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 *AMICUS CURIAE* OF MILITARY-VETERANS ADVOCACY SUPPORTING PETITIONERS

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INTEREST OF *AMICUS CURIAE* [1]

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

Veterans enjoy a unique presumption in benefits rights adjudication. In determining a veteran's entitlement to benefits, the Department of Veterans Affairs (VA) has long been required to give the benefit of the doubt to the veteran. *See* 38 U.S.C. § 5107(b). However, the VA has not always honored that requirement. So Congress stepped in. Pursuant to 38 U.S.C. § 7261(b)(1), Congress required that the United States Court of Appeals for Veterans Claims (the Veterans Court) "take due account of the Secretary's application of section 5107(b)" in conducting its review of the agency's decisions.

In *Bufkin v. McDonough*, 75 F.4th 168 (Fed. Cir. 2023), and *Thornton v. McDonough*, No. 2021-2329, 2023 WL 5091653 (Fed. Cir. Aug. 9, 2023), the

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

Federal Circuit has made § 7261(b)(1) a dead letter. According to the court of appeals, the Veterans Court is only required to review the VA's factual findings for clear error. This decision—if allowed to stand—will significantly narrow benefits review, resulting in denial of veterans the rights to benefits that their service to our Nation has earned them.

But the court of appeal's decision is wrong for two reasons. *First*, it conflicts with fundamental pro-veteran principles that trace back to the Civil War. As this Court has long held, veterans-benefits statutes must "always . . . be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943). The Federal Circuit, however, construed the statute to the VA's benefit, not the veteran's. And it did so by entirely ignoring the history and purpose of the statute. *Second*, the Federal Circuit ignored the will of Congress to abrogate its and the Veterans Court's responsibility to decide the legal question of whether the veteran has received the benefit of the doubt, leaving that decision entirely in the hands of the agency. This Court should reverse.

SUMMARY OF THE ARGUMENT

"The reasonable doubt policy . . . has always been a rule of [veterans] claims adjudication." 50 Fed. Reg. 34452, 34454 (Aug. 26, 1985); *see also VA Administrative Procedure and Judicial Review Act: Hearing on S. 364 Before the S. Comm. On Veterans' Affairs*, 95th Cong. 19 (1977) (statement of VA

Administrator Max Cleland) ("It has always been the policy of [the VA] to assist the claimant . . . and to resolve all reasonable doubt in favor of the claimant.").

It dates back to the post-Civil War era and is "considered one of the most integral aspects of the non-adversarial nature of veterans law." Angela Drake et. al., *Review of Veterans Law Decisions of the Federal Circuit*, 2021 Edition, 71 Am. U. L. Rev. 1619, 1621 (2022); 50 Fed. Reg. at 34454. The rule's express purpose is to provide "a distinct advantage to veterans" in the claims process—a sentiment derived from President Lincoln's promise after the Civil War: "[T]o care for him who shall have borne the battle, and for his widow and orphans." Drake, 71 Am. U. L. Rev. at 1621; Second Inaugural Address of Abraham Lincoln (Saturday, March 4, 1865).

As a result, Congress codified the benefit-of-doubt rule at 38 U.S.C. § 5107(b), which requires the VA to "give the benefit of the doubt to the claimant" when "there is an approximate balance of positive and negative evidence regarding any issue material to" a veteran's claim for benefits, and established the Court of Appeals for Veterans Claims. *Infra* Section I.B. And when the deference afforded to the VA's fact-findings appeared to ignore application of the benefit of the doubt, Congress once again took action, this time enacting 38 U.S.C. § 7261(b) to ensure the Veterans Court "review[s] the record" as a whole and "take[s] due account" of the benefit-of-doubt rule. *Id.*

Viewing the history, purpose, and evolution of § 7261(b) through the lens of the pro-veteran canon—

grounded in principles stemming from Article I, Section 8 of the Constitution—it is apparent that Congress has made every effort to ensure the pro-veteran benefit-of-doubt rule was not an illusory concept. Congress intended this statutory provision to have effect in the pro-claimant schema designed "in recognition of our debt to our veterans." *Gilbert v. Derwinski*, 1 Vet. App. 49, 54 (1990); *see also VA Administrative Procedure and Judicial Review Act: Hearing on S. 364 Before the S. Comm. On Veterans' Affairs*, 95th Cong. 3 (1977) ("I want all veterans to be served with compassion, fairness, and efficiency" and "each individual veteran to receive from our Government every benefit and service to which he or she may be entitled.") (Sen. Alan Cranston Opening Statement). But the Federal Circuit's decision turns decades of legislative history and Congressional intent on its head.

