Brief of the Federal Circuit Bar Association as *Amicus Curiae* Supporting Petitioners in *Bufkin v. McDonough*[*]

Christopher J.C. Herbert, Brian T. Burgess,[†] Jenny J. Zhang

[*] This Brief of Amicus Curiae was originally submitted to the Supreme Court. Brief of the Federal Circuit Bar Association as Amicus Curiae Supporting Petitioners, Bufkin v. McDonough (U.S. 2024) (No. 23-713). It is reprinted herein in its original form, with minimal editing and formatting changes.

[†] Counsel of Record.

Interest of the *Amicus Curiae*[1]

The Federal Circuit Bar Association ("FCBA") is a national organization for the bar of the United States Court of Appeals for the Federal Circuit. The organization unites different groups across the nation that practice before the Federal Circuit, seeking to strengthen and serve the court. As part of its efforts, the FCBA helps facilitate pro bono representation for veterans appealing decisions of the Department of Veterans Affairs to the Court of Appeals for Veterans Claims and the Court of Appeals for the Federal Circuit, with a view to strengthening the adjudication process at both stages of review. The benefit-of-the-doubt rule at issue in this case is central to the adjudication of veterans' claims, but its practical benefit to veterans is being diminished by the Federal Circuit's narrow reading of the scope and standard of review available to veterans at the Court of Appeals for Veterans Claims.

The FCBA has an interest in assisting this Court by submitting its views on cases that implicate subject matter within the appellate jurisdiction of the Federal Circuit. These submissions further the FCBA's commitment to promoting the health of the legal system in furtherance of the public interest. It is with that interest in mind that the FCBA submits this amicus brief in support of Petitioners.

Because the respondent in this case is part of the federal government, FCBA members and leaders who are employees of the federal government have not participated in the Association's decision-making regarding whether to participate as an amicus in this litigation, developing the content of this brief, or the decision to file this brief.

Summary of Argument

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

The Department of Veterans Affairs ("VA") is required, by statute, to afford claimant veterans the "benefit of the doubt" when the evidence on a material issue is "in approximate balance." 38 U.S.C. § 5107(b). This rule is central to the administration of veterans' claims, as it places the risk of error on the government rather than on the veterans the agency was created to serve. Meaningful judicial enforcement of the rule requires independent review of the evidence before the agency to determine whether there were close issues on which the veteran should have received the benefit of the doubt. The question presented here is whether the Court of Appeals for Veterans Claims ("Veterans Court") must undertake the independent, non-deferential review of the record necessary to make that determination.

The language and history of the statute confirm the answer is "yes." In 1988, Congress codified the benefit-of-the-doubt rule in the same legislation that created the Veterans Court as a specialized Article I tribunal dedicated to the review of VA decisions. The court became the first and only independent forum for veterans to seek review of both the agency's compliance with the law and its findings of fact. Veterans' Judicial Review Act ("VJRA") Pub. L. No. 100-687, Div. A., § 4061, 102 Stat. 4105, 4115 (1988). Congress understood that the availability of this review was critical as a check to ensure the risk of error in assigning veterans benefits is placed on the government rather than on veterans.

But the Veterans Court and the Federal Circuit applied the statute in a manner that undermined its impact, interpreting the clear-error standard prescribed for review of factual findings to absolve the Veterans Court of any authority or obligation to independently assess the factual record in detail or to disturb any VA finding that had a "plausible basis." *Hensley v. West*, 212 F.3d 1255, 1263–64 (Fed. Cir. 2000); *see also Wensch v. Principi*, 15 Vet. App. 362, 366–68 (2001). In 2002, Congress "overrule[d]" those decisions by adding a new provision to the

Veterans Court's governing statute. *See* 148 Cong. Rec. 22,597 (2002) (Explanatory Statement On House Amendment to Senate Bill, S. 2237 discussing *Wensch* and *Hensley*); 148 Cong. Rec. 22,913 (2002) (statement of Sen. Rockefeller discussing *Hensley*); S. Rep. No. 107-234, at 16 (2002) (discussing *Hensley*). That provision mandates that, in deciding every appeal from the VA's Board of Veterans Appeals ("BVA"), the Veterans Court "*shall* review the record of proceedings before the Secretary and the [BVA]" and "shall take due account of the Secretary's application of [the benefit-of-the-doubt statute]." 38 U.S.C. § 7261(b)(1) (emphasis added). According to members of Congress, the provision was adopted to give "full force to the 'benefit of doubt' provision" by empowering the Veterans Court to conduct more "searching appellate review" of VA decisions. 148 Cong. Rec. 22,597 (2002).

In the face of this focused congressional action, the Federal Circuit has construed Congress's instruction in § 7261(b)(1) as essentially hortatory, holding that the Veterans Court's authority to enforce the benefit-of-the-doubt rule is limited to the deferential, clear-error review of the VA's factual findings that already existed in the pre-amendment version of the statute. Thus, in each of the Petitioners' cases, the Federal Circuit held that the Veterans Court rightly affirmed the BVA's findings merely because it had given a plausible explanation for why it was "persuaded" by the evidence against the veteran; according to the Federal Circuit, the Veterans Court was neither required nor authorized to independently consider whether there was an approximate balance in the underlying evidence that should have led the VA to afford the benefit-of-the-doubt to the veteran. Pet. App. 10a-11a, 15a-16a.

