

**SUPREME COURT
OF THE UNITED STATES**

IN THE SUPREME COURT OF THE UNITED STATES

JOSHUA E. BUFKIN, ET AL.,)
 Petitioners,)
 v.) No. 23-713
DENIS R. McDONOUGH, SECRETARY OF)
VETERANS AFFAIRS,)
 Respondent.)

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Petitioners,)

v.) No. 23-713

DENIS R. McDONOUGH, SECRETARY OF)

VETERANS AFFAIRS,)

Respondent.)

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Washington, D.C.

Wednesday, October 16, 2024

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:06 a.m.

APPEARANCES:

MELANIE L. BOSTWICK, ESQUIRE, Washington, D.C.; on behalf of the Petitioners.

SOPAN JOSHI, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 23-713, Bufkin versus McDonough, Secretary of Veterans Affairs.

Ms. Bostwick.

ORAL ARGUMENT OF MELANIE L. BOSTWICK
ON BEHALF OF THE PETITIONERS

MS. BOSTWICK: Mr. Chief Justice, and may it please the Court:

In Gilbert, one of its earliest decisions, the newly created Veterans Court recognized both the importance of the benefit-of-the-doubt principle and the difference between reviewing findings of fact for clear error and reviewing VA's application of the approximate balance standard of proof as a matter of law, but the Veterans Court soon strayed from that understanding, and by 2001, the court had declared that the agency's approximate balance assessment can be reviewed only under the deferential clear error standard of 7261(a)(4).

Congress responded by changing the

1 statute. It directed the Veterans Court to take
2 due account of the Secretary's application of
3 Section 5107(b), the benefit-of-the-doubt
4 statute, and that new statutory command, unique
5 in administrative review, directed to a
6 specialized Article I tribunal reviewing a
7 uniquely pro-claimant agency process, must be
8 given effect.

9 Petitioners have provided an account
10 of Section 7261(b)(1)'s plain text that gives
11 effect to all parts of the statute and allows
12 for the meaningful and independent judicial
13 scrutiny that Congress intended.

14 Yet the government insists that the
15 statute not only requires nothing that wasn't
16 already required by Section (a) before 2002 but
17 also requires the one thing we know Congress
18 didn't want. Under its view, the Veterans Court
19 does not even look at the agency's
20 benefit-of-the-doubt rulings unless a -- so long
21 as no factual finding specifically challenged by
22 the veteran is infected with clear error.

23 That is also what the Veterans Court
24 and the Federal Circuit held in these cases.
25 Their decisions render Congress's statutory

1 amendment entirely superfluous. They mean that
2 a uniquely generous standard of proof is
3 reviewed in a uniquely ungenerous way. And, if
4 upheld, they will allow the agency's
5 non-compliance with its statutory mandate to
6 continue unchecked.

7 I welcome the Court's questions.

8 JUSTICE THOMAS: Would you spend a
9 minute or so explaining how your approach would
10 work in comparison to the government's approach?

11 MS. BOSTWICK: Certainly, Your Honor.
12 So our view of the statute starts with the text.
13 So the text is "in making the determinations
14 under subsection (a)." What are the
15 determinations that the Veterans Court makes
16 under subsection (a)? It is looking at the
17 particular aspects of the agency's order that
18 are challenged on appeal, so deciding whether to
19 affirm, reverse, or vacate those decisions.
20 That's the determinations under subsection (a).

21 In making those determinations, just
22 like the Veterans Court, if it's otherwise
23 inclined to reverse or vacate, under (b)(2), it
24 has to do a -- a -- a check to make sure that
25 the -- any error was, in fact, prejudicial.

1 Under (b)(1), if it's otherwise inclined to
2 affirm, it nonetheless has to do a check and
3 make sure that the decisions that it is about to
4 affirm complied with the -- with Section
5 5107(b). That is the benefit-of-the-doubt
6 statute.

7 And the benefit-of-the-doubt statute,
8 in turn, has two mandatory requirements. It
9 requires the VA to consider all medical and lay
10 evidence and information relevant to the -- the
11 issue, and then it requires, if there's an
12 approximate balance of positive and negative
13 evidence on any issue, that the veteran receives
14 the benefit of the doubt.

15 CHIEF JUSTICE ROBERTS: But --

16 MS. BOSTWICK: So our view is --

17 CHIEF JUSTICE ROBERTS: Go ahead.

18 MS. BOSTWICK: Thank you, Your Honor.

19 Our view is that this is something the
20 Veterans Court has to do in every case, that it
21 is not bound by party presentation, and that it
22 is a non-deferential review.

23 CHIEF JUSTICE ROBERTS: But it's a
24 pretty unusual law, right? It says that the
25 administration shall take account of, take due

1 account of. It -- it doesn't seem that they're
2 changing the legal standard at all. It just
3 says sort of be more careful.

4 And to take from that instruction some
5 change in the legal standard of review, I think,
6 is -- is quite a leap.

7 MS. BOSTWICK: So we don't think that
8 it was -- was changing what the standard of
9 review should have been. That's clear, for
10 example, as to -- to any aspect of the
11 Secretary's application of Section 5107(b) that
12 presents a legal question. The government
13 agrees with us that there are at least some of
14 those.

15 As to this approximate balance piece,
16 our view is that the Veterans Court, as it
17 recognized in its -- its Gilbert decision, was
18 supposed to be reviewing that as a matter of law
19 all along. It wasn't doing that. It was doing
20 this narrow clear-error review. And so Congress
21 came back and, you know, it thought about, well,
22 should we just change the -- the standard of
23 review for factual issues? No. Why not?
24 Because that wouldn't fix the problem. Instead,
25 they -- they took this more direct approach.

1 It is unique, Your Honor. This is a
2 -- this is a unique court reviewing, you know,
3 one uniquely pro-claimant system. So it makes
4 sense that Congress would do something sort of
5 sui generis here.

6 JUSTICE JACKSON: Can you be a little
7 bit more specific when you say it was supposed
8 to be -- the court, the Veterans Court, was
9 supposed to be doing that all along? What
10 exactly is the "that"?

11 MS. BOSTWICK: So the -- the "that," I
12 think it's most helpful if -- if we look at
13 Section 5107, and that is at Pet. App. 93a.

14 So -- so, again, Section 5107(b) has
15 these two requirements. It obligates the agency
16 to consider all information and lay and medical
17 evidence of record, and when there is an
18 approximate balance of positive and negative
19 evidence on any material issue, the Secretary
20 shall give the benefit of the doubt to the
21 claimant.

22 Our view is that before 2002, under
23 subsection (a) of Section 7261, if a veteran
24 presented an argument that the Secretary had not
25 complied with this statute, the Veterans Court

1 was supposed to be doing that. It was.

2 As to this particular category of
3 Section 5107(b) errors that is about the -- the
4 review of was the evidence actually in
5 approximate balance, the Veterans Court was --
6 was only looking at whether there had been a
7 clear error of fact and not whether -- having,
8 you know, assessed the credibility of the
9 evidence, the persuasiveness of any piece of
10 evidence, whether -- and -- and sort of put
11 those on the evidentiary scales, whether the
12 Veterans Court had correctly judged if there was
13 an approximate balance or --

14 JUSTICE JACKSON: And you say no --
15 and you say no deference should be given to the
16 Veterans -- to the administration, to the
17 agency, with making that determination?

18 MS. BOSTWICK: That's correct. That
19 is a question about whether -- it's a legal
20 conclusion about the state of the evidentiary
21 record, was it sufficient to meet the applicable
22 standard of proof.

23 Here, you have this kind of unique
24 standard of proof, approximate balance, but like
25 other standards of proof, the court should be

1 reviewing it de novo.

2 JUSTICE KAVANAUGH: Wouldn't you
3 expect that Congress, if they thought that the
4 standard of review was wrong, instead of saying
5 take due account, would have said review de
6 novo?

7 MS. BOSTWICK: That might have been a
8 clearer way to indicate this, but I -- I think
9 what is clear is that Congress put this in a --
10 an entirely new separate provision. They didn't
11 simply adjust the -- the standard of review for
12 facts.

13 We think that that's right because
14 this isn't a factual question. And -- and what
15 they did was they took a part of the statute
16 that was already there. (b)(2) had already said
17 take due account of the role of prejudicial
18 error.

19 JUSTICE KAGAN: Well, how could this
20 not be a factual question? I mean, I could
21 understand it if you were looking at a decision
22 by the Secretary or the Board where they
23 completely ignored the benefit-of-the-doubt rule
24 or where -- or where they gave the benefit of
25 the doubt to the wrong party. Then I can see

1 your saying, well, look, they made a legal error
2 and that's subject to de novo review.

3 But assume that they do that. Assume
4 that they just say, you know, we don't -- we
5 don't see that this case is in equipoise, so
6 we're not giving the benefit of the doubt to the
7 claimant. And then the court takes another look
8 at it.

9 I would think that what the court is
10 doing is to evaluate how the Board has evaluated
11 evidence, weighed evidence, contrasted one
12 party's evidence with another party's evidence,
13 decided which is the more credible. All of that
14 sounds like typical factual issues, factual
15 determinations.

16 MS. BOSTWICK: So there -- there are
17 certainly factual determinations underlying it,
18 and we agree that -- that the -- the Board's
19 assessment of -- of credibility or -- or
20 persuasive value or probative value to any given
21 piece of evidence should be reviewed
22 deferentially, just like it is in other
23 sufficiency-of-the-evidence challenges. But the
24 ultimate question that contrasts between the
25 party's evidence, that question is -- is

1 traditionally reviewed as a question of law.

2 And we think the same would apply
3 here. And I -- I can give Your Honor an example
4 of when there might be, for example, no clear
5 error but, nonetheless, a legal error in
6 applying the approximate balance standard.

7 If -- if the -- and this is a
8 simplified example, but if the agency has before
9 it two medical opinions. Let's say the -- the
10 question is, is the veteran's disabling pain
11 linked to a gunshot wound that he received in
12 service. There is one medical opinion that says
13 it is, one medical opinion that says it's not.

14 The agency says: Both of these are
15 credible and probative, but, nonetheless, we're
16 going to go with the opinion that says no nexus.

