No. 21-1453

In the Supreme Court of the United States

JOE A. LYNCH, PETITIONER

v.

DENIS R. MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
PATRICIA M. MCCARTHY
ERIC P. BRUSKIN
EVAN WISSER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

"When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter" pertaining to a veteran's claim for disability benefits, the Secretary of Veterans Affairs in adjudicating that benefits claim is required to "give the benefit of the doubt to the claimant." 38 U.S.C. 5107(b) . The question presented is as follows:

Whether Section 5107(b)'s benefit-of-the-doubt rule requires the Secretary to grant a veteran's claim unless there is clear and convincing evidence that the veteran is not entitled to benefits.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and regulations—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 21-1453

JOE A. LYNCH, PETITIONER

v.

DENIS R. MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-16a) is reported at 21 F.4th 776. The prior opinion of a panel of the court of appeals (Pet. App. 19a-33a) is reported at 999 F.3d 1391. The decision of the Court of Appeals for Veterans Claims (Pet. App. 34a-47a) is unreported but is available at 2020 WL 1899169. The decision of the Board of Veterans' Appeals (Pet. App. 48a-57a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 2021. On March 4, 2022, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 16, 2022. The petition was filed on May 13, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has authorized disability-benefit payments to any veteran with a disability resulting from a personal injury or disease incurred in the line of duty—or from the aggravation of a preexisting injury or disease in the line of duty—during active service during a period of war. 38 U.S.C. 1110; see 38 U.S.C. 101(2) and (24), 1101(1) (defining "veteran"); cf. 38 U.S.C. 1131 (addressing disability resulting from service during peacetime). To that end, Congress directed the Secretary of Veterans Affairs (Secretary) to adopt and apply "a schedule of ratings of reductions in earning capacity" upon which to base "payments of compensation" for "specific injuries or combination of injuries." 38 U.S.C. 1155. That schedule, 38 C.F.R. Part 4, contains an entry for mental disorders, including "[p]osttraumatic stress disorder" (PTSD), 38 C.F.R. 4.130 (diagnostic code 9411).

A veteran with service-related PTSD will qualify for a 30% disability rating where the veteran is "generally functioning satisfactorily, with routine behavior, self-care, and conversation normal," but where his PTSD causes "[o]ccupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks" due to symptoms such as "depressed mood, anxiety, suspiciousness, panic attacks (weekly or less often), chronic sleep impairment, [or] mild memory loss (such as forgetting names, directions, recent events)." 38 C.F.R. 4.130. A 50% disability rating is warranted if the veteran has "[o]ccupational and social impairment with reduced reliability and productivity" due to symptoms such as "flattened affect; circumstantial, circumlocutory, or stereotyped speech; panic attacks more than

once a week; difficulty in understanding complex commands; impairment of short- and long-term memory (e.g., retention of only highly learned material, forgetting to complete tasks); impaired judgment; impaired abstract thinking; disturbances of motivation and mood; [or] difficulty in establishing and maintaining effective work and social relationships." *Ibid.*

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

This case concerns a provision in Section 5107(b), known as the benefit-of-the-doubt rule, that governs the administrative adjudication of benefits claims. Section 5107(b) provides that, "[w]hen there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant." 38 U.S.C. 5107(b). The Secretary's implementing regulation similarly provides that "[w]hen, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant." 38 C.F.R. 3.102. The regulation states that a "reasonable doubt" is "one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim." *Ibid.* That doubt must reflect a "substantial doubt" that is "within the range of

probability as distinguished from pure speculation or remote possibility." *Ibid.*