In adopting its narrow reading of the Veterans Court's authority under § 7261(b)(1), the Federal Circuit made two key errors.

First, the Federal Circuit assumed that the same considerations normally constraining Article III courts from making independent empirical assessments of the agency record should extend to the Veterans Court. But Congress created the Veterans Court and deliberately vested specialized, narrow, and exclusive jurisdiction in that Article I tribunal to avoid the limitations of Article III review of agency action. And although Congress made clear that the Veterans Court was not a "trial" court authorized to take additional evidence "de novo," the court is expressly authorized to "reverse" the VA's findings based on the court's review of the evidence before the agency without remanding to the agency for new findings—a power generally not available to Article III courts. *See* 38 U.S.C. §§ 7261(c), 7261(a)(4); *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 88 (1943). All this is consistent with Congress's choice to entrust the Veterans Court with the authority in every appeal to review the record before the VA and assess the approximate balance of the evidence without blind deference to the VA's conclusion that the evidence cuts against the veteran.

Second, the Federal Circuit misread § 7261(c) as prohibiting the Veterans Court from reviewing the existing evidentiary record de novo for compliance with the benefit-of-the-doubt rule. But subsection (c) prohibits only a "trial de novo"—*i.e.*, the taking of new evidence on material facts—which is conceptually distinct from the standard of review.

I. Argument

A. The History of Section 7261(b)(1) Supports Robust Enforcement of the "Benefit of the Doubt" Rule By the Veterans Court.

Congress has twice sought to ensure that veterans have fair and meaningful judicial review of denials of their benefits claims. Congress first did so in 1988 by enacting the VJRA. There, Congress codified the benefit-of-the-doubt rule—to make sure that the VA errs in favor of

veterans—and created the Veterans Court, which is supposed to hold the VA to account for any improper applications of that rule. In 2002, in response to decisions narrowly circumscribing the Veterans Court's authority to scrutinize the agency record, Congress enacted the Veterans Benefits Act expressly to direct the Veterans Court to review the entire VA record and "take due account" of the agency's application of the benefit-of-the-doubt rule. But current precedent limiting the Veterans Court to clear-error review of the benefit-of-the-doubt rule has again compromised those congressional efforts to ensure that veterans receive the fair and meaningful judicial review that they are owed.

1. The Veterans Court Is a Specialized Tribunal With Distinct Responsibilities Compared to an Article III Court.

This Court has acknowledged the "singular characteristics of the review scheme that Congress created for the adjudication of veterans' benefits claims," central to which is the solicitude for veterans reflected in laws placing "a thumb on the scale in the veteran's favor." *Henderson v. Shinseki*, 562 U.S. 428, 440 (2011). In the VJRA, Congress codified a long-standing principle that the VA must afford veterans "the benefit of the doubt" in adjudicating the factual elements of their claims. 38 U.S.C. § 5107. This provision reflects Congress's intent that veterans be afforded the full scope of benefits to which they can reasonably be found to be entitled, and the government should bear the cost of uncertainty and error in the system. *See Gilbert v. Derwinski*, 1 Vet. App. 49, 54 (1990) ("It is in recognition of our debt to our veterans that society has through legislation taken upon itself the risk of error….").

The VJRA was the culmination of decades of hearings and reports emphasizing the need for judicial review of VA determinations. While the VA maintained that the agency's non-adversarial, pro-veteran system of adjudication did not align with the adversarial posture of

judicial review, Congress ultimately concluded that outside review was needed to hold the VA accountable to its obligations to veterans, including the duty to afford veterans the benefit of the doubt on factual disputes. This was especially critical in the face of competing structural incentives within the agency.

In committee hearings, veterans service organizations testified about the tendency for VA decisions "during periods of fiscal restraint" to be "shaped more through the influence of the Office of Management and Budget and blatant political pressure than the intent of Congress."[2] Legislators echoed concerns that VA decisions may be motivated by executive branch pressures to reduce costs to the detriment of the veterans served by the agency.[3] One representative, explaining the need for judicial review, pointed to a quota system implemented by the BVA that provided its judges with a 5 percent salary increase for completing an average of at least 40 cases per week, incentivizing them to dispose of cases quickly without meaningful engagement with the full record.[4] Against this backdrop, legislators called for "outside review by the independent branch of government established in our constitutional framework with the special responsibility of determining whether governmental action is legal and whether it is fundamentally fair."[5]

But while recognizing a need for judicial review, veterans service organizations and several representatives of the judiciary raised concerns about vesting already over-burdened Article III courts with review of veterans claims, especially because most appeals would focus

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[2] *Judicial Review of Veterans' Affairs: Hearing Before the H. Comm. on Veterans' Affs*., 100th Cong. 319 (1988) (statement of Gordon Mansfield, Associate Exec. Dir. for Gov't Relations, Paralyzed Veterans of America).

[3] *Judicial Review Legislation: Hearing Before the S. Comm. on Veterans' Affs. on S.11 & S.2292*, 100th Cong. 109-122 (1988) (statement of Sen. Alan Cranston, Chairman, S. Comm. on Veterans' Affs.).

