No. 23-713

In the Supreme Court of the United States

JOSHUA E. BUFKIN AND NORMAN F. THORNTON,
PETITIONERS

v.

DENIS R. MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS

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

BRIEF FOR THE RESPONDENT

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
SOPAN JOSHI
Assistant to the Solicitor General
PATRICIA M. MCCARTHY
ELIZABETH M. HOSFORD
L. MISHA PREHEIM
EVAN WISSER
MEREDYTH COHEN HAVASY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

RICHARD J. HIPOLIT
Principal Deputy General Counsel
BRIAN D. GRIFFIN
Deputy Chief Counsel
CHRISTOPHER O. ADELOYE
CHRISTINA L. GREGG
Attorneys
Department of Veterans Affairs
Washington, D.C. 20420

QUESTION PRESENTED

Section 5107(b) of Title 38 provides that, in the course of resolving claims for veterans' benefits, the Secretary of Veterans Affairs "shall 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 the determination of a matter." 38 U.S.C. 5107(b). Section 7261 governs review of the Secretary's decisions in the Court of Appeals for Veterans Claims. Subsection (a) provides that, "to the extent necessary to its decision and when presented," the court shall set aside or reverse any "finding of material fact adverse to the claimant * * * if the finding is clearly erroneous." 38 U.S.C. 7261(a)(4). "In making the determinations under subsection (a), the Court shall * * * take due account of the Secretary's application of section 5107(b)." 38 U.S.C. 7261(b)(1). The question presented is as follows:

Whether Section 7261's directive to "take due account" of the Secretary's application of Section 5107(b) when "making the determinations under subsection (a)" is limited by the scope of review specified in Subsection (a).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases—Continued: Page

Statutes, regulations, and rule:

Statutes, regulations, and rule—Continued: Page

In the Supreme Court of the United States

No. 23-713

JOSHUA E. BUFKIN AND NORMAN F. THORNTON,
PETITIONERS

v.

DENIS R. MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS

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

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

In *Bufkin*, the decision of the court of appeals (Pet. App. 1a-11a) is reported at 75 F.4th 1368. The decision of the Court of Appeals for Veterans Claims (Veterans Court) (Pet. App. 17a-30a) is available at 2021 WL 3163657. The decision of the Board of Veterans' Appeals (Board) (Pet. App. 53a-65a) is unreported. In *Thornton*, the decision of the court of appeals (Pet. App. 12a-16a) is available at 2023 WL 5091653. The decision of the Veterans Court (Pet. App. 31a-52a) is available at 2021 WL 2389702. The decision of the Board (Pet. App. 66a-90a) is unreported.

JURISDICTION

In *Bufkin*, the court of appeals entered judgment on August 3, 2023. On October 16, 2023, the Chief Justice

extended the time within which to file a petition for a writ of certiorari to and including December 31, 2023. In *Thornton*, the court of appeals entered judgment on August 9, 2023. On October 16, 2023, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 2, 2024. The joint petition for a writ of certiorari was filed on December 29, 2023, and was granted on April 29, 2024. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

38 U.S.C. 5107 provides:

> (a) CLAIMANT RESPONSIBILITY.—Except as otherwise provided by law, a claimant has the responsibility to present and support a claim for benefits under laws administered by the Secretary.
>
> (b) BENEFIT OF THE DOUBT.—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. 7261 provides in pertinent part:

> (a) In any action brought under this chapter, the Court of Appeals for Veterans Claims, to the extent necessary to its decision and when presented, shall—
>
> * * *
>
> (4) in the case of a finding of material fact adverse to the claimant made in reaching a decision

in a case before the Department with respect to benefits under laws administered by the Secretary, hold unlawful and set aside or reverse such finding if the finding is clearly erroneous.

(b) 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.

(c) In 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.

STATEMENT

A. Background

1. As a general matter, the Department of Veterans Affairs (VA) provides compensation to veterans "[f]or disability resulting from personal injury suffered or disease contracted in line of duty." 38 U.S.C. 1110 (Supp. IV 2022) (wartime); 38 U.S.C. 1131 (Supp. IV 2022) (peacetime). Such disabilities are called "service connected." Cf. 38 U.S.C. 101(16) (Supp. IV 2022) (defining "'service-connected'" for slightly different purposes to mean "incurred or aggravated * * * in line of duty in the active military, naval, air, or space service").

The VA has promulgated rules for determining when a veteran has a disability that qualifies as service-connected. See 38 U.S.C. 501(a)(1) (authority of the Secretary to prescribe "regulations with respect to the

nature and extent of proof and evidence and the method of taking and furnishing them in order to establish the right to benefits"). As relevant here, to establish service connection for post-traumatic stress disorder (PTSD), the VA requires "medical evidence diagnosing the condition in accordance with" applicable regulations; medical evidence linking the veteran's symptoms with an "in-service stressor," such as combat experience; and "credible supporting evidence that the claimed in-service stressor occurred." 38 C.F.R. 3.304(f); see 38 C.F.R. 4.125 (addressing the diagnosis of mental disorders such as PTSD). When the VA finds that a particular disability is service-connected, the agency applies a rating system that reflects "reductions in earning capacity" upon which the VA bases "payments of compensation" for "specific injuries or combination of injuries." 38 U.S.C. 1155; see 38 C.F.R. Pt. 4; see also 38 C.F.R. 4.130 (disability ratings for mental disorders).

2. A veteran seeking disability benefits generally is required to "present and support [his] claim for benefits." 38 U.S.C. 5107(a). The Secretary generally must then "make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim." 38 U.S.C. 5103A(a)(1). Once a record is developed, the Secretary must "consider all information and lay and medical evidence of record" when adjudicating a claim for benefits. 38 U.S.C. 5107(b).

Most relevant here, Section 5107(b) imposes an evidentiary rule known as the benefit-of-the-doubt rule. Specifically, Section 5107(b) provides that the Secretary "shall consider all information and lay and medical evidence of record," and that "[w]hen there is an approximate balance of positive and negative evidence re-

garding 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(b). The Secretary's implementing regulation similarly provides that "[w]hen, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant." 38 C.F.R. 3.102. The regulation states that a "reasonable doubt" is "one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim." *Ibid.* That doubt must reflect a "substantial doubt" that is "within the range of probability as distinguished from pure speculation or remote possibility." *Ibid.*

3. The VA's regional offices decide most benefits claims. *Shinseki* v. *Sanders*, 556 U.S. 396, 400 (2009). An adverse regional office decision "shall be subject to one review on appeal to the Secretary," although "[f]inal decisions on such appeals shall be made by the Board." 38 U.S.C. 7104(a); see 38 U.S.C. 511(a); 38 C.F.R. 20.104(a); see also Pet. App. 6a-7a. In the 1988 Veterans' Judicial Review Act, Pub. L. No. 100-687, Div. A, 102 Stat. 4105, Congress established the Veterans Court and vested it with exclusive jurisdiction to review Board decisions. § 301(a), 102 Stat. 4113; see 38 U.S.C. 7251; 38 U.S.C. 7252(a). The Veterans Court's review is "limited to the scope provided in [38 U.S.C. 7261]." 38 U.S.C. 7252(b).

In 38 U.S.C. 7261, Congress defined the relevant scope of review in veterans' benefits cases. Among other things, the Veterans Court decides "all relevant questions of law," including necessary interpretations of any "constitutional, statutory, and regulatory provi-

sions," and sets aside or reverses "a finding of material fact adverse to the claimant * * * if the finding is clearly erroneous." 38 U.S.C. 7261(a)(1) and (4). The court's review, however, may address issues only "to the extent necessary to its decision and when presented." 38 U.S.C. 7261(a). And "[i]n no event shall findings of fact made by the Secretary * * * be subject to trial de novo by the [Veterans] Court." 38 U.S.C. 7261(c). Congress has further provided that, "[i]n making the determinations under subsection (a)," the Veterans Court "shall review the record" and "take due account" of both "the Secretary's application of section 5107(b)" and "the rule of prejudicial error." 38 U.S.C. 7261(b).

B. Proceedings Below

Petitioners are former service members who filed claims for disability benefits with the VA. Petitioners were disappointed with the VA's disposition of those claims, and they sought review in the Veterans Court and then in the Federal Circuit. In each case, the Veterans Court affirmed the Board's decision and the Federal Circuit affirmed the judgment of the Veterans Court.

