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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

For more than a century, veterans have been entitled to the benefit of the doubt on any close issue relating to their eligibility for service-related benefits. As presently codified, "[w]hen there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary [of Veterans Affairs] shall give the benefit of the doubt to the claimant." 38 U.S.C. § 5107(b).

In 2002, Congress enacted the Veterans Benefits Act. Among other things, the Act supplemented the responsibilities of the United States Court of Appeals for Veterans Claims (the Veterans Court) by requiring it to "take due account of the Secretary's application of section 5107(b)" as part of its review of benefits appeals. 38 U.S.C. § 7261(b)(1).

In these cases, the Federal Circuit held 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 underlying factual findings—something already required by the pre-2002 review statute, under 38 U.S.C. § 7261(a)(4). Pet. App. 15a.

The question presented is: Must the Veterans Court ensure that the benefit-of-the-doubt rule was properly applied during the claims process in order to satisfy 38 U.S.C. § 7261(b)(1), which directs the Veterans Court to "take due account" of VA's application of that rule?

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INTRODUCTION

A unique standard of proof applies to veterans' benefits claims: "When there is an approximate balance of positive and negative evidence regarding any issue material to the determination" of a veteran's entitlement to benefits, the Department of Veterans Affairs "shall give the benefit of the doubt to the claimant." 38 U.S.C. § 5107(b). The rule that the veteran, not the government, receives the benefit of the doubt in a close case is among the most fundamental and longstanding precepts in our veterans' benefits system. This standard of proof, unlike any other in civil or criminal litigation, reflects a core societal judgment that it is better to err on the side of providing benefits to those who sacrificed their own interests on behalf of the nation.

Veterans' law also employs a unique review system for benefits claims to enforce this standard of proof. In reviewing VA decisions denying benefits, the United States Court of Appeals for Veterans Claims (the Veterans Court) is required to "review the record of proceedings" and "take due account of the Secretary's application of section 5107(b)." 38 U.S.C. § 7261(b)(1). Congress deemed judicial supervision of VA's compliance with the benefit-of-the-doubt rule necessary to ensure the fairness and reliability of VA's benefits determinations, and to make it easier for veterans with service-related disabilities to navigate the claims process and obtain the benefits Congress guaranteed them by law.

In the decisions below, the Federal Circuit reached the extraordinary holding that this special

review provision requires nothing at all. In the Federal Circuit's view, 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 underlying factual findings—something already required elsewhere in the veterans' review statute. Pet. App. 15a (emphasis added). This holding effectively eliminates section 7261's special benefit-of-the-doubt review provision and endangers the reliable application of section 5107(b)'s unique standard of proof, foundational to the benefits system. The Federal Circuit's holding violates multiple basic precepts of statutory interpretation and, in effect, nullifies an important act of Congress—one carefully adopted to address longstanding deficiencies in VA's handling of benefits claims.

When Congress first provided for judicial review of veterans' benefits claims in 1988, it created the Veterans Court and directed it to review VA's benefits decisions under a framework modeled on the Administrative Procedure Act. Like a court reviewing agency action under the APA, the Veterans Court must set aside VA benefits decisions found to be arbitrary or capricious, decide relevant questions of law, hold unlawful erroneous factual findings, and apply a harmless-error rule. 38 U.S.C. § 7261; *see Shinseki v. Sanders*, 556 U.S. 396, 406 (2009). But in 2002, Congress amended the statute to specifically require the Veterans Court to review VA's compliance with section 5107(b) alongside its existing review obligations. Congress added this provision to the benefits review statute in response to well-documented failures in the veterans' claims process. Even though the benefit-of-the-doubt rule had existed for more

than a century, VA had persistently failed to apply it. Congress sought to set things right by directing the Veterans Court to ensure VA's compliance with section 5107(b).

With that critical 2002 addition, the review statute now requires the Veterans Court to perform APA-*plus* review. The Veterans Court must review the veteran's claims of error under the familiar APA-like framework. 38 U.S.C. § 7261(a). But it must also—separately and in addition—review VA's compliance with section 5107(b). *Id.* § 7261(b)(1). If that subsection (b)(1) review reveals that VA failed to afford the veteran the benefit of the doubt on a close issue material to his claims, then VA's decision is infected with legal error and must be set aside.

Every traditional tool of statutory interpretation supports this understanding of the Veterans Court's review obligations. The text of section 7261(b)(1) plainly expands the remit of the Veterans Court by requiring it to "take due account" of VA's "application of section 5107(b)." The evidence that Congress, in enacting subsection (b)(1) in 2002, intended the Veterans Court to ensure VA's compliance with the benefit-of-the-doubt rule is irrefutable and overwhelming. And this understanding of subsection (b)(1) makes coherent sense of section 7261 as a whole, giving force to every word and phrase of a review statute that Congress fine-tuned over several iterations. The Federal Circuit, however, swept aside the text, statutory history, and structure of section 7261 in favor of a reading that gives Congress's carefully wrought enactment no meaning at all.

The Federal Circuit's error has profound implications for untold numbers of veterans, because it compromises the system Congress crafted for ensuring that section 5107(b)'s unique standard of proof is consistently followed. Judicial oversight of VA's compliance with the benefit-of-the-doubt rule remains urgently needed: VA often errs in benefits adjudications, and the difference between an award and a denial has life-altering consequences for disabled veterans. In these cases, the Federal Circuit's error prevented Petitioners Joshua Bufkin and Norman Thornton from obtaining the full scope of review of their cases that Congress required of the Veterans Court. Even though Petitioners were denied benefits where the evidence was close, the Veterans Court refused to even consider—much less meaningfully review—VA's compliance with section 5107(b) in their cases. After concluding that the agency had committed no clear error of fact, the Veterans Court in each case refused to look further at whether the benefit-of-the-doubt rule had been followed.

The Court should reverse the decisions below and hold that section 7261(b)(1) requires the Veterans Court to review VA's compliance with section 5107(b) as an inherent part of its appellate review—finally giving section 7261(b)(1) the meaning its text demands and the force Congress intended.

OPINIONS AND ORDERS BELOW

The Federal Circuit's decision in *Bufkin v. McDonough* is reported at 75 F.4th 1368 and reproduced at Pet. App. 1a-11a. The decision of the Veterans Court is unreported and reproduced at Pet.

App. 17a-30a. The decision of the Board of Veterans' Appeals is unreported and reproduced at Pet. App. 53a-65a.

The Federal Circuit's decision in *Thornton v. McDonough* is unreported and reproduced at Pet. App. 12a-16a. The decision of the Veterans Court is unreported and reproduced at Pet. App. 31a-52a. The decision of the Board of Veterans' Appeals is unreported and reproduced at Pet. App. 66a-90a.

JURISDICTION

In *Bufkin*, the Federal Circuit entered judgment on August 3, 2023. In *Thornton*, the Federal Circuit entered judgment on August 9, 2023. On October 16, 2023, the Chief Justice extended the due date for a certiorari petition in *Bufkin* to December 31, 2023, and in *Thornton* to January 2, 2024. The petition was timely filed on December 29, 2023, and granted on April 29, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

38 U.S.C. § 7261(b) provides:

> In making the determinations under subsection (a), the Court shall review the record of proceedings before the Secretary and the Board of Veterans' Appeals pursuant to section 7252(b) of this title and shall—
>
> > (1) take due account of the Secretary's application of section 5107(b) of this title; and

> (2) take due account of the rule of prejudicial error.

38 U.S.C. § 5107(b) provides:

> The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.

38 U.S.C. §§ 5107 and 7261, and 38 C.F.R. § 3.102, are reproduced in full at Pet. App. 93a-97a.

STATEMENT OF THE CASE

Veterans are entitled to the benefit of the doubt on close issues relating to their claims

It is a longstanding principle in veterans' law that the veteran, not the government, receives the benefit of the doubt on any close issue. The policy giving veterans the benefit of the doubt in close cases dates "back to the post-Civil War era when determining the extent of a veteran's disability … was done on a case-by-case basis by Bureau of Pension physicians." 50 Fed. Reg. 34452-02, 34454 (Aug. 26, 1985). It has persisted ever since in applicable regulations and is currently embodied in 38 C.F.R. § 3.102. The rule reflects the policy and aspiration to generously ensure decent treatment for veterans, and it exemplifies the non-

adversarial nature of the VA claims process. *See Sugrue v. Derwinski*, 26 F.3d 8, 12 (2d Cir. 1994) ("A veteran claiming disability benefits from the VA enjoys 'a beneficial non-adversarial system' of adjudicating veterans benefits claims in which the VA is 'to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits.'") (quoting H.R. Rep. No. 100-963, pt. 1, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5795).

The doctrine is now codified by statute at 38 U.S.C. § 5107(b), which states that, when there is "an approximate balance of positive and negative evidence" regarding any "material" issue, "the Secretary shall give the benefit of the doubt to the claimant." VA's counterpart regulation likewise states that any "reasonable doubt … will be resolved in favor of the claimant." 38 C.F.R. § 3.102. It defines "reasonable doubt" as "one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim." *Id.*; *see Lynch v. McDonough*, 21 F.4th 776, 781-82 (Fed. Cir. 2021) (en banc) (evidence is in "approximate balance" unless it "persuasively favors one side or the other").