17 That wouldn't meet the clear-error
18 standard of review, right, because, under clear
19 error, if there's two permissible views of the
20 evidence, it can't be a clear error.

21 But it would be, in our view, a
22 violation of the approximate balance standard of
23 proof. You have two competing opinions that the
24 agency has credited. You'd think that stands in
25 approximate balance. And that's the kind of

1 judgment that --

2 JUSTICE SOTOMAYOR: I'm sorry.

3 JUSTICE ALITO: No, I don't understand
4 that at -- at all because, if the administration
5 said the evidence is completely in equipoise,
6 then they would have to find in favor of
7 whichever party did not have the burden of proof
8 on that question.

9 And it -- sure, it would be a legal
10 error if one party has -- you know, one party
11 has the obligation to prove a fact by that fact,
12 you know, whether there's a linkage by a
13 preponderance of the evidence. If the -- if the
14 court or the administration doesn't heed where
15 the burden of proof has been allocated, then,
16 yes, that's legal error.

17 But, if they find -- they say that
18 the -- a particular burden of proof has been
19 satisfied or has not been satisfied on a
20 question of fact, and then there's an appeal,
21 the appellate court determines whether it was
22 clear error to apply the applicable burden of
23 proof in the way that is necessary in that
24 situation.

25 So I don't see any incompatibility.

1 If we view the burden -- the -- the
2 benefit-of-the-doubt rule as equivalent to the
3 allocation of the burden of -- of proof on -- on
4 a certain issue, I don't see any incompatibility
5 between that and ultimate clear-error review.

6 MS. BOSTWICK: So I -- I think the
7 example I gave is -- is an instance in which
8 the -- the Veterans Court would find no clear
9 error because there is a plausible basis for
10 finding a lack of nexus if you have one, you
11 know, credible medical opinion in the record
12 that says that. But there's, nonetheless, a
13 failure to apply the approximate balance
14 standard of proof.

15 I do want to be clear that we --

16 JUSTICE ALITO: No, I think it would
17 be a -- it would be a mistake, it would be a
18 legal error if they said, we're disregarding the
19 fact that the claimant was entitled to the --
20 the benefit of the doubt in the proceeding
21 before the administration. That would be a
22 mistake in applying the applicable law.

23 But, if they apply the applicable law,
24 then what is the problem with reviewing the
25 finding under the clear-error standard? Do you

1 agree that that would be appropriate?

2 MS. BOSTWICK: I -- I think that the
3 finding is reviewed for clear error, but the
4 application of the standard of proof is reviewed
5 de novo. This is how sufficiency of the
6 evidence works.

7 An example would be a -- a judge
8 reviewing a -- a motion for judgment as a matter
9 of law. There's a measure of deference in there
10 to things like credibility and persuasion.

11 In the JMOL context, it's -- it's
12 built in through inferences. Here, it would be
13 based on the explanation that the agency has
14 given about its credibility judgments and
15 persuasive judgments, which the agency is
16 required to provide in its opinion under the
17 reasons-and-bases requirement.

18 But the ultimate question, just like
19 in JMOL: Was the evidence sufficient to meet
20 that standard of proof -- whether it's
21 preponderance or clear and convincing in the
22 civil context; here, it's approximate balance --
23 was the evidence sufficient -- you know, did the
24 veteran present sufficient evidence to get into
25 that approximate balance, or was the agency,

1 instead, correct to find itself persuaded
2 against the veteran?

3 JUSTICE SOTOMAYOR: Counsel, it --
4 it's very rare -- and I think Justice Alito is
5 right. If the agency simply says both sides are
6 credible, I'm going to pick B, and stops there,
7 that's legal error because they have not -- the
8 -- the rule says you have to give the benefit of
9 the doubt to the plaintiff, and if they say
10 everything's equal, they've committed legal
11 error because it's in equipoise.

12 What actually happens, however, is
13 that the AIJ does a whole set of credibility
14 determinations to support the conclusion of why
15 they're going to believe one side or another.
16 They're going to look at the expert they believe
17 or -- and say: That expert had more
18 information. That expert was more precise about
19 A, B, and C. The other expert didn't know this
20 fact.

21 I think that's, in fact, what happened
22 in one of these cases. And they give a whole
23 set of reasons as to why they're disbelieving
24 one expert or not accepting one expert over the
25 other.

1 So let's get to that point. That, to
2 me, is a mixed question of law and fact.

3 MS. BOSTWICK: I think you could look
4 at it as a mixed question of law and fact. We
5 think that the -- the sufficiency-of-the-
6 evidence standards are -- are more of a helpful
7 analog. But, if you look at it under the mixed
8 question test, this is surely a predominantly
9 legal question that would be reviewed
10 non-deferentially. So it's --

11 JUSTICE SOTOMAYOR: So that's done in
12 almost -- in so few areas of law, most of them
13 constitutional. Like, is there probable cause?
14 I -- I don't know of any other area of civil law
15 where we view mixed questions of law and fact as
16 predominantly legal.

17 MS. BOSTWICK: And I would say this is
18 a -- a unique area of law, right? It has a
19 uniquely generous standard that is unlike
20 anything else that applies in civil litigation.
21 So having a unique standard of review --

22 JUSTICE SOTOMAYOR: But we go back to
23 Justice Kavanaugh's question, which is due
24 account --

25 MS. BOSTWICK: Yes.

1 JUSTICE SOTOMAYOR: -- seems to me not
2 to include a standard of review. They knew how
3 to say it's a matter of law or it's a matter of
4 fact and what standard of review applied, and
5 they didn't use those words.

6 MS. BOSTWICK: But they didn't use
7 "clear error" either. And they didn't put it
8 under (a)(4), which is the standard of review
9 for facts. I think that's a clear recognition
10 that this is not a factual question or at least
11 not purely a factual question.

12 To take --

13 JUSTICE SOTOMAYOR: But there are
14 components that are factual and components that
15 are legal, and we -- they take due consideration
16 of the standard of review that applies to each.

17 MS. BOSTWICK: But just because
18 something involves facts doesn't mean that the
19 ultimate question is -- is a question of fact.
20 There are many tests. I think, in the
21 intellectual property context, we have something
22 like obviousness in patent law or fair use in
23 copyright law.

24 Those tests are both based on
25 subsidiary factual findings that are reviewed

1 deferentially. The ultimate conclusion is
2 reviewed as a matter of law. So I don't think
3 this is so unusual.

4 JUSTICE KAGAN: But I think --

5 JUSTICE JACKSON: What happens --

6 JUSTICE BARRETT: Ms. Bostwick, can
7 I -- can I ask you just about the scope of your
8 argument for a moment?

9 You say that the Veterans Court must
10 consider this sua sponte in every case, but both
11 of your clients did raise the
12 benefit-of-the-doubt argument. So why should we
13 even reach that question?

14 MS. BOSTWICK: For a couple reasons,
15 Your Honor. First, because it -- it matters to
16 address the "when presented" language in order
17 to actually give effect to Congress's text and
18 not make it duplicative of what's already
19 required under subsection (a). But I would say
20 also that it matters concretely to these
21 Petitioners.

22 I think that the clearest example is
23 the fact that Mr. Thornton had two claims that
24 the agency resolved against him. One was his
25 rating for PTSD, as to which he did raise the

1 benefit-of-the-doubt argument to the Veterans
2 Court. The other was his rating for his
3 undiagnosed illness, as to which he did not
4 raise a -- specifically raise a
5 benefit-of-the-doubt error to the Veterans
6 Court.

7 Under our view, because he raised
8 other challenges to that rating denial, the
9 Veterans Court would have to look at -- have to
10 perform its (b)(1) review as to that claim as
11 well.

12 JUSTICE BARRETT: Well, I do have one
13 quick question about Mr. Thornton. Since he did
14 receive benefits, I just don't understand
15 exactly what he stands to gain because, because
16 of his unemployability, wasn't he given complete
17 disability? So what further relief could he get
18 if he wins before us?

19 MS. BOSTWICK: Yes, Your Honor.

20 So his total disability based on
21 individual unemployability, because of his age,
22 it's not a permanent benefit. He is subject to
23 continual review on that. So even though he is
24 receiving a hundred -- benefits at the
25 hundred percent level right now, that could

1 change in the future. So the rating for his
2 individual conditions is important.

3 He also may be in a situation where he
4 would be entitled to special monthly
5 compensation, which goes above the
6 hundred percent level.

7 JUSTICE BARRETT: Thank you.

8 JUSTICE GORSUCH: I'd like to follow
9 up on -- on -- on Justice Barrett's question,
10 Ms. Bostwick.

11 The party presentation question wasn't
12 really squarely addressed in either of the lower
13 court opinions, and I wonder whether we should,
14 as a court of review rather than first view,
15 give them the chance to tackle that first and
16 just address the question of, when it is
17 presented, must -- must it be interpreted the
18 way you -- you -- you propose?

19 What do you think of that?

20 MS. BOSTWICK: So, respectfully, Your
21 Honor, I -- I disagree. I do think the Federal
22 Circuit --

23 JUSTICE GORSUCH: I know you disagree.

24 MS. BOSTWICK: -- resolved this
25 question. I --

1 JUSTICE GORSUCH: I -- I -- I know
2 that, but would you object to a partial win
3 rather than a complete one, counsel?

4 MS. BOSTWICK: I'm certainly not going
5 to object, Your Honor, but I would point the
6 Court to Pet. App. 9a in the Bufkin opinion,
7 where it relies on the "when presented" language
8 to say that -- that arguments that are -- are
9 benefit-of-the-doubt errors that are not raised
10 to the Veterans Court don't have to be
11 addressed, so --

12 JUSTICE GORSUCH: And I understand
13 there's language in -- in some of the Federal
14 Circuit opinions that suggests that they do (a)
15 review -- sorry, (b)(2) review, that is, the
16 prejudicial error review, even when it isn't
17 presented, which is a little odd, but -- and I
18 understand that you want your -- your provision
19 interpreted in pare materia with that, but I
20 just wonder whether, as a first bite, we should
21 just tackle the narrow question that is squarely
22 presented.

23 MS. BOSTWICK: It would certainly be
24 -- be helpful for the Court to -- to address any
25 -- any of these questions. We do think the --

1 the "when presented" piece is an important part
2 of giving the statute effect, but if it -- if
3 the Court wanted to leave that for the Federal
4 Circuit to consider with the benefit of the
5 Court's other guidance, that would be fine.