1. a. Petitioner Joshua Bufkin served in the United States Air Force for six months in late 2005 and early 2006. Pet. App. 2a. Although Bufkin "did well in basic training," he "began repeatedly failing his required training classes" for the military police, putting him at risk of being "separated from the military" or reassigned "to a much simpler career field in the Air Force (such as cook)." J.A. 11, 13. Bufkin attributed his poor performance to marital troubles; specifically, he told officials that his wife, whom he had married shortly after basic training, wanted him to leave the military and had threatened to commit suicide if he did not. J.A. 11-12.

The Air Force acknowledged the difficulty and recommended that Bufkin separate from service with the opportunity to return if his domestic situation improved. J.A. 12. Bufkin "fully concur[red]" with the recommendation and was granted a nonprejudicial hardship discharge. J.A. 14.

Seven years later, Bufkin filed a disability-benefits claim with the VA, claiming service connection for several conditions, including PTSD. Pet. App. 2a. In support of his PTSD claim, Bufkin provided medical records from his visits with a VA psychiatrist, Dr. Robert Goos, between February and June of 2013. *Ibid.* Dr. Goos's notes stated that Bufkin met the diagnostic criteria for PTSD, but that Dr. Goos could not identify the specific stressor that had caused the PTSD or determine whether the stressor related to Bufkin's military service. *Ibid.* Accordingly, the VA Regional Office rejected Bufkin's PTSD claim because of an insufficient link between his symptoms and an in-service stressor. *Id.* at 2a-3a.

Bufkin then underwent additional VA examinations in June 2015 and April 2018. See Pet. App. 57a-60a. Both of the examiners opined that Bufkin's symptoms did not meet the criteria for PTSD. *Id.* at 3a. In December 2019, a VA treatment provider stated that Bufkin "suffers from chronic PTSD due to a number of issues, but some examiners do not consider this to be PTSD." *Ibid.* (brackets, citation, and ellipsis omitted); see J.A. 77. The VA continued to deny the PTSD claim.

b. Bufkin appealed to the Board, which denied service connection for an acquired psychiatric disorder. Pet. App. 53a-65a. The Board reviewed in detail the various medical opinions and other lay evidence in the record, *id.* at 56a-64a, and found that the "preponder-

ance of the evidence" did not establish that Bufkin suffered from PTSD, *id.* at 60a. The Board acknowledged that the "medical records contain conflicting information as to whether [Bufkin] has been diagnosed with PTSD," but it observed that the records noting a PTSD diagnosis did not consider the criteria set forth in the Fifth Edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-5), as required for a diagnosis of a mental disorder. Pet. App. 56a; see 38 C.F.R. 4.125(a) (explaining that a "diagnosis of a mental disorder" must "conform to DSM-5"); 38 C.F.R. 4.130 (requiring rating agencies to "be thoroughly familiar with [DSM-5]").

In contrast, the Board described the June 2015 VA examiner's findings as "especially persuasive." Pet. App. 61a. The Board noted the examiner's determination that Bufkin "did not meet the diagnostic criteria for PTSD under DSM-5," and the examiner's explanation that Dr. Goos's contrary conclusion rested on an incomplete record because Dr. Goos had not had an opportunity to review all of Bufkin's medical and training records. *Id.* at 57a; see *id.* at 61a. The Board then determined that, because "the preponderance of the evidence [wa]s against [Bufkin's] claim," the benefit-of-the-doubt rule was "not applicable." *Id.* at 64a.

c. The Veterans Court affirmed. Pet. App. 17a-30a. The court found that the Board had "assess[ed] the evidence of record and determine[d] the credibility and weight to be assigned to that evidence," including the "evidence favorable to [Bufkin]" and the "conflicting evidence of record as to whether [Bufkin] had a PTSD diagnosis." *Id.* at 21a. The court further found that the Board had "provide[d] reasons for rejecting material evidence favorable to [Bufkin]," in particular Dr. Goos's

findings. *Ibid.*; see *id.* at 21a-25a. The Veterans Court concluded that "the Board's assessment of this competing evidence is not clearly wrong" and that "the Board did not clearly err in weighing the evidence." *Id.* at 24a-25a.

The Veterans Court also explained that the benefit-of-the-doubt rule was inapplicable because the Board had found that the preponderance of the evidence weighed against Bufkin's claim. Pet. App. 29a-30a. Citing its decision in *Mattox* v. *McDonough*, 34 Vet. App. 61 (2021), affirmed, 56 F.4th 1369 (Fed. Cir. 2023), the court explained that the benefit-of-the-doubt doctrine considers the quality of evidence, not simply the quantity. Pet. App. 29a. Because the Board had found the June 2015 opinion more comprehensive and persuasive than opinions supporting a PTSD diagnosis, and because that finding was not clearly erroneous, the Veterans Court affirmed the Board's decision. *Id.* at 29a-30a.

d. The Federal Circuit affirmed. Pet. App. 1a-11a.

The Federal Circuit first agreed with Bufkin that "the Veterans Court can review the entire record of proceedings before the Secretary in determining whether the benefit of the doubt rule was properly applied." Pet. App. 9a. But the Federal Circuit disagreed with Bufkin's argument that the Veterans Court must "sua sponte 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." *Ibid.* The Federal Circuit observed that "Section 7261(a) explicitly prohibits such an expansive interpretation of the Veterans Court's jurisdiction," by providing that "the Veterans Court 'shall decide' issues only 'when presented.'" *Ibid.* (quoting 38 U.S.C. 7261(a)).

The Federal Circuit also rejected Bufkin's argument that "[Section] 7261(b) requires the Veterans Court to conduct a 'de novo, non-deferential' review of the Board's application of the benefit of the doubt rule." Pet. App. 10a. Citing its prior decision in *Roane* v. *McDonough*, 64 F.4th 1306 (2023), the Federal Circuit explained that "the scope of the Veterans Court's review is limited" by Section 7261(a), which "allows the Veterans Court to review facts only under the clearly erroneous standard." Pet. App. 10a. Reviewing the Veterans Court's analysis, the Federal Circuit determined that "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." *Id.* at 11a.

2. a. Petitioner Norman Thornton served in the United States Army for approximately three years, from 1988 to 1991. Pet. App. 32a. In 1994, the VA granted benefits for "an undiagnosed illness" at a rating of 40%, based on Thornton's symptoms of "fatigue, joint pain, gastrointestinal bleeding, headaches, night sweats, nightmares, shortness of breath, nausea, numbness in both hands, body shakes, and diarrhea." *Ibid.* (citation omitted). Some years later, Thornton additionally sought benefits for service-connected PTSD. *Id.* at 33a. The VA granted benefits for PTSD in February 2005, with a disability rating of 10%. *Ibid.* A 10% rating for mental disorders like PTSD generally involves "mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress, or symptoms controlled by continuous medication." 38 C.F.R. 4.130.

Ten years later, Thornton applied for an increased rating. Pet. App. 33a. VA examinations in July and De-

cember 2015 identified several relevant symptoms, including occupational and social impairment, depressed mood, anxiety, memory loss, sleep impairment, and difficulty adapting to stressful circumstances. *Id.* at 33a-35a. Both examinations also concluded that Thornton's "routine daily activities were restricted to 50% to 75% of his pre-illness level, but he had no periods of incapacitation." *Id.* at 34a; see *id.* at 33a. The VA continued the 40% rating for the undiagnosed illness, but increased Thornton's PTSD disability rating to 50%, effective July 2015. *Id.* at 34a-35a. A 50% rating for mental disorders generally involves "reduced reliability and productivity" because of symptoms like "panic attacks more than once a week," "impairment of short- and long-term memory," and "impaired judgment." 38 C.F.R. 4.130.

b. Thornton appealed to the Board, which denied his claim for a PTSD disability rating higher than 50%. Pet. App. 66a-90a. The Board also denied his claim for a rating higher than 40% for his undiagnosed illness, but granted Thornton's claim for a total disability based on his unemployability as a result of the combination of the two illnesses. *Id.* at 66a-67a. Only the PTSD ruling is at issue in this Court.

As to that ruling, the Board summarized the findings from the two 2015 PTSD evaluations and other treatment records. Pet. App. 79a-82a. In reviewing Thornton's symptoms and the evidence supporting them, the Board first applied the benefit-of-the-doubt rule in Thornton's favor to determine that his memory loss had been caused by his PTSD. *Id.* at 80a-81a. The Board explained that the July 2015 VA examiner had "indicated that [Thornton's] memory lapses may not be due to his PTSD, but he did not provide any other po-

tential etiology for such episodes." *Id.* at 80a. Based on the inconclusive statements of the examiner, the fact that "memory issues are known to be associated with PTSD," and prior medical records showing no other diagnoses that could be related to Thornton's memory loss, the Board "resolv[ed] reasonable doubt in favor of" Thornton, found that his memory loss was "attributable to his PTSD," and considered his memory loss as part of the overall evaluation of his disability rating. *Id.* at 80a-81a.