The benefit-of-the-doubt doctrine thus embodies the nation's determination, initially "[b]y tradition" and later "by statute," to place "upon itself the risk of error" in veterans' benefits cases, "in recognition of [the] debt" it owes to veterans. *Gilbert v. Derwinski*, 1 Vet. App. 49, 54 (1990). It is one of the "singular characteristics of the review scheme that Congress created for the adjudication of veterans' benefits claims," reflecting longstanding solicitude for veterans and

"'plac[ing] a thumb on the scale in the veteran's favor.'" *Henderson v. Shinseki*, 562 U.S. 428, 440 (2011) (citation omitted).

Congress creates the Veterans Court in 1988 and, in 2002, specifically requires it to enforce the benefit-of-the-doubt rule

Despite its long history and consistent efforts by Congress to mandate VA's compliance, in practice the benefit-of-the-doubt rule has proved illusory for many veteran claimants. Responding to a decade-long advocacy effort including testimony that VA was "systemically antagonistic to" and "fail[ed] to accord a reasonable doubt in favor of" veterans, *Judicial Review of Veterans' Affairs: Hearing Before the H. Comm. on Veterans' Affairs*, 100th Cong. 60 (1988) ("1988 Hearing") (statement of Rick O'Dell, Vietnam Veterans of America), Congress passed legislation in 1988 that, for the first time, allowed for judicial review of VA benefits decisions. The Veterans' Judicial Review Act ("VJRA"), Pub. L. No. 100-687, 102 Stat. 4105 (1988), established the Veterans Court to ensure that "our veterans who have sacrificed so much are entitled to th[e] fundamental protection" of judicial review of agency decisions denying benefits. 1988 Hearing, *supra*, 100th Cong. 3 (statement of Rep. Lane Evans). "[F]or most of the veterans involved," those benefits are "critical to whether or not they are going to be able to live and function in a normal fashion." *Id*. at 28 (statement of Rep. John Bryant). Congress therefore sought to differentiate the Veterans Court from other government-benefits systems, like the Social Security Administration's, which are subject to review by generalist Article III courts. *Id*. at 70

(statement of Rep. Marcy Kaptur). It created a "specialized Article I tribunal" that would be "right more often than the district courts" and would "provide a kind of uniformity" to VA benefits administration. *Id.* at 10 (statement of Judge Morris Arnold, Judicial Conference of the United States).

Congress in the VJRA set out an APA-style standard of review, largely tracking the provisions of 5 U.S.C. § 706 except that factual findings by the Board of Veterans' Appeals—the final agency decisionmaker on benefits claims, 38 C.F.R. § 20.103—were to be reviewed for clear error rather than substantial evidence. Pub. L. No. 100-687, § 4061(a), 102 Stat. at 4115; 38 U.S.C. § 7261(a). Like the APA, the VJRA also directed the court to "take due account of the rule of prejudicial error." Pub. L. No. 100-687, § 4061(b), 102 Stat. at 4115; *see Sanders,* 556 U.S. at 406. Separately in this same legislation, Congress codified the benefit-of-the-doubt rule, creating an explicit statutory requirement that VA give veterans the benefit of the doubt in close cases. Pub. L. No. 100-687, § 3007(b), 102 Stat. at 4106-07 (now codified at 38 U.S.C. § 5107(b)).

But the hope that codification and judicial review would lead to more vigorous enforcement of the benefit-of-the-doubt rule was not fulfilled. More than a decade later, veterans service organizations "voiced frustration with the perceived lack of searching appellate review of [agency] decisions" and the Veterans Court's "large measure of deference" to the Board's factfinding, which, they argued, "may result in failure to consider the 'benefit of the doubt' rule." S. Rep. No. 107-234, at 17 (2002).

To address the problem, the Senate Veterans' Affairs Committee proposed to amend section 7261(a)(4) to change the standard of review the Veterans Court applies to findings of fact from "clearly erroneous" to the less deferential "unsupported by substantial evidence." S. Rep. No. 107-234, at 17-18. This proposal would also afford the Veterans Court authority to reverse (not just "set aside") improper fact-findings. *Id.* at 26. And the Senate's proposal would require the court, in conducting its substantial-evidence review of facts, to "tak[e] into account the Secretary's application of section 5107(b)." *Id.* at 40.

Congress ultimately took a different approach, with the House rejecting the Senate's proposal to change the standard of review for factual issues. Instead, Congress in the Veterans Benefits Act of 2002 retained clear-error review for VA fact-findings but gave greater teeth to that review, by adopting the Senate's proposal to expressly allow for reversal of erroneous factual determinations. Then, to address the shortcoming in the enforcement of the benefit-of-the-doubt rule, Congress directed the Veterans Court to scrutinize the agency's application of that rule. But while the Senate's proposal would have linked this obligation to the court's review of facts under section 7261(a)(4), *see* S. Rep. No. 107-234, at 40, the text Congress enacted was not so limited. It instead added section 7261(b)(1), the provision at issue here, directing the Veterans Court to "take due account of the Secretary's application of section 5107(b) of this title." Pub. L. No. 107-330, § 401, 116 Stat. 2820, 2832 (2002); 38 U.S.C. § 7261(b)(1). In undertaking this review and the corresponding prejudicial-error review in subsection (b)(2), moreover, Congress required the

Veterans Court to "review the record of proceedings before the Secretary and the Board of Veterans' Appeals." 38 U.S.C. § 7261(b). These changes were enacted explicitly "to provide for more searching appellate review of [Board] decisions, and thus give full force to the 'benefit of [the] doubt' provision." 148 Cong. Rec. H8925, H9006 (daily ed. Nov. 14, 2002).

Mr. Bufkin is denied benefits despite close evidence

Petitioner Joshua Bufkin honorably served in the United States Air Force from September 2005 until March 2006. Pet. App. 17a (citing BRBA1487).[1] During this time, Mr. Bufkin sought counseling services to discuss his spouse's mental health and its effect on his training. BRBA775. Despite his plan to "mak[e] a career in the military," JA1, Mr. Bufkin was told he "had two options": he could either "divorce [his] wife and … stay in the military," or he could "take a General Discharge and leave under a Hardship." BRBA843. In response, Mr. Bufkin requested termination of his service, and he was discharged. BRBA1487.

Mr. Bufkin later submitted a claim seeking disability compensation for post-traumatic stress disorder connected to his military service. BRBA904-905. Mr. Bufkin included a letter from his treating physician at his local VA healthcare clinic, Dr. Robert Goos, who had performed a "comprehensive psychiatric evaluation" and conducted follow-up visits for a year. JA1.

[1] Citations to the Record Before the Agency are in the form of "BRBA__" for Mr. Bufkin and "TRBA__" for Mr. Thornton.

According to Dr. Goos, Mr. Bufkin presented with "avoidance behaviors," "prominent emotional numbing," "prominent hyperarousal," and "ongoing nightmares" caused by the military's ultimatum to "either divorce [his wife] or leave the military." JA1-2. Dr. Goos concluded: "It is clear … that in every aspect he meets criteria for Posttraumatic Stress Disorder and it is quite disabling for him." JA2. He determined that the "primary stressor" was the "perceived threat to his wife's life" and "this perception that those in power did not care if his wife lived or died." JA2.

A VA regional office denied Mr. Bufkin's claim because "[t]he available medical evidence is insufficient to confirm a link between current symptoms and an in-service stressor." BRBA859. Mr. Bufkin sought reconsideration, providing additional documentation including letters from his wife and mother explaining how Mr. Bufkin's "temper, attitude and demeanor totally changed while he was gone." BRBA838-840; *see* BRBA845. As part of its continued review, VA ordered an examination by a different VA physician, Dr. David Webster, who acknowledged this was "a very complex case." JA4-5. Dr. Webster did not dispute that Mr. Bufkin's symptoms were consistent with PTSD and may have resulted directly from the circumstances of his discharge. JA4-5; *see* JA27-28. But he chastised the applicable ratings system for including a symptom checklist, opining that such checklists "make no effort to insure that an actual DSM-5 defined PTSD trauma event occurred." JA7. Dr. Webster then concluded that Mr. Bufkin's symptoms did not satisfy the DSM-5 requirements for a PTSD diagnosis. In particular, Dr. Webster determined that Mr. Bufkin could not receive service connection because

his wife's "suicidal threats and gestures" did not "in [his] opinion represent the PTSD trauma definition of a significant 'threat to life'" and, even if they did, that trauma event did not "result[] in recurrent intrusive memories or recurring nightmares." JA7-11.

VA's regional office confirmed its denial of service connection for PTSD based on a lack of evidentiary nexus between Mr. Bufkin's condition and his military service. BRBA400. In doing so, the agency discounted Mr. Bufkin's lay evidence, credited Dr. Webster's opinion, and did not mention Dr. Goos's contrary opinion. BRBA400.

Mr. Bufkin challenged this decision, arguing (among other things) that VA had "fail[ed] to consider and correctly apply the provisions of 38 U.S.C. § 5107(b)." BRBA357. He then submitted to another diagnostic evaluation with another VA doctor, who attributed his symptoms to "his wife's medical problems." JA66. After "weigh[ing] all three medical statements/opinions regarding [his] claim for post-traumatic stress disorder," VA determined that "the rule regarding benefit of reasonable doubt does not apply, because the preponderance of evidence is unfavorable," and again denied service connection. BRBA248.