6 I do -- again, I think that this
7 language at Pet. App. 9a --

8 JUSTICE GORSUCH: 9a. I've got that.
9 I've got that note.

10 And then, separately, there's been
11 some discussion about the "take due account of"
12 language, and I -- I'm certainly sympathetic to
13 that point. But (b)(2), the "take due account
14 of the rule of prejudicial error," courts -- it
15 seems to be a given between the courts and both
16 sides here that that means that the reviewing
17 court will conduct a harmless error review.

18 MS. BOSTWICK: Yes, Your Honor.

19 JUSTICE GORSUCH: And it looks at the
20 record given -- given what's not clearly
21 erroneous. It takes those facts as given and
22 then does a de novo legal analysis and decides
23 whether the -- the -- the error which is found
24 would have been -- made a difference in the
25 outcome of the case.

1 MS. BOSTWICK: Yes, Your Honor.

2 JUSTICE GORSUCH: And you're asking
3 (b)(1) to be interpreted in the same manner?

4 MS. BOSTWICK: Yes, for -- for two
5 reasons. They're subject to the same language,
6 and -- and two pieces of language are important.
7 One is that subsection (b), unlike subsection
8 (a), the Veterans Court is directed to make
9 these determinations on -- based on a review of
10 the record of proceedings before the Secretary
11 and the Board. That's a comprehensive review,
12 as this Court recognized in Sanders when
13 addressing (b)(2).

14 And also the -- the words "take due
15 account," right? What -- to take due account of
16 something is -- what -- what account is due will
17 depend on the thing being taken account of. In
18 the prejudicial error context, it was, okay,
19 let's do it the same way we do in the APA.

20 Here, what are we dealing with? We're
21 dealing with the Secretary's application of
22 Section 510(c), a mandatory statute that binds
23 the agency with not one but two "shall"
24 commands. A reviewing court takes due account
25 of that by looking at whether the agency

1 complied with its obligations, and the piece of
2 that, the approximate balance piece of that that
3 sets out the standard of proof, reviewing courts
4 look at the -- the standard of proof as a matter
5 of law.

6 CHIEF JUSTICE ROBERTS: Are you -- are
7 you just asking for another line in the opinion
8 saying our conclusions take due account of what
9 it's supposed to, and then that's -- because, I
10 mean, your friend on the other side says that
11 this really doesn't add anything. And you seem
12 to be saying no, they have to look at this and
13 this.

14 So what -- I mean, I know you want a
15 different result in this case, but in terms of
16 the analysis, what are you looking for?

17 MS. BOSTWICK: Yeah, I -- I don't
18 think going from one rubber stamp to another
19 system would -- would be helpful here. We think
20 that this is a meaningful analysis that the
21 Veterans Court must perform.

22 I'll give you an example of what the
23 Veterans Court shouldn't be doing, which is at
24 Pet. App. 43a in Mr. Thornton's case.
25 Mr. Thornton, again, yes, he raised a

1 benefit-of-the-doubt challenge, but,
2 nonetheless, the Veterans Court said that the --
3 the agency's conclusion -- the outcome of the
4 agency's approximate balance analysis is a
5 factual finding. And because Mr. Thornton had
6 said, I'm not challenging factual findings, I'm
7 making a legal argument, the Veterans Court said
8 we don't have to do anything. Thus, he has not
9 shown error in the Board's application of
10 Section 5107(b).

11 That certainly can't be right.
12 Whatever precise level of deference or scrutiny
13 the -- that is appropriate to take due account
14 of the Secretary's application of this statute,
15 it has to be some meaningful review.

16 And that's the purpose of the Veterans
17 Court, right, is to -- to superintend this one
18 agency. If the Veterans Court is meaningfully
19 looking at this benefit-of-the-doubt rule, then
20 we will get a developed law. What does
21 approximate balance mean? How does it apply in
22 different cases? We will get uniformity, which
23 we don't have now.

24 I would point the Court to page 9 of
25 the DAV amicus brief, where it talks about

1 examples of veterans from -- who served on Eglin
2 Air Force base, where the government concedes it
3 used toxic herbicides. You have veterans with
4 identical records, some of them being given the
5 benefit of the doubt and others not. That --
6 that is the kind of legal error that the
7 Veterans Court should be supervising and should
8 be preventing by -- by doing an actual
9 meaningful review of this statute.

10 JUSTICE JACKSON: And should be
11 because, you say, Congress intended that. I
12 mean, I -- I understood from your argument that
13 Congress came back and put (b)(1) into the
14 statute, which suggests that it intended that it
15 do some work, I would think.

16 MS. BOSTWICK: Yes, Your Honor, that
17 it do some work. And we think the -- you know,
18 Congress putting it in subsection (b), where
19 it's something that applies in every case and --
20 and isn't bound to the specific arguments that
21 the parties raise and is based on a review of
22 the record, is indicative of the importance of
23 this issue.

24 I think it also is important for the
25 Court to bear in mind the number of veterans who

1 appear pro se even at the Veterans Court. There
2 were more than 1100 of them last year alone.
3 And, certainly, those veterans, you know, they
4 may not know to raise a specific articulation of
5 a -- a 5107(b) error, but they know something
6 went wrong.

7 And what Congress is telling the
8 Veterans Court is you have to look. It's the
9 Veterans Court's obligation to take due account
10 of the agency's compliance.

11 JUSTICE JACKSON: And going back to
12 Justice Gorsuch's point, we do see parallel
13 language between (b)(1) and (b)(2), so I just
14 want to be clear that (b)(2) does have this sort
15 of separate obligation, is that right, by the
16 court? In other words, (b) -- sorry, Chief.

17 CHIEF JUSTICE ROBERTS: No, no, you
18 can finish.

19 JUSTICE JACKSON: (b)(2) doesn't
20 require sort of a threshold analysis of legal
21 error versus factual error or whatnot. Everyone
22 agrees that when the statute says take due
23 account, the court operates, as Justice Gorsuch
24 suggests, to just determine whether there is a
25 harmless error under these circumstances.

1 MS. BOSTWICK: Yes. And under the
2 Federal Circuit's Tadlock ruling and others,
3 that is a mandatory obligation on the court.

4 JUSTICE JACKSON: Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Thomas?

8 Justice Alito?

9 JUSTICE ALITO: Let me just pursue for
10 a second the example that you gave earlier in
11 your argument about a hypothetical case in which
12 there are two experts who testify on the
13 question of the linkage between the disability
14 and service.

15 And let's say in that situation the --
16 the Veterans Administration finds that even
17 taking into -- even giving the claimant the
18 benefit of the doubt, the expert who says that
19 there is no linkage is more persuasive, okay?

20 Now that finding would be dispositive
21 of the claim for benefits, would it not?

22 MS. BOSTWICK: I -- I don't mean to --
23 to be difficult, but I would say it depends on
24 the circumstances because the test is not --
25 again, the test isn't equipoise and the test

1 isn't, you know, has one person persuaded more
2 than the other. It is an approximate balance
3 assessment.

4 JUSTICE ALITO: Right. They say:
5 Taking into account the approximate balance, the
6 approximate balance is not in favor of the
7 claimant, it is against the claimant, all right?
8 So that is a finding. And let's assume it's
9 dispositive of the -- of the claim for benefits.
10 And then there is -- then there is a review in
11 the Veterans Court.

12 Is it your argument that the finding
13 of fact as to which expert is more credible is
14 subject to de novo review or clear-error review?

15 MS. BOSTWICK: No, that aspect is
16 subject to clear-error review.

17 JUSTICE ALITO: And then what is
18 subject to de novo review?

19 MS. BOSTWICK: The judgment of taking
20 all of the evidence, right? It's -- it's rare
21 that there's going to be just these two pieces
22 of evidence and it's so clear how they balance
23 out. Taking all -- into account all of the lay
24 and medical evidence relevant to the issue, was
25 the evidence in approximate balance, or did it

1 persuasively favor one side or the other?

2 JUSTICE ALITO: Well, let's say that
3 there is a finding of fact on every piece of
4 evidence, and on all of these pieces of
5 evidence, the finding of fact is that, even
6 giving the claimant the benefit of the doubt,
7 the fact has not been proved.

8 Then what is the standard of review
9 before the Veterans Court? Do you say that --
10 that that is -- although each of them is subject
11 to clear error -- each of these findings is
12 subject to clear-error review, when you put it
13 all together, that is a question of law that is
14 subject to de novo review? Is that your
15 argument?

16 MS. BOSTWICK: Yes, Your Honor.

17 JUSTICE ALITO: Why wouldn't that
18 apply in -- in every civil bench trial? The
19 question of whether the -- the -- the -- the
20 judge erred in rejecting a particular civil
21 claim, that would be a -- in your view, that's a
22 -- that's a question of law?

23 MS. BOSTWICK: If -- if there's a
24 motion that the -- if there's -- if the
25 challenge is not to any factual finding but just

1 to the sufficiency of the evidence, that is a --
2 a question of law, as -- as this Court --

3 JUSTICE ALITO: But it takes into
4 account the -- the findings on all the
5 subsidiary facts?

6 MS. BOSTWICK: Yes. And that's our
7 view of how this works as well, Your Honor.

8 CHIEF JUSTICE ROBERTS: Justice
9 Sotomayor?

10 JUSTICE SOTOMAYOR: What is the
11 difference between (b)(1) and (b)(2)? (b)(2)
12 says: Take due account of the rule of
13 prejudicial error. And that's because the
14 Secretary doesn't do that, correct?

15 MS. BOSTWICK: Correct, Your Honor.

16 JUSTICE SOTOMAYOR: So it's only
17 the -- it's the Veterans Court that has to do
18 that because it's the only one charged with
19 doing it?

20 MS. BOSTWICK: Yes, Your Honor.

21 JUSTICE SOTOMAYOR: All right. So it
22 has to apply it. But (1) says: Take due
23 account of the Secretary's obligation --
24 application of Section 5107(b). That's
25 substantially different. It's asking a -- it's

1 asking them to review what someone else has
2 done, correct?