The Board ultimately determined that Thornton's symptoms most closely matched the 50% rating criteria. Pet. App. 82a-86a. The Board acknowledged that Thornton's difficulty in adapting to stressful circumstances was a symptom aligned with a 70% rating. *Id.* at 84a. That rating for mental disorders generally involves "deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood, due to such symptoms as: * * * difficulty in adapting to stressful circumstances," among other symptoms. 38 C.F.R. 4.130. The Board explained, however, that "the presence of a single symptom is not dispositive of any particular disability level," and that "[t]he cumulative evidence of record show[ed] that [Thornton's] overall level of occupational and social functioning is consistent with the moderate degree of impairment that is contemplated by a 50 percent rating." Pet. App. 84a-85a. With respect to the benefit-of-the-doubt rule, the Board concluded that "the evidence [wa]s not approximately evenly balanced," *id.* at 83a, and that "[t]here [wa]s no doubt to be resolved" in determining that Thornton did not have symptoms consistent with a higher disability rating for his PTSD, *id.* at 85a.

c. The Veterans Court affirmed. Pet. App. 31a-52a. The court held that the Board had properly engaged in a holistic analysis, had taken note of Thornton's symptoms, and had "considered their impact on his occupational and social functioning, thus complying with the legal requirements for determining the degree of disability." *Id.* at 40a; see *id.* at 39a-40a. The court further observed that the Board had applied the benefit-of-the-doubt rule in Thornton's favor to find that his memory lapses were attributable to his PTSD. *Id.* at 42a-43a. The court then summarized the Board's findings related to its overall rating decision: "the evidence showed a moderate degree of impairment better contemplated by the 50% rating than by the 70% rating"; "the evidence was not approximately evenly balanced"; and "there was no doubt to be resolved on that issue." *Id.* at 42a. The Veterans Court concluded that, "[i]n accordance with section 7261(b)(1), the Court takes due account of the Board's application of section 5107(b)—and finds no error." *Id.* at 43a.

d. The Federal Circuit affirmed. Pet. App. 12a-16a. The court observed that "[t]he same interpretation questions Mr. Thornton raises in this case recently were presented to and decided by this Court" in *Bufkin*. *Id.* at 15a; see *id.* at 15a-16a. Thornton argued "that 'taking due account' of the benefit of the doubt rule requires the Veterans Court to conduct an additional separate and independent de novo review of the entire record." *Id.* at 15a. The court of appeals rejected that argument, explaining 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." *Ibid.*

SUMMARY OF ARGUMENT

A. Under Section 5107(b), the Secretary first determines whether the evidence on a material issue is in "approximate balance." 38 U.S.C. 5107(b). When a claimant challenges the Secretary's weighing of the evidence, the Veterans Court must review the Secretary's approximate-balance determination under the clear-error standard prescribed by Section 7261(a)(4). Section 7261(b) directs the court to take due account of the Secretary's application of Section 5107(b) only "[i]n making the determinations under subsection (a)." 38 U.S.C. 7261(b). Review of the Secretary's approximate-balance determination thus is not a separate freestanding inquiry, but instead is an *aspect* of the Veterans Court's APA-style review under Section 7261(a), and it should be conducted under the standards set forth in that provision.

The Secretary's determination that the evidence on a particular material issue is not in approximate balance is itself a factual finding, or at worst a predominantly factual mixed law-fact question. Such a determination depends on the agency's evaluation of factors like credibility, competence, reliability, and relevance. Because those are quintessentially factual determinations, they are subject to review only for clear error under Section 7261(a)(4). To be sure, a contention that the Secretary committed *legal error* in applying Section 5107(b)—say, by relying on an incorrect understanding of the term "approximate balance"—would be reviewed de novo. But if the Secretary articulates the correct legal standard, and the claimant challenges only the agency's weighing of the evidence, clear-error review applies.

Petitioners' reliance on statutory history and perceived congressional intent is misplaced. Petitioners may be correct that Congress added Section 7261(b)(1)

to the statute in 2002 out of concern that the Veterans Court was not adequately policing the Secretary's application of the benefit-of-the-doubt rule. The amendment would serve a useful purpose, however, even if it simply confirmed and emphasized a pre-existing legal duty. Petitioners' speculation about a possible congressional policy compromise cannot override the clear import of the statutory text.

Petitioners' remaining arguments on this issue likewise lack merit. Although the statutory scheme as a whole reflects Congress's special solicitude for veterans, Section 7261(a)'s judicial review provisions adhere to usual norms of appellate review of agency action, with the Veterans Court reviewing legal challenges de novo while giving deference to the agency's factual findings. Section 7261(b)(2), which directs the Veterans Court to apply harmless-error principles in reviewing the Board's decisions, provides no basis for rejecting the most natural reading of Section 7261(b)(1)'s text. And because the pro-veteran canon comes into play only after the court has considered all other tools of statutory construction, it provides no ground for the Court to adopt an interpretation it would otherwise reject.

B. Because both petitioners presented benefit-of-the-doubt arguments in the Veterans Court, this Court need not decide whether the Veterans Court would be required to address the Secretary's application of Section 5107(b) sua sponte in a case where the claimant did not raise such a challenge. If the Court does consider that question, it should hold that benefit-of-the-doubt issues are subject to the same party-presentation requirements as other challenges to the Board's benefits decisions. Section 7261(a) states that the Veterans Court should make the determinations listed in that

provision only "to the extent necessary to its decision and when presented." 38 U.S.C. 7261(a). Because the Veterans Court reviews benefit-of-the-doubt issues only in the course of exercising its authority under Section 7261(a), it should consider such issues only when they are "presented" by the claimant.

C. The courts below properly interpreted and applied Section 7261 in deciding petitioners' appeals. Petitioners focus on the Federal Circuit's statement in *Thornton* 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 required by § 7261." Pet. App. 15a. But the court's point was simply that, when a claimant challenges the Secretary's determination that the evidence on a particular issue is not in approximate balance, the Veterans Court reviews that determination only for clear error and does not make its own de novo determination whether an approximate balance existed. That statement accurately describes the law in cases like these, where petitioners challenge only the Board's weighing of the evidence and do not argue that the Board misinterpreted the language of Section 5107(b).

ARGUMENT

By its plain terms, Section 7261(b)(1) directs the Veterans Court to "take due account of the Secretary's application of section 5107(b)" only "[i]n making the determinations under subsection (a)." 38 U.S.C. 7261(b)(1). The "due account" review mandated by Section 5107(b) thus is *an aspect of*, rather than a freestanding inquiry *separate from*, the APA-style review specified by Section 7261(a). Petitioners now acknowledge (Br. 33) that Subsection (a) "defines the scope of the review required under subsection (b)(1)."

Petitioners nevertheless contend that the Veterans Court (a) must make its own de novo determination whether the evidence on a material issue is in approximate balance (*e.g.*, Pet. Br. 32, 46-47) and (b) must undertake that inquiry whether or not the claimant challenges the Secretary's benefit-of-the-doubt determination (*e.g.*, *id.* at 49). Those arguments lack merit. In particular, petitioners fail to appreciate the effect of two important features of Subsection (a) that limit the scope of the review mandated by Subsection (b)(1).

First, the Secretary's factual findings may be reviewed only for clear error. 38 U.S.C. 7261(a)(4). The Secretary's determination that the evidence on a material issue is not in "approximate balance," 38 U.S.C. 5107(b), is itself a factual finding and is therefore subject only to clear-error review. Accordingly, if a claimant challenges the Board's weighing of the evidence on a material issue, and the Veterans Court concludes that the Secretary's approximate-balance determination is not clearly erroneous, the court has taken "due account" of the Secretary's application of Section 5107(b).

Petitioners are thus incorrect to assert (Br. 32-33, 46-47) that the Veterans Court should independently reweigh the evidence to determine whether it is in approximate balance. Such a reweighing would effectively constitute de novo review of the Secretary's approximate-balance determination. Reading the statute to compel such a reweighing would contradict Subsection (a)(4)'s specification of clear-error review as the appropriate standard, 38 U.S.C. 7261(a)(4), and it would be inconsistent with Subsection (c)'s prohibition on "trial de novo" of "findings of fact made by the Secretary," 38 U.S.C. 7261(c).