Mr. Bufkin appealed to the Board of Veterans' Appeals, reiterating that "VA failed to correctly apply the provisions of 38 U.S.C. § 5107(b)." BRBA201. He asserted "an approximate balance of positive and negative evidence regarding … whether there is a relationship between Mr. Bufkin's current psychiatric disability and his period of active duty service."

BRBA203. In support, he submitted a letter from yet another VA physician, who determined that Mr. Bufkin "suffers from chronic PTSD due to a number of issues, but the primary issue is that he was essentially forced out of the military due to intense family problems that put him in a very difficult psychological situation. … Some examiners do not consider this to be PTSD, but it was clearly traumatic for" Mr. Bufkin. JA77.

Although the evidence was close—with two VA doctors diagnosing him with PTSD and two VA benefits examiners disagreeing—the Board concluded that "the preponderance of the evidence is against the Veteran's claim," so the "doctrine [of benefit of the doubt] is not applicable," and denied his appeal. Pet. App. 64a.

Mr. Thornton is denied benefits despite close evidence

Petitioner Norman Thornton enlisted in the United States Army in October 1988 and was honorably discharged in December 1991. Pet. App. 31a-32a. He then served in the National Guard until 1996. TRBA1998. In 1991, Mr. Thornton was deployed to Kuwait and Saudi Arabia for six months, where he served on a tank crew and as a combat lifesaver, providing advanced first aid and lifesaving procedures to injured soldiers during the first Gulf War. TRBA375; TRBA827; *see also* TRBA1980-1986. While overseas, Mr. Thornton was "exposed to chemicals in the Gulf War with no protective gear," TRBA1490, was enlisted to help with "[b]ody recovery/burial," TRBA827, and reported encountering burned and

dismembered bodies, including of children, TRBA1982; TRBA1984.

Upon his return to civilian life, Mr. Thornton experienced multiple dissociative episodes, among other symptoms. TRBA44-47; TRBA1133; TRBA1894; TRBA1986. He ultimately received a diagnosis of "dissociative type" PTSD from his VA physician, Dr. Kaushalya Kumar, who had treated him for more than a decade. TRBA1099; TRBA1104; JA30.

In 2005, VA granted service connection for PTSD, rating Mr. Thornton's condition as 10% disabling. TRBA1928-1930. The agency noted that Mr. Thornton had "difficulty when working with civilians" and had held "multiple jobs since [his] return from the military," but because he had held a job as a manager at a fast-food restaurant for over two years, a "higher evaluation of 30 percent" was unwarranted. TRBA1929-1930.

Mr. Thornton's PTSD rating was increased in 2009 to 30%, TRBA1808, and in 2015 to 50%, TRBA1080. Mr. Thornton requested an additional increase to 70%, TRBA1678-1680, and underwent a new evaluation, JA29-48. VA's examiner found that Mr. Thornton suffered from "Depressed mood," "Anxiety," "Chronic sleep impairment," "Mild memory loss," and "Difficulty in adapting to stressful circumstances," JA44-46, and that he experienced occupational and social impairment with reduced reliability and productivity. JA32. The examiner notably did not identify symptoms that other VA doctors had observed, such as "Suicidal ideation," "Impaired impulse control," or "Panic attacks." JA44-46; *contra*

TRBA1821; TRBA1700; TRBA1478; TRBA1821-1822. And, despite acknowledging Mr. Thornton's "traditional dissociative periods," the examiner explicitly disagreed with Dr. Kumar that his PTSD was "dissociative type," noting that Mr. Thornton also experienced "periods of confusion and memory lapses that do not appear to be trauma-based." JA30.

After reviewing these examinations, a VA regional office found that "[t]he overall evidentiary record shows that the severity of [Mr. Thornton's PTSD] most closely approximates the criteria for a 50 percent disability evaluation." TRBA920; *see also* TRBA1074. VA determined that Mr. Thornton's PTSD had not "increased in severity sufficiently to warrant a higher evaluation." TRBA919.

Mr. Thornton appealed to the Board, arguing that the agency failed to consider Dr. Kumar's diagnosis and how his dissociative episodes had affected his employment history. TRBA37-38. He argued that consideration of those factors, all documented by VA physicians, warranted a rating of at least 70%. TRBA38.

The Board denied Mr. Thornton's appeal. It found that his "symptoms have not more nearly approximated the criteria for a rating in excess of 50 percent at any time, and the evidence is not approximately evenly balanced." Pet. App. 83a. It noted Mr. Thornton's "difficulty in adapting to stressful circumstances" as a "symptom enumerated in the 70 percent criteria," but held that "the presence of a single symptom is not dispositive of any particular disability level." Pet. App. 84a. And it determined that "the VA

examinations of record are adequate for ratings purposes" because they are "fully informed" and "contained reasoned explanations." Pet. App. 85a. Because "[t]here is no doubt to be resolved[,] a higher rating is not warranted." Pet. App. 85a.

The Veterans Court declines to review whether Mr. Bufkin and Mr. Thornton properly received the benefit of the doubt

Mr. Bufkin and Mr. Thornton both appealed their cases to the Veterans Court.

In Mr. Bufkin's case, the Veterans Court deferred to the Board's assessment of the competing medical evidence. It concluded that the Board's decision to give more weight to Dr. Webster's opinion than to Dr. Goos's was "not clearly erroneous." Pet. App. 29a-30a. "And thus," the court continued, "the benefit of the doubt doctrine does not apply here." Pet. App. 30a. In other words, upon concluding that the Board had made no clearly erroneous factual finding, the Veterans Court did not look further into VA's application of the benefit-of-the-doubt doctrine.

The Veterans Court also affirmed the Board's determination in Mr. Thornton's case. It held that the Board had satisfied its obligations because it "considered Mr. Thornton's symptoms and the resulting level of impairment" and "not only took note of his symptoms, but, crucially, considered their impact on his occupational and social functioning." Pet. App. 39a-40a. The court likewise affirmed the Board's application of the benefit-of-the-doubt rule. It held that "the Board's determination under section 5107(b) … is a factual

one that the Court reviews for clear error," and it concluded that no factual error had occurred. Pet. App. 42a. In other words, as it did in Mr. Bufkin's case, the Veterans Court limited its review to applying the clear-error standard for factual findings and conducted no further inquiry into VA's application of the benefit-of-the-doubt rule.

The Federal Circuit affirms in both cases, holding the Veterans Court need not review the benefit-of-the-doubt issue

On appeal to the Federal Circuit, both Mr. Bufkin and Mr. Thornton challenged the Veterans Court's interpretation of section 7261(b)(1).

The Federal Circuit decided *Bufkin* first in a precedential opinion affirming the Veterans Court. The court held that the statutory command to "take due account" of VA's application of the benefit-of-the-doubt rule does not require the Veterans Court to conduct any review of that rule beyond the clear-error factual review that is already required by section 7261(a)(4). Pet. App. 10a. The *Bufkin* panel held that, in "conclud[ing] that the Board did not misapply the benefit of the doubt rule" and finding that "the underlying facts supporting the Board's conclusion are not clearly erroneous," the Veterans Court "applied the appropriate standard of review, clear error, and properly took account of the Board's application of the benefit of the doubt rule." Pet. App. 11a.

The following week, the Federal Circuit issued its opinion in *Thornton*, with the panel deeming itself

bound by *Bufkin*. Pet. App. 16a.[2] The Federal Circuit summarized its resolution of these two cases by announcing the following interpretation of section 7261(b)(1): "the statutory command that the Veterans Court 'take due account' of the benefit of the doubt rule does not require the Veterans Court to conduct any review of the benefit of the doubt issue beyond the clear error review required by § 7261[(a)(4)], and 'if no issue that touches upon the benefit of the doubt rule is raised on appeal, the Veterans Court is not required to sua sponte review the underlying facts and address the benefit of the doubt rule.'" Pet. App. 15a-16a (quoting Pet. App. 9a).

SUMMARY OF ARGUMENT

I. Section 7261(b)(1) requires the Veterans Court to review VA's compliance with section 5107(b) with regard to every issue raised on appeal.

A. Section 7261, which defines the scope of the Veterans Court's review, establishes a distinctive framework under which the Veterans Court performs review similar to that of an Article III court reviewing agency action under the APA. But, unique to the Veterans Court, it *also* reviews VA's compliance with one particular legal principle: section 5107(b), which directs that VA must afford the claimant the benefit of

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[2] After oral argument, the *Thornton* panel had ordered supplemental briefing addressing whether (and what) "further analysis" is required by section 7261(b)(1), beyond that required by section 7261(a). CAFC Dkt. 34. But the *Thornton* opinion did not address the supplemental briefing because the panel deemed itself bound by the *Bufkin* opinion already issued by a separate panel.

the doubt on any close issue. Subsection (a) gives the Veterans Court the authority to reverse decisions of the Board if they are contrary to law, reflect an abuse of discretion, or are based on clearly erroneous factual determinations. 38 U.S.C. § 7261(a). Subsection (b)(1) directs that, "[i]n making the determinations under subsection (a)," the Veterans Court "shall … take due account of the Secretary's application of section 5107(b)." *Id.* § 7261(b)(1). And subsection (b)(2) provides in parallel that the Veterans Court "shall … take due account of the rule of prejudicial error." *Id.* § 7261(b)(2). If the Veterans Court determines that VA did not comply with section 5107(b) because it did not grant the veteran the benefit of the doubt on a close issue, the Board's decision is infected with legal error, and the Veterans Court must determine the appropriate remedy in light of subsection (b)(2)'s harmless-error proviso.