3 MS. BOSTWICK: Yes, Your Honor.
4 It's --

5 JUSTICE SOTOMAYOR: And so that
6 comes -- may come to a different standard of
7 review, correct?

8 MS. BOSTWICK: It could. And -- and
9 so we have to look further at what is the -- the
10 Secretary's application of 5107(b).

11 JUSTICE SOTOMAYOR: My point is only
12 that (b) doesn't really tell us much.

13 MS. BOSTWICK: I don't think it -- it
14 answers the -- the question, no, Your Honor.

15 CHIEF JUSTICE ROBERTS: Justice Kagan?

16 JUSTICE KAGAN: I just want to make
17 sure I understand.

18 Do you agree with the description of
19 the benefit-of-the-doubt rule, that it's
20 essentially just a change in the burden of
21 proof, right?

22 Usually, a claimant comes in and he
23 has to meet a 51 percent burden. And what the
24 benefit-of-the-doubt rule does is to say: No,
25 if you meet 50 percent, you win, and maybe even

1 a little bit more because it's an approximate
2 balance. So maybe, if you go 49 percent, you
3 win.

4 But that's what this rule is. It's
5 just a shift in the burden of proof?

6 MS. BOSTWICK: Yes. I'd say it's --
7 it's a different burden of proof.

8 And I do want to be clear it is not a
9 50 percent rule. It is not a preponderance
10 rule. The Federal Circuit has rejected that.
11 It is broader than that.

12 JUSTICE KAGAN: Okay. So it's in
13 the -- right. Like, even if you don't get up to
14 50 percent, maybe because we find that there is
15 an approximate balance, you still win. But
16 that's just a -- a -- a -- that's just another
17 way of shifting the burden of proof. That's
18 what this rule is?

19 MS. BOSTWICK: Yeah. It's also -- the
20 burden remains on the claimant, but the level of
21 the burden they have to -- the threshold they
22 have to meet is different. It sort of creates
23 three zones: persuasively favoring the veteran,
24 the veteran wins; persuasively against the
25 veteran, the veteran loses on that issue; and

1 then this middle zone of approximate balance.

2 It would chase that.

3 JUSTICE KAGAN: Yeah. So why isn't --
4 the way we usually do this -- it's like usually,
5 in, like, a totally factual case, where you have
6 all these subsidiary factual findings and then
7 you have a question of whose facts weigh more
8 heavily, whose facts are more credible, and we
9 usually think about that as, like, was it clear
10 error to find that the claimant didn't meet his
11 51 percent burden of proof?

12 Now we just say: Is it clear error to
13 find that the plaintiff didn't meet his slightly
14 less stringent burden of proof? But it's still
15 clear error.

16 MS. BOSTWICK: I -- I don't think so,
17 Your Honor. Again, I think, when you're judging
18 the sufficiency of the evidence to meet whatever
19 the applicable standard of proof is, I mean,
20 this case -- this Court's case in -- in Reeves,
21 in Weisgram, talks about that. And then, of
22 course, in the criminal context with probable
23 cause, it -- it -- it talks about that as an
24 ultimate question of law.

25 JUSTICE KAGAN: Okay. Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Gorsuch?

3 JUSTICE GORSUCH: Let me see if I've
4 got it, and I may not, Ms. Bostwick.

5 So, in -- in a normal civil case, for
6 example, we -- we look at all -- a reviewing
7 court will look at all of the facts in the light
8 most favorable to the prevailing party below.

9 MS. BOSTWICK: Yes, Your Honor.

10 JUSTICE GORSUCH: We take those facts
11 and then we do a legal analysis to see if
12 they're sufficient as a matter of law to support
13 the verdict rendered, and we do that de novo.

14 MS. BOSTWICK: Yes, Your Honor.

15 JUSTICE GORSUCH: That -- that --
16 that's just what it is. Now that standard is:
17 Could any reasonable juror come to this
18 conclusion? But that's the legal standard we
19 ask based on the evidence that's given.

20 MS. BOSTWICK: Yes.

21 JUSTICE GORSUCH: And you're here
22 asking us essentially to say, take all the
23 non-clearly erroneous facts and ask: Was the
24 Secretary's approximate -- instead of a
25 sufficiency line, whether the -- whether the

1 Secretary's determination that they were not in
2 approximate balance is correct?

3 MS. BOSTWICK: Yes, Your Honor.

4 JUSTICE GORSUCH: And what's an
5 approximate balance? Nobody knows. But
6 that's -- that's what -- what you were talking
7 with Justice Kagan about. It's something less
8 than 50 percent.

9 MS. BOSTWICK: It's -- the -- the way
10 the Federal Circuit has described it in the --
11 the governing Lynch opinion is whether the
12 evidence persuasively favors one side or the
13 other or whether it's, instead, an approximate
14 balance. And they have rejected the idea
15 that -- that proof by a preponderance for the
16 government is enough to get you out of
17 approximate balance.

18 JUSTICE GORSUCH: Okay. So, to take
19 your example of the two experts, let's say
20 they're both super well qualified and they both
21 do a really good job. And one says:
22 Service-related. The other says: Not.

23 The agency favors the one that's not
24 because, hmm, he -- he interviewed the claimant
25 more recently in time or ran one more test.

1 And -- and that's not clearly erroneous because
2 a clearly erroneous standard is very hard to
3 meet.

4 MS. BOSTWICK: Yes, Your Honor.

5 JUSTICE GORSUCH: Right? It's -- it's
6 basically: Were they crazy in -- in choosing
7 this one fact over the other fact? And they
8 were not crazy. So there's no clear error.

9 But, as a matter of law, you would
10 say, as I understand your argument, that, hey,
11 those are really pretty similar, and the
12 Secretary's decision that it wasn't decisively
13 in favor, I think is the language you used, or
14 something like that, in favor of -- of -- of the
15 government means that -- that this standard has
16 teeth and should be applied?

17 MS. BOSTWICK: Yes, Your Honor.

18 JUSTICE GORSUCH: Okay. And in the
19 same way that -- that the prejudicial error
20 language works, we take all the non-clearly
21 erroneous facts and say: Okay, would this error
22 have made any difference?

23 MS. BOSTWICK: Yes, Your Honor.

24 JUSTICE GORSUCH: All right. I think
25 I got it. Thank you.

1 MS. BOSTWICK: Yeah.

2 JUSTICE GORSUCH: All right.

3 CHIEF JUSTICE ROBERTS: Justice
4 Kavanaugh?

5 JUSTICE KAVANAUGH: Two things. I
6 assume you don't want us to accept the premise
7 that clearly erroneous is the same as crazy as a
8 general proposition.

9 (Laughter.)

10 MS. BOSTWICK: The -- correct, Your
11 Honor. The way the Veterans Court has
12 articulated it is: Is there a plausible basis?

13 JUSTICE KAVANAUGH: And, second, can
14 you quantify or try to quantify what approximate
15 balance is?

16 MS. BOSTWICK: I think we're -- we're,
17 in this case, not challenging the -- the Lynch
18 decision, and so it is just: Have you
19 persuasively favored one side or the other?

20 Trying to put numbers on that --

21 JUSTICE KAVANAUGH: Is that 35, 40,
22 45, 49?

23 MS. BOSTWICK: I think that's a
24 question that -- that this Court doesn't have to
25 resolve in this case. What we do know is that

1 it's -- it's more than, you know, 51/49. It's
2 broader than that difference.

3 JUSTICE KAVANAUGH: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Barrett?

6 JUSTICE BARRETT: No.

7 CHIEF JUSTICE ROBERTS: Justice
8 Jackson?

9 JUSTICE JACKSON: So just a final
10 point on this.

11 You've said a couple of times that
12 this area is involving a unique standard, and
13 what I took you to mean is that the approximate
14 balance standard itself, the 5017(b) standard,
15 is unique, but what you're asking of the Court,
16 the rule that you would like to have applied
17 here is very similar to what courts do when they
18 evaluate sufficiency of the evidence, as you had
19 in the dialogue with Justice Gorsuch.

20 Is that what you're saying? So we're
21 not -- you're not asking for something new and
22 different by the Court with respect to the
23 assessment here?

24 MS. BOSTWICK: We don't view it as new
25 and different, correct, Your Honor. It's just

1 that the -- the -- you know, whereas, in a Rule
2 50 context, for example, you might be looking at
3 the sufficiency of the evidence through a
4 preponderance standard --

5 JUSTICE JACKSON: Right.

6 MS. BOSTWICK: -- this is a -- a
7 different test, this approximate balance.

8 JUSTICE JACKSON: But we're still
9 doing the same -- qualitatively, same kind of
10 review as a sufficiency-of-the-evidence review?

11 MS. BOSTWICK: Analytically, we think
12 it is the same, yes, Your Honor.

13 JUSTICE JACKSON: Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Mr. Joshi.

17 ORAL ARGUMENT OF SOPAN JOSHI

18 ON BEHALF OF THE RESPONDENT

19 MR. JOSHI: Mr. Chief Justice, and may
20 it please the Court:

21 The Veterans Court does not apply
22 5107(b) itself. It takes due account of the
23 Secretary's application of it, and it does so in
24 making the determinations under subsection (a).

25 Those textual clues point to standard

1 principles of judicial review of agency action.
2 That is, the Veterans Court reviews legal
3 aspects of the Secretary's application of
4 5107(b) de novo and factual aspects
5 deferentially, here, for clear error.

6 The Secretary's determination that all
7 the evidence in the record on a particular issue
8 is or is not an approximate balance is itself
9 factual or predominantly factual and so should
10 be reviewed for clear error.

11 Now what I heard my friend say this
12 morning and the reason Petitioners resist that
13 fairly obvious conclusion, I think, is because
14 they observe that everything I just said could
15 have been inferred from subsection (a) itself.
16 And so that leaves subsection (b)(1) with no
17 additional work to do.

18 But, when Congress enacted (b)(1) in
19 2002, it took what was implicit or just
20 generally covered in (a) and made it explicit
21 and specific. It put an exclamation point on
22 it. That's not nothing. Think of the Tenth
23 Amendment, for example.

24 But, even if you think that our
25 interpretation renders (b)(1) largely redundant,

1 it's still better than the alternative that
2 Petitioners offer you.

