in approximate balance is itself a factual inquiry, that would not render the entire section 7261(b)(1) inquiry a matter for clear-error review. The government is thus wrong to call this the "principal disagreement in this case." GB23. The parties' principal disagreement is whether section 7261(b)(1) imposes a requirement that is separate from the review the Veterans Court conducts under section 7261(a).

The government is also incorrect about the nature of the approximate-balance inquiry. Section 5107(b)

establishes "approximate balance" as the standard of proof for any factual issue material to a veteran's claim. Like other such standards, section 5107(b) sets "the evidentiary threshold which a litigant must achieve in order to prevail." *Gilbert*, 1 Vet. App. at 53. Courts review the application of such evidentiary standards as a matter of law. Petitioners demonstrated this well-accepted principle with multiple examples. PB44.[3]

The government ignores Petitioners' showing. And it offers no contrary authority suggesting that the question whether an evidentiary standard is met is reviewed as a question of fact. Instead, the government relies on two categories of inapposite caselaw.

The government first cites a series of cases for the undisputed proposition that "assigning a particular weight to each piece of evidence"—by assessing "credibility, competence, reliability, and relevance"—is a factfinding function. GB23-25 (collecting cases). Petitioners agree. *See* PB45-46. But once the factfinder has assessed the various pieces of evidence in this way, the task remains to determine whether the sum total of the evidence on a particular issue stands in "approximate balance" within the meaning of section 5107(b), or whether it instead "persuasively favors one side or the other." *Lynch v. McDonough*, 21 F.4th 776, 781-82 (Fed. Cir. 2021) (en banc); *see* DAV Br. 6-9. That exercise involves a judgment about the

[3] The government concedes that the Secretary's application of the approximate-balance standard could constitute legal error in some circumstances. GB27 n.*. It is unclear where the government would draw the line.

relative strength of the evidence favoring each side of an issue. And, just as in the multiple analogous examples Petitioners cited, a reviewing court scrutinizing that judgment asks, as a legal matter, whether the factfinder properly applied the governing standard to the evidence at hand. *See* PB44.

The government next turns to cases that illustrate how to determine the proper standard of review for a mixed question of law and fact. GB24-25. But in those cases, the Court was focused on the nature of the ultimate element that a party is tasked with proving to obtain the legal result it seeks. So, for example, this Court deemed it a primarily factual question whether a transaction was conducted at less than arm's length, which would make one of the transacting parties an "insider" to the other and prevent a proposed bankruptcy reorganization. *U.S. Bank Nat'l Ass'n v. Village at Lakeridge, LLC*, 583 U.S. 387, 395-99 (2018). Similarly, the Court has observed that the question whether a noncitizen's removal would cause sufficient hardship to justify eligibility for cancellation of that removal is a primarily factual determination that deserves deference on appeal. *Wilkinson v. Garland*, 601 U.S. 209, 225 (2024). But in neither of these cases was the Court assessing the standard of proof for showing insider status or exceptional hardship. Nor was it commenting on whether that standard is itself a question of fact or law, or how it should be reviewed on appeal.

Cases like *U.S. Bank* and *Wilkinson* might have relevance to judicial review of the substantive elements of the veteran's claim that are subject to the "approximate balance" standard—for example, the

existence of a present disability. *See* PB45-46. But they do not shed light on the nature of the "approximate balance" standard itself, which the Secretary applies in determining whether that element is met, or on the standard of review the Veterans Court must use in reviewing the Secretary's application of the "approximate balance" standard. In contrast, Petitioners provided multiple examples showing that appellate courts review de novo the question whether the evidence was sufficient to meet a standard of proof. PB44. The government has no response.

