No. _____

In The
Supreme Court of the United States

JOE A. LYNCH,

Petitioner,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

To underscore the uniquely pro-claimant Veterans Administration ("VA") benefits system, Congress designed the most favorable standard of proof by far in American jurisprudence, the benefit-of-the-doubt rule. This rule ensures that claimants will prevail on any issue of their disability claim(s) when there is "an *approximate balance* of the positive and negative evidence." 38 U.S.C. § 5107(b) (1988) (italics added). By inserting the modifier *approximate* into Section 5107(b), Congress set the standard of positive to negative evidence for granting claims lower than an even *balance*, and conversely, fixed the quantum of negative evidence for denying them higher than the preponderance-of-the-evidence standard.

Nonetheless, over twenty years ago in *Ortiz v. Principi*, 274 F.3d 1361 (Fed. Cir. 2001), the Federal Circuit Court of Appeals adopted the preponderance-of-the-evidence standard for denying claims. *Id.* at 1365. In the present case, the *en banc* court affirmed this standard under a different name.

The question presented is:

Are the many millions of disabled veterans, their survivors and dependents entitled to have the VA meet a higher threshold of proof to deny their claims than the preponderance-of-the-evidence standard?

RELATED PROCEEDINGS

Joe A. Lynch v. Denis McDonough, *Secretary of Veterans Affairs*, No. 20-2067 (Fed. Cir. Judgment entered December 17, 2021)

Joe A. Lynch v. Robert L. Wilkie, Secretary of Veterans Affairs, No. 19-3016 (Vet. App. Judgment entered May 12, 2020)

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PETITION FOR A WRIT OF CERTIORARI

Joe A. Lynch respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in the case below.

OPINIONS BELOW

The order granting the petition for rehearing *en banc* by the Federal Circuit is unreported (App. 17a-18a), and the accompanying precedential opinion issued by the *en banc* court (App. 1a-16a) is reported at 21 F.4th 776. The precedential opinion of the Federal Circuit's three-judge panel (App. 19a-33a) is reported at 999 F.3d 1391. The opinion of the United States Court of Appeals for Veterans Claims ("the Veterans Court") (App. 34a-47a) is unreported and can be found at *sub nom*. *Lynch v. Wilkie*, 2020 U.S. App. Vet. Claims LEXIS 681. The order of the Board of Veterans' Appeals is unreported. App. 48a-57a.

JURISDICTION

The judgment of the Federal Circuit was entered on December 17, 2021. On the same date, the Federal Circuit granted the petition for rehearing *en banc* and issued its opinion affirming the Veterans Court's opinion. App. 1a-16a. On March 5, 2022, petitioner's motion for an extension of time to file his petition for a writ of

certiorari to May 16, 2022 was granted. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are set forth in the appendix of this petition. App. 58a-59a.

STATEMENT

There is nothing like the benefit-of-the-doubt rule of VA adjudication.[1] In civil and administrative law, the preponderance-of-the-evidence and equipoise-of-the-evidence standards are nearly universal benchmarks: the preponderance-of-the-evidence standard devolving upon the plaintiff/claimant, and a *de facto* equipoise-of-the-evidence standard applying to the defendant/agency.[2] By explicit statutory design, the VA's evidentiary standards look much different.

[1] The benefit-of-the-doubt rule has no comparable analogue. The closest, the former true doubt rule of the Department of Labor, set forth an equipoise-of-the-evidence standard for granting claims. *Dir. v. Greenwich Collieries*, 512 U.S. 267, 269 (1994) (noting that under the former true doubt rule claimants win "when the evidence is evenly balanced"). Unfortunately, *Ortiz* interpreted the benefit-of-the-doubt rule from the "perspective" of the true doubt rule. 274 F.3d at 1365.

[2] *See, e.g.*, cases pairing preponderance-of-the-evidence and evenly-balanced/equipoise-of-the-evidence standards as opposing, reciprocal and mutually exclusive standards of proof. *United States v. Gigantea*, 39 F.3d 42, 47 (2d Cir. 1994), amended, 94

Section 5107(b), the benefit-of-the-doubt provision, provides:

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

§ 5107(b) (1988) (italics added).

F.3d 53 (2d Cir. 1996) ("The preponderance standard is no more than a tie-breaker dictating that when the evidence on an issue is evenly balanced, the party with the burden of proof loses.") (citations omitted); *Lovell ex rel. Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 373 (9th Cir. 1996) ("In general, if the evidence is evenly balanced, such that a decision on the point cannot be made one way or the other, then the party with the burden of persuasion loses.") (citations omitted); *Cigaran v. Heston*, 159 F.3d 355, 357 (8th Cir. 1998) (under an "an evidentiary burden of preponderance . . . [i]f the evidence that the parties present balances out perfectly, the party bearing the burden loses"); *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 1580 n.11 (Fed. Cir. 1988) ("where the evidence is so evenly balanced that no preponderance emerges . . . the party having the burden of persuasion necessarily loses"); *Bristow v. Drake Street Inc.*, 41 F.3d 345, 353 (7th Cir. 1994) ("Burdens of persuasion affect the outcomes only of cases in which the trier of fact thinks the plaintiff's and defendant's positions equiprobable. Burdens of persuasion are, in other words, tie-breakers."); *Goldman Sachs Grp., Inc. v. Ark. Teacher Ret. Sys.*, ___ U.S. ___; 141 S. Ct. 1951, 1963 (2021) (preponderance-of-the-evidence standard strictly tied to opposing equipoise-of-the-evidence standard).