3 Petitioners say that the approximate
4 balance finding should be reviewed de novo. But
5 that creates needless contradictions in the
6 text. It conflicts with the express standard of
7 review Congress supplied in (a)(4). It's in
8 serious tension with the prohibition on trial de
9 novo in subsection (c). It's a real divergence
10 from standard principles of judicial review
11 generally and judicial review of agency
12 decisions more specifically.

13 And it's even inconsistent with the
14 way other factual issues under (b)(1) are
15 reviewed, as my friend mentioned this morning,
16 like the in-service connection or existence of a
17 disability. If Congress intended that highly
18 irregular result, I think the language in (b)(1)
19 is an awfully cryptic way of going about it.

20 So, as between two interpretations,
21 one that's sort of consistent, coherent, with a
22 little bit of redundancy, and one that
23 eliminates the redundancy at the cost of a
24 statute at war with itself, I think you should
25 pick the former over the latter.

1 I'm sorry, I welcome the Court's
2 questions.

3 JUSTICE THOMAS: Well, in order for
4 you -- us to accept your argument, don't we have
5 to accept that Congress passed a meaningless
6 provision?

7 MR. JOSHI: I don't think so, Justice
8 Thomas. I think --

9 JUSTICE THOMAS: So what work is it
10 doing?

11 MR. JOSHI: So I -- I just want to be
12 clear I am willing to accept that it's redundant
13 but not that it does no work. It does work. It
14 just does work that subsection (a) generally,
15 you could infer, also does. So it's doing
16 duplicate work. It's not a nullity.

17 So I know, you know, when there are
18 statutory nullities, you should avoid those at
19 all costs, but redundancy --

20 JUSTICE GORSUCH: What's the
21 difference between a duplicative work and a
22 redundancy?

23 MR. JOSHI: Oh, no, there's no
24 difference there. I'm drawing a distinction
25 between that and a nullity, where a statute says

1 do X, but we say it actually has no effect, you
2 don't have to do X.

3 JUSTICE GORSUCH: Well, no, that's
4 very different.

5 MR. JOSHI: Yeah.

6 JUSTICE GORSUCH: I think Justice
7 Thomas's question is, if (a) does all the work,
8 what does (b) do?

9 MR. JOSHI: Yeah. So I think --

10 JUSTICE GORSUCH: You say it's an
11 exclamation point like the Tenth Amendment. I
12 -- I hope you don't think the Tenth Amendment's
13 a redundancy and a nullity.

14 MR. JOSHI: So --

15 JUSTICE GORSUCH: But put that aside.

16 MR. JOSHI: Well, so, Justice Gorsuch,
17 this Court in New York against United States
18 said that the Tenth Amendment simply makes
19 clear -- and this is quoting Justice Story --
20 simply makes clear what you would already do to
21 address --

22 JUSTICE GORSUCH: It makes very clear
23 what you do --

24 MR. JOSHI: Yeah.

25 JUSTICE GORSUCH: -- already. And the

1 question is, is that what this does?

2 MR. JOSHI: I --

3 JUSTICE GORSUCH: Are you suggesting
4 this only --

5 MR. JOSHI: I think so. And let me
6 give you just a little bit of history that is
7 recounted in -- I think even in Petitioners'
8 tale in the -- the -- the -- the history they
9 cite of the enactment.

10 Veterans groups came to Congress and
11 they said, look, you have given us -- they
12 didn't -- they weren't identifying some gap in
13 the statute. They were saying, you gave us this
14 lower standard of proof, whether it's 49, 50,
15 48, whatever it is, a lower standard of proof,
16 but we're not getting the benefit of it and the
17 Veterans Court isn't holding the Board to giving
18 us the benefit of this thing.

19 And so Congress, I think, reacted in a
20 way you might expect when faced --

21 JUSTICE GORSUCH: Right.

22 MR. JOSHI: -- with that problem, not
23 --

24 JUSTICE GORSUCH: Right. But you just
25 said that they came to Congress saying that the

1 Veterans Court isn't giving the benefit of the
2 rule. And -- and I'm -- and I'm just wondering,
3 after the law passed, I think you're still
4 saying that the court doesn't have to do that.

5 MR. JOSHI: No.

6 JUSTICE GORSUCH: It just does clear
7 -- clear-error analysis.

8 MR. JOSHI: Well, so there are a
9 couple things there. Let -- let me first say I
10 think what the statute did was remind the
11 Veterans Court of its preexisting obligation.
12 And you see that in the case law. So --

13 JUSTICE GORSUCH: What -- what
14 obligation does it have?

15 MR. JOSHI: So the obligation is to --
16 so let me give you an example, and I'm going to
17 cite a couple cases in the Senate report, but I
18 -- Congress was thinking about these cases.

19 So Congress identified two cases as
20 exemplary of what the Veterans Court was doing
21 that it didn't like, that it thought was not
22 honoring the statute it had already passed.
23 They're called -- the two cases are called
24 Ammons, I think, A-m-m-o-n-s, and Presley.

25 And if you look at these cases, they

1 rejected factual challenges by the claimants,
2 and they rejected it for having no plausible
3 basis in the record. And there's just no
4 citation or mention of the benefit --

5 JUSTICE GORSUCH: So that's clear
6 error?

7 MR. JOSHI: They don't even mention --

8 JUSTICE GORSUCH: But that would be --
9 that would fail --

10 MR. JOSHI: Yeah.

11 JUSTICE GORSUCH: -- on clear-error
12 standard, right?

13 MR. JOSHI: I'm sorry?

14 JUSTICE GORSUCH: Those examples would
15 fail for lack -- they would be clearly erroneous
16 --

17 MR. JOSHI: No.

18 JUSTICE GORSUCH: -- factual findings,
19 right?

20 MR. JOSHI: No. What -- what I'm
21 saying is that those cases found no clear error
22 without any recognition that it's a clear-error
23 review against a standard of proof that is lower
24 than a preponderance, right?

25 Standards of proof and standards of

1 review are two different things, and you can mix
2 and match. There's no -- you could have a high
3 standard of proof, like clear and convincing, or
4 a low one, like -- like this one here, but you
5 can mix and match with de novo or deferential
6 review. There -- there's no reason one compels
7 the other. But --

8 CHIEF JUSTICE ROBERTS: Counsel --

9 JUSTICE JACKSON: Mister --

10 CHIEF JUSTICE ROBERTS: -- I -- I want
11 to go back before you get off it. What other
12 examples do you have of Congress passing a law
13 that doesn't do anything?

14 MR. JOSHI: As I -- so we cite a
15 couple of cases in our brief involving statutes,
16 O'Gilvie and Kawashima. You know, in O'Gilvie,
17 there, you know, if you -- I don't want to delve
18 too deep in it, but there was a statute that
19 said damages in litigation about personal
20 injuries are not taxable, you can exclude them
21 from your income, and the question was, well,
22 what about punitive damages because those aren't
23 on account of your physical injury; they're on
24 account of, you know, punishing the defendant or
25 something. And the Court said, no, punitive

1 damages are excluded. You have to count those
2 as income.

3 And the argument was made on the other
4 side, well, wait a minute, Congress had passed a
5 subsequent amendment saying that punitive
6 damages are excluded in personal injury cases
7 for non-physical injuries, so like mental
8 injuries. And they said, well, that statute
9 would be completely superfluous if punitive
10 damages were not already included. And you
11 said, well, it doesn't matter. We go with the
12 reasonable test.

13 CHIEF JUSTICE ROBERTS: Well, but that
14 seems to me that there's a legal determination
15 and that the law that you're talking about sort
16 of pointed the Court in the right direction.

17 I mean, here, it was an eye-catching
18 sentence in your brief for me when you said the
19 amendment would serve a useful purpose even if
20 it simply confirmed and emphasized a preexisting
21 legal duty.

22 Now this is not part of a complicated
23 law where they wanted to say and we want you to
24 do this. This was freestanding, right? It said
25 this is what you get in the veterans groups

1 making a -- a fairly significant push to get
2 this fixed from their point of view.

3 And you say what they got was
4 something that didn't do anything.

5 MR. JOSHI: I -- I -- I think it did
6 have a good effect. So, to finish my answer to
7 Justice Gorsuch, I mentioned the Ammons and
8 Presley cases, which applied a clear-error
9 standard with no recognition that the standard
10 of proof against which it was measuring the
11 clear error was lower than a preponderance.

12 But then, shortly after the law was
13 passed, there was a case, it's not discussed
14 here, but it was discussed extensively in the
15 Federal Circuit below in these cases, a case
16 called Mariano from the Veterans Court, where it
17 just looks completely different. It's still
18 applying clear-error review, but it is actually
19 reversing the --

20 JUSTICE KAVANAUGH: That's why -- why
21 -- yeah. Why are you accepting the premise that
22 it didn't do anything? It seems to me the way
23 you're describing it, it did something
24 important, which was describing the practice at
25 least in some cases by the Veterans Court where

1 they weren't separately analyzing it in light of
2 the benefit-of-the-doubt rule and telling the
3 Veterans Court you need to take due account of
4 the benefit-of-the-doubt rule.

5 That is accomplishing something. And,
6 in fact, as you say, the proof's in the pudding,
7 then the Veterans Court and the -- they're doing
8 that, right?

9 MR. JOSHI: That's exactly right,
10 Justice Kavanaugh.

11 JUSTICE JACKSON: Doesn't it depend on
12 what the complaint --

13 JUSTICE KAVANAUGH: Well --

14 JUSTICE JACKSON: Oh, sorry. Go
15 ahead.

16 JUSTICE KAVANAUGH: -- this -- so I
17 guess I'm not sure why you so easily accept the
18 premise. I mean, it seems to me it accomplished
19 something important.

20 MR. JOSHI: I -- I agree completely.
21 There are times I think Congress is free to pass
22 a statute that reminds a court of its obligation
23 if it feels that the court is not currently
24 fulfilling the obligation that already exists.

25 JUSTICE KAVANAUGH: I mean, it didn't

1 just --

2 MR. JOSHI: It doesn't want to change
3 the obligation.

4 JUSTICE KAVANAUGH: Congress didn't
5 just pass the same words.

6 MR. JOSHI: Correct.

7 JUSTICE KAVANAUGH: Right, right.

8 MR. JOSHI: Correct. And -- and --

9 JUSTICE JACKSON: But doesn't --
10 doesn't it depend on the complaint that's being
11 made, though? I mean, that's why I think it's
12 really important that we understand what the
13 veterans were complaining about to begin with.