B. The plain text of subsection (b)(1) requires the Veterans Court to review VA's compliance with section 5107(b) with respect to the issues on appeal in every case. The text provides: "In making the determinations under subsection (a)," the Veterans Court "shall … take due account of the Secretary's application of section 5107(b)." 38 U.S.C. § 7261(b)(1). Each word and phrase in this subsection works together to confer an obligation on the Veterans Court to review VA's compliance with section 5107(b) with respect to the issues raised on appeal. This language confers an independent obligation on the Veterans Court, to be performed in addition to its ordinary APA-like review otherwise provided for elsewhere in the statute.

C. This plain-text interpretation vindicates Congress's intent in enacting subsection (b)(1). Congress added subsection (b)(1) to the veterans' review statute in 2002 to address VA's persistent failure to afford veterans the benefit of the doubt as required by law. The 2002 enactment added to the preexisting responsibilities of the Veterans Court by requiring it to "take due account of the Secretary's application of section 5107(b)" as part of its review of benefits appeals. 38 U.S.C. § 7261(b)(1). Interpreting subsection (b)(1) to provide a mandatory supplemental analysis that the Veterans Court must undertake in discharging its subsection (a) responsibilities gives force to Congress's enactment and clear intent. The text and statutory history work together to mandate the same result.

D. The plain text suffices to resolve this case. But if the Court perceives any ambiguity with respect to the Veterans Court's review obligations under section 7261, it should construe the statute in veterans' favor under the longstanding pro-veteran canon.

II. The Federal Circuit's atextual reading is incorrect. The Federal Circuit held that "the statutory command that the Veterans Court 'take due account' of the benefit of the doubt rule does not require the Veterans Court to conduct *any* review of the benefit of the doubt issue beyond the clear error review required by § 7261[(a)(4)]." Pet. App. 15a (emphasis added).

A. The Federal Circuit's reading deprives subsection (b)(1) of any force and reduces it to surplusage. The Federal Circuit read Congress's critical modification of ordinary APA-like review out of the statute by

expressly holding that subsection (b)(1) provides for nothing more than what is already established in section 7261's other provisions, and requires nothing of the Veterans Court that was not already required before the provision's enactment in 2002. The Federal Circuit's reading thus effectively nullifies an important act of Congress, violating the cardinal principle of statutory construction that courts must give effect to every clause and word of a statute.

B. The Federal Circuit misunderstood review of VA's compliance with section 5107(b) to be equivalent to review of factual findings. Review of VA's compliance with section 5107(b) is a legal, not a factual, inquiry. And it does not require revisiting particular evidentiary determinations or second-guessing VA's factfinding. Section 7261 requires the Veterans Court to accept the facts as found by VA (unless clearly erroneous), determine whether the evidence stands in approximate balance with regard to issues material to the appeal, and review whether the veteran received the benefit of the doubt in any such circumstance. If the veteran did not, VA did not comply with section 5107(b), and the denial of benefits is infected with legal—not factual—error.

C. The Federal Circuit also overlooked that, as with the parallel harmless-error provision in subsection (b)(2), benefit-of-the-doubt review is mandated in all cases under subsection (b)(1). The text makes such review mandatory, regardless of whether a veteran specifically invokes section 5107(b) in his appeal. Subsection (b)(1) remains a global requirement that applies in every case.

III. Mr. Bufkin and Mr. Thornton are entitled to the review Congress provided for in the Veterans Court. The Veterans Court failed to meaningfully review VA's application of the benefit-of-the-doubt rule in Petitioners' cases, notwithstanding subsection (b)(1)'s instruction to do so. In each case, the Veterans Court assessed only whether the agency had made a clear factual error, but conducted no further review of whether the benefit-of-the-doubt rule and its "approximate balance" standard were properly applied. Petitioners are entitled to the review Congress provided for in the Veterans Court.

ARGUMENT

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

The text, structure, and origin of section 7261 compel a single conclusion: Congress's mandate to "take due account of the Secretary's application of 5107(b)," 38 U.S.C. § 7261(b)(1), means that the Veterans Court in every case must review VA's compliance with section 5107(b). That review supplements the Veterans Court's ordinary appellate responsibilities and differs from its clear-error review of VA fact-finding.

A. Section 7261 establishes a distinctive review system.

1. Congress created an appellate review system for veterans' benefits claims that is unique in federal law. That system—fine-tuned through multiple

rounds of legislation—is spelled out in section 7261, which governs the "[s]cope of review" in the Veterans Court. 38 U.S.C. § 7261 (title). Much of "the Veterans Court's scope of review" under section 7261 "is similar to that of an Article III court reviewing agency action under the Administrative Procedure Act." *Henderson*, 562 U.S. at 432 n.2. But in certain critical respects, "Veterans Court review of a VA decision denying benefits differs … from court of appeals review of an agency decision," because it is part of a system designed to be "'unusually protective' of claimants.'" *Id.* at 437 (quoting *Heckler v. Day*, 467 U.S. 104, 106-07 (1984)).

Congress designed a system to affirmatively help veterans obtain all benefits they are entitled to by law. VA's "adjudicatory 'process is designed to function throughout with a high degree of informality and solicitude'" for veterans. *Id.* at 431 (quoting *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985)). Among other pro-claimant features, Congress made the process for adjudicating claims "at the regional office and the Board … *ex parte* and nonadversarial." *Id.* It gave VA "a statutory duty to assist veterans in developing the evidence necessary to substantiate their claims." *Id.* at 431-32 (citing 38 U.S.C. § 5103(a)). And it required VA to "give veterans the 'benefit of the doubt' whenever positive and negative evidence on a material issue is roughly equal." *Id.* at 432 (citing 38 U.S.C. § 5107(b)).

Congress brought the same pro-claimant approach to bear when it provided for judicial review of adverse benefits decisions. In keeping with the legislature's hallmark "solicitude" for veterans, *id.* at 431,

section 7261 establishes an APA-*plus* review framework. The Veterans Court performs ordinary appellate review of any errors the veteran alleges (subject to the standard harmless-error rule), but it also, crucially, gives an independent look to the benefit-of-the-doubt rule. That rule itself provides a "unique standard of proof" that "is in keeping with the high esteem in which our nation holds those who have served in the Armed Services." *Gilbert*, 1 Vet. App. at 54. By giving that rule full force through a similarly unique appellate review provision, Congress placed yet another check in the system to ensure that veterans receive the full benefits they have earned through their service.

Extending this unique pro-claimant approach into the judicial-review phase accords with the Veterans Court's conception as an Article I court. "The Veterans Court, as an Article I tribunal, is a creature of statute by definition." *Burris v. Wilkie*, 888 F.3d 1352, 1357 (Fed. Cir. 2018) (citing 38 U.S.C. § 7251). It is an example of a "legislative court[]," which is a "special tribunal[]" of Congress's "creat[ion]" devised "to examine and determine various matters[] arising between the government and others." *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929). Notably, "[t]he mode of determining matters of this class is completely within congressional control." *Id.* With that leeway, Congress conferred on the Veterans Court the mandate to take a particularly searching review of certain executive actions. The "particular type of review" required of the Veterans Court in this "unique administrative scheme," *Henderson*, 562 U.S. at 437-38, reflects its "special 'expertise … in making complex determinations in a specialized area of the law,'"

Sanders, 556 U.S. at 412 (quoting *United States v. Haggar Apparel Co.*, 526 U.S. 380, 394 (1999)).

2. Section 7261 has two main components. First, subsection (a) describes the Veterans Court's main powers and is modeled on the APA. *See Henderson*, 562 U.S. at 432 n.2; *Sanders*, 556 U.S. at 406. It empowers the Veterans Court to (1) "decide all relevant questions of law," including constitutional, statutory, and regulatory interpretation; (2) "compel action of the Secretary unlawfully withheld or unreasonably delayed;" (3) "hold unlawful and set aside" agency decisions and regulations that are "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or (D) without observance of procedure required by law;" and (4) "hold unlawful and set aside or reverse" any "finding of material fact adverse to the claimant" that "is clearly erroneous." 38 U.S.C. § 7261(a)(1)-(4). These powers can be exercised only "to the extent necessary to [the Veterans Court's] decision and when presented." *Id.* § 7261(a). Subsection (a) therefore authorizes the Veterans Court to set aside or reverse agency action on legal or factual grounds when necessary to resolve arguments presented on appeal.

Second, subsection (b) sets out two special provisos for how the Veterans Court must exercise its powers: "In making the determinations under subsection (a), the Court shall review the record of proceedings before the Secretary and the Board of Veterans' Appeals … and shall" (1) "take due account of the

Secretary's application of section 5107(b)"; and (2) "take due account of the rule of prejudicial error." *Id.* § 7261(b).