Second, the Veterans Court is directed to make the determinations specified in Subsection (a) only "to the extent necessary to its decision and when presented." 38 U.S.C. 7261(a). Thus, if legal or factual issues touching on the benefit-of-the-doubt rule are not properly presented, or if resolution of those issues would be unnecessary to the court's decision, the court has no further obligation to review the Secretary's application of Section 5107(b) with respect to those issues. To the extent petitioners suggest (Br. 50-51) that the Veterans Court must consider sua sponte the benefit-of-the-doubt rule in every case or as to every benefits claim raised on appeal, that suggestion is incorrect.

The Federal Circuit correctly recognized those principles, and the Veterans Court correctly applied them in each of these consolidated cases. The judgments below should therefore be affirmed.

A. When A Claimant Challenges The Board's Weighing Of The Evidence On A Material Issue, The Veterans Court Takes "Due Account" Of The Secretary's Application Of Section 5107(b) By Reviewing The Secretary's Approximate-Balance Determination For Clear Error

Section 7261(b) requires the Veterans Court to take "due account of the Secretary's application of section 5107(b)" only when "making the determinations under" Section 7261(a); the plain text of the provision thus makes clear that the account which is "due" is an aspect of the review in Section 7261(a), not a freestanding inquiry. 38 U.S.C. 7261(b)(1). Section 7261(a), in turn, provides that factual findings are subject only to clear-error review—and the Secretary's determination that the evidence on a particular issue is not in approximate balance is just such a factual finding. Accordingly, the Veterans Court has taken "due account of the Secre-

tary's application of section 5107(b)" when it concludes that the Secretary's approximate-balance determination is not clearly erroneous. Petitioners' contrary position cannot be squared with the plain text of Section 7261, and their reliance on statutory history, perceived congressional intent, and general pro-veteran norms is therefore misplaced.

1. Under the plain text of Section 7261(b), Section 7261(a) limits and defines what it means to take "due account" of the Secretary's application of Section 5107(b)

a. Section 7261 establishes the scope of the review that the Veterans Court conducts in appeals from VA benefits determinations. See 38 U.S.C. 7252(b) ("The extent of the review shall be limited to the scope provided in section 7261."). Subsection (a) of Section 7261 empowers and directs the court to engage in review similar to that of a court reviewing agency action under the Administrative Procedure Act (APA) and traditional principles of administrative law. See *Henderson* v. *Shinseki*, 562 U.S. 428, 432 n.2 (2011). Among other things, the Veterans Court "decide[s] all relevant questions of law," including by "interpret[ing] constitutional, statutory, and regulatory provisions," 38 U.S.C. 7261(a)(1); "compel[s] action" that it determines to have been "unlawfully withheld or unreasonably delayed," 38 U.S.C. 7261(a)(2); "hold[s] unlawful and set[s] aside decisions" that are arbitrary and capricious, or otherwise unlawful, 38 U.S.C. 7261(a)(3); and sets aside or reverses the Secretary's findings of material fact if the findings are "clearly erroneous," 38 U.S.C. 7261(a)(4). Subsection (a) thus largely tracks the language of the APA judicial-review provision set forth in 5 U.S.C. 706.

Like a court reviewing agency action under the APA, the Veterans Court engages in that review only "to the extent necessary to its decision and when presented." 38 U.S.C. 7261(a); cf. 5 U.S.C. 706 (same). Also as under the APA, the Veterans Court, "[i]n making the determinations" above, shall "review the record" and "take due account of the rule of prejudicial error." 38 U.S.C. 7261(b)(2); see *Shinseki* v. *Sanders*, 556 U.S. 396, 406-407 (2009); cf. 5 U.S.C. 706.

In certain respects, however, the review prescribed by Section 7261 differs from APA review. As noted, the Veterans Court reviews factual findings for clear error, 38 U.S.C. 7261(a)(4), rather than for "substantial evidence," 5 U.S.C. 706(2)(E). In addition, while the APA contemplates that in some circumstances the facts may be "subject to trial de novo by the reviewing court," 5 U.S.C. 706(2)(F), Section 7261 directs that "[i]n no event shall findings of fact made by the Secretary * * * be subject to trial de novo by the [Veterans] Court," 38 U.S.C. 7261(c). And when a claimant has been denied benefits solely because of his failure to comply with a regulation, the Veterans Court may review only the claimant's "compliance with and the validity of the regulation." 38 U.S.C. 7261(d).

Finally, in a provision added in 2002, Congress directed that "[i]n making the determinations under subsection (a)" of Section 7261, the Veterans Court "shall review the record" and "take due account of the Secretary's application of section 5107(b)." 38 U.S.C. 7261(b)(1); see Veterans Benefits Act of 2002, Pub. L. No. 107-330, § 401(b), 116 Stat. 2832. Section 5107(b) directs the Secretary to "consider all information and lay and medical evidence of record," and to "give the benefit of the doubt to the claimant" "[w]hen there is an

approximate balance of positive and negative evidence regarding any issue material to the determination of a matter." 38 U.S.C. 5107(b).

b. The principal disputed question in this case concerns the meaning of the directive that the Veterans Court "shall * * * take due account of the Secretary's application of section 5107(b)." 38 U.S.C. 7261(b)(1). The government agrees with petitioners (Pet. Br. 29-30) that, in this particular context, "shall" is best read to impose a mandatory command. See *Shapiro* v. *McManus*, 577 U.S. 39, 43 (2015); cf. *United States* v. *Texas*, 599 U.S. 670, 682 (2023). The government also agrees that to "'take account of' something means 'to give attention or consideration to' it." Pet. Br. 30 (citation omitted).

Subsection (b)(1), however, directs the court not simply to "take account of" the Secretary's application of Section 5107(b), but to "take *due* account of" that application. 38 U.S.C. 7261(b)(1) (emphasis added). "Due" means "appropriate" or "proper." See 4 *The Oxford English Dictionary* 1105 (2d ed. 1989) ("Merited, appropriate: proper, right"); *Black's Law Dictionary* 515 (7th ed. 1999) ("Just, proper, regular, and reasonable"). Accordingly, the attention or consideration that the Veterans Court must pay to the Secretary's application of Section 5107(b) is that which is appropriate in the particular context where the court's review occurs. Cf. *Black's Law Dictionary* 516 (defining "due consideration" to mean "[t]he degree of attention properly paid to something, as the circumstances merit").

A critical piece of that context is the directive that the Veterans Court take due account of the Secretary's application of Section 5107(b) only "[i]n making the determinations under subsection (a)." 38 U.S.C. 7261(b).

That language makes clear that the Veterans Court's review of the Secretary's approximate-balance determination is an *aspect of*, and is subject to the statutory limits imposed on, the court's APA-style review under Subsection (a) of Section 7261. Two limits on Veterans Court review under Subsection (a) are particularly relevant here.

First, Subsection (a) directs the Veterans Court to make the listed determinations only "to the extent necessary to its decision and when presented." 38 U.S.C. 7261(a). We address that limit in more detail below. See pp. 38-41, *infra*. Second, and more relevant to the principal dispute in this case, the Veterans Court reviews factual findings only for clear error. 38 U.S.C. 7261(a)(4). Accordingly, as petitioners appear to recognize (cf. Pet. Br. 33, 43, 46), the Veterans Court must accept the Secretary's factual findings unless they are clearly erroneous when the court reviews the Secretary's application of Section 5107(b).

Petitioners generally acknowledge (Br. 27-35) the principles set forth above, and the government and petitioners largely agree on the Veterans Court's responsibilities under Section 7261. In particular, the parties agree that the court is obligated to review de novo a properly preserved claim of legal error in the Secretary's application of Section 5107(b). For example, if the Secretary found that the evidence on a material issue was in equipoise, but resolved that issue against the claimant on the ground that the claimant bore the burden of proof, the Veterans Court would be obliged to set aside that ruling as legally erroneous. The parties also agree that the Secretary's factual findings are reviewable only for clear error, and that examples of such factual findings include "'the existence of a present disa-

bility,'" an "'in-service incurrence or aggravation of a disease or injury,'" the "'causal relationship between'" the two, and the "competency of the examiner's findings." Pet. Br. 46 (citation omitted).

2. Under 38 U.S.C. 7261(a)(4), the Secretary's determination that the evidence is not in approximate balance is itself a factual finding reviewable only for clear error

The principal disagreement in this case concerns the proper characterization of the Secretary's determination that the evidence on a particular material issue is not in approximate balance. Petitioners assert that the approximate-balance determination is "a legal inquiry" that the Veterans Court must independently undertake. Pet. Br. 47; see *id.* at 32 ("The Veterans Court must therefore assess whether the evidence was in 'approximate balance' on any points material to a veteran's claim.") (citation omitted). That assertion is incorrect.