14 If the sum total of the complaint was
15 that the Veterans Court was completely ignoring
16 the benefit-of-the-doubt rule, it never raised
17 it, it didn't say anything about it, et cetera,
18 then I suppose you could have an argument that a
19 subsequent amendment that was designed to remind
20 the Veterans Court that this obligation existed
21 makes sense.

22 But, if the complaint was maybe there
23 are times when a court is completely ignoring
24 it, but what we really are worried about is that
25 we're not actually getting it, that they're

1 saying benefit of the doubt or whatever, but
2 then, when they're applying it, they are not
3 actually giving us -- they're not evaluating
4 whether the evidence is in equipoise properly;
5 when it is in equipoise, they're not giving it
6 to us.

7 In that circumstance, if that was the
8 complaint, it seems odd that Congress would just
9 come back and point to the benefit-of-the-doubt
10 rule as opposed to saying we need a court that's
11 actually policing the extent to which the
12 Veteran -- the administration is giving people
13 what we said in 5017.

14 MR. JOSHI: Right, Justice Jackson.
15 So, as I -- as I read it and as I read it as
16 Petitioners' account of it, it was that it was
17 not -- they were not complaining that there was
18 some gap in the statute.

19 JUSTICE JACKSON: No, not gap, meaning
20 the gap in the statute would be we don't have
21 the ability to bring this to the court's
22 attention. We all agree that before, under the
23 existing statute, under the existing
24 circumstances, they could make a claim about the
25 benefit-of-the-doubt rule.

1 The question is, when Congress amended
2 the statute to say something to the Veterans
3 Court, weren't they -- this is the other side's
4 argument -- weren't they saying what we need you
5 to do is to make sure that the agency is
6 actually applying this consistent with the law?

7 And that's why it becomes, as Justice
8 Gorsuch suggested, a legal question, because
9 just like the sufficiency of the evidence is a
10 standard in the law and we want to make sure
11 that the evidence is sufficient, here, Congress
12 is saying you need to make sure, court, that
13 when this comes to you, it's not just a
14 deference to the agency, whatever they did with
15 respect to benefit of the doubt, but you're
16 actually making clear that they met the legal
17 standard of giving the veteran what they're
18 entitled to under this statute.

19 MR. JOSHI: Okay. So there was a lot
20 there. I would like --

21 JUSTICE JACKSON: Yes, I'm sorry.

22 MR. JOSHI: -- to address all of the
23 pieces of it.

24 Let me just start with sufficiency of
25 the evidence because that's come up a lot in

1 this morning's discussion. That is a
2 deferential standard of review.

3 Remember, a sufficiency-of-the-
4 evidence challenge has a reviewing court looking
5 at the fact finder's application of a legal
6 standard to the facts. Fact finder in
7 sufficiency challenges would be the jury, right?

8 But the reviewing court, in reviewing
9 a sufficiency motion, doesn't ask: Did the jury
10 err in finding --

11 JUSTICE JACKSON: No, I understand.

12 MR. JOSHI: -- every element met
13 beyond a reasonable doubt.

14 JUSTICE JACKSON: But isn't it a
15 question of law? It is a -- we -- we evaluate
16 it as --

17 MR. JOSHI: No, no. That --

18 JUSTICE JACKSON: -- a question of
19 law, don't we?

20 MR. JOSHI: No. That's my point.
21 It's -- it's a deferential standard. It doesn't
22 ask if the jury erred. It doesn't even ask if
23 the jury clearly erred. It asks, did the -- was
24 the jury so out to lunch in finding each element
25 met beyond a reasonable doubt because, in fact,

1 there was no reasonable juror on the face of the
2 earth who could have found every element beyond
3 a reasonable doubt.

4 JUSTICE GORSUCH: Right. Right. But,
5 counsel, I -- I --

6 MR. JOSHI: It's the most deferential
7 --

8 JUSTICE GORSUCH: Sure. But it is a
9 --

10 MR. JOSHI: -- standard of review I
11 know.

12 JUSTICE GORSUCH: -- it is a -- it is
13 a legal standard, though, isn't it? Because
14 we --

15 MR. JOSHI: No --

16 JUSTICE GORSUCH: Just a second.
17 Don't we take, when we do sufficient -- I mean,
18 maybe I'm just wrong, out to lunch, and I -- I
19 welcome being corrected.

20 But I -- I -- I thought, when I used
21 to do this a lot on the court of appeals, that
22 I'd take all the facts in the light most
23 favorable to the victor, those are the facts
24 I've got to use, and then ask the legal question
25 whether any reasonable juror could come to the

1 conclusion this jury did. That's a legal
2 question.

3 MR. JOSHI: It's a legal standard. Of
4 course, it is.

5 JUSTICE GORSUCH: Okay. That's all.
6 That's --

7 MR. JOSHI: But it's a deferential
8 standard.

9 JUSTICE GORSUCH: Oh, sure it is.
10 Yeah.

11 MR. JOSHI: Yeah.

12 JUSTICE GORSUCH: And the question --

13 MR. JOSHI: So that's all we're saying
14 here, is the deferential standard is clear
15 error.

16 JUSTICE GORSUCH: On -- on the
17 facts --

18 JUSTICE JACKSON: No, but the clear
19 error goes to the facts.

20 JUSTICE GORSUCH: -- facts.

21 MR. JOSHI: Yes.

22 JUSTICE JACKSON: Right. So the
23 deference is baked into the -- the acceptance of
24 the facts. But then, once you have that bucket
25 of non-clear-error facts, you're making a legal

1 determination as to whether or not it satisfies
2 the standard.

3 MR. JOSHI: So -- so there are
4 multiple things going on here, but -- but I
5 agree that the -- that the -- that the
6 approximate balance standard is a legal
7 standard. Of course, it is.

8 And you apply it to all of these
9 historical facts that have been found: the
10 expert evidence, the lay evidence, the medical
11 evidence. That's the application of a legal
12 standard to the facts in the record.

13 That is a classic mixed question of
14 law. And so then the question is: How do you
15 review -- how does a reviewing court review the
16 fact finder's mixed question resolution?

17 And the answer there, which has been
18 given in case after case -- Village at Lakeridge
19 is probably a great example from a few terms
20 ago -- you ask: Does answering that mixed
21 question entail primarily factual work or
22 primarily legal work?

23 And, here, it is clearly, I think,
24 primarily factual. I mean, it says "balance."
25 That means assigning weights to different

1 evidence and then putting them on the scales and
2 seeing how heavy they are.

3 JUSTICE KAGAN: So --

4 JUSTICE BARRETT: So, Mister --

5 JUSTICE KAGAN: -- can I ask,
6 Mr. Joshi, how would you describe what the
7 reviewing court -- how the reviewing court is
8 supposed to take into account the
9 benefit-of-the-doubt rule in conducting its
10 review?

11 MR. JOSHI: Sure. So, for example, a
12 claimant raises an injury or says: I suffer
13 from PTSD. And the Board rules against him and
14 says: You don't actually suffer from PTSD.

15 What the Veterans Court will do on
16 appeal is say: All right, the standard of proof
17 was little -- was lower than preponderance, and
18 so we're going to ask: Did the Board clearly
19 err in finding -- well, the first step -- I
20 should back up. It's the Secretary's
21 application of 5107(b). The first part of
22 5107(b) says: The Secretary has to take into
23 account all the lay and medical evidence in the
24 record.

25 So the first thing the Court should do

1 is say: Did the Board actually take into
2 account all the evidence? If not, that's a
3 legal error. You can reverse. Then you say:
4 Okay, it did take into account. Is the Board --
5 based on all of the evidence in the record, is
6 the Board's conclusion that the claimant did not
7 reach 48 or 49 --

8 JUSTICE KAGAN: Clear error.

9 MR. JOSHI: -- is that clearly
10 erroneous or not?

11 JUSTICE KAGAN: So -- so, in the -- in
12 the usual case where a claimant has a 51 percent
13 standard, you would say, did the Board clearly
14 err in -- in deciding that the plaintiff did not
15 meet his 51 percent standard?

16 MR. JOSHI: Exactly.

17 JUSTICE KAGAN: And, in this case, you
18 would ask the same question, except you would
19 substitute for the 51 percent standard some
20 lower standard, whatever it is --

21 MR. JOSHI: Exactly.

22 JUSTICE KAGAN: -- 45, 35, whatever it
23 is?

24 MR. JOSHI: Exactly right.

25 JUSTICE KAGAN: But you would ask the

1 same question?

2 MR. JOSHI: Exactly right.

3 JUSTICE KAGAN: And your -- if I
4 understand the difference between you and
5 Ms. Bostwick, Ms. Bostwick says, look -- she
6 accepts that all the individual facts should be
7 reviewed only for clear error, right, so that,
8 like, any particular factual matter is -- gets
9 clear-error review, any particular factual
10 determination. But this ultimate balance and
11 the ultimate determination of whether the weight
12 of the evidence indicates that the plaintiff did
13 or did not meet the standard is an entirely
14 legal question.

15 And the difference is you're saying
16 it's not a legal question, that last bit, that
17 that last bit is at -- is at most -- it's either
18 a pure factual question or it's the kind of
19 mixed question that U.S. Bank was talking about
20 when it talked about mixed questions that
21 immerse courts in case-specific factual issues,
22 compelling them to marshal and weigh evidence
23 and make credibility judgments.

24 Is that correct?

25 MR. JOSHI: It's exactly right.

1 That's our position, and that's what we view as
2 the critical difference between the two sides in
3 this case.

4 JUSTICE GORSUCH: If that's the case,
5 then what do we do about the fact that courts
6 all the time do sufficiency-of-the-evidence
7 review de novo based on the record, again, in
8 the light most favorable?

9 And the -- the next section of (b) --
10 (b)(2) is the same -- works the same way, I
11 think, on your -- on your understanding as well,
12 that the court, in deciding whether there's
13 harmless error, takes all the non-clearly
14 erroneous facts and asks de novo whether, as a
15 matter of law, it would have made any
16 difference, the -- the -- the error, that is.