The two remaining components of section 7261 are more narrowly targeted. Subsection (c) clarifies that "[i]n no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the Court." *Id.* § 7261(c). And subsection (d) prescribes special rules for appeals involving specified procedural issues. *Id.* § 7261(d).

3. Put together, section 7261 confers on the Veterans Court three interconnected responsibilities relevant here.

First, like any court reviewing agency action, the Veterans Court must decide the issues a veteran raises on appeal—reviewing and ruling on arguments that the Board's decision was contrary to law, arbitrary or capricious, procedurally deficient, or based on clearly erroneous factual determinations. 38 U.S.C. § 7261(a).

Second, "[i]n making [those] determinations," the Veterans Court must also "review the record" and consider the Secretary's compliance with section 5107(b)—evaluating whether the veteran received the benefit of the doubt on close questions. 38 U.S.C. § 7261(b)(1). If the Veterans Court determines that VA did not properly grant the veteran the benefit of the doubt on a close issue, then the decision denying benefits is infected with legal error, because VA failed to comply with the mandatory prescription of section 5107(b).

Third, if the Veterans Court determines that there has been an error of one kind or another, it must determine the appropriate remedy. In considering whether to reverse, remand, or let a decision stand, the Veterans Court must "take due account of the rule of prejudicial error," 38 U.S.C. § 7261(b)(2), and "apply the same kind of 'harmless-error' rule that courts ordinarily apply in civil cases," *Sanders*, 556 U.S. at 406.

This understanding of section 7261 accounts for "every clause and word" of the statute, *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 106 (2011) (citation omitted), and describes a fully "coherent and consistent" "statutory scheme," *Matal v. Tam,* 582 U.S. 218, 232 (2017) (citations omitted).

B. The text of subsection (b)(1) directs the Veterans Court to review VA's compliance with section 5107(b).

The question presented here is what, precisely, the Veterans Court must do when it undertakes the second task set out above. Again, that task is mandated by subsection (b)(1): "In making the determinations under subsection (a)," the Veterans Court "shall … take due account of the Secretary's application of section 5107(b)." 38 U.S.C. § 7261(b)(1). The analysis of this provision "begins and ends with the text." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553 (2014). "[E]very clause and word" in subsection (b)(1) works together to confer a special obligation on the Veterans Court to review VA's compliance with section 5107(b) as part of every appeal. *Microsoft*, 564 U.S. at 106 (citation omitted).

Shall. Subsection (b)(1) uses the "mandatory 'shall.'" *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). "Shall" means "must." *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 172 (2016). This word "normally creates an obligation impervious to judicial discretion." *Lexecon*, 523 U.S. at 35. The tasks that subsection (b)(1) directs—"review the record of proceedings" and "take due account of the Secretary's application of section 5107(b)"—are mandatory and not within the Veterans Court's discretion to bypass. These tasks must therefore be performed in addition to the review functions described in section 7261(a). Importantly, although subsection (a) provides that the Veterans Court must address any ordinary APA-type issues "to the extent necessary" and "when presented," there is no similar qualification in the text of subsection (b). Nothing in subsection (b)(1)'s mandatory language suggests that an appellant must specifically invoke the review commanded by that statutory provision. *Contra* Pet. App. 9a. On the contrary, the statute directs that the Veterans Court must review VA's compliance with section 5107(b) "[i]n making the determinations under subsection (a)"—that is, every time its jurisdiction is invoked. 38 U.S.C. § 7261(b)(1); *see infra* II.C.

This understanding of subsection (b)(1) tracks the way courts understand subsection (b)(2)'s harmless-error proviso. Subsection (b)(2)—governed by the same mandatory "shall" in the opening clause of section 7261(b)—requires the Veterans Court to apply the harmless-error rule with respect to every issue under review in every case, whether or not the parties specifically dispute harmfulness. *Tadlock v. McDonough*, 5 F.4th 1327, 1334 (Fed. Cir. 2021)

(Veterans Court is "statutorily charged with taking 'due account of the rule of prejudicial error'" in "all cases before it") (quoting 38 U.S.C. § 7261(b)). This must be equally true of subsection (b)(1). *See FCC v. AT&T Inc.,* 562 U.S. 397, 408 (2011) ("[I]dentical words and phrases within the same statute should normally be given the same meaning.") (citation omitted); *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 329 (2000) ("[W]e refuse to adopt a construction that would attribute different meanings to the same phrase in the same sentence, depending on which object it is modifying."). Like the application of the harmless-error rule, review of VA's compliance with section 5107(b) is "an obligation impervious to judicial discretion" in every Veterans Court appeal. *Lexecon*, 523 U.S. at 35.

Take due account. To "take account of" something means "to give attention or consideration to" it. *Take account of,* Merriam-Webster, https://tinyurl.com/yhm2rfzx. When a decisionmaker is directed to take account of a factor, it means that the decisionmaker must give attention and consideration to that factor as a meaningful component of its analysis, mindful that that factor might influence or even control the final decision.

For example, if a statute provided, "The parole board shall take due account of the severity of a potential parolee's crime of conviction," it would mean that the parole board must consider the parolee's crime of conviction in addition to other factors that relate to its analysis. That consideration may well impel the board to deny parole even if the application were otherwise meritorious.

As another example, a recent judicial decision noted that "[i]nterpretation of a provision must take due account of 'neighboring statutory provisions.'" *In re Google LLC*, 949 F.3d 1338, 1344 (Fed. Cir. 2020) (citation omitted). In this sentence, a court "take[s] due account" of a neighboring provision by considering it in a manner that may direct the final interpretation on which the court settles. The court must consider neighboring provisions; the neighboring provisions are owed weight in the court's analysis; and the court's assessment of neighboring provisions might well affect and control its ultimate disposition.

Similarly, when a reviewing court must "take due account of the rule of prejudicial error"—an instruction that appears in section 7261(b)(2) and in the APA, 5 U.S.C. § 706—the court must give attention to that rule, mindful that doing so may govern the final action the court takes. Even if the court finds error during its primary analysis, the obligation to "take due account of the rule of prejudicial error" requires the court to affirm if the error turns out to be harmless.

This understanding of "take due account" tracks the way this Court has interpreted subsection (b)(2). In *Sanders*, the Court explained that the phrase "take due account of the rule of prejudicial error" requires the Veterans Court to apply a "case-specific application of judgment, based upon examination of the record," to determine whether a claim of error that would otherwise merit reversal must instead be deemed harmless and call for affirmance. 556 U.S. at 407-08. Subsection (b)(1) works the same way. *See AT&T*, 562 U.S. at 408 ("[I]dentical words and

phrases" should "be given the same meaning."). The agency's ruling may appear correct when viewed through the lens of subsection (a) alone: the Veterans Court, reviewing the arguments "presented" by the appellant, may identify no clear error of fact, no arbitrary or capricious conclusions, and no errors of law. But the Veterans Court is also required to give attention to VA's application of the benefit-of-the-doubt rule. Once it does so, it may realize that the decision is nonetheless infected with legal error because VA violated section 5107(b).

Of the Secretary's application of section 5107(b). Taking due account "of the Secretary's application of section 5107(b)" means evaluating whether the Secretary applied section 5107(b) correctly. Section 5107(b) itself establishes a mandatory obligation binding on VA: "When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant."[3] Taking due account of the Secretary's application of this requirement means considering whether VA followed section 5107(b) in deciding the veteran's case. The Veterans Court must therefore assess whether the evidence was in "approximate balance" on any points material to a veteran's claim and, if so, whether VA gave "the benefit of the

[3] The statutory term "the Secretary" includes the Board as well as regional offices. Pet. App. 6a; *see Lynch*, 21 F.4th at 781. Thus, the Veterans Court's attention must be trained not only on the Board's analysis, but also on any underlying analysis by VA decisionmakers. The question is whether the agency as a whole complied with section 5107(b) in resolving the veteran's case.

doubt to the claimant" on that point. 38 U.S.C. § 5107(b). In other words, the Veterans Court must determine whether VA committed a legal error by failing to follow section 5107(b).

Importantly, reviewing "the Secretary's application of section 5107(b)" is not the same as reviewing VA's underlying factfinding. Section 7261(b)(1) requires the Veterans Court to "review the record" as it already exists, take a second look at whether there are material issues on which the evidence stands in "approximate balance," and confirm whether VA afforded the veteran the benefit of the doubt on those issues. This task does not require second-guessing or re-evaluating VA's factual determinations. Just the opposite: It requires assessing the conclusions VA reached based on those factual determinations. Thus, even as section 7261 provides for deferential clear-error review of VA's factfinding, it also provides for independent review of VA's compliance with the legal principle of section 5107(b).