The Secretary's approximate-balance determination is itself a factual finding, which under the plain terms of 38 U.S.C. 7261(a)(4) is reviewable only for clear error. Determining whether evidence is in approximate balance requires assigning a particular weight to each piece of evidence—a task that necessarily involves consideration of factors such as credibility, competence, reliability, and relevance. Those are quintessentially factual determinations. See *U.S. Bank N.A.* v. *Village at Lakeridge, LLC*, 583 U.S. 387, 396 (2018) (explaining that to "marshal and weigh evidence" and "make credibility judgments" are factual tasks); *Anderson* v. *Bessemer City*, 470 U.S. 564, 574 (1985) ("weigh[ing] the evidence"); *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844, 855 (1982) ("evaluate the credibility of witnesses" and "weigh the evidence"); *Zenith*

Radio Corp. v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969) ("appraise and weigh the evidence"); see also *Teva Pharmaceuticals USA, Inc.* v. *Sandoz, Inc.*, 574 U.S. 318, 335 (2015) (crediting one expert's testimony while rejecting the testimony of another). In *Anderson*, for example, the Court explained that the clear-error standard of review applied both to the district court's subsidiary factual findings (*e.g.*, that the plaintiff in that case was the most qualified job applicant and had been asked questions not posed to other applicants, see 470 U.S. at 576-577) and to the district court's ultimate finding that the defendant had intentionally discriminated based on sex, see *id.* at 573 ("Because a finding of intentional discrimination is a finding of fact, the standard governing appellate review of a district court's finding of discrimination is" the clear-error standard "set forth in Federal Rule of Civil Procedure 52(a)."). Accordingly, under Section 7261(a)(4), the Veterans Court must review the Secretary's approximate-balance determination for clear error.

At a minimum, applying the statutory "approximate balance" standard to conflicting evidence in a particular case would present a *predominantly factual* mixed question for which the Secretary's determination likewise should be reviewed for clear error. Although Section 7261(a) does not specify a standard of review for mixed questions of fact and law, Subsection (a)(4) was plainly patterned on Federal Rule of Civil Procedure 52(a)(6), which governs in ordinary civil litigation. Subsection (a) more generally reflects standard principles of judicial review of agency action. See *Henderson*, 562 U.S. at 432 n.2. Accordingly, the principles of review that apply in those contexts should apply here too.

In those and other civil contexts involving review of mixed questions of fact and law, "the standard of review for a mixed question all depends—on whether answering it entails primarily legal or factual work." *U.S. Bank*, 583 U.S. at 396; see *Wilkinson* v. *Garland*, 601 U.S. 209, 221-222 (2024). And "tak[ing] a raft of case-specific historical facts, consider[ing] them as a whole, [and] balanc[ing] them one against another" is "about as factual sounding as any mixed question gets." *U.S. Bank*, 583 U.S. at 397 (footnote omitted); see *Wilkinson*, 601 U.S. at 222, 225 (holding that mixed question involving the adjudicator's "weigh[ing] [of] found facts" was "primarily factual" and that review of the adjudicator's decision therefore was "deferential"). Section 5107(b) likewise requires the Secretary to make a raft of case-specific findings of historical fact (including findings about the credibility and competence of each expert or provider, see Pet. Br. 46); to "consider all information and lay and medical evidence of record"; and to weigh the facts against each other to determine whether "there is an approximate balance of positive and negative evidence." 38 U.S.C. 5107(b). The resulting approximate-balance determination should thus be reviewed for clear error.

Petitioners' contrary view would needlessly require courts to draw abstruse distinctions between subsidiary facts—like the credibility and weight to be assigned to a particular treatment provider, which petitioners acknowledge is factual, see Pet. Br. 46—and the ultimate determination whether those subsidiary facts are in approximate balance. But it is hard to see why such distinctions should matter. A finding that one expert is credible and the other incredible is no different in substance from a finding that the expert evidence is not in

approximate balance. Both are fundamentally factual in nature. And when a court of appeals reviews district-court factual findings in civil litigation, the clear-error standard of review applies not only to subsidiary findings (such as whether a particular witness was credible) but also to the ultimate determination whether the defendant more likely than not committed the alleged violation. See p. 24, *supra* (discussing *Anderson*). There is no sound reason to view the Secretary's approximate-balance determination as less factual in nature than a determination that the preponderance of the evidence points in a particular direction.

Accordingly, if a claimant challenges the Board's weighing of the evidence and the Veterans Court concludes that the Secretary's approximate-balance determination is not clearly erroneous, the court has provided all the consideration of "the Secretary's application of section 5107(b)" that is "due." 38 U.S.C. 7261(b)(1). After all, the Secretary must provide the benefit of the doubt to the claimant only when the evidence is in approximate balance; if it is not, Section 5107(b) imposes no further obligations. See 38 U.S.C. 5107(b). Or, put differently, any further exploration of "the Secretary's application of section 5107(b)," 38 U.S.C. 7261(b)(1), would not be "necessary to [the court's] decision," 38 U.S.C. 7261(a).

To be sure, the Veterans Court must apply a de novo standard in reviewing any contention that the Secretary committed *legal* error in conducting the inquiry required by Section 5107(b). See p. 22, *supra*. For example, a particular Board decision might reflect a misunderstanding of what is meant by an "approximate balance"—say, by describing that standard as requiring exact equipoise. Cf. Pet. Br. 45. Application of a de

novo standard in reviewing such a challenge would be consistent with the Veterans Court's obligation (where a challenge is properly presented and necessary to the court's decision) to "decide all relevant questions of law" and to "interpret * * * statutory * * * provisions." 38 U.S.C. 7261(a)(1). But if the Secretary properly considers all of the record evidence and applies a legally correct approximate-balance standard, the Secretary's determination that the evidence on a particular material issue is not in approximate balance is itself a factual finding that the Veterans Court reviews only for clear error under 38 U.S.C. 7261(a)(4).*

Petitioners therefore are wrong in asserting (Br. 32-33, 46-47) that the Veterans Court should independently reweigh the evidence on a material issue and reach its own determination as to whether the evidence is in approximate balance. As explained above, under the plain text of Section 7261, the court's obligation to "take due account of the Secretary's application of section 5107(b)" (38 U.S.C. 7261(b)(1)) is not a standalone duty untethered to the rest of the court's review. Rather, Section 7261 directs the court to conduct that inquiry "[i]n making the determinations under subsection (a),"

---

* The Secretary could also commit legal error in concluding that the evidence in a particular case *is* in "approximate balance"—say, by construing that statutory term so expansively as to encompass all circumstances where any doubt exists as to the correct resolution of a factual dispute. That misinterpretation of Section 5107(b) might lead the Board to give a particular veteran the benefit of the doubt even though the evidence strongly suggested that the veteran was ineligible for benefits. Such an error likely could not be corrected on appeal, however, since the Veterans Court's review is limited to factual findings "adverse to the claimant," 38 U.S.C. 7261(a)(4), and the government "may not seek" Veterans Court review of the Board's decision, 38 U.S.C. 7252(a).

including the clear-error review specified in Subsection (a)(4). 38 U.S.C. 7261(b).

The sort of reweighing that petitioners advocate would also be inconsistent with Subsection (c), which provides that "[i]n no event shall findings of fact made by the Secretary * * * be subject to trial de novo by the Court." 38 U.S.C. 7261(c). Because the marshalling and weighing of evidence is a fundamentally factual task, see *U.S. Bank*, 583 U.S. at 396-397, the Veterans Court's performance of that task would effectively amount to such a trial de novo. Petitioners and their amici read Subsection (c) as merely clarifying that the "court does not receive new evidence but rather is bound by the record developed before the agency." Pet. Br. 48; see Fed. Cir. Bar Ass'n Amicus Br. 19-23. By its plain terms, however, Subsection (c) precludes trial de novo with respect to "findings of fact made by the Secretary." 38 U.S.C. 7261(c). Because (as explained above) the Secretary's approximate-balance determination is itself a "finding[] of fact," *ibid.*, Subsection (c) prohibits plenary reevaluation of the record by the Veterans Court even if the court does not receive new evidence.

3. Petitioners' reliance on statutory history and perceived congressional intent is misplaced

a. Petitioners contend that "[s]tatutory history and congressional intent" support their position here. Pet. Br. 35; see *id.* at 35-36, 40-41. Petitioners argue that, in adding Subsection (b)(1) to the statute in 2002, Congress sought to address prior deficiencies in the VA's application of the benefit-of-the-doubt rule. See *id.* at 35. Petitioners assert that, "[i]n the Federal Circuit's view, the Veterans Court's responsibilities remained effectively the same before and after" that statutory

amendment, thereby giving the amendment "zero effect." *Id.* at 40. They urge the Court to give the amendment more substantial practical import by "[r]eading subsection (b)(1) to require something distinct from deferential review of agency factfindng." *Id.* at 42. That argument lacks merit.