[4] *Judicial Review of Veterans' Affairs: Hearing Before the H. Comm. on Veterans' Affs.*, 100th Cong. 191 (1988) (opening statement of Rep. James J. Florio).

[5] *Judicial Review Legislation: Hearing Before the S. Comm. on Veterans' Affs. on S.11 & S.2292*, 100th Cong. 114 (1988) (opening statement of Sen. Alan Cranston, Chairman, S. Comm. on Veterans' Affs.).

on factual issues idiosyncratic to veterans benefits law.[6] An early Senate bill proposed to address this by substantially narrowing the standard of review applied to factual issues. Under the Senate proposal, courts could only set aside a VA finding "so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result"—a standard that legal commentators suggested might never be met in practice. S. 11, 100th Cong. (1988); 134 Cong. Rec. 17,448-17,483 (1988) (Senate consideration of S. 11).

Congress ultimately rejected that proposal, opting instead for a compromise that vests primary review of VA determinations in a new specialized Article I court limited to review of appeals from the VA. Judges serve 15-year terms and are appointed by the President, subject to the advice and consent of the Senate. 38 U.S.C. § 7253. Litigants may appeal the Veterans Court's decisions to the Federal Circuit, where the review is limited to legal and constitutional questions, not factual findings or the application of law to facts. 38 U.S.C. § 7292(d)(2).

In Congress's view, this new system provided two key benefits. First, Congress expected that the new Veterans Court "would quickly acquire expertise in the subject matter of benefits' appeals and should be able to make decisions more quickly and on the basis of a better understanding of the record than a court of general jurisdiction."[7] As one Congressman explained in supporting the compromise, the new court, "because of its special focus," would be "in a far better position to assess whether the BVA properly understood its statutory obligation

[6] *Judicial Review of Veterans' Affairs: Hearing Before the H. Comm. on Veterans' Affs.*, 100th Cong. 193-224 (1988) (prepared statement of Hon. Morris S. Arnold and Hon. Stephen G. Breyer on behalf of the Judicial Conference of the United States).

[7] *Judicial Review of Veterans' Affairs: Hearing Before the H. Comm. on Veterans' Affs.*, 100th Cong. 215 (1988) (prepared statement of Hon. Morris S. Arnold and Hon. Stephen G. Breyer on behalf of the Judicial Conference of the United States); *see also* 134 Cong. Rec. 31,765-31,790 (1988) (House concurrency to the Senate amendment to S. 11 with additional amendments); 134 Cong. Rec. 31,770 (1988) (statement of Rep. G.V. Montgomery, "The new Court of Veterans' Appeal (CVA) established by the compromise agreement would not be burdened with matters which often require a district court to delay a decision in a case. The sole function of this court is to decide, on the record, whether the VA and the BVA decided a matter correctly; the court will develop expertise on such matters and its decisions will be uniform.").

and acted correctly." 134 Cong. Rec. 31,770-31,7711 (1988) (statement of Rep. G.V. Montgomery). Second, Congress emphasized that the new tribunal would be truly "independent," resolving prior concerns that agency decisions were based on budgetary and political considerations rather than on the merits of any particular case. *See id.*

Accordingly, with its combination of specialized expertise and independence, Congress entrusted the new Veterans Court with a more rigorous standard of review than is typically applicable to generalist Article III courts reviewing agency action. For example, one legislator noted that prior concerns over "maintaining the BVA's role as expert arbiter" became less compelling given the new court's very limited jurisdiction consisting entirely of reviewing the VA's benefits decisions. 134 Cong. Rec. 31,459 (1988) (statement of Sen. George Mitchell). And, he continued, because the Veterans Court's "single role" would be "adjudicating veterans' cases," there was "little reason" to "assiduously limit the number of appeals of factual questions that" it could consider. *Id.* Congress thus enacted a "markedly wider" standard of review over factual questions than had been contemplated in the earlier Senate proposal. 134 Cong. Rec. at 31,478 (Explanatory Statement on the Compromise Agreement on S.11, as Amended, the Veterans' Judicial Review Act).

The resulting "clearly erroneous" standard of review was chosen because it was "not [ ] particularly restrictive" and permitted courts to engage in a "more expansive" and "full and fair review of BVA decisions on factual issues." *Id.* at 31,461, 31,471, (statements of Sen. Arlen Specter and Sen. Alan Cranston). And while no "trial de novo" was permitted, the Veterans Court is authorized to "conduct a full review of the decision based on the BVA record," and may "modify or reverse" the BVA decision based on the existing record. *Id.* at 31,470; 38 U.S.C.

§ 7261(a)(4), (c). This "full review" includes a searching review of "all legal issues, including ... the fairness of BVA ... adjudication procedures and operations." 134 Cong. Rec. at 31,460.