By introducing a wholly new proof standard – *approximate balance* – for VA adjudication, Congress designed a radically different regime, one "express[ing] a [strong] preference for"[3] "a special class of citizens, those who risked harm to serve and defend their country."[4] Specifically, the modifier *approximate* sets the *balance* of positive to negative evidence for granting VA claims – the standard of proof – below an even-balance/equipoise-of-the-evidence standard and, by the same measure, places the level of negative to positive evidence for denying them higher than the preponderance-of-the-evidence standard.[5]

The Federal Circuit, however, refuses to follow the plain language of Section 5107(b). In *Ortiz v. Principi*, 274 F.3d 1361, the court invoked the preponderance-of-the-evidence standard for denying claims, and the *en banc* court below did the same under its newly styled persuasive-evidence formulation. App. 11a, 12a. No

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[3] *Herman & Maclean v. Huddleston*, 459 U.S. 375, 390 (1983).

[4] *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006) (citations and internal quotation marks omitted).

[5] The term *approximate* often connotes an estimate, signifying more or less of the subject in question. *Infra* at 22-23. *Approximate* is used in the same sense here but its meaning is limited to *less* (not *more*) than an equal balance of positive to negative evidence for granting claims. To construe *approximate* otherwise would be to turn the benefit-of-the-doubt rule on its head. Above all, Section 5107(b) was designed to operate in favor of veterans. *Compare AZ v. Shinseki*, 731 F.3d 1303, 1322 (Fed. Cir. 2013) ("To the extent that Congress has relaxed evidentiary requirements in the VA context, it did so to *benefit*, not penalize, claimants.") (citation omitted).

matter its phraseology, the Federal Circuit's preponderance-of-the-evidence standard for denying claims cannot be harmonized with Congress' *approximate balance* standard for granting them.

I. Overview of VA Adjudication

Under the Appeals Modernization Act ("AMA") of 2017, a VA disability claim may go through several stages of adjudication. Pub. L. No. 115-55 (August 23, 2017). At each stage, a VA adjudicator must consider the applicability of Section 5107(b).[6]

A claim is first adjudicated by a Veteran Service Rating Specialist ("VSRS") at one of the many regional offices located throughout the country. From there, veteran claimants may seek another level of adjudication in one of three ways: by 1) filing for a Higher Level

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[6] The VA M-21 Adjudication Procedure Manual ("M-21 Manual") reads the modifier *approximate* out of the reasonable doubt rule under 38 C.F.R. § 3.102 (App. 58a-59a) (the corresponding regulation of the benefit-of-the-doubt rule under 38 U.S.C. § 5107(b)), instructing VA adjudicators to apply an even-balance/equipoise-of-the-evidence standard. M-21 Manual, Part III, subpart iv, Chap. 5k, *Reasonable Doubt Rule* ("The ***reasonable doubt rule*** means that the evidence provided by the claimant/beneficiary (or obtained on his/her behalf) must only persuade the decision maker that each factual matter is *at least as likely as not*.") (bold in original, italics added); *id*., 3e, *Considering Reasonable Doubt* ("Consider Reasonable Doubt *only* when the evidence is in equipoise, *not* when the evidence weighs in favor or against the claimant.") (italics in original).

The M-21 Manual "is an internal manual used to convey guidance to VA adjudicators." 72 Fed. Reg. 66,218, 66,219 (Nov. 27, 2007).

Review (HLR) at the regional office, adjudicated by a Decision Review Officer (DRO), 2) filing a supplemental claim at the regional office, with the submission of new and material evidence, adjudicated by a VSRS, or 3) filing a direct appeal to the Board of Veterans' Appeals ("the Board") located in Washington, D.C, adjudicated by a Veterans Law Judge. Claimants may request an HLR following the adjudication of a supplemental claim. After a decision from any HLR, claimants may appeal to the Board. 38 U.S.C. §§ 5104B, 5104C, 5108, 7105; *see* https://benefits.va.gov/benefits/appeals.asp (briefly summarizing the options under the AMA) (visited on May 6, 2022).

After a Board decision, claimants may appeal to the Veterans Court. Even at this late appellate stage, the Veterans Court must "take due account of the Secretary's application of section 5107(b) . . . " 38 U.S.C. § 7261(b)(1).[7]

Given its potential applicability at every step during the process, the benefit-of-the-doubt rule has outsize importance in VA adjudication.