17 MR. JOSHI: So let me answer both
18 pieces of that question, Justice Gorsuch.

19 JUSTICE GORSUCH: Yeah.

20 MR. JOSHI: First, I want to push back
21 on the premise that sufficiency is -- it -- it
22 is a legal standard, but it is a deferential
23 standard of review.

24 JUSTICE GORSUCH: No, I understand.
25 But it's a legal standard. And -- and harmless

1 error is --

2 MR. JOSHI: Yeah, but ---

3 JUSTICE GORSUCH: -- also a legal
4 standard, isn't it?

5 MR. JOSHI: Correct, it is a legal
6 standard. But the point is the legal standard
7 is applied to evaluate whether the fact finder
8 erred in coming to some conclusion or not.

9 JUSTICE GORSUCH: Mm-hmm.

10 MR. JOSHI: Here, the fact finder is
11 the Board. Sufficiency would be the jury.

12 But -- and then, as you go up further
13 levels of appellate review, there's not
14 cascading deference up the appellate chain.
15 It's each reviewing court is reviewing the fact
16 finder. And so I think, colloquially, we might
17 say, oh, the Supreme Court reviews the court of
18 appeals' sufficiency determinations de novo.
19 Sure, we can say that colloquially.

20 JUSTICE GORSUCH: No, no, no. I'm
21 talking --

22 MR. JOSHI: But, really, you're
23 applying a deferential standard to the fact
24 finder.

25 JUSTICE GORSUCH: Again, I'm just, you

1 know --

2 MR. JOSHI: Yeah. The second -- the
3 second piece was on (b)(2). I think I have two
4 answers to that.

5 Number one, what Justice Sotomayor
6 said, which is that the court is applying
7 prejudicial error. That's something only a
8 court applies. And that's different from the
9 Secretary's application of (b)(1), which invokes
10 principles of review of agency action. And so
11 that's a difference.

12 But I do think that -- so we disagree
13 with Petitioners that the Federal Circuit thinks
14 that the prejudicial error has to apply in every
15 case. They cite this Tadlock case.

16 JUSTICE GORSUCH: No, I know.

17 MR. JOSHI: I've read the Tadlock
18 case. It wasn't presented error at all.

19 JUSTICE GORSUCH: Put that -- put
20 that -- put that aside.

21 MR. JOSHI: Yeah.

22 JUSTICE GORSUCH: We normally read
23 statutes in pari materia. And (b)(2) you agree
24 is a -- is a de novo legal standard the Court
25 has to apply when raised?

1 MR. JOSHI: Yes.

2 JUSTICE GORSUCH: Okay.

3 MR. JOSHI: Yeah, that's right.

4 JUSTICE KAVANAUGH: Does the
5 approximate balance determination go only to the
6 final conclusion, or does it go as well to
7 subsidiary factual conclusions, just to make
8 sure we're clear on that?

9 MR. JOSHI: I think it would do both.

10 JUSTICE KAVANAUGH: That's what I
11 thought. Okay.

12 MR. JOSHI: I think it would go to
13 subsidiary as well. I -- I think the -- the
14 statute says on any material issue. And one can
15 imagine there are subsidiary material issues and
16 ultimate ones.

17 And I think that's the most consistent
18 with cases like Anderson against Bessemer City,
19 where this Court said clear-error review, for
20 example, applies to both subsidiary and ultimate
21 facts.

22 JUSTICE KAVANAUGH: Okay. Thank you.

23 JUSTICE JACKSON: How big a deal is
24 this? I mean, I can imagine there are not that
25 many situations in which the evidence is truly

1 an approximate balance.

2 So even if the government's position
3 is -- you know, if we agreed with the Petitioner
4 here, is this going to be a big deal?

5 MR. JOSHI: I think it is going to be
6 a big deal. I think the vast majority of cases
7 that get appealed to the Veterans Court are
8 raising essentially factual challenges to
9 findings that there's no present disability or
10 no in-service connection or no causation between
11 the two.

12 JUSTICE JACKSON: Right. But the
13 question --

14 MR. JOSHI: And -- but --

15 JUSTICE JACKSON: Yeah. Mm-hmm.

16 MR. JOSHI: Oh, sorry. So just to --
17 just to continue on that --

18 JUSTICE JACKSON: Yeah. Yeah.

19 MR. JOSHI: So, because of that, I
20 think, as these cases illustrate, the Veterans
21 Court is going to be reviewing the factual
22 findings and, thus, has to take due account of
23 the Secretary's application.

24 But, if it's a de novo review, that
25 means that in every case, this appellate court,

1 which is not well situated to do it -- the
2 appellate court is going to have to, in every
3 case -- almost every case, review the entire
4 record, assign weight, balance things, figure
5 out if it's an approximate balance.

6 Appellate courts are not well suited
7 to doing this, as Anderson against Bessemer City
8 made clear. That's why there's a really strong
9 norm in our system that --

10 JUSTICE JACKSON: I know. But then
11 why -- why did Congress clearly require the
12 court to do it? I -- this is the thing that's a
13 little unfortunate in a way in the way that I
14 think you're arguing it because, even if we say
15 Congress went back and underscored this
16 obligation, the approximate balance obligation
17 runs to the Secretary, right, and the
18 underscoring is now to the court.

19 So it's obvious that Congress wanted
20 the court to have some assessment of whether or
21 not the Secretary is doing it correctly. So I
22 think you -- you don't get out of that by just
23 saying, oh, the court is not well positioned.

24 Congress thought the court was going
25 to do something, right?

1 MR. JOSHI: Yes. But Congress
2 expressly had before it a proposal to change the
3 standard of review and then rejected it and said
4 we're sticking with the clear error review. So
5 I think Congress was pretty --

6 JUSTICE JACKSON: Yeah, but Congress
7 also had before it a proposal to put that into
8 -- this new "take due account" into (a), which
9 would have made clear that clear-error review
10 was supposed to be happening in this context,
11 and it rejected it.

12 MR. JOSHI: So I -- I disagree with
13 that. I mean, look, it said "in making the
14 determinations under (a)," which put it in
15 there. And just to spin that out a little bit
16 more, Justice Jackson, if they had put it in
17 (a)(4), I think it would have been an awkward
18 fit there because, as we say, the
19 benefit-of-the-doubt rule does have some legal
20 aspects to it.

21 You know, for example, if you don't
22 review all the evidence in the record, that's
23 legal error. If the Secretary says it's not an
24 approximate balance unless it's in absolute
25 perfect equipoise, I think that would be a legal

1 error. So they -- so Congress couldn't stick it
2 just in (a)(4) because there are legal aspects
3 to it.

4 But nor could it put it as an (a)(5)
5 because it's not something that happens after
6 you go through (a)(1), (2), (3), (4), you know,
7 compel agency action, unlawfully withheld, et
8 cetera. It's not like a separate thing you do.
9 You do it in the course of reviewing statutory
10 legal challenges, agency action withheld,
11 factual findings.

12 And so the natural place to put it is
13 somewhere else. You see this in 706 of the APA.
14 It's the -- the prejudicial error rule is not
15 stuck in 7062.

16 JUSTICE JACKSON: And so you don't
17 think --

18 MR. JOSHI: It's put outside.

19 JUSTICE JACKSON: -- that the
20 deference that you say Congress wanted to retain
21 was in the assessment of what evidence is
22 positive and negative? In other words, the --
23 the approximate balance rule says when there is
24 an approximate balance of positive and negative
25 evidence regarding any issue material to the

1 determination of the matter. And I could see a
2 world in which the Secretary's assessment of
3 whether this evidence is material to this issue,
4 is it, you know, credible and, therefore, I'm
5 going to count it as positive? Is it credible
6 on the negative side? All of those individual
7 determinations the court cannot review for
8 anything other than clear error.

9 But I thought you said earlier in this
10 conversation -- and maybe I misheard you -- that
11 you did think that approximate balance itself,
12 once we know what the positive -- bucket of
13 positive evidence and bucket of negative
14 evidence is, is a question of law. I thought I
15 heard you say it was a question of law.

16 MR. JOSHI: Oh, approximate balance is
17 a legal standard.

18 JUSTICE JACKSON: Okay.

19 MR. JOSHI: And what it means is, of
20 course, a legal question as to what it means,
21 but when --

22 JUSTICE JACKSON: And whether or not
23 it's satisfied?

24 MR. JOSHI: Whether it's satisfied is
25 a classic mixed question, right? It's a

1 standard of proof that you apply to facts in a
2 case. And the application of a statutory
3 standard of proof to the facts and record
4 evidence is a classic mixed question. And how
5 you review a mixed question, this Court has said
6 time and again, depends on the nature of the
7 mixed question. Does it involve primarily
8 factual work or primarily legal work?

9 And our submission here today is that
10 applying an approximate balance -- and the word
11 "balance" itself implies weights and weighing
12 things against each other as facts --

13 JUSTICE JACKSON: Yeah, but you've
14 already gotten -- you've already taken care of
15 the factual assessments. I have my bucket. I
16 understand it involves facts because we're
17 balancing facts, but we already have the bucket
18 of positive and bucket of negative that the
19 Secretary has determined and we're stuck with
20 that.

21 The question of whether or not they
22 are roughly equal, I don't understand -- I don't
23 know why that isn't a factual question.

24 MR. JOSHI: Well, I mean, look, I
25 think because there aren't -- we don't put

1 actual weights with numbers on pieces of
2 evidence and add it up. If we did, it would be
3 a trivial exercise, right? It's always
4 qualitative.

5 And so, at the end of the day, the
6 Board is just going to look at expert opinions
7 like here, for example, in Mr. Bufkin's case,
8 right? The -- the Board look at the medical
9 opinions in the record and Mr. Bufkin had
10 presented a medical opinion saying he suffered
11 from PTSD, and then there were other medical
12 evaluations that said he did not suffer. And
13 the Board looked at them and said: Well, the
14 regulations require any diagnosis of PTSD to
15 conform with DSM V. The one doctor who said he
16 suffers from PTSD didn't apply DSM V at all.
17 And, indeed, the next doctor who did apply DSM V
18 and said he doesn't suffer from PTSD, said that
19 --

20 JUSTICE JACKSON: Right. So -- so --
21 so those would not be credible. They wouldn't
22 be in the bucket. And when the court did its
23 assessment of whether there's approximate
24 balance, it would say there's not, right?