The Federal Circuit's decidedly anti-veteran interpretation of 38 U.S.C. § 7261(b)(1) instead cedes a question of law to an executive agency—a question reserved for the courts to resolve. In effect, the Federal Circuit's ruling 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)]," *Thornton*, 2023 WL 5091653, at *2 (emphasis added), leaves the responsibility of the proper application of the benefit-of-doubt rule in the hands of the VA, an executive agency—not the judiciary. In this case, whether the evidence is in "approximate balance" and whether the VA properly

applied the benefit of doubt is a legal inquiry traditionally reserved for judicial review. *See Marbury v. Madison*, 1 Cranch 137, 177 (1803). Here, the "clear error" standard of review applied to the VA's findings of fact under § 7261(a)(4) does not account for the judicial purview over the benefit-of-doubt rule or the pro-veteran lens through which the statute must be read.

Indeed, the statute itself requires the Veterans Court to "review the record of proceedings," and further, that it "*shall* . . . take due account of the Secretary's application of section 5107(b)." 38 U.S.C. §§ 7261(b) & (b)(1) (emphasis added). But the Federal Circuit's decisions ignore the statutory language of both §§ 7261(b)(1) and 5107(b) in favor of the language of § 7261(a)(4), failing to give meaning and weight to "the language [of § 7261(b)(1)] itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

Here, the Veterans Court should resolve any question of law regarding proper application of the benefit of the doubt, in accordance with the pro-veteran presumption that Congress granted meaningful appellate review of whether a veteran actually received the benefit of the doubt. The Federal Circuit decisions should be reversed.

ARGUMENT

I. THE PRO-VETERAN CANON SUPPORTS INDEPENDENT ASSESSMENT OF THE VA'S APPLICATION OF THE BENEFIT OF DOUBT.

Article I, Section 8 of the U.S. Constitution grants Congress the power "[t]o raise and support armies" and "[t]o provide and maintain a navy." Part and parcel with this notion, the first Congress passed a bill in the first session of the first Congress to provide compensation to wounded veterans, followed thereafter with a Congressional grant for service pension for Revolutionary War veterans. James D. Ridgway, *The Splendid Isolation Revisited: Lessons From the History of Veterans' Benefits Before Judicial Review*, 3 Veterans L. Rev. 135 at 142 (2011) (citing Act of Sept. 29, 1789, Ch. 24, 1 Stat. 95). These pensions were granted "in pursuance of the acts of the United States in Congress assembled." Act of Sept. 29, 1789, Ch. 24, 1 Stat. 95. Since 1789, those in military service have "support[ed] the constitution of the United States." *Id.* (Ch. 25, § 3).

For hundreds of years, American veterans have defended the principles of the United States Constitution. As but a small recognition of their sacrifice, statutes concerning veterans and their claims for disability benefits are "liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *See Boone*, 319 U.S. at 575. This traditional tool of statutory construction is known as the pro-veteran canon. *See Procopio v. Wilkie*, 913 F.3d 1371, 1382–

84 (Fed. Cir. 2019) (J. O'Malley, concurrence) (stating the pro-veteran canon is a traditional tool of statutory interpretation) (citing *Henderson v. Shinseki*, 562 U.S. 428, 441 (2011)).

A. The pro-veteran canon provides that benefits statutes are to be read in the veteran's favor.

"Congress's intent in crafting the veterans benefits system [was] to award entitlements to a special class of citizens, those who risked harm to serve and defend their country" and, consequently, the "entire scheme is imbued with special beneficence from a grateful sovereign." *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006) (internal quotations omitted); *see also Brown v. Gardner*, 513 U.S. 115, 118 (1994) (stating that veterans benefits statutes should be read "in the veterans favor"); *Gambill v. Shinseki*, 576 F.3d 1307, 1316 (Fed. Cir. 2009) (Bryson, J., concurring) (Supreme Court and Federal Circuit "have long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant"). Put simply, the pro-veteran canon is a presumption that—absent contrary evidence—Congress enacts veterans benefits statutes to benefit veterans.

Support for this presumption is evident in myriad Congressional actions. For example, Congress has required that the VA assist every veteran in obtaining evidence necessary to substantiate any claim for benefits. *See* 38 U.S.C. § 5103(A)(a). And Congress has created a statutory obligation to notify claimants of any missing information in an application "necessary to substantiate the claim." *Id.* at § 5103(a).