II. Sections 5107(a) & 5107(b), the Burden of Production & Burden of Persuasion

For the VA system, Congress set forth a burden of production and a burden of persuasion. Section 5107(a) charges the claimant with the initial burden of

[7] An appeal may be taken from a Veterans Court's decision to the United States Court of Appeals for the Federal Circuit. 38 U.S.C. § 7292(a).

production, *i.e.*, "a party's obligation to come forward with evidence to support its claim":[8]

> **Claimant responsibility.** Except as otherwise provided by law, a claimant has the responsibility to present and support a claim for benefits under laws administered by the Secretary.

38 U.S.C. § 5107(a).

The burden of production "obligates the claimant to provide some evidentiary basis for his or her benefits claim." *Skoczen v. Shinseki*, 564 F.3d 1319, 1323 (Fed. Cir. 2009). Once this burden has been met, a "rather low hurdle," the VA's duty to assist under 38 U.S.C. § 5103A is triggered. *Id*. at 1329. "From this point forward, VA has the obligation to assist the veteran in supporting his[/her] claim." *Id.*

Following the development of the claim, Section 5107(b) governs, placing the burden of persuasion on the VA. The VA adjudicator must "consider all information and lay and medical evidence of record"[9] and then make a finding as to whether the VA has met its burden of persuasion, otherwise known as "the risk of nonpersuasion." *Ortiz*, 274 F.3d at 1366 ("placement of the risk of nonpersuasion on the VA"); *Walton v. Arizona*, 497 U.S. 639, 650 (1990) overruled on another ground in *Ring v. Arizona*, 536 U.S. 584 (2002) (referring to burden of persuasion and "risk of

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[8] *Dir. v. Greenwich Collieries*, 512 U.S. at 272.

[9] § 5107(b).

nonpersuasion" interchangeably); *Dir. v. Greenwich Collieries*, 512 U.S. 267, 282 (1994) (Souter, J., dissenting) (same); Fleming James, Jr. & Geoffrey C. Hazard, et al., Civil Procedure § 7.12 (5th ed. 2001) ("the risk of nonpersuasion, sometimes called the burden of persuasion").

The question here is whether *Ortiz* and the present *en banc* court, respectively, erred in setting forth and then affirming the preponderance-of-the-evidence standard for denying claims: "[T]he VA has overcome its risk of nonpersuasion" when "the preponderance of the evidence is against the veteran's claim." *Ortiz*, 274 F.3d at 1366.

III. Facts of the Case

a) Petitioner, Joe A. Lynch, served on active duty for the United States Marine Corps from July 1972 to July 1976.

From May 10 to October 30, 1974, petitioner served on the USS Trenton where he experienced many traumatic events. Among them, he participated in the ship's primary mission of evacuating desperate refugees from war-torn areas, like Cyprus and Beirut, during the Greek/Turkey conflict. Petitioner also witnessed a helicopter crash on the flight deck, killing several passengers.

For many years after his service, petitioner refused to seek medical attention for his increasing psychological symptoms. Finally, he followed the

recommendation of his veteran peer group and saw a private psychologist, Gwendolyn Keith Newsome, Ph.D., on March 6 and 30, 2015. Petitioner reported symptoms of sleeps problems, phobias of confined spaces, panic attacks, mood swings, frequent nightmares, depression, memory impairment, social isolation, and antisocial behavior. In her report, Dr. Newsome concluded that petitioner's occupational and social functioning were severely limited by his PTSD symptomology. His distress level required him to avoid elevators and office spaces with no windows. His poor judgment, thinking, and mood were increasingly limiting his quality of life. App. 35a, 49a.

In August 2016, petitioner underwent a VA PTSD examination. Petitioner reported experiencing anxiety and chronic sleep impairment, and re-experiencing traumatic events, avoidance behavior, negative alteration in cognition, numbing behavior, hyperarousal. App. 50a. According to the examiner, at the time of the examination, petitioner was not experiencing the level of impairment observed by Dr. Newsome. App. 51a.

In September and October 2016, petitioner was seen by private psychiatrist H. Jabbour, M.D., who wrote two reports. At the September 2016 evaluation, petitioner reported that he experienced chronic sleep impairment, averaging three to four hours of sleep a night. Petitioner stated that he had been dealing with past suicidal ideation, depressed moods, panic attacks, anxiety, suspiciousness, irritability, intrusive thoughts, mild memory loss, difficulty in adapting to stressful circumstances, and an inability in establishing and

maintaining effective relationships. He also reported self-isolation and had difficulty engaging in activities outside of his home because he was easily startled and hyperalert. As to occupational impairment, petitioner stated that he had problems focusing and concentrating at work, exclaiming: "I can't compete at work or in the environment that I'm in any longer." The October 2016 evaluation report made essentially the same observations. App. 36a-37a.

On July 20, 2017, petitioner underwent a VA videoconference examination. App. Petitioner recounted experiencing numerous symptoms – *e.g.*, social isolation, anxiety attacks, insomnia, irritability, anger outbursts, nightmares, paranoia, memory impairment. The examiner noted symptoms of anxiety and suspiciousness. App. 37a-38a.