In making the determinations under subsection (a). This language defines the scope of the review required under subsection (b)(1). As explained above (at 29-30), review of VA's compliance with section 5107(b) is mandatory in every appeal. But section 7261(b)(1) does not require the Veterans Court to scour the record for any conceivable benefit-of-the-doubt error on any topic. Instead, it calls for the Veterans Court to review VA's compliance with section 5107(b) as it pertains to the arguments the veteran raises on appeal—that is, to the issues "presented" under subsection (a). By requiring benefit-of-the-doubt review "[i]n making the determinations under

subsection (a)"—which, in turn, requires the Veterans Court to review questions of law and fact "when presented"—Congress cabined the scope of subsection (b)(1)'s inquiry. Thus, even though the task of benefit-of-the-doubt review is mandatory regardless of whether the veteran identifies a specific benefit-of-the-doubt error, the scope of that task extends only to the grounds put at issue by the veteran's allegations of error.

For example, veterans often ask VA to award compensation for multiple disabilities, and the agency considers these requests together and issues a single decision addressing them all. *See, e.g.*, TRBA918-921 (VA considering Mr. Thornton's request for compensation for multiple disabilities). If the Board denies service connection for a knee disability and a shoulder disability, and the veteran pursues only the knee disability on appeal, subsection (b)(1) requires the Veterans Court to perform benefit-of-the-doubt review only with respect to the knee claim. It does not require the Veterans Court to also investigate whether VA made a benefit-of-the-doubt error in denying the shoulder claim. But the Veterans Court's obligation to conduct benefit-of-the-doubt review on the knee claim does not depend on whether the veteran affirmatively invokes section 5107(b) or raises a benefit-of-the-doubt error as a ground for reversal. Subsection (b)(1)'s review obligation is limited in scope to the issues presented on appeal, but it is mandatory for those issues.

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In sum, subsection (b)(1)'s mandate that the Veterans Court "shall review the record" and "shall …

take due account of the Secretary's application of section 5107(b)" means that the Veterans Court must review whether VA correctly applied the benefit-of-the-doubt rule with respect to the issues presented on appeal. If the Veterans Court determines that the veteran properly received the benefit of any evidentiary doubt on those issues, it has discharged its duties under subsection (b)(1). If the veteran did not receive that benefit—meaning VA violated section 5107(b)—the Veterans Court must determine whether that legal error was prejudicial, as required by subsection (b)(2), and assess the appropriate remedy.

C. Statutory history and congressional intent underscore that subsection (b)(1) mandates review of VA's compliance with section 5107(b).

The statutory history and evidence of Congress's intent in enacting subsection (b)(1) compel the same conclusion. Congress added judicial review to the statutory scheme in 1988 specifically to protect veterans whose claims "have fallen through the cracks" because "all reasonable doubt has not been given to [them]." 1988 Hearing, *supra*, 100th Cong. 57 (statement of Rep. Lane Evans). But judicial review alone proved insufficient, and VA's systematic failure to apply the benefit-of-the-doubt rule persisted. *Supra* 9. So, in 2002, Congress added section 7261(b)(1), specifically requiring the Veterans Court, as part of its review of adverse benefits decisions, to "take due account of the Secretary's application of section 5107(b)."

In imposing that obligation, Congress intended to "modify" the review already required under section 7261(a) to "give full force to the 'benefit of [the] doubt' provision." 148 Cong. Rec. at H9006. Notably, although Congress considered addressing the problem by changing the standard of review for VA fact-finding to the less deferential substantial-evidence test, and tying the court's benefit-of-the-doubt review specifically to factual issues, it ultimately chose not to do so. *See id.* Instead, it imposed the separate obligation codified in subsection (b)(1), which appropriately recognizes that VA's compliance with section 5107(b) is distinct from the correctness of its findings of fact. *Infra* II.B.

Petitioners' plain-text interpretation vindicates Congress's objectives. *See Loper Bright Enters. v. Raimondo*, 603 U.S. __ (2024) (slip op. at 15) ("The text … means what it says. And a look at its history if anything only underscores that plain meaning."). Statutory interpretation must "give effect to congressional purpose so long as the congressional language does not itself bar that result." *Johnson v. United States*, 529 U.S. 694, 710 n.10 (2000).

Here, the statutory history and evidence of Congress's intent align exactly with the result that a plain reading of the text compels: the Veterans Court must perform an additional, independent review of VA's compliance with section 5107(b) as relevant to the issues on appeal. Requiring the Veterans Court to provide this second look ensures that VA is fulfilling its statutory obligation to give veterans the benefit of the doubt.

D. If the Court perceives any ambiguity, the statute should be construed in veterans' favor.

The text of section 7261 is sufficient to resolve this case. Subsection (b)(1) plainly requires the Veterans Court to enforce the benefit-of-the-doubt rule as part of its appellate review. And this obligation is plainly separate from the review required under subsection (a), including clear-error factual review. Should this Court conclude that any aspect of subsection (b)(1) is ambiguous, however, it may employ the pro-veteran canon. The canon provides that, in construing a statute concerning veterans, "interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *Henderson*, 562 U.S. at 441.

This approach effectuates "[t]he solicitude of Congress for veterans," which "is of long standing." *United States v. Oregon*, 366 U.S. 643, 647 (1961). Because Congress intends to help veterans when it enacts legislation providing them benefits, the best reading of the text of a benefits statute is one consistent with that long-recognized intent. This Court recently reaffirmed the viability of the pro-veteran canon. *See Rudisill v. McDonough*, 601 U.S. 294, 314 (2024) ("If the statute were ambiguous, the pro-veteran canon would favor [the veteran] …."). Here, therefore, if the Court concludes that section 7261(b)(1) is ambiguous regarding the Veterans Court's benefit-of-the-doubt review, the Court should adopt the interpretation more favorable to veterans—the one that gives this statute force and empowers the Veterans Court to meaningfully review VA's compliance with section 5107(b).

II. The Federal Circuit's Atextual Reading Is Incorrect.

Contrary to the text, structure, and origin of section 7261, the Federal Circuit held that "the statutory command that the Veterans Court 'take due account' of the benefit of the doubt rule does not require the Veterans Court to conduct any review of the benefit of the doubt issue beyond the clear error review required by § 7261[(a)(4)]." Pet. App. 15a.

That holding is fundamentally wrong. The Federal Circuit reduced Congress's purposeful enactment of subsection (b)(1) to nothing that is not already required by other parts of the statute, violating the basic precepts that when Congress amends statutory text, it does so for a reason, and that every provision in a statute should be given meaningful effect.

The Federal Circuit was able to reach its extraordinary conclusion because it fundamentally misunderstood the nature of the benefit-of-the-doubt review required under subsection (b)(1), wrongly assuming that it was equivalent to review of VA's factual findings. The Federal Circuit also overlooked that, as with the parallel harmless-error provision in subsection (b)(2), benefit-of-the-doubt review under subsection (b)(1) is mandated in all cases. These conceptual mistakes led the Federal Circuit to effectively nullify an important act of Congress and to construe a statutory amendment to mean nothing.

A. The Federal Circuit's reading gives subsection (b)(1) no force.

Despite the text, history, and congressional purpose establishing that section 7261(b)(1) requires a distinct analysis from the other provisions of section 7261, the Federal Circuit interpreted subsection (b)(1) to add nothing to the statutory review scheme that was not already there before 2002. The court of appeals said as much: the provision "does not require the Veterans Court to conduct any review of the benefit of the doubt issue beyond the clear error review required by § 7261[(a)(4)]." Pet. App. 15a.

This holding cannot be squared with the "cardinal principle" of statutory interpretation that courts "must give effect, if possible, to every clause and word of a statute." *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 304 (2017) (internal quotation marks omitted); *see TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001); *Inhabitants of Montclair Twp. v. Ramsdell*, 107 U.S. 147, 152 (1883). By holding that subsection (b)(1) does not require "any review" of benefit-of-the-doubt issues "beyond the clear error review" of VA's factual findings already called for in subsection (a)(4), Pet. App. 15a, the Federal Circuit failed to give subsection (b)(1) any force of its own.

That was error. The Federal Circuit's reading presumes that the Veterans Court's (a)(4) and (b)(1) obligations are one and the same. But "Congress did not write the statute that way." *United States v. Naftalin*, 441 U.S. 768, 773 (1979). The two requirements reside in separate—and separately enacted—statutory subsections, using different phrasing, and surrounded by

different statutory context, such as the "when presented" modifier in (a), which is absent from (b). Subsection (a)(4) empowers the Veterans Court to "hold unlawful and set aside or reverse" "a finding of material fact adverse to the claimant" "if the finding is clearly erroneous," while subsection (b)(1) obligates the Veterans Court to "take due account of the Secretary's application of section 5107(b)." Congress wrote two statutory provisions and used different terms in each. They must have independent meaning and effect. *See Pub. Lands Council v. Babbitt*, 529 U.S. 728, 746-47 (2000) (rejecting interpretation of statute that would have "two sets of different words mean the same thing").

The Federal Circuit's evisceration of subsection (b)(1) is especially problematic given how conspicuous Congress's addition of that provision was. In the Federal Circuit's view, the Veterans Court's responsibilities remained effectively the same before and after 2002, even though Congress in 2002 passed legislation assigning an additional obligation to the Veterans Court. The Federal Circuit apparently believed that Congress went to the trouble of amending section 7261 in 2002 but meant its amendment to have zero effect. That is wrong. "When Congress acts to amend a statute," it presumably "intends its amendment to have real and substantial effect." *Husky Int'l Elecs., Inc. v. Ritz*, 578 U.S. 355, 359 (2016) (quoting *United States v. Quality Stores, Inc.*, 572 U.S. 141, 148 (2014) (internal quotation marks omitted)).