The benefit-of-doubt rule codified in § 5107(b) is another product of Congress's intent to establish a pro-claimant system to help veterans, requiring that veterans receive the benefit of the doubt "[w]hen there is an approximate balance of positive and negative evidence" in any claim for benefits.

The pro-veteran canon is therefore not a mere platitude. This Court has "long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" *Henderson*, 562 U.S. at 441 (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220–21, n.9 (1991)).

Interpretation of § 7261(b)(1) and its legislative history must be construed accordingly. Just as the benefit-of-doubt rule serves to resolve issues in favor of the veteran when evidence is in "approximate balance," the pro-veteran canon dictates that, to the extent there is any "interpretive doubt" about the purpose and history of § 7261(b)(1), it should "be resolved in the veteran's favor." *Brown*, 513 U.S. at 117–18; *see also Jensen v. Brown*, 19 F.3d 1413, 1417 (Fed. Cir. 1994).

Moreover, this Court has "presume[d] congressional understanding of such interpretive principles" like the pro-veteran canon and that Congress enacts laws with this understanding. *King*, 502 U.S. at 220–21, n.9 (citing *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991)). It is no different in the context of the statutory history of § 7261(b)(1). Here, the pro-veteran canon informs statutory interpretation by providing context to legislation. And it should be used to resolve issues in

favor of veterans if there is any ambiguity in the statute.

Make no mistake, application of the pro-veteran canon does not encourage strained interpretations of veterans benefit statutes. Rather, as a reflection of Congress's clear desire to benefit veterans, the pro-veteran canon is an appropriate tool to determine the best interpretation of a benefits statute to effectuate Congress's intent. *See Gomez v. Toledo*, 446 U.S. 635, 639 (1980) ("As remedial legislation, [the statute] is to be construed generously to further its primary purpose."). And reliance on and use of the pro-veteran canon provides consistency across all veterans benefits statutes. In other words, the pro-veteran canon is a reflection of the Congressional purpose in promulgating the entire pro-claimant veterans benefits scheme and should not be discounted.

That the pro-veteran canon is grounded in principles of the Constitution, is used to develop legislation, and is perpetuated by this Court's jurisprudence shows that it is an important tool of statutory construction. *See, e.g.*, *Henderson*, 562 U.S. at 441 (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220–21, n.9 (1991)). As such, it informs the proper interpretation of § 7261(b)(1) and compels the conclusion that Congress granted meaningful appellate review of whether a veteran actually received the benefit of the doubt.

B. Congress explicitly intended to establish independent review under § 7261(b).

[T]he role of the reviewing court . . . is, as always, to independently interpret the statute and effectuate the will of Congress . . . ." *Loper Bright Enters. v. Raimondo*, No. 22-451, 2024 WL 3208360 at *14 (U.S. June 28, 2024). "Congressional intent may be discerned by looking to the legislative history and other factors: *e.g.*, the identity of the class for whose benefit the statute was enacted, [and] the overall legislative scheme." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 377 n.60 (1982). Here, examination of the legislative history through the lens of the pro-veteran canon is helpful to ascertain Congress's intent and purpose in enacting § 7261(b). *See Brown*, 513 U.S. at 117–118 (looking for statutory ambiguity only "*after* applying the rule that interpretive doubt is to be resolved in the veteran's favor (citing *King*, 502 U.S. at 220–221 n.9)); *see also Henderson*, 562 U.S. at 438 ("we attempt to ascertain Congress' intent regarding the particular type of review at issue in this case"). As the history of § 7261(b)(1) shows, Congress enacted the provision to protect veterans and their families. The proper interpretation of § 7261(b)(1), therefore, requires the Veterans Court to ensure that the benefit-of-the-doubt rule was properly applied during the claims process.

The benefit-of-doubt rule can be traced back to the post-Civil War era when guidelines to physicians at the Bureau of Pensions stated that "[s]o far as it was

permissible under the laws as they exist and the established practice of the Bureau, the benefit of any doubt has been resolved in favor of the claimant." 50 Fed. Reg. at 34454 (alteration in original). The policy continued through World War I—the VA's first-ever disability rating schedule stated "[w]herever a question of doubt arises the benefit of such doubt must be given to the claimant." *Id.* The benefit-of-doubt rule continues today, codified in § 5107(b) and promulgated in current VA regulation 38 C.F.R. § 3.102.