At the same time, Congress limited the extent to which any other tribunal could revisit the details of the VA's administrative record and the agency's application of law to facts. Thus, although Congress vested the Federal Circuit with jurisdiction to review Veterans Court decisions, it precluded the Article III court from reviewing "(A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." 38 U.S.C. § 7292(d)(2). Consistent with this legislative command, the Federal Circuit has held that § 7292(d)(2) prevents it from considering the merits of whether the VA complied with the benefit-of-the-doubt rule in individual cases. *See, e.g.*, *Ferguson v. Principi*, 273 F.3d 1072, 1076 (Fed. Cir. 2001). Accordingly, the Federal Circuit routinely dismisses appeals from the Veterans Court challenging the BVA's application of the benefit-of-the-doubt rule, holding that it lacks jurisdiction to hear them. *See, e.g.*, *Soodeen v. McDonough*, No. 2023-1575, 2023 WL 8467508, at *1 (Fed. Cir. Dec. 7, 2023) (citing *Ferguson* in holding that § 7292(d)(2) "preclude[s] review of the challenge to the application of the benefit-of-the-doubt rule of § 5107(b)"); *Chapman v. McDonough*, No. 23-1834, 2024 WL 1132218, at *2 (Fed. Cir. Mar. 15, 2024); *Gonzalez v. McDonough*, No. 23-1347, 2024 WL 503739, at *3 (Fed. Cir. Feb. 9, 2024).

As a result, in the review scheme Congress adopted, the Veterans Court occupies a unique role in providing veterans with their *only* opportunity for any judicial oversight of the VA's compliance with the benefit-of-the-doubt rule in its weighing of evidence in a given case.

2. Congress Enacted Section 7261(b)(1) To Overturn Case Law Unduly Restricting the Veterans Court's Review of the Factual Record.

Despite Congress's directive that the Veterans Court ensure veterans receive the benefit of any doubt, in the decade following the enactment of the VJRA, both the Veterans Court and the Federal Circuit substantially restricted the scope of the Veterans Court's review. One report by the Senate Committee on Veterans Affairs described the courts' narrowing of clear error review in the decade after the VJRA's enactment:

> More than a decade of experience with [the Veterans Court's] application of the "clearly erroneous" standard suggests that [the Veterans Court] is not consistently performing thorough reviews of BVA findings and that the Congressional intent for a broad standard of review has often been narrowed in application.

S. Rep. No. 107-234, at 16 (2002). The Senate committee was particularly troubled by the holding in *Hensley v. West*, 212 F.3d 1255, 1264 (Fed. Cir. 2000), which criticized the Veterans Court for "dissecting the factual record in minute detail" and affirming the BVA decision based on the court's independent review of the evidence rather than remanding to the BVA. The Federal Circuit deemed such independent analysis problematic because it believed the Veterans Court, as an appellate tribunal, was limited to reviewing BVA findings with "substantial deference" and could not make independent factual determinations based on its own review of the record. 212 F.3d at 1263.

Legislators were also troubled by the Veterans Court's decision in *Wensch v. Principi*, 15 Vet. App. 362 (2001). *See* 148 Cong. Rec. 22,597 (2002) (Explanatory Statement on House Amendment to Senate Bill, S.2237 discussing *Wensch*). There, the record contained conflicting evidence over whether a veteran's debilitating back pain was connected to scarring from a gunshot wound to his left leg. *Wensch*, 15 Vet. App. at 363–66. The BVA found that a VA examiner's conclusion of no service connection was more probative than multiple reports by independent examiners that supported a service connection. *Id.* at 366. Without independently evaluating the balance of the evidence, the Veterans Court affirmed the VA's finding, reasoning

that the agency had adequately articulated a plausible basis in the record for favoring one medical opinion over others. *Id.* at 366–68. The court held that it was the VA's prerogative alone to weigh the evidence under § 5107(b) and determine "whether the evidence supports the [appellant's] claim," "is in relative equipoise," or "whether a fair preponderance of the evidence is against the claim." *Id.* at 367.

Reflecting on the state of case law at the time, a representative of the veterans service organization Disabled American Veterans lamented that "under current law…, a veteran can be deprived of benefits whenever there is some slight evidence that gives the Government a plausible reason for denial," which "renders the benefit of the doubt rule meaningless." *Pending Legislation: Hearing Before the S. Comm. on Veterans' Affs.*, 107th Cong. 47 (2002) (statement of Joseph A. Violante, Nat'l Legis. Dir., Disabled American Veterans).[8] This echoed a general concern among veterans service organizations over the "lack of searching appellate review of BVA decisions" and the general observation that "the large measure of deference that [the Veterans Court] affords BVA fact-finding is detrimental to claimants" by undermining consideration of the bene-fit-of-the-doubt rule. S. Rep. No. 107-234, at 17 (2002). Veterans service organizations also expressed broader frustration with the Veterans Court's reluctance under prevailing case law to "actually decid[e]" individual claims on the merits of the facts, opting instead to "decid[e] finer points of law that it can elucidate in scholarly discourse or … send[ ] cases back to BVA on procedural grounds." *Pending Legislation: Hearing Before the S.*

[8] *See also Pending Benefits Legislation: Hearing Before the S. Comm. on Veterans' Affs.*, 107th Cong. 6970 (2001) ("[I]f it only takes that much to uphold a factual finding when they are supposed to rule in favor of the veteran unless a preponderance of the evidence is against the veteran, then that makes that standard unenforceable and, thus, in some instances, meaningless.") (Testimony of Mr. Rick Surrat, Deputy Nat'l Legis. Dir., Disable American Veterans).