25 MR. JOSHI: Right. I -- I think --

1 JUSTICE JACKSON: All I'm saying is
2 approximate balance sounds to me like sufficient
3 -- sufficiency of the evidence, and sufficiency,
4 approximate, seems like a legal question, not a
5 factual one. So you keep saying this is
6 factual, intensely factual -- the only factual
7 part is deciding what facts go in to be weighed,
8 but whether or not they're in balance seems to
9 me to be a question of law.

10 MR. JOSHI: I disagree. I think what
11 constitutes --

12 JUSTICE JACKSON: Yeah.

13 MR. JOSHI: -- an approximate balance,
14 how far away the scales should be --

15 JUSTICE JACKSON: Yeah.

16 MR. JOSHI: -- that's a legal
17 question. But I think where are the scales in
18 this particular case I think is predominantly
19 factual.

20 JUSTICE JACKSON: Thank you.

21 MR. JOSHI: And -- and, as I mentioned
22 to Justice Kagan, I think that is the
23 fundamental disagreement between the parties in
24 -- in this case.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas, anything further?

3 Justice Alito?

4 JUSTICE SOTOMAYOR: I have a question.

5 The Chief started with whether this was a
6 redundant, duplicate, unimportant provision or
7 not. It's pretty absolute. The language of the
8 BOPDR review provision says the court "shall"
9 review that issue. Yet you say, no, they don't
10 really have to unless the party presents it.

11 If I say no, you're wrong, that
12 doesn't make this provision superfluous, does
13 it?

14 MR. JOSHI: That's correct, although
15 --

16 JUSTICE SOTOMAYOR: You don't want
17 that outcome, but that's how to avoid the
18 superfluous -- how -- making this provision
19 superfluous, correct?

20 MR. JOSHI: That -- that would avoid
21 the redundancy, yes, right.

22 JUSTICE SOTOMAYOR: And wouldn't that
23 also take care of everything you said was wrong
24 with the old system, which was -- and I remember
25 that veterans are generally not represented.

1 They're laypeople. And recognizing that they
2 may not be schooled enough to raise an issue on
3 appeal, wouldn't this provision require the --
4 the Veterans Court to ensure that the court
5 below has actually done everything it needed to
6 do, that it looked at all of the relevant facts
7 and didn't commit the legal error of avoiding
8 one, whether raised to it or not, and whether or
9 not it committed clear error in its balance or
10 not, et cetera?

11 It would do a lot of work to ensure
12 the system was actually taking care of the
13 problem Congress saw, wouldn't it?

14 MR. JOSHI: It would do work. I don't
15 think -- if I could just --

16 JUSTICE SOTOMAYOR: Mm-hmm.

17 MR. JOSHI: -- now push back a little
18 bit, I think it's -- it wasn't the problem that
19 Congress was facing, first of all. And I think
20 it can't be supported by --

21 JUSTICE SOTOMAYOR: Well, it was. The
22 court -- the two cases you mentioned were the
23 Secretary not looking at things and the Veterans
24 Court not looking at what they did.

25 MR. JOSHI: No, I disagree, and I -- I

1 apologize if that was the impression I gave you.
2 I think the two cases that were mentioned were
3 really the Veterans Court saying we find no
4 clear error in the Board's finding of facts,
5 without mentioning or even recognizing that the
6 standard of proof against which clear error was
7 to be measured was lower than a preponderance.
8 It was represented by the approximate balance,
9 so --

10 JUSTICE SOTOMAYOR: It wasn't looking
11 at what went on below and figuring out if it was
12 done right.

13 MR. JOSHI: No, we don't -- we don't
14 know. You could indulge the presumption of
15 regularity and think the Veterans Court was
16 cognizant of it, but to -- to say -- you know,
17 you could -- for example, with a given set of
18 facts, it could always be possible to say that
19 if the standard of proof were a preponderance,
20 the fact finder would not have clearly erred in
21 finding that the party --

22 JUSTICE SOTOMAYOR: All right. One
23 last question.

24 MR. JOSHI: -- with the burden didn't
25 meet but did clearly err --

1 JUSTICE SOTOMAYOR: Should we reach
2 this issue?

3 MR. JOSHI: No, you shouldn't because
4 both of the Petitioners here didn't raise it.

5 JUSTICE SOTOMAYOR: But your colleague
6 on the other side, in her presentation, pointed
7 out to one issue that Mr. Thornton allegedly did
8 not raise. What do I do about that?

9 MR. JOSHI: I mean, I -- I -- again, I
10 think the right standard, if you do want to
11 reach it, would just be to say that the "when
12 presented" language, which is a condition
13 precedent on making determinations under (a),
14 and making determinations under (a) is a
15 condition precedent --

16 JUSTICE SOTOMAYOR: I think that might
17 be better for us --

18 MR. JOSHI: -- but it's just --

19 JUSTICE SOTOMAYOR: -- than saying
20 that Congress acts -- that it's okay for
21 Congress to act in duplicate and make a
22 provision wholly useless.

23 MR. JOSHI: Not useless, just
24 emphasizing something that already exists. And,
25 as a practical matter, it did have an effect.

1 JUSTICE SOTOMAYOR: Thank you,
2 counsel.

3 MR. JOSHI: So I think it worked.

4 CHIEF JUSTICE ROBERTS: Justice Kagan?
5 Justice Gorsuch?

6 JUSTICE GORSUCH: Do you think
7 Congress adopted this language about the
8 benefit-of-the-doubt rule, in both instances
9 where it did, in recognition of the high esteem
10 in which our nation holds those who have served
11 in the armed services?

12 MR. JOSHI: Probably, yes.

13 CHIEF JUSTICE ROBERTS: Justice
14 Kavanaugh?

15 Justice Jackson? Okay.

16 Thank you, counsel.

17 Rebuttal, Ms. Bostwick?

18 REBUTTAL ARGUMENT OF MELANIE L. BOSTWICK

19 ON BEHALF OF THE PETITIONERS

20 MS. BOSTWICK: Section 7261(b)(1) is
21 not an exclamation point. It is an entirely new
22 sentence placed in an entirely new statutory
23 sub-provision. It was not responding to the
24 problem that my colleague on the other side has
25 identified.

1 As we have explained in our briefs,
2 the Veterans Court very much was reviewing
3 benefit-of-the-doubt errors when presented.
4 This is not a -- a case like O'Gilvie where
5 there was genuine uncertainty in the law.

6 The problem was that the Veterans
7 Court was being overly deferential when it
8 reviewed. So I would point the Court to the
9 Wuensch case, which is also discussed in the
10 legislative history, as an example of what
11 Congress didn't like.

12 There, the court recognized that
13 5107(b) was the applicable standard. It said:
14 We can review for clear error. We can review
15 reasons and bases. And we can't do anything
16 else.

17 That is the problem that Congress was
18 addressing. And unfortunately, what the
19 Veterans Court did is, a year after the statute
20 was past, in a case called Roberson in 2003, it
21 looked at it and said: We don't think Congress
22 made any change here. We don't think it altered
23 the judicial landscape.

24 And so this statute has never been
25 given the effect that it was intended.

1 Instead -- so the idea that it -- that what
2 Congress did worked, absolutely not, Your Honor.

3 You see that in the Mariano case that
4 the government mentioned. There, too, the --
5 the Veterans Court says: This outcome is a
6 factual determination. We review for clear
7 error. The same thing that it said in the
8 Wuensch case that Congress rejected.

9 And that's what's happening today.
10 That's what happened in these cases. In
11 Mr. Bufkin's case, they reviewed only the
12 relative credibility judgments for clear error,
13 did not look at approximate balance, even
14 though, again, he raised the -- the argument.

15 And in Mr. Thornton's case, they said:
16 We're not even going to look at this. You say
17 you're not challenging any facts. And so even
18 though you've said there was a
19 benefit-of-the-doubt problem, we're not going to
20 look at it.

21 Everyone agrees that at least some
22 aspect of this review, this approximate balance
23 review, is legal. That is reason enough why the
24 Federal Circuit's decision is wrong, because the
25 Federal Circuit held that the (b)(1) review is

1 limited to clear error review under (a)(4).

2 But we think that even the -- the
3 approximate balance test should be reviewed
4 non-deferentially, exactly as -- as Justice
5 Jackson articulated it.

6 I would point out that if you,
7 instead, try to review the approximate balance
8 judgment for clear error, the two things are
9 just incompatible.

10 Under Anderson, if there are two
11 permissible views of the evidence, it cannot be
12 clear error. That is exactly the opposite of
13 what the benefit-of-the-doubt rule is supposed
14 to achieve. If there are two permissible views
15 of the error, the veteran gets the benefit of
16 the doubt there.

17 If -- if the court is inclined to view
18 this as a mixed question, we think it is the
19 kind that should be treated as a question of
20 law. Among other reasons, we have an expert
21 tribunal reviewing the full record and being --
22 being competent to make these decisions. And we
23 would be able to provide uniformity in the law
24 here.

25 If the Court thinks it's -- it's too

1 factual to call this de novo, at a minimum I
2 would say this -- this statute, again, unique in
3 the administrative review, at least requires the
4 Veterans Court to take a hard look at what the
5 agency has done with the benefit-of-the-doubt
6 rule and not be the kind of rubber stamp that
7 was happening pre-2002 and that continues to
8 happen today in these cases.

9 The question was asked: How -- how
10 big of a deal is this? I -- I'd say it's a big
11 deal that the agency is still today not
12 complying with its statutory obligation under
13 Section 5107(b), and that the Veterans Court is
14 still, after multiple statutory attempts by
15 Congress, not looking at and enforcing this
16 important standard of review.

17 As to, you know, an example of -- of
18 how this is failing, counsel said that
19 Mr. Bufkin had one positive opinion on the PTSD
20 diagnosis. That's incorrect. He had two. And
21 that's part of the problem with the Board's
22 decision and the kind of error that the Veterans
23 Court should be looking at, is whether the
24 agency actually considered all of the evidence
25 relevant to that question.

1 We would ask the Court to reverse the
2 Federal Circuit.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 The case is submitted.

6 (Whereupon at 11:19 a.m., the case was
7 submitted.)

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