But after the Vietnam War, tens of thousands of veterans appealed VA decisions denying their claims for benefits. *See VA Administrative Procedure and Judicial Review Act: Hearing on S. 364 Before the S. Comm. On Veterans' Affairs*, 95th Cong. 2 (1977) (Sen. Alan Cranston Opening Statement). It was clear that "many active service officers" were "seldom" given "the benefit of the doubt" in their claims for benefits. *Id.* at 269 (Edwin L. Meyers, Veterans of Foreign Wars). Congress therefore took action, proposing legislation that would grant judicial review of VA determinations, which, up until that time was barred by statute. *Judicial Review and the Governmental Recovery of Veterans' Benefits*, 118 U. Pa. L. Rev. 288, 288 (1969) (citing 38 U.S.C. § 211(a) (1964)); Act of Mar. 20, 1933 Pub. L. No. 73-2 § 5, 48 Stat. 8, 9 ("All decisions rendered by the Administrator of Veterans' Affairs . . . shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review.").

In 1988, after multiple proposals from the Senate, House, and Committee on Veterans Affairs, Congress passed the Veterans' Judicial Review Act (VJRA), which established the Veterans Court to review "all aspects of a claim for benefits as decided by the BVA" and, "most significant[ly]," codified the benefit-of-doubt rule provided for in the regulations, 38 C.F.R. § 3.102. *See* 134 Cong. Rec. S16632, S16638–40 (1988); *id.* at S16659 (Sen. Murkowski).

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

But the deference afforded to VA findings of fact continued to result in the failure to properly apply the benefit of the doubt. S. Rep. No. 107-234 at 17 (2002). To address these failures, the Committee on Veterans' Affairs proposed amendments, most notably, an amendment that would allow the Veterans Court to "set aside or reverse" findings of material fact that were not supported by "substantial evidence." S. Rep. No. 107-234 at 40 (2002). These changes were "intended to provide far more searching appellate review of BVA decisions, and thus give full force to the 'benefit of the doubt' provision." *Id.* at 17. And when Congress legislates against a statutory backdrop, it is presumed to know the existing law and intend to build upon it. *See, e.g.*, *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696–97 (1979) ("It is always appropriate to

assume that our elected representatives, like other citizens, know the law"); *United States v. LeCoe*, 936 F.2d 398, 403 (9th Cir. 1991) ("Congress is, of course, presumed to know existing law pertinent to any new legislation it enacts."). The Committee's proposal therefore shows that it intended "to provide for searching judicial review of VA benefits claims encompassing the 'benefit of the doubt' rule." *See* S. Rep. No. 107-234 at 18.

To that end, the Senate passed the Committee bill, but the House made additional proposals, one of which included amendment to § 7261(b) to explicitly require the Veterans Court to "take due account of the Secretary's application of section 5107(b)"—the same language at issue here. 148 Cong. Rec. H8925, H9002 (Nov. 14, 2002) (§ 401(b)). The House, however, rejected the "substantial evidence" standard of review. *Id.* at H9006.

The resulting compromise bill "clarifie[d] the authority of the Court of Appeals for Veterans Claims to reverse decisions of the Board of Veterans Appeals in appropriate cases and require[d] the decisions be based upon the record as a whole, taking into account the pro-veteran rule known as the 'benefit of the doubt.'" *Id.* at H9003. In particular, the amendment to § 7261(b) "would *require* the [Veterans] Court to examine the record of proceedings before the Secretary and BVA and the *special emphasis* during the judicial process on the benefit of the doubt provisions of section 5107(b) as it makes findings of fact in reviewing BVA decisions." *Id.* at H9006 (emphasis added). These amendments were enacted

into law by the Veterans Benefits Act of 2002, Pub. L. No. 107-330, 116 Stat. 2820, 2832.

The "pattern of legislation dealing with this subject" shows that the "solicitude of Congress for veterans is of long standing." *United States v. Oregon*, 366 U.S. 643, 647 (1961). Congress enacted § 7261(b)(1) as part of the VJRA, which is "decidedly favorable to veterans." *Henderson*, 562 U.S. at 441. And because it "legislates with knowledge of our basic rules of statutory construction," *King*, 502 U.S. at 220–221 n.9, Congress intended § 7261(b)(1) to "place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions." *Shinseki v. Sanders*, 556 U.S. 396, 416 (2009) (Souter, J. dissent).