Comm. on Veterans' Affs., 107th Cong. 49 (2002) (statement of Joseph A. Violante, Nat'l Legis. Dir., Disabled American Veterans).

In 2002, Congress responded to these concerns by enacting the Veterans Benefits Act, which "modif[ied] the requirements of the review the court must perform when making determinations under section 7261(a) of title 38." 148 Cong. Rec. 22,913 (2002). The statute did so in two key ways.

First, Congress added new language to § 7261, directing the Veterans Court to "take due account" of the VA's application of the benefit-of-the-doubt rule. 38 U.S.C. § 7261(b)(1). In adopting that provision, legislators made clear that it was intended to "overrule" *Hensley v. West*, which restricted the Veterans Court's authority to "only limited, deferential review of BVA decisions, and stated that BVA fact-finding 'is entitled on review to substantial deference.'" 148 Cong. Rec. at 22,913, 22,917. Congress explained that the new provision would "provide for more searching appellate review of BVA decisions, and thus give full force to the 'benefit of doubt' provision." *Id.* Under the new provision, the Veterans Court "would be specifically required to examine the record of proceedings—that is, the record on appeal before the Secretary and BVA." *Id.* at 22,917. That "judicial process" would place "special emphasis" on the benefit-of-the-doubt provision when the Veterans Court "makes findings of fact in reviewing BVA decisions." *Id.*

Congress's instruction for the Veterans Court to "take due account" of the VA's application of § 5107 parallels the preexisting duty assigned to the Court in § 7261(b)(2). Under that provision, the Veterans Court must "take due account of the rule of prejudicial error." As with § 7261(b)(2), in enacting § 7261(b)(1), Congress instructed the Veterans Court to independently "review the record of proceedings before the Secretary and the [BVA]," 38 U.S.C.

§ 7261(b), *i.e.*, to assess the role that different pieces of evidence played in the outcome of the proceedings, in taking "due account" of the benefit-of-the-doubt rule.

Second, Congress clarified the Veterans Court's authority to decide factual issues on the merits by reversing rather than remanding cases based on its review of the factual record. As originally enacted, § 7261(a)(4) permitted the Veterans Court to "hold unlawful and set aside" any "finding of material fact" "if the finding is clearly erroneous." Pub. L. No. 100-687, Div. A., § 4061 (1988). In the Veterans Benefits Act, Congress added the words "or reverse" after "and set aside." This addition, Congress explained, was meant "to emphasize that [the Veterans Court] should reverse clearly erroneous findings when appropriate, rather than remand the case." 148 Cong. Rec. 22,913 (2002); *see* Veterans Benefits Act of 2002, Pub. L. No. 107-330, Tit. IV, § 401, 116 Stat. 2832 (codified at 38 U.S.C. § 7261(a)(4)).

Altogether, the text and history of the Veterans Benefits Act make clear Congress's intent that deference to the VA's findings should not preclude the Veterans Court from meaningfully reviewing the record, including to ensure the benefit-of-the-doubt rule is honored. Rather, Congress chose to entrust the Veterans Court with authority to review the VA's application of the benefit-of-the-doubt rule based on the Veterans Court's own searching, independent review of the agency record.

B. The Narrow Reading of Section 7261(b)(1) in *Bufkin* Nullifies Congress's Directive to the Veterans Court.

In interpreting § 7261(b)(1), the Federal Circuit held that "the statutory command that the Veterans Court 'take due account' of the benefit of the doubt rule does not require the Veterans Court to conduct any review of the benefit of the doubt issue beyond the clear error review required by § 7261." Pet. App. 15(a). That interpretation contravenes Congress's intent for the

role of the Veterans Court. By holding that the provision's mandate is satisfied by ordinary clear-error review of the BVA's findings, and by prohibiting the Veterans Court from conducting an "independent, non-deferential review" of the record, the Federal Circuit's interpretation shields from meaningful review the very cases that the benefit-of-the-doubt rule was meant to address.

Petitioners' cases are illustrative. In each, the record contained multiple medical reports offering competing opinions on the veteran's diagnosis and its connection to his service. The BVA declined to afford the benefit of any doubt to either veteran because it found the reports of the independent examiners supporting the veterans' claims less persuasive than the reports of the VA medical examiner. Pet. App. 60a-61a, 77a-86a. The Veterans Court affirmed in each case without independently considering the balance of evidence because it found no clear error in the BVA's explanations for why it was persuaded by the VA examiner's reports. Pet App. 25a, 42a-43a. According to the Federal Circuit, the Veterans Court satisfied its obligation to review the record and take "due account" of the benefit-of-the-doubt rule by "not[ing]" the BVA's "consideration of conflicting medical opinions" and its "conclusion that the [medical opinion showing no diagnosis] is more persuasive than the opinion showing a diagnosis" and finding no clear error in that determination. Pet. App. 10a-11a.