IV. Procedural History of the Case

Petitioner represented himself from the time he filed his disability claim in March 2016[10] until the Veterans Court issued its opinion in April 2020. App. 34a.

a) In August 2016, the local regional office awarded petitioner service-connection for post-traumatic stress disorder (PTSD) and assigned a disability rating of thirty (30) percent. App. 36a. Petitioner appealed to the Board for a higher disability rating.

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[10] Petitioner's claim was adjudicated under the old legacy appeal system. *See* https://www.va.gov/decision-reviews/legacy-appeals/ (viewed on May 6, 2022).

b) On April 15, 2019, the Board denied an increased rating for his PTSD, finding that "the preponderance of the evidence is against the claim." App. 56a [*id*. 48a-57a].

c) On April 17, 2021, the Veterans Court affirmed the Board's denial of an increased rating, ruling that the Board's adverse finding under the preponderance-of-the-evidence standard was sufficient to deny the claim. App. 45a [*id*. 34a-47a].

d) On June 3, 2021, a three-judge panel of the Federal Circuit affirmed the Veterans Court decision in a divided opinion. App. 19a-33a. As to the propriety of the preponderance-of-the-evidence standard, the majority held that it was bound by *Ortiz*:

> As to whether *Ortiz* correctly held that the benefit-of-the-doubt rule does not apply when "the preponderance of the evidence is found to be against the claimant," 274 F.3d at 1364, this panel is bound by *Ortiz*.

App. 28a.

In his partial dissent, Judge Dyk disagreed, characterizing *Ortiz*'s discussion of the preponderance-of-the-evidence standard as misguided dicta. Foremost, Judge Dyk pointed out that the preponderance-of-the-evidence standard was at odds with the plain text of Section 5107(b):

> Because preponderant evidence may be found when the evidence tips only slightly against a veteran's claim, that standard is inconsistent

with the statute's standard that the veteran wins when there is an "approximate balance" of evidence for and against a veteran's claim. "Approximate" is not the same as "slight." By reframing the statute's standard in terms of preponderance of the evidence, *Ortiz* departed from the clear language of the statute to the disadvantage of the veteran. It is not difficult to imagine a range of cases in which the evidence is in approximate balance between the veteran and the government (and the veteran should recover), but still slightly favors the government (and under the majority's test, the veteran would not recover).

Ortiz's holding effectively and impermissibly restricts the benefit-of-the-doubt rule to cases in which there is close to an evidentiary tie, a proposition that the majority agrees would be contrary to the "approximate balance" language of the statute. *See* Maj. Op. 8. Indeed, the government appeared to agree at oral argument that when the evidence against a veteran's claim is equal to "equipoise plus a mere peppercorn," denying the benefit-of-the-doubt rule would be contrary to statute. Oral Argument at 23:00-23:16, http://oralarguments.cafc.uscourts.gov/default.aspx?fl=20-2067_04082021.mp3 (but disagreeing that preponderance of the evidence is satisfied under that circumstance).

> I respectfully dissent from the majority's conclusion that the preponderance standard is consistent with the statute.

App. 32a-33a.

e) On December 17, 2021, the Federal Circuit granted *en banc* review to address *Ortiz* and issued its accompanying opinion on the same date. App. 17a-18a, 1a-16a. Writing for the majority, Judge Prost insisted that *Ortiz*'s preponderance-of-the-evidence test was correct but needed some clarification, setting forth a persuasive-evidence formulation in its stead:

> *Ortiz* correctly established that the benefit-of-the-doubt rule does not apply when a fact-finder is *persuaded* by the evidence to make a particular finding. *See* 274 F.3d at 1365-66. And *Ortiz* made clear that, under its formulation, a finding by "the preponderance of the evidence" reflects that the Board "has been persuaded" to find in one direction or the other. 274 F.3d at 1366. But *Ortiz*'s preponderance-of-the-evidence formulation – while correctly viewing the issue as one of *persuasion* – nonetheless could confuse because other cases link "preponderance of the evidence" to the concept of equipoise. *E.g.*, *Medina v. California*, 505 U.S. 437, 449, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992) (stating that preponderance-of-the-evidence burden matters "only in a narrow class of cases where the evidence is in equipoise"); *see also Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.*, 141 S. Ct. 1951, 1963, 210 L. Ed. 2d 347 (2021). Accordingly, to eliminate the potential for confusion going

> forward, we depart from *Ortiz*'s "preponderance of the evidence" language and determine that the benefit-of-the-doubt rule simply applies if the competing evidence is in "approximate balance," which *Ortiz* correctly interpreted as evidence that is "nearly equal."
>
> As a corollary, evidence is not in "approximate balance" or "nearly equal," and therefore the benefit-of-the-doubt rule does not apply, when the evidence persuasively favors one side or the other. To be clear, *Ortiz* (and the instant case) were not wrongly decided. In the instant case, for example, the Board made extensive findings that show it was *persuaded* that Mr. Lynch was not entitled to a disability rating greater than 30% for PTSD. *See*, *e.g.*, J.A. 20-21. And the Veterans Court made plain that the evidence was quite clearly against the veteran, not in approximate balance.