Congress could not have been clearer that it acted in 2002 "to provide for more searching appellate review of [Board] decisions, and thus give full force to

the 'benefit of [the] doubt' provision." 148 Cong. Rec. at H9006; *supra* 9-11. But the Federal Circuit's interpretation gives no additional heft to the Veterans Court's review of the Secretary's application of the benefit-of-the-doubt rule. On the contrary, the Federal Circuit's holding reduces this enactment to nothing more than clear-error factual review, which the statute already required.

The Federal Circuit's holding also conflicts with the broader statutory backdrop against which Congress legislated. In the VJRA, Congress modeled section 7261 on the APA. *Supra* 9, 26-27. With limited exceptions, "Congress used the same words in the Administrative Procedure Act" as in section 7261. *Sanders*, 556 U.S. at 406. That is true for subsection (a). *Compare* 38 U.S.C. § 7261(a), *with* 5 U.S.C. § 706 (parallel "[s]cope of review" provisions, though with differing review standards for factual errors). And it is true for subsection (b)(2). *Compare* 38 U.S.C. § 7261(b)(2) ("In making the determinations under subsection (a), the [Veterans] Court shall review the record of proceedings … and shall … take due account of the rule of prejudicial error."), *with* 5 U.S.C. § 706 ("[A] court shall review the … record ... and due account shall be taken of the rule of prejudicial error."). The benefit-of-the-doubt provision in subsection (b)(1), however, is unique to the veterans' context. It has no APA counterpart. Congress thus legislated a unique appellate framework for the review of veterans' benefits claims. In devising the Veterans Court's review provisions, Congress borrowed from the familiar framework of the APA, but refashioned it into an APA-*plus* review system, under which the Veterans

Court must perform ordinary APA-like review, *and* one thing more.

The Federal Circuit's reading, however, makes Congress's decision to expressly add benefit-of-the-doubt review an effective nullity. Reading subsection (b)(1) to require something distinct from deferential review of agency factfinding is the only interpretation consistent with Congress's choice to depart from the existing APA model. *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374, 398 (2016) (Thomas, J., concurring) ("[W]hen Congress enacts a statute that uses different language from a prior statute, we normally presume that Congress did so to convey a different meaning."); *cf. Rudisill*, 601 U.S. at 308 ("[W]e generally 'presume differences in language like this convey differences in meaning.'") (quoting *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 86 (2017)). That express addition to the APA template must be given meaningful effect.

B. The Federal Circuit's interpretation improperly conflates clear-error review with benefit-of-the-doubt review.

The Federal Circuit was able to reach its aberrant conclusion in part because it misunderstood the nature of benefit-of-the-doubt review and wrongly believed it to be akin to reviewing VA's factfinding. *See* Pet. App. 15a. That assumption paved the way for the Federal Circuit's conclusion that, once the Veterans Court found no clear error in VA's factfinding, it had also discharged its benefit-of-the-doubt duties.

Contrary to the Federal Circuit's assumption, the review required by subsection (b)(1) does not overlap with clear-error factual review. On clear-error review, the Veterans Court must assess individual pieces of evidence for what they tend to show as a factual matter. On benefit-of-the-doubt review, the Veterans Court determines whether the agency applied the right standard as a *legal* matter. Reviewing whether VA has complied with section 5107(b) is a legal, not a factual, inquiry. Determining whether VA properly afforded the veteran the benefit of the doubt on close issues does not require re-evaluating VA's factual determinations; it requires assessing the conclusions VA reached based on those determinations. Reviewing VA's compliance with section 5107(b) is thus conceptually and functionally different from reviewing underlying facts.

1. It is commonplace that reviewing a factfinder's application of a standard of proof is a legal question. That legal inquiry requires consideration of the record but remains distinct from any specific factual question.

To begin with, if the factfinder applied the wrong standard of proof, that is legal error. "[T]he court's application of an improper standard to the facts … may be corrected as a matter of law." *United States v. Singer Mfg. Co.*, 374 U.S. 174, 194 n.9 (1963); *see, e.g.*, *Abbott v. Perez*, 585 U.S. 579, 607 (2018) ("[W]hen a finding of fact is based on the application of an incorrect burden of proof, the finding cannot stand."); *Inwood Lab'ys, Inc. v. Ives Lab'ys, Inc.*, 456 U.S. 844, 855 n.15 (1982) ("[I]f the trial court bases its findings upon a mistaken impression of applicable legal

principles, the reviewing court is not bound by the clearly erroneous standard.").

A factfinder also commits legal error if it states the correct standard but errs in its application of that standard to the evidence of record. *Cf. Interstate Com. Comm'n v. Louisville & Nashville R.R. Co.*, 227 U.S. 88, 92 (1913) ("[T]he legal effect of evidence is a question of law."). For example, Federal Rule of Civil Procedure 50 permits a district court to grant judgment as a matter of law when it "finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a). A reviewing court in turn decides the proper application of this standard as a question of law. *See, e.g.*, *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 138-39, 153-54 (2000); *Weisgram v. Marley Co.*, 528 U.S. 440, 444 (2000).

Likewise, the "review of the sufficiency of the evidence to support a criminal conviction" is a question of law (as is the question "whether the jury was properly instructed"). *Jackson v. Virginia*, 443 U.S. 307, 318 (1979). And in the criminal context, "'[t]he question of whether the facts are sufficient to constitute probable cause'" is "subject to de novo review." *United States v. 1407 N. Collins St.*, 901 F.3d 268, 273 (5th Cir. 2018) (citation omitted); *accord Stewart v. Sonneborn*, 98 U.S. 187, 190 (1878) ("What constitutes probable cause is a question of law.").

2. The same is true here. Clear-error review of VA's underlying factfinding remains separate and distinct from the legal inquiry of whether the agency complied with section 5107(b).

Again, this is plainly true when the question is whether VA applied the correct "approximate balance" standard. For example, the Federal Circuit recently clarified that "the benefit-of-the-doubt rule … applies if the competing evidence" is "nearly equal," "depart[ing] from" previous caselaw which had endorsed a "confus[ing] … preponderance of the evidence" standard. *Lynch*, 21 F.4th at 781. If the Board nonetheless applies the rejected preponderance standard to a veteran's claim, that would be legal error.

It is also legal error if the agency recites the correct "approximate balance" standard but misapplies that standard to the evidence. This is a different question than clear-error review. To illustrate, a factfinder does not commit a clear error by choosing between "two permissible views of the evidence." *Anderson v. City of Bessemer City,* 470 U.S. 564, 574 (1985). But if there are two permissible views, then the evidence likely would not "persuasively favor[] one side or the other" and so would stand in "approximate balance." *Lynch*, 21 F.4th at 782. Section 5107(b) requires that when evidence is in approximate balance, the scales tip in favor of the veteran. In that circumstance, VA might not commit a clear error of fact in finding against the veteran, but it would commit a legal error in doing so. Section 7261(b)(1) requires the Veterans Court to correct that error.

A concrete example demonstrates how the Veterans Court's review might work in practice. A veteran seeking compensation based on a disability linked to military service must show three elements:

"(1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service." *Saunders v. Wilkie*, 886 F.3d 1356, 1361 (Fed. Cir. 2018) (citation omitted); *see* 38 U.S.C. § 1110. Whether a veteran has met any individual element is a factual question. *See Saunders*, 886 F.3d at 1368-69; *Sanchez-Benitez v. Principi*, 259 F.3d 1356, 1362 (Fed. Cir. 2001).

In assessing whether the veteran has a present disability, VA might make "factual findings as to whether [the veteran's condition] impaired her function, or as to the scope of any such impairment," and might do so by considering evidence such as any findings by a VA examiner who performs a medical assessment as part of the claims process. *Saunders*, 886 F.3d at 1368-69. The examiner's findings must be competent, that is, rendered by one of appropriate qualifications and medical expertise. *See* 38 C.F.R. § 3.159(a)(1). The competency of the examiner's findings is a question of fact. *See Francway v. Wilkie*, 940 F.3d 1304, 1309 (Fed. Cir. 2019) (determination of an examiner's competency is "a factual matter").

But once the Veterans Court has reviewed the agency's factfinding that the medical opinions VA considered were competent, and found no clear error, the Veterans Court's review does not end. Under section 7261(b)(1), the Veterans Court must then review VA's application of the benefit-of-the-doubt rule. Under that review, the Veterans Court must assess whether VA properly applied the "approximate balance" standard of proof in evaluating competing

medical opinions, each of which the agency independently treated as competent, as well as other record evidence such as statements from the veteran's family and friends. That assessment is a legal inquiry and considers whether the agency applied the proper standard to the facts at hand. If VA's assessment of the competency of medical evidence is not clearly erroneous, but VA's weighing of that medical evidence failed to give the veteran of the benefit of the doubt on approximately balanced material issues, that is legal error.

3. Nothing about subsection (b)(1) is in tension with subsection (c)'s rule that "findings of fact made by the Secretary or the Board of Veterans' Appeals" may not "be subject to trial de novo" by the Veterans Court. *Contra* Pet. App. 10a.