This thin review perpetuates the same problems that Congress sought to rectify when it enacted the Veterans Benefits Act. Indeed, the Federal Circuit decisions below effectively reinstate the deferential review scheme articulated in *Hensley* and *Wensch* under which veterans can be deprived of benefits based on any evidence plausibly justifying that result. *Compare* Pet. App. 15a ("'take due account' [provision] 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"), *with Hensley*, 212 F.3d at 1263 ("conclusion rest[ing] on factual matters... is entitled

on review to substantial deference"), *and Wensch*, 15 Vet. App. at 367 (determination that benefit-of-the-doubt rule did not apply "was not clearly erroneous").

Under that standard, the benefit-of-the-doubt requirement becomes meaningless. As numerous veterans service organizations recognized in urging enactment of § 7261(b)(1), when there is probative evidence on both sides, the agency can nearly always articulate some plausible basis for finding the evidence on one side more persuasive. *See* [Part I.A.2], *supra*. And these cases evade review because the agency has no obligation or incentive to explain that "the case was in fact a close call" when it "determines that the evidence 'persuasively' forecloses a veteran's claim." *Lynch v. McDonough*, 21 F.4th 776, 783 (Fed. Cir. 2021) (Reyna, J., dissenting). As a result, the agency's decision to place the risk of error on the veteran is essentially unchecked. A standard of review that asks only whether the agency's finding is plausibly justified sidesteps the core question of whether the relevant evidence was close enough for the government to bear the risk of error as Congress directed in § 5107(b).

C. The Narrow Reading of Section 7261(b)(1) in Bufkin Rests Upon Flawed Reasoning.

In holding that § 7261(b)(1) does not mandate any review "beyond ... clear error review," the Federal Circuit relied in part on § 7261(c), Pet. App. 15a, 10a— which precludes the Veterans Court from conducting a "trial de novo"—and on an assumption that determining whether the benefit-of-the-doubt rule applies is "committed to the discretion of the" agency, *see Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013). Both lines of reasoning are incorrect, and the latter traces back to precedent predating the Veterans Benefits Act. Neither justifies defying Congress's clear instruction to permit the Veterans Court to engage in an independent,

non-deferential review of the record to ensure a proper application of the benefit-of-the-doubt rule.

1. Section 7261(c)'s Bar Against Trial De Novo Does Not Preclude Independent Review of the Existing Agency Record.

Despite Congress's direction that the Veterans Court "review the record" to "take due account of the" benefit-of-the-doubt rule, the Federal Circuit has read § 7261(c)'s blanket prohibition on "trial de novo" as preventing the Veterans Court from independently weighing factual findings. *See* Pet. App. 10a. Specifically, in interpreting § 7261(b)(1), the Federal Circuit has held that, because "§ 7261(c) expressly prohibits de novo review," "the Veterans Court properly review[s] the [BVA's] factual determination[s] for clear error while taking due account of [its] application of the benefit of the doubt rule." *See* Pet. App. 10a (citing *Roane v. McDonough*, 64 F.4th 1306, 1310–11 (Fed. Cir. 2023)). The Government adopted this reasoning in its certiorari-stage brief, contending that § 7261(c) precludes the Veterans Court from "de novo reconsideration of factual findings" and thus "confine[s] the scope of the Veterans Court's own consideration of the benefit-of-the-doubt rule." Br. for Respondent 11.

But that view conflates "trial de novo"—the phrase Congress used in § 7261(c)—with "de novo review"—an altogether different concept. Congress understood this distinction, and the language it selected for § 7261(c) cannot be read to preclude the independent and searching review of the existing administrative record specifically prescribed in § 7261(b).

1. "The term 'trial de novo' has a long-standing and well-established meaning." *Timmons v. White*, 314 F.3d 1229, 1233 (10th Cir 2003). As courts have explained, "[a] trial de novo is a trial which is not limited to the administrative record—the plaintiff 'may offer any relevant evidence available to support his case, whether or not it has been previously submitted to the

agency.'" *Kim v. United States*, 121 F.3d 1269, 1272 (9th Cir. 1997) (quoting *Redmond v. United States*, 507 F.2d 1007, 1011–12 (5th Cir. 1975)); *Affum v. United States*, 566 F.3d 1150, 1160 (D.C. Cir. 2009) (same). A trial de novo contemplates "the taking of additional evidence or even rehearing the testimony of key witnesses." *Abrams v. Johnson*, 534 F.2d 1226, 1228 (6th Cir. 1976). The term "trial de novo" thus speaks to the form that a reviewing court's inquiry may take— specifically whether it can accept new evidence.

De novo review, on the other hand, addresses the level of independence or deference with which the reviewing court will test an agency's (or lower court's) decision-making, typically based on the existing record on appeal. In applying de novo review, courts "make an independent determination of the issues." *Heggy v. Heggy*, 944 F.2d 1537, 1539 (10th Cir. 1991); *see Ornelas v. United States*, 517 U.S. 690, 697–98 (1996) (equating de novo review with "independent appellate review"). This means "that the reviewing court 'do[es] not defer to the lower court's ruling but freely consider[s] the matter anew.'" *Dawson v. Marshall*, 561 F.3d 930, 933 (9th Cir. 2009) (quoting *United States v. Silverman*, 861 F.2d 571, 576 (9th Cir. 1988)); *see Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991) ("When de novo review is compelled, no form of appellate deference is acceptable").