App. 11a-12a (italics in original).

Judge Reyna, joined by Judges Newman and O'Malley, concurred in-part and dissented in-part. In his dissent, Judge Reyna made plain that *Ortiz* was wrongly decided, and criticized the majority's newly minted persuasive-evidence construction as the equivalent of the preponderance-of-the-evidence standard:

> I dissent, however, from the court's refusal to recognize that *Ortiz* was wrongly decided. In *Ortiz*, the court held that the benefit-of-the-doubt rule does not apply in cases where the Board of Veterans' Appeals finds that a preponderance of the evidence is against the

> veteran's claim. *Ortiz*, 274 F.3d at 1365-66. The court reached this holding after determining that the statute required no interpretation and upon consulting dictionaries to construe the meaning of "approximate" and "balance." *Id.* at 1364-65. Today's en banc decision acknowledges that the preponderance of the evidence formulation carries potential confusion. As a result, "to eliminate the potential for confusion going forward," the majority "depart[s] from *Ortiz*'s 'preponderance of the evidence' language." Maj. Op. 9. This means two things. First, the "preponderance of the evidence" standard is repealed and replaced with a "persuasive evidence" standard. *Id.* at 9-10. Second, the analytical structure underpinning the preponderant evidence rule in *Ortiz* not only remains, but now girds the persuasive evidence standard. Not only is the persuasive evidence standard, like the preponderance rule, not contemplated by the statute, but its analytical framework has as provenance the now-estranged *Ortiz*'s preponderant evidence rule. This result is a far cry from the language contemplated by Congress. Accordingly, I dissent from the court's adoption of the persuasive evidence standard.

App. 14a.

REASONS FOR GRANTING THE PETITION

A) *Ortiz*'s Preponderance-of-the-Evidence Standard and the Present *En Banc* Court's Differently Named Persuasive-Evidence Formulation Severely Undercut Congress' Design of an Exceptionally Favorable Standard of Proof for Adjudicating the Many Millions of VA Claims

Ortiz violates the plain text of Section 5107(b), undermining Congress' express design of an exceptionally favorable standard of proof to adjudicate veteran disability claims. *Ortiz* incorrectly reasoned that, in all cases, a finding that the preponderance of the evidence weighs against the claim necessarily precludes a finding that the evidence is in approximate balance:

> [W]e conclude that a finding that evidence preponderates in one direction precludes a finding that the positive and negative evidence is in "approximate balance," and we therefore interpret the clear and unambiguous language of § 5107(b) and its accompanying regulation[11] to have no application where the Board determines that the preponderance of the evidence weighs against the veteran's claim.

274 F.3d at 1366.

Ortiz blunders in its basic premise. A finding that the evidence preponderates for or against a claim, at most, precludes a finding that the evidence is in even

[11] App. 58a-59a (providing the full text of 38 C.F.R. § 3.102).

or perfect balance/equipose. But, the same finding does not, as *Ortiz* would have us believe, "preclude[ ] a finding that positive and negative evidence is in 'approximate balance.' " *Id*. After all, the totality of the evidence can both preponderate in one direction and be nearly or approximately in balance. Yet the claimants' and the Agency's opposing standards of proof must be mutually exclusive, *i.e.*, a claim cannot be granted and denied in the same adjudication. Under the *Ortiz* regime, however, claims are being denied even when the evidence is in approximate balance. App. 32a-33a. (Dyk, J., concurring and dissenting) ("It is not difficult to imagine a range of cases in which the evidence is in approximate balance between the veteran and the government (and the veteran should recover), but still slightly favors the government (and under the majority's test, the veteran would not recover)."); *see infra* at 22-28 (the range of cases improperly denied under *Ortiz* or the persuasive-evidence formulation would be vastly wider if the modifier *approximate* were given its less stringent, pro-claimant definition).

Nonetheless, the present Federal Circuit *en banc* court agreed with *Ortiz*, offering only a semantical change to the preponderance-of-the-evidence standard, the so-called persuasive-evidence formulation:

> *Ortiz* correctly established that the benefit-of-the-doubt rule does not apply when a fact-finder is *persuaded* by the evidence to make a particular finding. *See* 274 F.3d at 1365-66. And *Ortiz* made clear that, under its formulation, a finding by "the preponderance of the

> evidence" reflects that the Board "has been persuaded" to find in one direction or the other. 274 F.3d at 1366.[12] But *Ortiz*'s preponderance-of-the-evidence formulation – while correctly viewing the issue as one of *persuasion* – nonetheless could confuse because other cases link "preponderance of the evidence" to the concept of equipoise.[13] *E.g.*, *Medina v. California*, 505 U.S. 437, 449, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992) (stating that preponderance-of-the-evidence burden matters "only in a narrow class of cases where the evidence is in equipoise"); *see also Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.*, 141 S. Ct. 1951, 1963, 210 L. Ed. 2d 347 (2021). Accordingly, to eliminate the potential for confusion going forward, we depart from *Ortiz*'s "preponderance of the evidence" language and determine that the benefit-of-the-doubt rule simply applies if the competing evidence is in

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[12] By agreeing in substance with *Ortiz*, the *en banc* court's persuasive-evidence formulation presumes only minor stylistic changes to the preponderance-of-the-evidence standard. Yet, the court inexplicably characterized its new formulation as a "change in our construction of § 5107(b)" so much so that it "would not provide grounds for claims of clear and unmistakable error ("CUE") for prior Board decisions," citing *George v. McDonough*, 991 F.3d 1227, 1334 (Fed. Cir. 2021), *cert. granted* (U.S. Jan. 14, 2022) (No. 21-234). App. 12a n.6.