The 2002 amendment would not have "zero effect" (Pet. Br. 40) under the Federal Circuit's approach. Subsection (b) had previously provided that, "[i]n making the determinations under subsection (a) of this section, the Court shall take due account of the rule of prejudicial error." 38 U.S.C. 7261(b) (2000). By adding an express reference to "the Secretary's application of section 5107(b)," the 2002 amendment eliminated any doubt that the Veterans Court's review under Section 7261(a) should (where the point is raised on appeal) include an assessment of the Secretary's approximate-balance determination. That alone makes the amendment non-superfluous. Cf. *Scheidler* v. *National Organization for Women, Inc.*, 547 U.S. 9, 22 (2006) ("We concede that this additional work is small.").

The amendment would serve a useful function, moreover, even if this Court assumes that the Veterans Court *should have been* reviewing the Secretary's application of Section 5107(b) under the pre-2002 law. Lawmakers often enact provisions that emphasize, clarify, or confirm the proper application to specific circumstances of more general pre-existing statutory language. Such emphasis or clarification can produce salutary effects even if it does not create a new legal right or duty.

Any perceived superfluity that results from such clarifying amendments should not distort the interpretation of the pre-existing provisions they are intended

to clarify. When Congress amends a statute to resolve a circuit split, for example, the amendment by its nature will have only a clarifying effect in the circuits that had adopted the "correct" view of the law in the first place. It would be perverse, however, for those circuits to treat the amendment as a ground for reconsidering their (seemingly vindicated) interpretation of the pre-amendment statute, simply to give the amendment more work to do. Similarly, Congress might sometimes include a specific prohibition alongside a more general one simply to "remove any doubt" that the specific offense is covered. *Kawashima* v. *Holder*, 565 U.S. 478, 487 (2012); see *O'Gilvie* v. *United States*, 519 U.S. 79, 83-89 (1996).

Indeed, the phrase "take due account of" in Subsection (b)(1) would more naturally be used to emphasize an existing duty than to create a new one. Subsection (b)(1) itself gives the Veterans Court no guidance for determining what "account" to the Secretary's application of Section 5107(b) is "due" (*i.e.*, "appropriate" or "proper," see p. 21, *supra*) in resolving a particular challenge. The answer to that question depends instead on the larger veterans'-benefits-law context, and on background principles of administrative law. Congress's choice of words makes sense if Congress was seeking to admonish the Veterans Court to more consistently and diligently perform a pre-existing duty. But it would be an odd way to create a new (and still unspecified) review responsibility. And if Congress had intended the Veterans Court to make its own de novo determination regarding the weight of the evidence, in derogation of the norms that generally govern appellate review of agency factfinding, the language Congress chose would have been a highly oblique way to accomplish that result.

The 2002 Congress may well have been responding to complaints from veterans service organizations that the Veterans Court was not adequately policing the Secretary's application of the benefit-of-the-doubt rule. See Pet. Br. 8-11. But Congress required the court to "take due account of the Secretary's application of section 5107(b)" only when "making the determinations under subsection (a)." 38 U.S.C. 7261(b)(1). And because the pre-existing provisions within Subsection (a) already defined the scope of the court's review, it would not be surprising if the Veterans Court's *legal* obligations remained largely unchanged after the amendment, even while Subsection (b)(1)'s emphasizing effect increased the practical likelihood that the court would fulfill those obligations. This Court therefore should enforce the plain language of the statute as it exists today, and not strain to give more effect to Subsection (b)(1) than its text warrants simply because it was added to the statute in 2002 rather than included within the original Section 7261.

b. To the extent petitioners rely on legislative history (see Pet. Br. 7-11, 35-36, 41), that reliance is misplaced. "'[L]egislative history is not the law,'" and "even those * * * who believe that clear legislative history can 'illuminate ambiguous text' won't allow 'ambiguous legislative history to muddy clear statutory language.'" *Azar* v. *Allina Health Services*, 587 U.S. 566, 579 (2019) (citations omitted). As explained above, the statutory language here makes clear that the review required under Section 7261(b)(1) is defined and limited by Section 7261(a). And even if legislative history were to be considered, that history is at best ambiguous here.

Petitioners observe that the Senate initially proposed to amend Section 7261(a)(4), which addresses re-

view of factual findings, to change the standard of review "from 'clearly erroneous' to the less deferential 'unsupported by substantial evidence'" and to require the Veterans Court, in conducting that review, "to 'take into account the Secretary's application of section 5107(b).'" Pet. Br. 10 (quoting S. Rep. No. 234, 107th Cong., 2d Sess. 17-18, 40 (2002) (Senate Report)) (brackets omitted). Petitioners suggest (Br. 36) that Congress's ultimate decision to place the amendment in Subsection (b)(1) rather than Subsection (a)(4), but to leave the standard of review unchanged, reflected a compromise in which the court's review of factual findings would remain more deferential, but its review of the Secretary's application of Section 5107(b) would be "distinct from" (and broader than) its review of the Secretary's factual findings.

That suggestion lacks merit. When Congress placed the contested provision in Subsection (b)(1), it changed the Senate bill's language—"taking into account the Secretary's application of section 5107(b)," Senate Report 40 (emphasis omitted)—to add the word "due": "take due account of the Secretary's application of section 5107(b)," 38 U.S.C. 7261(b)(1). Congress further specified that the Veterans Court would undertake that inquiry only "[i]n making the determinations under subsection (a)." 38 U.S.C. 7261(b). Together, those changes make clear that the factual aspects of the Secretary's application of Section 5107(b) should be reviewed only for clear error, as specified in Subsection (a)(4), because that is the consideration that would be "due" when a claimant challenges the Secretary's weighing of the evidence.

Petitioners identify no sound basis to infer that the 2002 enacted law actually reflected a compromise of the

sort they describe. Although petitioners suggest that the "'unsupported by substantial evidence'" standard would have been "less deferential" than clear-error review, Pet. Br. 10 (citation omitted), the Senate Report recognized that the opposite might be true. See Senate Report 18 (stating that "the 'clearly erroneous' standard has been interpreted by some to require an incrementally more searching review than 'substantial evidence'"). Indeed, in another context, this Court had held just that. See *Dickinson* v. *Zurko*, 527 U.S. 150, 154 (1999) (observing, in the context of the patent laws, that clear-error review is "stricter than" substantial-evidence review). That uncertainty underscores the dangers of relying on legislative history and the Senate's failed proposal, rather than on the plain text of Section 7261(b)(1) as enacted. Cf. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 382 n.11 (1969) ("[U]nsuccessful attempts at legislation are not the best of guides to legislative intent.").

4. Petitioners' remaining arguments lack merit

a. Petitioners' reliance on the "unique pro-claimant approach" in this area likewise is misplaced. Pet. Br. 25; see *id.* at 23-26. To be sure, the veterans-benefits system as a whole "is 'unusually protective' of claimants." *Henderson*, 562 U.S. at 437 (citation omitted); see *id.* at 431-432 (describing pro-claimant aspects of the system); see also p. 4, *supra*. Indeed, the benefit-of-the-doubt rule, when it applies, is a "rare" exception to "the normal default rule" that "plaintiffs bear the burden of persuasion regarding the essential aspects of their claims." *Schaffer* v. *Weast*, 546 U.S. 49, 57 (2005).

But it is also true that "no law pursues its purposes at all costs." *Luna Perez* v. *Sturgis Public Schools*, 598 U.S. 142, 150 (2023) (brackets, citation, ellipsis, and in-

ternal quotation marks omitted). Here, Congress specified that the Veterans Court should review Board factual findings adverse to the claimant only for clear error, 38 U.S.C. 7261(a)(4), and forbade the court from conducting a trial de novo of those findings, 38 U.S.C. 7261(c). And in directing the Veterans Court to "take due account of the Secretary's application of section 5107(b)," Congress specified that the court should undertake that inquiry "[i]n making the determinations under subsection (a)." 38 U.S.C. 7261(b)(1).