Thus, trial de novo and de novo review are distinct concepts—a court can engage in de novo review of an existing agency record without conducting trial de novo on any of the agency's factual findings. *See, e.g.*, *Stein's Inc. v. Blumenthal*, 649 F.2d 463, 466 (7th Cir. 1980) ("there is a difference between the 'de novo review' ... and a "trial de novo"); *Greenlaw v. Garrett*, 59 F.3d 994, 999 (9th Cir. 1995) ("After proceeding administratively, a claimant is entitled to a trial de novo in federal court, meaning a trial on the merits; not de novo review of an administrative record."); *Luby v. Teamsters Health, Welfare, & Pension Tr. Funds*, 944 F.2d

1176, 1185 (3d Cir. 1991) (acknowledging difference between "trial de novo" and "de novo review"); *cf. United States v. Raddatz*, 447 U.S. 667, 674 (1980) (distinguishing between "de novo determination" and "de novo hearing").[9] In the classic example of de novo review, a reviewing court takes "a 'fresh look' at the administrative record but does not consider new evidence or look beyond the record that was before the" agency or lower court. *See, e.g.*, *Wilkins v. Baptist Healthcare Sys., Inc.*, 150 F.3d 609, 616 (6th Cir. 1998); *cf. Dep't of Commerce v. N.Y.*, 588 U.S. 752, 780 (2019) ("in reviewing agency action, a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record"). Indeed, "de novo review of the record before the lower decisionmaker is [a] well-established meaning of de novo." *See Perry v. Simplicity Eng'g, a Div. of Lukens Gen. Indus., Inc.*, 900 F.2d 963, 966 (6th Cir. 1990).

2. Congress enacted the VJRA against the backdrop of this well-established distinction between "trial de novo" and "de novo review." *See F.A.A. v. Cooper*, 566 U.S. 284, 292 (2012) ("[W]hen Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.") (citation and quotation marks omitted); *N.L.R.B. v. Amax Coal Co., a Div. of Amax*, 453 U.S. 322, 329 (1981) ("[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law" "a court must infer, unless the statute otherwise dictates, that

[9] Relatedly, courts have expressly recognized that trial de novo does not require de novo review, underscoring that these are different concepts. The U.S. Tax Court, for instance, will in some cases "conduct[ ] a 'trial de novo' and consider evidence not included in the administrative record," but "appl[y] an abuse of discretion standard of review in that trial de novo proceeding." *Comm'r v. Neal*, 557 F.3d 1262, 1263 (11th Cir. 2009); *see, e.g.*, *Porter v. Comm'r*, 130 T.C. 115, 122 (2008) ("Review for abuse of discretion does not ... preclude us from conducting a de novo trial."); *Ewing v. Comm'r*, 122 T.C. 32, 40 (2004) ("Our longstanding practice has been to hold trials de novo in many situations where an abuse of discretion standard applies."). The D.C. Circuit has also considered the question "whether 'trial de novo' ... always means 'de novo review.'" *See Affum*, 566 F.3d at 1160. Answering "[w]e think not," the court there held that the Food Stamp Act required the district court to conduct a trial de novo into the Secretary of Agriculture's choice to impose one penalty over another; "[b]ut the controlling standard of review is abuse of discretion." *Id.* at 1160–61.

Congress means to incorporate the established meaning of these terms."). Legislative history confirms that Congress was well aware of this backdrop when passing the VJRA, with a member of Congress explaining that "nothing in the new language is inconsistent with the existing section 7261(c), which precludes the court from *conducting trial de novo* when reviewing BVA decisions, *that is, receiving evidence that is not part of the record before BVA*." *See* 148 Cong. Rec. 22,913 (2002) (emphases added).

Beyond the VJRA, Congress has demonstrated its understanding of these concepts as distinct across broad ranging legislation. In permitting or prohibiting a trial de novo, Congress regularly specifies that the provision governs the form of the reviewing court's proceedings rather than prescribing the standard of review. *See* 7 U.S.C. § 2023(a)(15) ("The suit in the United States district court or State court shall be a trial de novo by the court ... except" one category, which "shall be a review on the administrative record'"); *see also* 28 U.S.C. § 657(c); 47 U.S.C. § 504(a). In other statutes, Congress expressly prescribes de novo review while remaining silent about the form of the reviewing court's proceedings. *E.g.*, 12 U.S.C. § 1828(c)(7)(A); 12 U.S.C. § 1849(b)(1); 15 U.S.C. § 3414(b)(6)(F); 16 U.S.C. § 823b(d)(3)(B); 18 U.S.C. § 3613A(b)(1); 22 U.S.C. § 4140(b)(2); 28 U.S.C. § 2265(c)(3); 30 U.S.C. § 1300(j)(4)(ii)(I); 42 U.S.C. § 2282a(c)(3)(B); 42 U.S.C. § 5851(b)(4); 42 U.S.C. § 6303(d)(3)(B). And, in a third category, Congress has addressed both issues, providing for de novo review while also specifying that the reviewing court may conduct a trial on the merits, *i.e.*, a trial de novo. *See, e.g.*, 12 U.S.C. § 5567(c)(4)(D)(i); 15 U.S.C. § 2087(b)(4); 21 U.S.C. § 399d(b)(4)(A); 49 U.S.C. § 20109(d)(3); 49 U.S.C. § 31105(c). To nonetheless equate the VJRA's restriction against "trial de novo" with a limit on the scope of review would conflict with the structure of these statutes. *See, e.g.*, *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*,

551 U.S. 644, 669 (2007) (cautioning "against reading a text in a way that makes part of it redundant").

In short, there is no support for the Federal Circuit's view that § 7261(c) prohibits "independent and non-deferential review of the facts to take due account of the Board's application of the benefit of the doubt rule." *Roane v. McDonough*, 64 F.4th 1306, 1310 (Fed. Cir. 2023). The Federal Circuit's reasoning improperly conflates distinct concepts.