[13] This purported *confusion* is of the majority's own making. Cases correctly link the preponderance-of-the-evidence and the equipoise-of-the-evidence standards as reciprocal and mutually exclusive standards. *Supra* at 2-3 n.2. In fact, any confusion must be attributed to the majority's unprecedented and undefined persuasive-evidence formulation. *Infra* at 21-22.

> "approximate balance," which *Ortiz* correctly interpreted as evidence that is "nearly equal."
>
> As a corollary, evidence is not in "approximate balance" or "nearly equal," and therefore the benefit-of-the-doubt rule does not apply, **when the evidence persuasively favors one side or the other**. To be clear, *Ortiz* (and the instant case) were not wrongly decided. In the instant case, for example, the Board made extensive findings that show it was *persuaded* that Mr. Lynch was not entitled to a disability rating greater than 30% for PTSD. *See*, *e.g.*, J.A. 20-21. And the Veterans Court made plain that the evidence was quite clearly against the veteran, not in approximate balance.

App. 11a-12a (italics in original, bold added).

In his dissent, Judge Reyna denounced the majority's persuasive-evidence test as a mere reiteration of *Ortiz*'s preponderance-of-the-evidence standard:

> [T]he analytical structure underpinning the preponderant evidence rule in *Ortiz* not only remains, but now girds the persuasive evidence standard. Not only is the persuasive evidence standard, like the preponderance rule, not contemplated by the statute, but its analytical framework has as provenance the now-estranged *Ortiz*'s preponderant evidence rule.

App. 14a.

Judge Reyna's observations were prescient; both the Secretary and the Veterans Court now read the persuasive-evidence formulation as the equivalent of

the preponderance-of-the-evidence standard. *Sansbury v. McDonough*, 2022 U.S. App. Vet. Claims LEXIS 545 at 29-32 (Vet. Ct. No. 20-8639, April 11, 2022) (unpub. opn.); *Stevenson v. McDonough*, 2022 U.S. App. Vet. Claims LEXIS 592 at 12-13 (Vet. Ct. No. 20-6985, April 22, 2022) (unpub. opn.); *Turner v. McDonough*, 2022 U.S. App. Vet. Claims LEXIS 518 at 13 (Vet. Ct. No. 21-0914, April 5, 2022) (unpub. opn.).

Indeed, the majority's persuasive-evidence formulation ("when the evidence persuasively favors one side or the other"), could not be understood in any other way. Case law and dictionary definitions articulate the preponderance-of-the-evidence test in much the same way as the persuasive-evidence formulation. *See, e.g.*, *Endeavor Partners Fund, LLC v. Comm'r*, 943 F.3d 464, 467 (D.C. Cir. 2019) ("Under a preponderance standard, once both parties have produced their respective evidence, the side with the more persuasive case prevails."); *Hale v. Dept. of Transp., Federal Aviation Admin.*, 772 F.2d 882, 885 (Fed. Cir. 1985) ("Preponderance of the evidence, with respect to the burden of proof in civil or administrative actions such as this one, means . . . evidence which is more convincing than the evidence which is offered in opposition to it."); *Williams v. Eau Claire Pub. Sch.*, 397 F.3d 441, 446 (6th Cir. 2005) (approving the definition of "preponderance of the evidence" as "such evidence as, when considered and compared with that opposed to it, has more convincing force") (internal quotations marks omitted); Black's Law Dictionary 1182 (6th ed. 1990) (defining "preponderance of the evidence" as "[e]vidence which

is of greater weight or more convincing than the evidence which is offered in opposition to it").

Nevertheless, the majority disagreed with this characterization, and yet conspicuously failed to identify a standard of proof for its new formulation:

> The dissent characterizes the majority opinion as reinstituting the preponderance of the evidence standard under a different linguistic formulation. Dissent at 1-2. That is not a correct characterization of the majority opinion.

App. 11a n.4.

The majority's bald disclaimer begs a pivotal question: If the persuasive-evidence formulation is not just another name for the preponderance-of-the-evidence standard, then which standard of proof is it? The majority does not say, nor does its formulation. And, without a governing standard of proof, VA adjudicators run the risk of denying claims upon mere whim or upon any number of subjective and undisclosed standards – an unacceptable practice in any adjudicatory forum:

> [T]his Court never has approved case-by-case determination of the proper standard of proof for a given proceeding. Standards of proof, like other procedural due process rules[,] are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions. Since the litigants and the factfinder must know at the outset of a given proceeding how the risk of error will be allocated, the standard of proof necessarily must be calibrated in advance.