2. From July 1972 to July 1976, petitioner served in the United States Marine Corps. Pet. App. 3a. In March 2015, a private psychologist diagnosed petitioner with PTSD. *Ibid.*

a. In March 2016, petitioner filed a disability claim with the Department of Veterans Affairs (VA), alleging that his military service had caused his PTSD. Pet. App. 3a-4a. When examined by a VA examiner, petitioner reported that he experienced anxiety, sleep impairment, hyperarousal, and other symptoms of PTSD. *Id.* at 50a. But petitioner also reported that he had been married for 24 years in a "generally fulfilling and supportive" relationship; that he was "emotionally connect[ed] to his wife, his children, and his family"; and that he was "socially connected to his church and with friends." *Ibid.* Petitioner further reported that he was in "good standing" with his employer; that his work performance was "excellent"; and that "his relationships with his co-workers and supervisors through the years were characterized as typically positive and productive." *Ibid.* The VA examiner confirmed petitioner's PTSD diagnosis but determined that his symptoms were not "severe enough to interfere with occupational or social functioning or to require continuous medication." *Id.* at 4a, 51a. The examiner also explained that the level of impairment suggested by petitioner's private physician was neither "observed [n]or reported" by petitioner in the examination. *Id.* at 36a (citation omitted).

In August 2016, a VA regional office granted petitioner's claim for benefits with a 30% disability rating. Pet. App. 4a, 36a.

Petitioner filed a notice of disagreement with that initial determination, requesting a higher disability rating and submitting psychological evaluations by a second private physician. Pet. App. 4a. In July 2017, a second VA evaluation was conducted in which petitioner again reported PTSD systems but also reported having "a close family" with which he had "a good relationship," adding that his wife was "frustrated that he would not go out with her to crowded places." *Id.* at 52a-53a. Petitioner reported that he had "a few long-term friends with whom he spoke with on the phone." *Ibid.* Petitioner also reported that he "did not have any trouble completing his work" and that he "restrain[ed] himself and tried to be polite" there because he had been told that "he could be 'too aggressive' interpersonally with other people at work." *Id.* at 53a.

The VA examiner discussed the "conflicting medical evidence," stating that "the conclusions drawn by [petitioner's] private provider were more extreme than what was supported by the available evidence," including petitioner's own reporting during VA examinations. Pet. App. 54a. Based on all the findings of record, the examiner further concluded that petitioner's "occupational and social impairment appeared to be currently worse than reported at the 2016 VA examination, but less severe than the impairment noted by the 2016 private examiner's evaluation." *Id.* at 54a-55a. The examiner ultimately determined that petitioner had "occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks," but that he "generally function[ed] satisfactorily." *Id.* at 55a.

In August 2017, the regional office again determined that petitioner's PTSD warranted a 30% disability rating. Pet. App. 4a.

b. Petitioner appealed to the Board of Veterans' Appeals (Board), which denied petitioner's request for a higher disability rating. Pet. App. 48a-57a. After reviewing the evidence, *id.* at 49a-55a, the Board concluded that petitioner did not have "social and occupational impairment manifested by reduced reliability and productivity" that might warrant a 50% disability rating. *Id.* at 55a. The Board found that its conclusion was reflected in petitioner's self-reported "'excellent'" work performance; his reported relationships with his wife, children, and family; social connections to friends and through church; and his general symptomology, which included infrequent panic attacks, no "inability [to] maintain[] effective work and social relationships," and no reported "memory loss, impaired judgment, impaired abstract thinking, [or] serious disturbances in motivation and mood." *Ibid.* The Board stated that, although petitioner experienced hypervigilance and hyperarousal, there was "no indication from the record" that those conditions "interfere[d] with his ability to perform activities of daily living." *Id.* at 55a-56a. The Board explained that, although petitioner's private examiners "described more severe impairment," "those findings [we]re not supported by the subjective symptoms provided by [petitioner]." *Id.* at 56a. Citing Section 5107(b), the Board stated that "the preponderance of the evidence is against [petitioner's] claim" for a disability rating greater than 30%. *Id.* at 56a-57a.

2. The Court of Appeals for Veterans Claims (Veterans Court) affirmed. Pet. App. 34a-47a. As relevant here, the court determined that the Board had specifi-

cally "addressed the conflicting evidence regarding the severity of [petitioner's] symptoms" and had adequately explained its decision to rely on the VA examinations of record rather than on the "the two private evaluations" describing more severe symptoms. *Id.* at 43a-44a. The court noted the Board's explanation that "the more serious findings in the private evaluation reports '[were] not supported by the subjective symptoms provided by [petitioner].'" *Id.* at 44a (citation omitted). The court further explained that the Board had "considered the doctrine of reasonable doubt" but had found that it did not apply, and it concluded that the Board's decision was "consistent with law." *Id.* at 45a.