Instead, the government criticizes Petitioners for drawing "abstruse distinctions" and deems it "hard to see why such distinctions should matter." GB25. In doing so, the government relies on an oversimplified hypothetical of a record containing findings that one expert is credible and one is not. *Id.* As Petitioners' own cases demonstrate, however, application of the approximate-balance standard is rarely that simple. In Mr. Bufkin's case, for example, the agency had before it four medical opinions touching just on the question whether the veteran had PTSD, and even more evidence bearing on the nexus between his current symptoms and his military service. *See* Pet. App. 20a-27a, 56a-60a. The Board deemed some evidence more or less persuasive, but it did not simply deem the favorable evidence non-credible and the unfavorable evidence credible. In these circumstances, there is a meaningful distinction between the assessment of any individual piece of evidence and whether the evidence, so assessed, might be deemed to stand in "approximate balance" on the question whether Mr. Bufkin is suffering from PTSD. Because of its reductive framing of Petitioners' position, the government

also has no response to Petitioners' showing of how the agency's assessment of the evidence in such a case might not amount to clear error but could nonetheless constitute an improper application of the approximate-balance test. *See* PB45 (citing *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985)).

The government also briefly invokes section 7261(c) to support its argument that the Veterans Court is barred from reviewing de novo the Secretary's application of the approximate-balance standard. GB28. The government overreads the effect of this provision. As Petitioners demonstrated, "trial de novo" in this context refers to a court actually considering new evidence that was not before the agency. PB47-48; *see* FCBA Br. 19-23. The government fails to show otherwise.

IV. Petitioners Are Entitled To The Appellate Review Congress Provided.

Petitioners demonstrated that, in both of their cases, the Veterans Court failed to provide the review required by section 7261(b)(1). PB52-53. The government nonetheless asserts that the Veterans Court *did* "take due account of the Secretary's application of Section 5107(b) in [Petitioners'] cases" by reviewing VA's application of the approximate-balance standard for clear error. GB43-44. As Petitioners have explained, that is not what the statute requires.

The government is also wrong in its account of Petitioners' cases. The government claims that the Veterans Court in *Bufkin* first applied the clear-error standard to the Secretary's various factual findings,

then concluded that "the Secretary had not clearly erred in determining that the evidence was not in approximate balance." GB43. That is incorrect. The Secretary made no "approximate balance" determination at all. *See* Pet. App. 60a-64a. On the contrary, as the government admits, the Board applied the now-abrogated "preponderance of the evidence" standard and therefore held the benefit-of-the-doubt doctrine "not applicable." Pet. App. 64a; *see* GB44. The Veterans Court, meanwhile, found no clear error in the Board's assessment of the persuasiveness of two of the four medical opinions "[a]nd thus" agreed that "the benefit of the doubt doctrine does not apply here." Pet. App. 29a-30a. It also repeated the Board's invocation of the preponderance standard. Pet. App. 29a. The Veterans Court said nothing about the application of section 5107(b)'s approximate-balance standard to the full set of evidence. *See* PB52.[4]

Likewise, Mr. Thornton never received the review to which he is entitled. The government contends that the Veterans Court "reviewed the Secretary's conclusions …, found them not to be clearly erroneous, and thus determined that Thornton had not shown error in the Secretary's application of Section 5107(b)."

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[4] The government asserts that "petitioners have not preserved any challenge" to the use of the now-abrogated "preponderance" standard. GB44. But Petitioners have maintained that the Veterans Court must independently review the Secretary's application of section 5107(b), which includes assessing the correct interpretation of the statutory term "approximate balance." Regardless, this Court need not address whether the Board erred by applying the "preponderance" standard and can leave that question for resolution by the Veterans Court on remand. *See Chiaverini v. City of Napoleon*, 144 S. Ct. 1745, 1752 (2024).

GB44. Again, that is incorrect. The Veterans Court did not apply the clear-error standard at all, instead reasoning that the "outcome" of the section 5107(b) analysis "is a factual finding" and "Mr. Thornton does not challenge the Board's factual findings." Pet. App. 43a; PB53. Thus, even though Mr. Thornton specifically argued that the Board had erred by failing to resolve a "reasonable doubt" in his favor, the Veterans Court did not address that challenge. The Veterans Court certainly did not do what section 7261(b)(1) requires and review, on its own accord, the Secretary's application of the benefit-of-the-doubt statute.

CONCLUSION

The Court should reverse the judgment of the Federal Circuit.

Respectfully submitted,

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September 19, 2024