Santosky v. Kramer, 455 U.S. 745, 757 (1982) (citation, internal quotation marks and italics omitted). "The function of a standard of proof . . . is to *instruct* the factfinder concerning the degree of confidence . . . he should have in the correctness of factual conclusions for a particular type of adjudication." *Addington v. Texas*, 441 U.S. 418, 423 (1979) (citation and internal quotation marks omitted) (italics added).

B) The Term *Approximate* is Ambiguous and the Pro-Veteran Canon of Statutory Construction and the Relevant Legislative History Support a Clear-and-Convincing-Evidence Standard of Proof for Denying Claims

Affirming *Ortiz*, the *en banc* court found the word *approximate* "to be clear and unambiguous," meaning "almost exactly or nearly equal" in measure. App. 8a, 10a (quoting *Ortiz*, 264 F.3d at 1364). This cursory gloss overlooks the term's nearly contrary connotation, meaning a lax standard or measure, synonymous with the term *estimate*. *Compare* Black's Law Dictionary 103 (6th ed. 1990) (defining "approximate" as "[u]sed in the sense of an estimate merely, meaning more or less, but about and near the amount, quantity, or distance specified"); https://www.macmillandictionary.com/dictionary/british/approximate_1) (setting forth one common definition of approximate as "not exact or accurate, but good enough to be useful") (viewed on May 6, 2022); (https://www.collinsdictionary.com/dictionary/english/approximate (viewed on May 6, 2022) (same:

"An Idea or description that is approximate is not intended to be precise or accurate, but to give some indication of what something is like.") https://dictionary.cambridge.org/thesaurus/articles/approximate (viewed on May 6, 2022) (example sentence: "We can only give an approximate number for dinner until all the invited guests have responded."); https://www.lexico.com/synonyms/approximate (same: "all measurements are approximate and for guidance only") (viewed on May 6, 2022); https://www.synonyms.com/synonym/approximate (same: "the approximate time was 10 o'clock"; "a rough guess"; "a ballpark estimate") (viewed on May 6, 2022); https://thesaurus.yourdictionary.com/approximate (providing synonyms of approximate) (viewed on May 6, 2022); https://www.thesaurus.com/browse/approximate (same) (viewed on May 6, 2022); https://www.collinsdictionary.com/dictionary/english-thesaurus/approximate (same) (viewed on May 6, 2022) *with* Webster's Third New International Dictionary 778 (unabr. ed. 1993) (To "estimate" means "to arrive at [] a value judgment that is often valid but incomplete, approximate, or tentative."); Merriam-Webster's Tenth Collegiate Dictionary 397 (1997) (defining "estimate" as to judge tentatively or approximately the value, worth or significance of; to determine roughly the size, extent, or nature of).

On this score, *Pierce v. Underwood*, 487 U.S. 552 (1988) is highly instructive. In that case, the Court considered a similarly ambiguous phrase, *substantially justified* under 28 U.S.C. § 2412(d)(1)(A), noting its two common, but nearly opposite, meanings:

> [T]here is nevertheless an obvious need to elaborate upon the meaning of the phrase. The broad range of interpretations described above is attributable to the fact that the word 'substantial; can have two quite different – indeed, almost contrary – connotations. On the one hand, it can mean "[c]onsiderable in amount, value, or the like; large," Webster's New International Dictionary 2514 (2d ed. 1945) – as, for example, in the statement, "He won the election by a substantial majority." On the other hand, it can mean "[t]hat is such in substance or in the main," *ibid.* – as, for example, in the statement, "What he said was substantially true." Depending upon which connotation one selects, "substantially justified" is susceptible of interpretations ranging from the Government's to the respondents'.

Id. at 564. In *Pierce*, the Court followed the second definition, relying upon prior interpretations of the phrase in related fields. *Id.* at 564-65. While equally ambiguous, the phrase *approximate balance* has no such analogues to guide its construction.

This aside, if Congress had been committed to the more stringent definition of *approximate*, "almost exactly or nearly equal," presumably it would have chosen a more stable and limiting modifier, such as the word *virtual*[14] or the phrase *nearly equal*. *Compare*

[14] Webster's Third New Int'l Dictionary 2556 (2002) (defining "virtually" as "almost entirely"); https://www.yourdictionary.com/virtually (similar definition) (viewed on May 6, 2022); https://www.britannica.com/dictionary/virtual (defining "virtual" as "very close to being something without actually being it")

Bailey v. United States, 516 U.S. 137, 148 (1995) ("If Congress had intended to deprive 'use' of its active connotations, it could have simply substituted a more appropriate term – 'possession' – to cover the conduct it wished to reach.").