3. A divided panel of the court of appeals affirmed. Pet. App. 19a-33a. The majority opinion (*id.* at 20a-29a) and Judge Dyk's opinion concurring in part and dissenting in part (*id.* at 29a-33a) both discussed the court's prior decision in *Ortiz* v. *Principi*, 274 F.3d 1361 (Fed. Cir. 2001), which had addressed Section 5107(b)'s benefit-of-the-doubt rule.

a. In *Ortiz*, the court of appeals noted that Section 5107(b)'s benefit-of-the-doubt rule applies when the positive and negative evidence are in "approximate balance." *Ortiz*, 274 F.3d at 1364. Applying the commonly used definitions of the adjective "approximate" and the noun "balance," the court determined that the benefit-of-the-doubt rule is triggered when "the evidence in favor of and opposing the veteran's claim is found to be 'almost exact[ly or] nearly' 'equal.'" *Ibid.* (brackets in original). The court therefore explained that, if the agency decision-maker "finds" the evidence to be in that state, Section 5107(b) "dictates a finding in favor of the claimant." *Id.* at 1365-1366. The *Ortiz* court added, however, that if the factfinder "is persuaded that the

preponderant evidence weighs * * * against the veteran's claim, [the factfinder] necessarily has determined that the evidence is not 'nearly equal'" and "the benefit of the doubt rule therefore has no application." *Id.* at 1365.

b. In this case, the panel majority rejected petitioner's contention that "*Ortiz* was wrongly decided because it sets forth an 'equipoise of the evidence' standard to trigger the benefit-of-the-doubt rule." Pet. App. 25a. The majority explained that "*Ortiz* says no such thing" and instead "explicitly gives force to the modifier 'approximate'" in Section 5107(b) by applying the rule "where the evidence is 'nearly equal.'" *Id.* at 26a (citation omitted). Petitioner argued that the *Ortiz* court had erred in holding the benefit-of-the-doubt rule to be inapplicable "when 'the preponderance of the evidence is found to be against the claimant,'" but the majority stated that it was bound by *Ortiz*. *Id.* at 28a-29a (citation omitted).

In his partial dissent, Judge Dyk agreed with the majority that *Ortiz* did "not establish an equipoise-of-the-evidence standard for applicability of the benefit-of-the-doubt rule." Pet. App. 29a. Unlike the majority, however, Judge Dyk viewed *Ortiz*'s statement that the rule does "not apply when the preponderance of the evidence is found to be for or against a claimant" as inconsistent with Section 5107(b)'s "plain text." *Id.* at 30a. Judge Dyk explained that the phrase "'preponderant evidence'" has been understood to mean "'the greater weight of evidence'" and that, if the term is given that meaning, "preponderant evidence may be found when the evidence tips only slightly against a veteran's claim," even though there may be "an 'approximate balance' of evidence" for and against the claim. *Id.* at

31a-32a (citation omitted). Because Section 5107(b)'s benefit-of-the-doubt rule applies when such an approximate balance exists, Judge Dyk concluded that *Ortiz* had "departed from the clear language of the statute," and he observed that the "the government appeared to agree." *Id.* at 32a-33a.

4. The court of appeals granted rehearing en banc "for the limited purpose of addressing *Ortiz*"; vacated the original panel opinion; and replaced it with a revised opinion. Pet. App. 18a. The revised opinion affirming the Veterans Court (*id.* at 1a-16a) is a unanimous opinion for the panel (including Judge Dyk). Section II.B of the opinion (*id.* at 10a-12a) also speaks for a nine-judge majority of the en banc court. *Id.* at 3a, 10a n.3.

a. The panel again unanimously concluded that *Ortiz* does not limit Section 5107(b)'s benefit-of-the-doubt rule to circumstances satisfying "an equipoise-of-the-evidence standard." Pet. App. 8a; see *id.* at 8a-10a. The panel explained that the *Ortiz* court had correctly applied the common meanings of "the words 'approximate' and 'balance'" in concluding that the rule applies not only where the evidence is in exact "equipoise," but also "where the evidence is 'nearly equal,' i.e., [where] an 'approximate balance' of the positive and negative evidence" exists. *Id.* at 8a (footnote omitted). The panel explained that "a claimant is to receive the benefit of the doubt when there is an 'approximate balance' of positive and negative evidence, which *Ortiz* interpreted as 'nearly equal' evidence. This interpretation necessarily includes scenarios where the evidence is not in equipoise but nevertheless is in approximate balance." *Id.* at 9a-10a.