2. Congress Did Not Commit to Agency Discretion the Identification of Close Factual Questions in the Agency Record.

The Federal Circuit has also justified its benefit-of-the-doubt holdings by assuming that determining whether record evidence is close enough to trigger the rule is "committed to the discretion of the" agency and lies outside the purview of the Veterans Court as an "appellate tribunal[ ]." *Deloach*, 704 F.3d at 1380. But this reasoning traces back to precedent, such as *Hensley*, 212 F.3d at 1263, that was directly abrogated by Veterans Benefits Act.

In Hensley, the Federal Circuit invoked the Chenery doctrine in holding that the Veterans Court, as an appellate body, could not affirm or reverse a VA decision based on its own findings from a detailed examination of the factual record. *See* 212 F.3d at 1263–64 & n.7. This was based on the principle in Chenery that "an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency" in affirming or reversing an agency's orders. 318 U.S. at 88.

As discussed, [Part I.A.2], *supra*, Congress responded to Hensley by adopting the Veterans Benefits Act, which amended the statutory language to clarify that the Veterans Court has authority to "reverse" the BVA, 38 U.S.C. § 7261(a)(4)—a departure from the ordinary remand rule, reflected in the *Chenery* doctrine. *See, e.g.*, *Calcutt v. FDIC*, 598 U.S. 623, 629

(2023). Nevertheless, the Federal Circuit has repeatedly fallen back on inapplicable administrative law principles in concluding that the Veterans Court may not make any independent determinations when enforcing the benefit-of-the-doubt rule. *See Deloach*, 704 F.3d at 1380 (citing *Hensley*, 212 F.3d at 1264, in holding that the Veterans Court lacked authority to "independently weigh the evidence" and reverse the VA's decision); *Roane*, 64 F.4th at 1310 (citing Deloach in holding that the Veterans Court, as an appellate tribunal, can only "review the Board's weighing of the evidence" and "may not weigh any evidence itself") (emphasis in original); Pet. App. 10a (citing *Roane*, 64 F.4th at 1310). This reflexive invocation of deference conflicts with the text and history of § 7261(b)(1), which show that Congress intended for the Veterans Court to exercise independent assessments of the factual record and provide a robust check on the agency's determinations.

Notably, the Federal Circuit's approach to § 7261(b)(1) conflicts with its application of similar language in § 7261(b)(2), which directs the Veterans Court to review the agency record and "take due account" of the rule of prejudicial error. In cases interpreting that provision, the Federal Circuit has recognized that the Veterans Court's "statutory obligation" under § 7261(b)(2) "permits the Veterans Court to go outside of the facts as found by the [VA] to determine whether an error was prejudicial by reviewing 'the record of the proceedings before the Secretary and the Board.'" *Mlechick v. Mansfield*, 503 F.3d 1340, 1345 (Fed. Cir. 2007) (citing *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007)). The court has concluded that this authority does not violate the Chenery principle because the statutory mandate in § 7261(b)(2) made clear that the prejudicial error determination was not one "which the VA alone is authorized to make." *Newhouse*, 497 F.3d at 1301. Thus, the Veterans Court could "give[ ]

effect to the choices Congress made in crafting the applicable judicial review provisions" by undertaking the independent determination authorized by Congress. *Mlechick*, 503 F.3d at 1345.

This same reasoning should apply to the Veterans Court's authority under § 7621(b)(1). Congress created the Veterans Court as a tribunal particularly suited to evaluating the proper allocation of the risk of error on a given agency record. Indeed, this Court has acknowledged the Veterans Court's unique experience in reviewing "sufficient case-specific raw material in veterans' cases" to make these types of "empirically based" judgments in an informed way. *Shinseki v. Sanders*, 556 U.S. 396, 412 (2009). And to remove all doubt over the Veterans Court's intended role, Congress enacted § 7261(b)(1) to charge the court with reviewing the agency record in enforcing the benefit-of-the-doubt rule. The Court must give effect to that clear statutory command.

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The Federal Circuit's interpretation of § 7261(b)(1) reads the provision out of the statute, eroding the scope of judicial review available to veterans and the protection offered by the benefit-of-the-doubt rule. This Court should reverse.

Conclusion

The decisions of the Court of Appeals for the Federal Circuit should be reversed.[10]

[10] The U.S. Supreme Court is currently set to hear oral arguments in *Bufkin v. McDonough* on October 16, 2024. U.S. Sup. Ct., Supreme Court of The United States October Term 2024 (July 26, 2024), https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalOctober2024.pdf [https://perma.cc/M46S-CWPK].