Absent clear proof to the contrary, Congress must be presumed to be acting "for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). Accordingly, § 7261(b)(1) should be afforded "as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits." *Id.* The pro-veteran canon, as well as the remedial nature of § 7261(b)(1), therefore compels the conclusion that the Veterans Court must independently consider whether the VA properly applied the benefit of the doubt in all claims for benefits.

II. THE FEDERAL CIRCUIT'S DECISIONS IMPROPERLY DELEGATE A QUESTION OF LAW TO AN AGENCY.

Even though the benefit-of-doubt rule has been in existence for more than a hundred years—as noted above—it has been inconsistently applied to the detriment of millions of claimants. One reason for this inconsistency is the deference afforded to the VA's fact-findings. Such deference, however, is not applicable to questions of law, which are reserved for the judiciary. *See Loper Bright Enters.*, 2024 2024 WL 3208360 at *10 ("questions of law [are] for courts to decide, exercising independent judgment"). Whether the VA properly applied the benefit-of-doubt rule is a question of law, as is whether the evidence is in "approximate balance." Because the application of § 7261(b)(1) is a question of law, the Veterans Court should independently review whether the VA has complied with its obligations under § 5107(b).

Any other reading of § 7261(b)(1) heightens the burden on the veteran, contrary to the pro-claimant scheme of veterans benefits provisions. The Federal Circuit's decision below, for example, does not require the Veterans Court to "review the entire record to address the benefit of the doubt rule even if there was no challenge to the underlying facts found by the Board or to the Board's application of the benefit of the doubt rule." *Bufkin*, 75 F.4th at 1372–73. Under the Federal Circuit's erroneous reading, veterans must raise on appeal questions of the application of the benefit-of-doubt rule, even though the rule poses a legal question distinct from any factual challenges.

And even then, according to the Federal Circuit, the resolution of the benefit-of-doubt question requires nothing beyond the Veterans Court's clear error review of factual issues. This defies the notion that provisions for veterans benefits should be construed in the claimant's favor and disrupts the "high degree of informality and solicitude" with which the claims process is conducted. *Henderson*, 562 U.S. at 431 (citing *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 311 (1985)).

To leave as optional any independent assessment by the Veterans Court as to whether the benefit-of-doubt rule is properly applied in all cases places a question of law solely in the hands of an agency. Under clear error review—the only review required by the Federal Circuit under § 7261—"it is highly unlikely that the Veterans Court will reverse any finding in which the Board was 'persuaded' by the evidence that a veteran's claim should not be granted." Drake, 71 Am. U. L. Rev. at 1630. Such a result cannot be squared with the pro-veteran canon or the plain language of § 7261(b)(1).

A. The Federal Circuit has abrogated to the VA a legal inquiry more appropriate for the judiciary.

The benefit-of-doubt rule requires "an approximate balance of positive and negative evidence regarding any issue material" to the veteran's benefits claim. § 5107(b). And § 7261(b)(1) incorporates § 5107(b), mandating that the Veterans Court "take due account" of the VA's application of the benefit-of-doubt rule.

The determination of whether the positive and negative evidence are in "approximate balance," while dependent on questions of fact, is a legal question reserved for judicial—not agency—resolution. *See, e.g.*, *Lynch v. McDonough*, 21 F.4th 776, 783 (Fed. Cir. 2021) (J. Reyna concurring-in-part) (advocating for meaningful "appellate review in all cases" regarding "the question of whether the evidence is in approximate balance under § 5107(b)"); *Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) (Veterans Court can "review the Board's weighing of the evidence; it may not weigh any evidence itself."); *Bagby v. Derwinski*, 1 Vet. App. 225, 227 (1991) (concluding that whether facts are sufficient to meet a statutorily required burden is "a legal determination subject to *de novo* review"); *Gilbert*, 1 Vet. App. at 60 (Kramer, J., concurring) (stating that the proper standard of review for VA determinations applying the benefit-of-doubt rule is *de novo*). Whether § 5107(b) has been properly applied therefore cannot be subject to clear error review under § 7261(a)(4).