Congress thus combined the distinctly pro-claimant aspects of the system, including the availability of the benefit-of-the-doubt rule when it applies, with more traditional deferential appellate review of agency factfinding. See *Sanders*, 556 U.S. at 406-407 (comparing the scheme to traditional APA review). The best way to honor that balance is to enforce the statutory text as written. Cf. *Corner Post, Inc.* v. *Board of Governors*, 144 S. Ct. 2440, 2454 (2024) ("[T]he text of a law controls over purported legislative intentions unmoored from any statutory text.") (citation omitted); *Baker Botts L.L.P.* v. *ASARCO LLC*, 576 U.S. 121, 135 (2015) (courts should "follow the text even if doing so will supposedly 'undercut a basic objective of the statute'") (citation omitted).

b. At times petitioners rely (*e.g.*, Br. 29, 31-32, 51) on the parallel provision in Subsection (b)(2), which requires the Veterans Court to "take due account of the rule of prejudicial error." 38 U.S.C. 7261(b)(2). Petitioners are correct to note the parallel, but they draw the wrong lessons from it. According to petitioners, the "Veterans Court must apply subsection (b)(2)'s harmless-error rule to every claim on appeal" as a standalone step in the review process. Pet. Br. 51; see

id. at 27-28. Petitioners argue that "[t]here is no textual basis to treat subsection (b)(1) differently." *Id.* at 51. Neither the premise nor the conclusion is correct.

The premise is incorrect because Subsection (b)(2) directs the Veterans Court to "take due account of the rule of prejudicial error" only "[i]n making the determinations under subsection (a)." 38 U.S.C. 7261(b)(2). Accordingly, like the directive in Subsection (b)(1), the directive in Subsection (b)(2) is limited by the scope of the review set forth in Subsection (a)—including the limitation that the court should decide issues only "to the extent necessary to its decision and when presented." 38 U.S.C. 7261(a). That limitation is consistent with the general operation of harmless-error review in administrative-law cases. See, *e.g.*, 5 U.S.C. 706 ("In making the foregoing determinations, * * * due account shall be taken of the rule of prejudicial error."). And indeed, courts have sometimes refused to uphold agency action on harmless-error grounds where the government has forfeited reliance on that doctrine. See, *e.g.*, *WildEarth Guardians* v. *United States Bureau of Land Management*, 870 F.3d 1222, 1239 (10th Cir. 2017) ("The BLM has forfeited any harmless error claim by failing to argue it before the district court. We therefore decline to address it.") (citation omitted); cf. *Ohio* v. *EPA*, 144 S. Ct. 2040, 2057 (2024) (similar, under the judicial-review provision of the Clean Air Act, 42 U.S.C. 7607(d)(8), in the context of a stay application).

The conclusion likewise is incorrect because of textual differences between Subsections (b)(1) and (b)(2). The harmless-error provision in Subsection (b)(2) echoes language in the APA and thus "requires the Veterans Court to apply the same kind of 'harmless-error' rule that courts ordinarily apply in civil cases." *Sand-*

ers, 556 U.S. at 406; see *George* v. *McDonough*, 596 U.S. 740, 746 (2022) ("Where Congress employs a term of art obviously transplanted from another legal source, it brings the old soil with it.") (citation and internal quotation marks omitted). In contrast, as petitioners acknowledge (Br. 41), the directive in Subsection (b)(1) is "unique to the veterans' context." Accordingly, even if the harmless-error rule in Subsection (b)(2) should operate in a manner consistent with the old soil from which it originated, the directive in Subsection (b)(1) should operate only in the manner dictated by the plain meaning of the statute's text.

Moreover, Subsection (b)(1) does not direct the Veterans Court to "take due account of section 5107(b)" (which would have more closely paralleled Subsection (b)(2)'s language), but instead directs the court to "take due account of *the Secretary's application of* section 5107(b)," 38 U.S.C. 7261(b)(1) (emphasis added). The italicized language emphasizes that, rather than making its own independent determination whether the evidence on a material issue is in "approximate balance," 38 U.S.C. 5107(b), the Veterans Court should review the Secretary's analysis of that question. That language reinforces the conclusion that review under Subsection (b)(1) is subject to the limitations set forth in Subsection (a), including Subsection (a)(4)'s directive that the Secretary's factual findings are reviewable only for clear error.

c. Petitioners briefly invoke (Br. 37) the pro-veteran canon, but that canon has no application here. Under that canon, "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson*, 562 U.S. at 441 (citation omitted). But "canons of construction are no more than rules of

thumb that help courts determine the meaning of legislation." *Connecticut National Bank* v. *Germain*, 503 U.S. 249, 253 (1992); see *Chickasaw Nation* v. *United States*, 534 U.S. 84, 94 (2001) (explaining that "canons are not mandatory rules," but instead are "guides * * * designed to help judges determine the Legislature's intent as embodied in particular statutory language"). Accordingly, the pro-veteran canon should be invoked only to resolve "interpretive doubt" when the relevant statutory text remains ambiguous after applying all of the traditional tools of statutory interpretation. *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994); see *King* v. *St. Vincent's Hospital*, 502 U.S. 215, 220 n.9 (1991); see also *Sanders*, 556 U.S. at 416 (Souter, J., dissenting).

For the reasons set forth above, the question whether Section 7261(b)(1) authorizes the Veterans Court to make its own approximate-balance determination does not present the type of interpretive doubt that would trigger the canon. This Court has never applied the canon to rule in a veteran's favor when it otherwise would not have done so, see *Rudisill* v. *McDonough*, 601 U.S. 294, 316 (2024) (Kavanaugh, J., concurring), and it should not take that step here.

B. Although The Court Need Not Reach The Issue, A Claimant Must Properly Preserve A Legal Or Factual Challenge Touching On The Benefit-Of-The-Doubt Rule In Order For The Veterans Court To Resolve It

As noted above, another limitation that Section 7261(a) imposes on the scope of review under Section 7261(b)(1) is that the Veterans Court should make the determinations listed in Subsection (a) only "to the extent necessary to its decision and when presented." 38 U.S.C. 7261(a). Petitioners do not address the significance of the phrase "to the extent necessary to its deci-

sion." But petitioners would capaciously interpret the phrase "when presented" to encompass every issue relevant to a preserved claim for benefits, even when a particular issue has not been identified as a ground for reversal. See Pet. Br. 34, 49-52. For example, petitioners argue that if a claimant appeals as to a denial of benefits for a knee injury, the Veterans Court has a "mandatory" duty to engage in "benefit-of-the-doubt review" as to that knee-injury claim even when the claimant does not "affirmatively invoke[] section 5107(b) or raise[] a benefit-of-the-doubt error as a ground for reversal." *Id.* at 34.

This Court need not address the meaning of the phrase "when presented" to resolve these cases because both petitioners "expressly presented arguments about the benefit-of-the-doubt rule to the Veterans Court." Pet. Br. 49 n.4. In each case, the Board recognized its obligation to apply Section 5107(b) (and in fact gave Thornton the benefit of the doubt on one issue), see Pet. App. 64a, 80a-81a, 83a-85a; the Veterans Court addressed the claimant's challenge to the Board's application of Section 5107(b), see *id.* at 29a-30a, 42a-43a; and the Federal Circuit recognized that the claimant had preserved the challenge, see *id.* at 5a, 15a-16a. Accordingly, this Court's choice among competing interpretations of the phrase "when presented" would have no bearing on the outcome of these cases. Cf. *United States* v. *Rahimi*, 144 S. Ct. 1889, 1898-1899 (2024) (declining to decide a legal question that would have no bearing on the outcome); *Wittman* v. *Personhuballah*, 578 U.S. 539, 545 (2016) (similar).

If the Court chooses to address the issue, however, it should reject petitioners' interpretation. Section 7261(a) sets forth a reticulated list of determinations

that the Veterans Court might have to make in any given appeal. The prefatory instruction to the court to decide each of those issues "when presented" is therefore best read as applying to each of the listed determinations separately. Cf. *Pulsifer* v. *United States*, 601 U.S. 124, 137 (2024) (explaining that Congress may "draft more concisely" by including a prefatory phrase before an enumerated list rather than repeating it for each item). Thus, if a claimant argues that the Secretary's decision is "arbitrary[and] capricious," 38 U.S.C. 7261(a)(3)(A), the court is obligated to address that argument (assuming the other statutory requirements are satisfied); but the court need not address whether the Secretary's decision is "contrary to constitutional right," 38 U.S.C. 7261(a)(3)(B), if the claimant does not "present[]" any constitutional challenge, 38 U.S.C. 7261(a).