Section 7261(c)'s prohibition must be understood in the overall context of judicial review of agency action. The APA recognizes two different factual review regimes. It provides for substantial-evidence review of factual findings in cases "reviewed on the record of an agency hearing." 5 U.S.C. § 706(2)(E). But "to the extent that the facts are subject to trial de novo by the reviewing court," that court must determine if the agency's findings and conclusions are "unwarranted by the facts." 5 U.S.C. § 706(2)(F). As the text suggests, the applicable standard depends on what type of agency action is at issue.

Most agency actions are reviewed on the agency record. But some statutes provide for new evidence to be considered on judicial review—that is, they authorize "trial de novo." Under the Food Stamp Act,

for example, judicial review of the agency's decision to disqualify a store from participation in the food stamp program can be conducted by "a trial de novo" in the district court. 7 U.S.C. § 2023(a)(15). That means the reviewing court is "not limited to the administrative record" and can "reach its own factual … conclusions." *Affum v. United States*, 566 F.3d 1150, 1160 (D.C. Cir. 2009) (citations omitted). Likewise, the Patent Act invokes the concept of a trial de novo by authorizing a reviewing court to "adjudge … the facts," 35 U.S.C. § 145, permitting the reviewing court to "consider new evidence" and "act as a factfinder," instead of deferring to agency factfinding under substantial-evidence review. *Kappos v. Hyatt*, 566 U.S. 431, 438 (2012).

Section 7261(c) simply instructs that the Veterans Court's review is not of this latter type. The court does not receive new evidence but rather is bound by the record developed before the agency. *See* 38 U.S.C. § 7252(b). Therefore, the Veterans Court accords a measure of deference to agency factfinding—in this case, clear-error review, rather than the APA substantial-evidence standard. *Id.* § 7261(a)(4); *supra* 9, 26.

The Federal Circuit erred in reading subsection (c) to instead have some broader effect and to deprive section 7261(b)(1) of any meaning. Again, the court of appeals overlooked the critical distinction between legal review and factfinding in concluding that the combination of subsections (a) and (c) meant that subsection (b)(1) requires nothing more than clear-error review. Pet. App. 10a. Under subsection (b)(1), the Veterans Court no more receives new evidence

than acts as a factfinder. The review mandated under subsection (b)(1) does not involve "subject[ing]" the "findings of fact" made during VA proceedings to "trial de novo." 38 U.S.C. § 7261(c). Nothing about subsections (a) or (c), therefore, collapses section 7261(b)(1) review into clear-error factual review.

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By equating the benefit-of-the-doubt review required by section 7261(b)(1) with the clear-error review of challenged factual findings required by section 7261(a), the Federal Circuit disregarded Congress's intent that the Veterans Court perform a hard look to make sure the veteran received the benefit of any doubt on any close issues material to his claim, and undermined the independent force that Congress intended subsection (b)(1) to have.

C. The Federal Circuit's interpretation wrongly requires the veteran to raise benefit-of-the-doubt issues on appeal.

According to the Federal Circuit, "if no issue that touches upon the benefit of the doubt rule is raised on appeal, the Veterans Court is not required to … address the benefit of the doubt rule." Pet. App. 15a-16a (quoting Pet. App. 9a).[4] This holding, too, is wrong. Whereas section 7261(a) contains the "when presented" requirement, section 7261(b) does not.

[4] The Federal Circuit so held even though both Petitioners expressly presented arguments about the benefit-of-the-doubt rule to the Veterans Court. *See* Pet. App. 27a-30a; Pet. App. 40a-43a.

Nothing in the text of subsection (b) states that the veteran must specifically assert a benefit-of-the-doubt error to trigger the Veterans Court's (b)(1) review. On the contrary, the statutory text establishes that it is VA's affirmative duty to provide the benefit of the doubt, and the Veterans Court's affirmative duty to ensure that VA did so. 38 U.S.C. § 5107(b) ("the Secretary *shall* give the benefit of the doubt to the claimant"); *id.* § 7261(b)(1) (Veterans Court "*shall* … take due account of the Secretary's application of section 5107(b)") (emphases added).

The Federal Circuit's contrary holding again inherently deprives subsection (b)(1) of force. If a veteran expressly raises a section 5107(b) error on appeal, the Veterans Court would have to review and decide that issue under its ordinary subsection (a) review (specifically, as a claim of legal error under section 7261(a)(3)). There would be no need for section 7261(b)(1). Only if the Veterans Court is obliged to review VA's compliance with section 5107(b) regardless of party presentation does Congress's enactment have any meaningful effect.

Congress's decision to mandate benefit-of-the-doubt review regardless of presentation is unsurprising. The veterans' benefits system is "designed to function throughout with a high degree of informality and solicitude for the claimant." *Henderson*, 562 U.S. at 431 (quoting *Walters*, 473 U.S. at 311). The benefit-of-the-doubt rule is part of that pro-claimant scheme. *Id.* at 432. Section 7261(b)(1) ensures that the benefit-of-the-doubt rule continues to favor claimants at the first level of judicial review. It would contradict these aims if Congress had specifically provided for

mandatory review of this one category of legal error (misapplication of section 5107(b))—even though legal errors generally may be presented and reviewed under section 7261(a)—yet *sub silentio* imposed a presentation requirement. The pro-claimant nature of the context in which the Veterans Court operates confirms what Congress's text plainly says: the Veterans Court must conduct its review under section 7261(b)(1) in every case. *See Henson*, 582 U.S. at 85 (plain text reading confirmed by "contextual clues").

The Federal Circuit's contrary holding not only ignores this context, it also creates needless textual discord between subsections (b)(1) and (b)(2). The Veterans Court must apply subsection (b)(2)'s harmless-error rule to every claim on appeal, regardless of what the parties argue. *See Tadlock*, 5 F.4th at 1334. There is no textual basis to treat subsection (b)(1) differently. And doing so would work a special unfairness. Under the Federal Circuit's view, the government can win on harmless-error grounds even if it does not present the argument. But the Veterans Court cannot correct the agency's benefit-of-the-doubt error unless the veteran specifically identifies that error. That asymmetry has no grounding in the text and works at cross-purposes with the goals of the veterans' benefits system.

Certainly, veterans and their advocates will strive to surface section 5107(b) errors for review, as both Petitioners did here. But party presentation does not drive the Veterans Court's obligation to review compliance with section 5107(b); that review is mandated by statute. To be sure, that review is not limitless and open-ended. It must be conducted in

conjunction with the Veterans Court's assessment of issues the veteran has otherwise raised on appeal. *Supra* 33-34. But within the identified set of issues relevant on appeal, the Veterans Court's obligation to conduct benefit-of-the-doubt review is co-equal with its obligation to conduct harmless-error review.

III. Petitioners Are Entitled To The Review Congress Provided For In The Veterans Court.

Section 7261(b)(1) requires the Veterans Court to review the record in each case to determine whether VA properly applied the benefit-of-the-doubt rule. In each of Petitioners' cases, however, the Veterans Court stopped after reviewing the Board's decision for clear errors of fact. It did not, as section 7261(b)(1) requires, go further and determine whether VA had correctly applied the "approximate balance" standard of proof in resolving Petitioners' claims.

In Mr. Bufkin's case, the Veterans Court noted that the Board had found Dr. Webster's opinion "more persuasive" than Dr. Goos's because it was "more comprehensive," and it deemed that finding "not clearly erroneous." Pet. App. 29a-30a. The Board then immediately concluded: "And thus, the benefit of the doubt doctrine does not apply here." Pet. App. 30a. It did not assess, for example, whether the Board properly applied the "approximate balance" standard to the full set of evidence in the record, including the other two medical opinions and the lay evidence.

The Veterans Court took the same unduly limited approach in Mr. Thornton's case. Here the court was

even more explicit: it acknowledged section 7261(b)(1), but stated that "the Board's determination under section 5107(b) of whether the evidence is approximately balanced is a factual one that the Court reviews for clear error." Pet. App. 42a; *accord* Pet. App. 43a ("The outcome of [the section 5107(b)] analysis is a factual finding"). Because "Mr. Thornton [did] not challenge the Board's factual findings," the Veterans Court reasoned, "he has not shown error in the Board's application of section 5107(b)." Pet. App. 43a. Here too, the Veterans Court made no independent inquiry into the Board's application of the "approximate balance" standard.

This review falls short of what the statute commands. As demonstrated above (at 42-49), section 7261(b)(1) is separate from the clear-error review of challenged factual findings required by section 7261(a)(4). It entails a legal inquiry about whether the agency properly applied the "approximate balance" standard in section 5107(b). And, contrary to the Veterans Court's expressed belief in *Thornton*, it does not depend on whether the veteran has challenged any specific factual finding. It is an obligation on the Veterans Court that applies in every case.

The Veterans Court did not conduct the legal inquiry that is mandated by section 7261(b)(1) and is specifically assigned to that tribunal. This Court should remand to allow the Veterans Court to conduct the proper inquiry in the first instance.

CONCLUSION

The Court should reverse the judgment of the Federal Circuit.

Respectfully submitted,

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