The Veterans Court reviews VA benefits decisions in an Administrative Procedure Act-like (APA) review. *See Shinseki*, 556 U.S. at 406–07 (comparing Veterans Court review to APA approach). In so doing, the VA's fact-findings are entitled to deference provided that there is "evidence to support the findings," *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 51 (1936), but at no point should the agency "decide all relevant questions of law." 5 U.S.C. § 706. Such judgment is reserved for the courts. *Marbury*, 1 Cranch at 177. Indeed, there is no

deference to agencies for resolutions of questions of law and § 7261(b)(1) is no different. *See United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 544 (1990) ("The interpretation of the meaning of statutes, as applied to justiciable controversies is exclusively a judicial function."). The VA should not therefore enjoy the deference typically afforded to its findings of fact in determining whether § 7261(b)(1) has been met.

Such a reading of the statute is similar to the requirements for other agency proceedings. For example, in the patent context, the Patent Trial and Appeal Board (PTAB), an executive agency, reviews *inter partes* petitions that are subject to the APA. *Fanduel, Inc. v. Interactive Games LLC*, 966 F.3d 1334, 1339 (Fed. Cir. 2020). Many of these *inter partes* petitions involve "a question of law based on underlying fact." *Uniloc 2017 LLC v. Facebook Inc.*, 989 F.3d 1018, 1031 (Fed. Cir. 2021). While the PTAB's findings of fact are afforded deference, the ultimate legal conclusion is reviewed by the Federal Circuit *de novo*. *Id.*

So too, should the Veterans Court conduct *de novo* review of questions implicating the benefit of the doubt. *See* Pet. Br. at 36–37 ("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 "approximate balance" determination, along with the subsequent application of the benefit of the doubt, is ultimately a question of law based on underlying fact.

The Veterans Court should therefore assess in all cases whether any agency action is inconsistent with §§ 5107(b) and 7261(b)(1) separate from the clear error review mandated by § 7261(a)(4).

B. Viewed through the pro-veteran canon, the plain language of § 7261(b)(1) unambiguously requires judicial review of the benefit-of-doubt.

The plain language of § 7261(b) requires the Veterans Court to "review the record of proceedings" and assess whether there were material issues for which there was an "approximate balance" of evidence regarding any material issue. *See* §§ 5107(b) and 7261(b); Pet. Br. at 23–27. The "clearly erroneous" inquiry, however, is set forth in a separate provision: § 7261(a). Yet, the Federal Circuit's interpretation of § 7261(b) essentially collapses the benefit of the doubt inquiry into the "clearly erroneous" review, thereby ceding proper review of the application of the benefit-of-doubt rule to the agency in view of the deference offered to VA fact-findings.

So, too, does the Federal Circuit's ruling make it more difficult for benefits claims to be granted while also ignoring all the reasons for, and amendments to, the legislation that resulted in the creation of the Veterans Benefits Act of 2002. Section I.B *supra*; *see* Pub. L. No. 107-330, 116 Stat. 2820, 2832; *Hodge v. West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998) ("in the context of veterans' benefits where the system of awarding compensation is so uniquely pro-claimant, the importance of systemic fairness and the

appearance of fairness carries great weight"). This cannot be the correct interpretation of § 7261(b)(1).

For one, the placement of § 7261(b)(1) within the Veterans Benefits Act of 2002, Pub. L. No. 107-330, 116 Stat. 2820, contradicts the Federal Circuit's interpretation. The Veterans Benefits Act of 2002 amended § 7261(a) to grant the Veterans Court power to reverse or set aside VA fact-findings. 148 Cong. Rec. H8925, H9002 (Nov. 14, 2002) (§ 401(a)). It also amended § 7261(b) to explicitly require the Veterans Court to "take due account of the Secretary's application of section 5107(b)." *Id.* (§ 401(b)).

Of the amendments promulgated by the Veterans Benefits Act of 2002, Congress placed § 7261 (numbered § 401 when the legislation was enacted) under "Title IV—Judicial Matters" and titled the section "Standard for Reversal by Court of Appeals for Veterans Claims of Erroneous Finding of Fact by Board of Veterans' Appeals." Pub. L. No. 107-330, 116 Stat. at 2832. While § 7261(a) actually speaks to the "Standard for Reversal," as indicated by the subsection title, § 7261(b) is titled "Requirements for Review." *Id.* The placement of § 7261(b)(1) within the Veterans Benefits Act of 2002 suggests that the Veterans Court is *required* to judicially review the application of § 5107(b) in all appeals from the VA. *Cf. INS v. National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("the title of a statute or section can aid in resolving an ambiguity in the legislation's text").