As applied here, the phrase "when presented" makes clear that the Veterans Court must evaluate particular factual or legal aspects of the Secretary's application of Section 5107(b) only to the extent that the claimant challenges the Secretary's benefit-of-the-doubt analysis. For example, a claimant might argue that the Secretary misunderstood what the term "approximate balance" means; found that the evidence on a material issue was in equipoise but resolved the issue against the claimant; or failed to "consider all information and lay and medical evidence of record." 38 U.S.C. 5107(b). Those would be legal challenges whose presentation on appeal would trigger the court's obligation to "decide all relevant questions of law." 38 U.S.C. 7261(a)(1); see p. 22, *supra*. If a claimant challenges the Secretary's weighing of the evidence on a material issue and argues that the Secretary should have found the evidence to be

in approximate balance, the court would be obliged to review the Secretary's contrary determination for clear error. 38 U.S.C. 7261(a)(4). The claimant need not cite Section 5107(b) or use magic words like "benefit of the doubt," but he must "present" the issue with the specificity ordinarily required by standard principles of forfeiture and waiver in civil litigation.

But where the claimant does not raise any challenge to the Secretary's factual findings, and does not claim that any aspect of the Secretary's application of Section 5107(b) was legally erroneous, the court need not sua sponte address Section 5107(b). In those circumstances, the court's refusal to address the Secretary's application of Section 5107(b) would comport with Section 7261(b)(1) because no additional consideration would be "due." Cf. *Harrow* v. *Department of Defense*, 601 U.S. 480, 483-484 (2024) (explaining that even "categorical commands" that govern the "litigation process" are not always "as strict as they seem" because "Congress legislates against the backdrop of judicial doctrines" like "forfeit[ure] or waive[r]"). Indeed, that is how the party-presentation requirement generally operates in the administrative-law context, which Section 7261(a) echoes. See p. 35, *supra*.

C. The Courts Below Properly Interpreted And Applied Section 7261

The Federal Circuit's decisions in petitioners' cases are consistent with the principles set forth above. See Pet. App. 1a-11a (Bufkin), 12a-16a (Thornton). Relying on its previous decision in *Roane* v. *McDonough*, 64 F.4th 1306 (2023), the Federal Circuit correctly explained in *Bufkin* that the Veterans Court is not required "to conduct an 'additional and independent nondeferential review' of the Board's application of the ben-

efit of the doubt rule" because "the scope of the Veterans Court's review is limited" by Section 7261(a), which "allows the Veterans Court to review facts only under the clearly erroneous standard." Pet. App. 10a (quoting *Roane*, 64 F.4th at 1309) (brackets omitted); see *Roane*, 64 F.4th at 1311 ("By asking for an 'additional and independent non-deferential review' of the Board's application of the benefit of the doubt rule, Mr. Roane essentially asks us to allow the Veterans Court to reweigh evidence de novo.") (brackets and citation omitted). And the court in *Thornton* explained that, "[b]ecause Mr. Thornton's preferred interpretation of § 7261(b)(1) was rejected in *Bufkin*, we must also reject it in this appeal." Pet. App. 16a.

Petitioners repeatedly highlight (Br. i, 18-19, 21, 38-39) the Federal Circuit's statement in *Thornton* 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." Pet. App. 15a (citation omitted). In petitioners' view, that reading "gives subsection (b)(1) no force" and "conflates clear-error review with benefit-of-the-doubt review." Pet. Br. 39, 42; see *id.* at 38-49.

As an initial matter, petitioners focus on a strawman. The snippet they repeatedly quote was simply the Federal Circuit's attempt to concisely summarize what it had previously explained in greater detail in *Bufkin* and *Roane*. The court's point was that, when a claimant challenges the Secretary's determination that the evidence on a material issue is not in approximate balance, the Veterans Court reviews that determination only for clear error and does not make its own de novo determi-

nation whether an approximate balance existed. See *Roane*, 64 F.4th at 1310 ("Since the Veterans Court's review under § 7261(b) is tied to § 7261(a), the Veterans Court can review facts *only* under the clearly erroneous standard when considering the Board's benefit of the doubt determination."); *ibid.* ("[T]he Veterans Court cannot conduct its own independent and non-deferential review of the facts to take due account of the Board's application of the benefit of the doubt rule.").

In cases like *Bufkin* and *Thornton*, where the claimants challenge the Board's weighing of the evidence, the Veterans Court reviews the Board's application of Section 5107(b) only in the course of conducting clear-error review of the Board's factfinding under Section 7261(a)(4). *In that circumstance* it is accurate to say, as the Federal Circuit said in *Thornton*, 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 required by § 7261." Pet. App. 15a. To be sure, the Federal Circuit did not include the italicized qualifier above, but both *Bufkin* and *Thornton* involved that circumstance, and "[t]his Court has often admonished that 'general language in judicial opinions' should be read 'as referring in context to circumstances similar to the circumstances then before the Court,'" *Turkiye Halk Bankasi A.S.* v. *United States*, 598 U.S. 264, 278 (2023) (citation omitted).

Of course, claimants in *other* cases might argue that the Board misinterpreted Section 5107(b)'s text, thereby triggering the Veterans Court's duty to "decide all relevant questions of law" and "interpret * * * statutory * * * provisions." 38 U.S.C. 7261(a)(1); see pp. 22, 26-27, *supra*. Nothing in the Federal Circuit's opinions in these cases, or in *Roane*, casts doubt on that

proposition. But even if the Federal Circuit's half-sentence summary in *Thornton* were viewed as opaque or imprecise (as summaries often are), the court's opinion (which simply explained that *Bufkin* was controlling) is unpublished and nonprecedential. See Pet. App. 16a. Petitioners do not appear to take issue with any specific language in the Federal Circuit's published opinions in *Bufkin* or *Roane*.

In any event, petitioners are wrong to assert (Br. 39) that the Federal Circuit's reading would "give[] subsection (b)(1) no force." As explained above, see pp. 28-31, *supra*, interpreting that provision according to its plain text still gives it at least a clarifying and emphasizing role to play in the statutory scheme. Petitioners are likewise wrong in asserting (Br. 42) that the Federal Circuit's reading "conflates clear-error review with benefit-of-the-doubt review." The Secretary's application of Section 5107(b) contains both legal and factual aspects, and if a claimant challenges a factual aspect—including the Secretary's bottom-line determination that the evidence is not in approximate balance—that factual determination is subject to clear-error review under 38 U.S.C. 7261(a)(4). See pp. 23-28, *supra*.

Petitioners are likewise wrong in asserting (Br. 52-53) that the Veterans Court failed to take due account of the Secretary's application of Section 5107(b) in their cases. In *Bufkin*, the court undertook a thorough review of the Secretary's factual findings, ultimately determining that none was clearly erroneous. Pet. App. 21a-27a. The court then directly addressed the benefit-of-the-doubt rule and concluded that the rule "does not apply" given that the Secretary had not clearly erred in determining that the evidence was not in approximate balance. *Id.* at 30a; see *id.* at 29a-30a. In *Thornton*, the

court reviewed the Secretary's conclusions as to the disability rating for Thornton's PTSD, found them not to be clearly erroneous, and thus determined that Thornton had not shown error in the Secretary's application of Section 5107(b). *Id.* at 40a-43a. Petitioners' contention (Pet. 52) that the court had to "go further" relies on their view that the court was required to make its own independent determination whether the evidence was in approximate balance. As explained above, that view is incorrect.

Finally, the Veterans Court and the Board suggested that the evidence as to Bufkin's PTSD and Thornton's disability rating was not in "approximate balance" because the "preponderance of the evidence" on those points was against petitioners. See Pet. App. 29a-30a, 45a, 64a, 76a. After the Board and Veterans Court issued those decisions, the Federal Circuit clarified that a "preponderance-of-the-evidence formulation * * * could confuse because other cases link 'preponderance of the evidence' to the concept of equipoise," but the positive and negative evidence on an issue need not be in perfect "equipoise" to be in "approximate balance." *Lynch* v. *McDonough*, 21 F.4th 776, 781 (2021) (en banc), cert. denied, 143 S. Ct. 369 (2022). The Federal Circuit did not refer to the "preponderance of the evidence" in ruling on petitioners' appeals, and petitioners have not preserved any challenge to the "preponderance" language in the Board and Veterans Court decisions. Use of the term in those decisions therefore would provide no basis to reverse or vacate the judgments below.

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
SOPAN JOSHI
Assistant to the Solicitor General
PATRICIA M. MCCARTHY
ELIZABETH M. HOSFORD
L. MISHA PREHEIM
EVAN WISSER
MEREDYTH COHEN HAVASY
Attorneys

RICHARD J. HIPOLIT
Principal Deputy General Counsel
BRIAN D. GRIFFIN
Deputy Chief Counsel
CHRISTOPHER O. ADELOYE
CHRISTINA L. GREGG
Attorneys
Department of Veterans Affairs

AUGUST 2024