In Section II.B of the opinion, the en banc court observed that *Ortiz* had used the phrase "preponderant

evidence" to describe only those circumstances in which the agency factfinder had already "determined that the evidence is not 'nearly equal.'" Pet. App. 10a (citation omitted); see *id.* at 10a n.3. The court noted, however, that "*Ortiz*'s preponderance-of-the-evidence formulation" was potentially "confus[ing]" in light of other precedents "link[ing] 'preponderance of the evidence' to the concept of equipoise." *Id.* at 11a. The full court therefore "depart[ed]" from that formulation and emphasized that "the benefit-of-the-doubt rule" applies whenever "the competing evidence is in 'approximate balance,' which *Ortiz* correctly interpreted as evidence that is 'nearly equal.'" *Ibid.* The court added that, "when the evidence persuasively favors one side or the other," the "evidence [will] not [be] in 'approximate balance' or 'nearly equal.'" *Id.* at 12a. In so ruling, the court stated that the dissenting opinion had misunderstood the court's decision, which the full court reiterated does not "reinstitut[e] the preponderance of the evidence standard" through "a different linguistic formulation." *Id.* at 11a n.4.

The en banc court concluded that, in this case, the benefit-of-the-doubt rule was inapplicable because "the evidence was quite clearly against the veteran, not in approximate balance." Pet. App. 12a. The court also observed that it had not identified "any case that improperly applied *Ortiz* in an outcome-determinative manner." *Id.* at 12a n.5.

b. Judge Reyna, joined by Judges Newman and O'Malley, concurred in part and dissented in part from Part II.B. Pet. App. 13a-16a. Judge Reyna agreed with "the court's decision to reject the preponderance of evidence standard." *Id.* at 13a. He concluded, however, that the "persuasion of evidence standard" that he

ascribed to the majority (*ibid.*) was similarly inconsistent with Section 5107(b) because it reflected the same "analytical structure underpinning the preponderant evidence rule in *Ortiz*." *Id.* at 14a; see *id.* at 16a.

ARGUMENT

Petitioner argues (Pet. 16-22) that the court of appeals interpreted Section 5107(b) to incorporate a "preponderance-of-the-evidence standard." Petitioner further contends (Pet. 22-28) that Section 5107(b)'s reference to an "approximate balance" between positive and negative evidence, 38 U.S.C. 5107(b), "calls for" a "more demanding" standard—"namely, the clear-and-convincing-evidence standard"—before a veteran's disability claim can be rejected, Pet. 25. The Federal Circuit's decision is correct and does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. Section 5107(b) states that the Secretary, when resolving a veterans' benefits claim, "shall consider all information and lay and medical evidence of record in a case." 38 U.S.C. 5107(b). Section 5107(b) further provides that "the Secretary shall give the benefit of the doubt to the claimant" when "there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter." *Ibid.* The court of appeals correctly held that such evidence is "in 'approximate balance'" under Section 5107(b) when the agency factfinder concludes that positive and negative evidence are "'nearly equal,'" including when the evidence tilts slightly against a benefits claim. Pet. App. 10a-11a.

The court of appeals' decision reflects the most natural understanding of Section 5107(b)'s text. A *precise* "balance" of the evidence exists when the factfinder

determines that the positive and negative evidence on an issue are in "equipoise," *i.e.*, are of exactly equal weight. See *Webster's Third New International Dictionary of the English Language* 164 (2002) (*Webster's Third*) (defining "balance" as "equipoise produced between two contrasting or opposing elements" and "equality between the totals of the two sides of an account"); *Webster's New International Dictionary of the English Language* 206 (2d ed. 1949) (*Webster's Second*) (defining "balance" as the "[s]tate of equipoise between the weights of opposite scales" and the "imaginary balance by which Justice determines her decisions"). By adding the adjective "approximate" to modify "balance," Congress expanded Section 5107(b)'s coverage to include circumstances where the positive and negative evidence are of nearly but not precisely equal weight. *Webster's Third* 107 (defining adjective "approximate" as "nearly exact"); see *Webster's Second* 133 (same "nearly exact" definition).