Under the pro-veteran canon of statutory construction, the chosen modifier, *approximate*, should be given the more beneficent definition. *See* 38 C.F.R. § 3.102 ("It is the defined and consistently applied policy of the Department of Veterans Affairs to administer the law under a *broad interpretation*") (italics added); *Brown v. Gardner*, 513 U.S. 115, 117-18 (1994) (affirming the pro-veteran canon of resolving statutory ambiguity in favor of veterans); *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) ("This court and the Supreme Court both have long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant."). By this definition, Section 5107(b) calls for a lower standard for proving claims than evidence "almost exactly" in equipoise and a more demanding one, namely, the clear-and-convincing-evidence standard, for disallowing them. *California ex rel. Cooper v. Mitchell Bros' Santa Ana Theater*, 454 U.S. 90, 93 n.6 (1981) (noting that the intermediate standard of clear-and-convincing proof articulated in various verbal formulations applies when a litigant must prove his/her case by "a higher probability than

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(viewed on May 6, 2022); https://www.lexico.com/en/definition/virtual ("virtual" means "almost or nearly as described, but not completely or according to strict definition") (viewed on May 6, 2022).

is required by the preponderance-of-the-evidence standard.").

Also bearing on this question is the legislative history of the Veterans Judicial Review Act of 1988 ("VJRA"). *Bostock v. Clayton Cty*., 140 S. Ct. 1731, 1750 (2020) (Gorsuch, J.) ("To ferret out such shifts in linguistic usage or subtle distinctions between literal and ordinary meaning, this Court has sometimes consulted the understandings of the law's drafters as some (not always conclusive) evidence."); *Steadman v. SEC*, 450 U.S. 91, 100-01 (1981) (1981) (finding the legislative history of the APA useful in clarifying the meaning of the text to ascertain the precise standard of proof).

As part of the VJRA, Congress enacted former 38 U.S.C. § 3007(b),[15] later renumbered 38 U.S.C. §5107(b).[16] Prior to the enactment, the Senate Committee of Veterans Affairs had engaged in "extensive consultations with the VA in past Congresses with respect to" the interpretation of the benefit-of-the-doubt rule. In its Report, the Senate Committee gave its final gloss on the benefit-of-the-doubt rule:

> After extensive consultations with the VA in past Congresses with respect to the current VA interpretation of the rule and practices under it, the Committee bill provision has been fashioned to require that where the totality of the evidence is such that "there is an

[15] Pub. L. No. 100-687, 102 Stat. 4113 (November 1988).

[16] Pub. L. No. 102-40, § 402(b)(1), (d)(1), 105 Stat. 238, 239 (1991).

> approximate balance of positive and negative evidence regarding the merits" of a material issue, the doubt is to be resolved in the claimant's favor. Thus, under the provision in the Committee bill, where on the basis of all the relevant evidence an element of a claim is neither *clearly established*[17] *nor clearly refuted*, the benefit of the doubt is to be given to the claimant. Where the evidence *clearly* calls for a finding of fact for or against the claimant, such a rule would be unnecessary and would thus not apply; the finding would simply follow the *clear* direction of the evidence.

110th Cong., 2d Sess., Sen. Report No. 100-418, *Veterans Administration Adjudication Procedure & Judicial Review Act* (July 7, 1988) at 33 (italics added).

The much-repeated word *clearly* (and *clear*) speaks volumes of the intended standard of proof for disallowing claims. By describing this threshold in terms of evidence *clearly refut[ing]* the claim, the Committee envisioned the clear-and-convincing proof standard. *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 97-98 (2011) (equating Federal Circuit's "clear evidence" standard with "clear and convincing" standard); *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 737 (1966) ("Although the statute does not define 'clear

[17] If the evidence *clearly establishe[s]* the claim, then the claimant prevails without resort to the benefit-of-the doubt rule. *See* App. 31a (Dyk, J., concurring and dissenting) ("If the preponderance of the evidence favors the claimant, the claimant prevails, and there is no need to reach the benefit-of-the-doubt rule.").

proof' . . . Congress meant at least to signify a meaning like that commonly accorded such similar phrases as 'clear, unequivocal, and convincing proof.' ") (citation omitted); *Oriel v. Russell*, 278 U.S. 358, 362-63 (1929) ("clear and convincing evidence" equated with "clear evidence"); *Ramsey v. United Mine Workers of America*, 401 U.S. 302, 309, 311 (1971) (stating that "clear evidence" or "clear proof" is equivalent to "clear and convincing evidence"); *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239-40 (Fed. Cir. 2002) (explaining that "clear evidence" is equivalent to "clear and convincing evidence," a heavier burden than preponderance of the evidence).

Stated otherwise, a standard by which the evidence must *clearly refute* an asserted fact or proposition (here, an element of a claim), equates to the clear-and-convincing standard of proof – requiring "evidence indicating that the thing to be proved [or disproved] is highly probable or reasonably certain." Black's Law Dictionary 674 (10th ed. 2009); *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984) (stating that the clear and convincing standard of proof requires evidence showing the truth of the factual assertion is "highly probable").

CONCLUSION

For the stated reasons, petitioner respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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