The plain language of the statute aligns with this notion. Section 7261(b)(1) recites that the Veterans

Court "*shall* . . . take due account of the Secretary's application of section 5107(b)." (emphasis added). "[T]he use of 'shall' in a statute makes what follows mandatory." *Hennepin Cnty. v. Fed. Nat. Mortg. Ass'n*, 742 F.3d 818, 822 (8th Cir. 2014); *Norman v. U.S.*, 942 F.3d 1111, 1117 (Fed. Cir. 2019). And § 5107(b) also requires the VA to apply the benefit-of-doubt rule: "the Secretary *shall* give the benefit of the doubt to the claimant." (emphasis added). That Congress incorporated § 5107(b) into § 7261(b)(1) shows the importance of the benefit-of-doubt rule to the veterans benefits scheme. It should therefore be reviewed on appeal independent of any clear error review.

C. The Federal Circuit's reading of § 7261(b)(1) imputes a higher burden on veterans to initiate appellate review of the benefit of the doubt contrary to any pro-veteran interpretation.

To hold that the application of the benefit-of-doubt rule is subject to anything other than *de novo* review creates a heavy burden on the veteran. Under the Federal Circuit's ruling below, the Veterans Court is required to assess the application of §§ 5107(b) and 7261(b)(1) only in the event that such an issue is presented. *Bufkin*, 75 F.4th at 1373 (citing § 7261(a)). It does not require the Veterans Court to review the record before the VA "to address the benefit of the doubt rule even if there was no challenge to the underlying facts found by the [VA] Board or to the Board's application of the benefit of the doubt rule." *Id.* at 1372–73.

Not only does this ruling defy this Court's admonition that veterans statutes must "be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation," *Boone*, 319 U.S. at 575, it "fails to account for the purpose underlying the entire statutory scheme providing benefits to veterans." *Procopio*, 913 F.3d at 1385; *see also Skoczen v. Shinseki*, 564 F.3d 1319, 1328 (Fed. Cir. 2009) ("For [the Federal Circuit] to disregard in our analysis the uniquely pro-veteran, non-adversarial nature of the veterans' claims process would be wrong.") (citing H.R. Rep. No. 100-963, at 13). The Federal Circuit's ruling improperly heightens the burden on the veteran to raise issues implicating the benefit of the doubt. *See Hodge*, 155 F.3d at 1360, 1362 (rejecting statutory interpretation of 38 U.S.C. § 5108 that makes it more difficult for veteran to submit evidence in benefits cases because it was "inconsistent with the underlying purposes and procedures of the veterans' benefits award scheme").

But what if the veteran is unable to do so? As Judge Reyna opined in *Lynch v. McDonough*, the VA is under no obligation to explain that if it "internally recognizes the evidence is close but finds in the end that the evidence 'persuasively' precludes the veteran's claim, the VA does not need to disclose that the evidence may have been close." 21 F.4th 776, 783 (Fed. Cir. 2021) (J. Reyna, concurring-in-part). This is not mere speculation—in the fiscal year of 2023, most of the Veterans Court's decisions "were also remands to the Board to provide additional 'reasons and bases' to support why the Board denied" the veteran's claim for benefits. *Dep't of Veterans Affairs Board of*

Veterans' Appeals Annual Report, Fiscal Year (FY) 2023 at 11. Failure to explain reasons for denial of benefits "shields such determinations from meaningful appellate review under § 5107(b)." *Lynch*, 21 F.4th at 783. It also prevents veterans from presenting issues implicating the benefit of the doubt, as the Federal Circuit has interpreted § 7261(b)(1) to require. *Bufkin*, 75 F.4th at 1372–73. *But see Henderson*, 562 U.S. at 440 ("The VA is charged with the responsibility of assisting veterans in developing evidence that supports their claims, and in evaluating that evidence, the VA must give the veteran the benefit of any doubt."). This cannot be the correct interpretation—it does not honor "the character of the veterans' benefits statutes" as "strongly and uniquely pro-claimant." *Hodge*, 155 F.3d at 1362.

The Federal Circuit's decision serves only to present yet another obstacle for veterans to claim benefits. It does not effectuate the purpose of the benefit-of-doubt rule—to ensure that the veteran prevails in the event there is a close case "in recognition of our debt to our veterans." *Gilbert*, 1 Vet. App. at 54.

The Federal Circuit's incorrect interpretation of § 7261(b)(1) should therefore be reversed so "that justice shall be done, that all veterans so entitled receive the benefits due to them." *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006).

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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