That traditional use of the word "approximate" makes particular sense in the context of Section 5107(b), where Congress sought to specify when an agency factfinder should "give the benefit of the doubt to the claimant." 38 U.S.C. 5107(b). If the factfinder has considered the credibility and weight of "all information and lay and medical evidence of record in a case" (*ibid.*) and has determined that the competing evidence on an issue is in "nearly exact" balance, Section 5107(b) directs the factfinder to give the veteran the "benefit of the doubt," even if the factfinder would otherwise have found the evidence to tip slightly against the veteran's benefits claim.

The court of appeals accordingly recognized that Section 5107(b)'s benefit-of-the-doubt rule applies not

only when the competing evidence is in "equipoise," but also when the evidence is "'nearly equal.'" Pet. App. 11a. The court specifically disavowed language in its prior decision in *Ortiz* v. *Principi*, 274 F.3d 1361 (Fed. Cir. 2001), that had suggested that the benefit-of-the-doubt rule does not apply where "the preponderance of the evidence is found to be against the claimant." Pet. App. 10a (quoting *Ortiz*, 274 F.3d at 1364). The court viewed that language as potentially misleading "because other cases link 'preponderance of the evidence' to the concept of equipoise." *Id.* at 11a. The court further explained, however, that the benefit-of-the-doubt rule does not apply where "the evidence persuasively favors one side or the other," because in such circumstances the "evidence is not in 'approximate balance' or 'nearly equal.'" *Id.* at 12a. And the court concluded that the rule does not apply in this case because "the evidence was quite clearly against the veteran, not in approximate balance." *Ibid.*

2. a. Petitioner argues (Pet. 16-22) that the court of appeals "agreed with *Ortiz*" and made "only a semantical change to the preponderance-of-the-evidence standard," Pet. 17. That is incorrect. The court of appeals specifically disavowed the dissent's characterization of the majority opinion as "reinstituting the preponderance of the evidence standard under a different linguistic formulation." Pet. App. 11a n.4. When the evidence in a particular case is "'nearly equal'" (*id.* at 11a) but weighs slightly against the veteran, the effect of the court's decision is that the veteran is awarded benefits, even though a preponderance standard would produce the opposite result. And in stating that the rule does not apply when "the evidence persuasively favors one side or the other," the court was referring to circum-

stances where the "evidence is *not* in 'approximate balance' or 'nearly equal.'" *Id.* at 12a (emphasis added).

b. Petitioner contends (Pet. 22-28) that Section 5107(b) imposes a "clear-and-convincing-evidence standard" for rejecting a benefits claim, Pet. 25. Petitioner did not advocate that reading of Section 5107(b) in the court of appeals, focusing instead on his argument that *Ortiz*'s preponderance-of-the-evidence formulation erroneously limited the benefit-of-the-doubt rule to circumstances where the evidence is in exact "equipoise." See Corrected Pet. C.A. Br. 12-13, 15-41; Corrected C.A. Reply Br. 1-15.[1] After the panel in this case rendered its initial decision, petitioner sought rehearing en banc based on Judge Dyk's partial dissent, arguing again that *Ortiz*'s preponderance-of-the-evidence formulation was incorrect and that Section 5107(b)'s "*approximate* balance-of-the-evidence [formulation] is the * * * operative standard of proof." C.A. Pet. for Reh'g En Banc 3-5; see *id.* at 2-13.

Petitioner's failure to make his current clear-and-convincing-evidence argument below is a sufficient reason for this Court to deny certiorari. See, *e.g.*, *Johnson* v. *Arteaga-Martinez*, 142 S. Ct. 1827, 1835 (2022) (noting that this Court is "a court of review, not of first view") (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). And given the court of appeals' conclusion

---

[1] At oral argument below, petitioner appears to have waived his current theory that a clear-and-convincing-evidence standard applies. Petitioner's counsel stated that the relevant standard was "lower" than the "clear and convincing" evidence standard, and that it would be acceptable to petitioner if the court of appeals simply reinstated the "approximate balance" test and "g[o]t rid of the preponderance of the evidence standard." C.A. Oral Argument 45:20-45:26, 46:04-46:20, https://oralarguments.cafc.uscourts.gov/default.aspx?fl=20-2067_04082021.mp3; see *id.* at 6:30-10:05.

that "the evidence was quite clearly against [him]," Pet. App. 12a, it does not appear that petitioner could prevail even if that standard were adopted.

In any event, Section 5107(b)'s reference to an "approximate balance" between positive and negative evidence, 38 U.S.C. 5107(b) is not naturally read to incorporate a clear-and-convincing-evidence standard. The term "clear and convincing evidence" is a legal term of art for a "well known * * * standard[] of proof." *Allentown Mack Sales & Serv., Inc.* v. *NLRB*, 522 U.S. 359, 376 (1998). It requires evidence showing that "the thing to be proved is highly probable or reasonably certain." *Black's Law Dictionary* 698 (11th ed. 2019); accord, *e.g.*, *Colorado* v. *New Mexico*, 467 U.S. 310, 316-317 (1984) (highly probable). The term "approximate balance," by contrast, suggests a relationship between positive and negative evidence that is much closer to equipoise than to reasonable certainty.

Other statutory provisions governing veterans' benefits expressly incorporate a clear-and-convincing-evidence standard. For instance, Congress has directed the Secretary to "resolve every reasonable doubt [regarding a disability's service connection] in favor of [a] veteran" who "engaged in combat with the enemy" while in active service during a period of war, but has provided that such service connection "may be rebutted by clear and convincing evidence to the contrary." 38 U.S.C. 1154(b) (formerly 38 U.S.C. 354(b) (1988)); accord 38 U.S.C. 354(b) (1958). Congress likewise has provided that an administrative finding favorable to a claimant "shall be binding on all subsequent [agency] adjudicators," "unless clear and convincing evidence is shown to the contrary to rebut such favorable finding."

38 U.S.C. 5104A.[2] When "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted); see *Halo Elecs., Inc.* v. *Pulse Elecs., Inc.*, 579 U.S. 93, 107 (2016) (rejecting "clear and convincing evidence" standard where Congress had "expressly erected [that] higher standard of proof elsewhere in the [statute]" but had not specified that standard in the particular provision at issue).

Petitioner contends that "approximate" can be "synonymous with the term *estimate*," Pet. 22, and that the latter term can suggest significant indeterminacy, as when used in the phrase "ballpark estimate," Pet. 23 (citation omitted). But Section 5107(b) uses "approximate" as an adjective modifying "balance," not as a verb or noun. And the specific statutory context in which the term "approximate balance" appears further belies petitioner's reading.

Section 5107(b) does not address an unknown quantum of evidence that might be estimated *ex ante*. Section 5107(b) instead directs the Secretary to give the veteran the benefit of the doubt *after* the Secretary has "consider[ed] all information and lay and medical evidence of record in a case" and has determined that "there is an approximate balance of positive and negative evidence" on an issue. 38 U.S.C. 5107(b). Because the record at that point is fixed and the factfinder has determined the relative weight and credibility of the

---

[2] Congress has expressly incorporated the clear-and-convincing-evidence standard into other veterans'-benefits provisions as well. See, *e.g.*, 38 U.S.C. 1980A(*l*)(2); 38 U.S.C. 2411(c) and (d)(2)(A)(ii).

positive and negative evidence, the term "approximate" in Section 5107(b) cannot reasonably be understood to contemplate an "estimate" of what further inquiry might reveal. Congress instead directed the factfinder to give the veteran the benefit of the doubt when the evidence is in "approximate balance," *i.e.*, when the balance of positive and negative evidence is "nearly exact." See pp. 11-13, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
PATRICIA M. MCCARTHY
ERIC P. BRUSKIN
EVAN WISSER
Attorneys

SEPTEMBER 2022