No. 21-1453

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

REPLY BRIEF

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Introduction

No issue could be more pressing to the VA disability system and to the millions of VA claimants than ensuring a proper standard of proof for adjudicating claims. Yet, the Federal Circuit's newly fabricated persuasive-evidence formulation is confusing and fundamentally wrong. This anomaly needs to be corrected now, or it will become a fixture of VA adjudication for a very long time. Just how long? The present case marks twenty years since the Federal Circuit last decided the standard of proof issue in *Ortiz v. Principi*, 274 F.3d 1361 (Fed. Cir. 2001). Considering the importance of the Question Presented and the Federal Circuit's unlikely revisit of this issue for decades, if ever, this petition presents a compelling case for granting certiorari.

Argument

A) Veterans Court Judges, VA Adjudicators, and VA Claimants and Their Representatives Need to Know the Standard of Proof for Denying Claims; the Lower Court's Persuasive-Evidence Formulation Does Not Provide a Standard of Proof

Petitioner made clear that the preponderance-of-the-evidence test endorsed in *Ortiz*, 274 F.3d 1361 could not possibly be the correct standard of proof for denying VA claims. Pet.[1] 16-17. Rather, this standard

[1] Petition for Writ of Certiorari.

would only apply if equipoise/balance-of-the-evidence were the reciprocal standard for granting claims. Pet. 2-3 n.2. Section 5107(b)'s operative language – *approximate balance* – unmistakably defines a lower standard of proof than equipoise/balance-of-the-evidence for granting claims and, by necessary implication, imposes a higher standard of proof than preponderance-of-the-evidence for denying them.

The Secretary does not dispute this basic syllogism. BIO[2] 13-14. Instead, he counters that, by substituting the persuasive-evidence language for *Ortiz*'s preponderance-of-the-evidence formulation, the Federal Circuit *en banc* opinion now provides the correct standard for denying claims:

> 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

[2] Brief for the Respondent in Opposition.

> case because "the evidence was quite clearly against the veteran, not in approximate balance." *Ibid*.

BIO 13 (italics & bold added).

Critically, the Secretary and the Federal Circuit assume that the term *persuasively*, in and of itself, defines a standard of proof. BIO 13. That is fundamentally incorrect. "Persuasiveness is not a standard of proof." *Brown v. Wilkie*, 2019 U.S. App. Vet. Claims LEXIS 428 at 7 (Vet. Ct. No. 17-2519, Mar. 21, 2019). By any definition, a standard of proof must specify the *degree* of persuasion by which the evidence must prove or disprove an asserted fact or proposition. VA M-21 Manual, Part III, Subpart iv, Chap. 5, 1(j), *Standards of Evidentiary Proof* ("Standard of proof specifies the *degree* of persuasion or confidence in the evidence with regard to the subject of the proof that is required in order to find a fact proven.")[3] (italics added); Black's Law Dictionary (11th ed. 2019) (defining "standard of proof" as referring to "[t]he *degree* or level of proof demanded in a specific case.") (italics added); *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622 (1993) (observing that the applicable standard of proof defines "the requisite *degree* of certainty" the evidence must satisfy to prove or disprove

[3] Available at https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/554400000001018/content/554400000014383/M21-1,%20Part%20V,%20Subpart%20ii,%20Chapter%201,%20Section%20A%20-%20Requirements%20for%20Live%20Pension%20 (visited on September 16, 2022).

"the truth of the asserted proposition") (italics added); *Addington v. Texas*, 441 U.S. 418, 423 (1979) ("The function of a standard of proof . . . is to instruct the factfinder concerning the *degree* of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.") (citation and internal quotation marks omitted) (italics added); *Steadman v. SEC*, 450 U.S. 91, 95 (1981) (defining standard of proof as "the *degree* of proof which must be adduced by the proponent of a rule or order to carry its burden of persuasion") (italics added); *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 100 n.4 (2011) ("We use the term standard of proof to refer to the *degree* of certainty by which the factfinder must be persuaded of a factual conclusion to find in favor of the party bearing the burden of persuasion. . . . [T]he term 'standard of proof' specifies *how difficult* it will be for the party bearing the burden of persuasion to convince the jury of the facts in its favor. Various standards of proof are familiar – beyond a reasonable doubt, by clear and convincing evidence, and by a preponderance of the evidence.") (citation and internal quotation marks omitted) (italics added).

Thus, despite the lower court's heavy reliance upon the word *persuasively* (and *persuaded*),[4] this term

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[4] App. 11a (emphasizing that "*Ortiz* correctly established that the benefit-of-the-doubt rule does not apply when a factfinder is *persuaded* by the evidence to make a particular finding. *See* 274 F.3d at 1365-66") (italics in original); App. 12a (emphasizing that "the Board made extensive findings that show it was *persuaded*") (italics in original).

simply does not move the needle. It is superfluous: When the evidence favors one side or the other, it necessarily "*persuasively* favors one side or the other." App. 12a (italics added). Little wonder then that the phrase *persuasively favors* does not appear anywhere in the jurisprudence,[5] save for the VA cases following the present *en banc* opinion. At best, the court's persuasive-evidence articulation is a tautology of the preponderance-of-the-evidence standard. *See* Pet. 19-21.

Given the indeterminacy of the persuasive-evidence formulation for denying claims,[6] and the ambiguity of the operative phrase *approximate*[7] *balance* for granting them, VA claimants and their representatives, if any,[8] will not know with any reasonable certainty the quantum of positive evidence needed to prevail in their claims. Nor will VA adjudicators have a clear standard to ensure consistent and accurate determinations.

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[5] One exception exists. *See Saginaw Chippewa Indian Tribe v. Gover*, 1999 U.S. Dist. LEXIS 22690 at 12 (E.D. Mich. Aug. 19, 1999) (Ct. No. 99-10327).

[6] Pet. 19-22.

[7] Pet. 22-24.

[8] As was the case with petitioner, many claimants have no representation.

B) The Persuasive-Evidence Formulation Is Incoherent; The Federal Circuit Affirmed *Ortiz*'s Preponderance-of-the-Evidence Standard in Substance, Changing Only Its Language, But Insisted That Its New Formulation Was Not the Linguistic Equivalent of *Ortiz*'s Preponderance-of-the-Evidence Standard

The Federal Circuit's *en banc* opinion affirmed *Ortiz*'s preponderance-of-the-evidence standard in substance, but considered its language potentially confusing:

> *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. *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.

App. 11a.

Yet, without explanation, the court insisted that its newly styled formulation was not the linguistic/functional equivalent of the preponderance-of-the-evidence standard:

> 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 persuasive-evidence formulation cannot be two things at once: both an affirmation and a disavowal of the preponderance-of-the-evidence standard. The court's Janus-faced opinion, while purporting to clarify the standard of proof issue, has greatly confused it. Amicus Vietnam Veterans of America explains:

> Despite the Federal Circuit's goal of eliminating confusion at the VA, *Lynch* left the agency more, not less, room for misinterpretation. The VA's articulation and application of the approximate balance test post-*Lynch* has been inconsistent. The Board of Veterans' Appeals continues to apply *Ortiz*'s preponderance standard, further confirming that it and the persuasive evidence standard are one and the same. *See*, *e.g.*, Title Redacted by Agency, No. 210915-185717, 2022 WL 669062, at *8-9 (Bd. Vet. App. Jan. 28, 2022) ("For these reasons, the preponderance of the evidence is against a finding that the Veteran's PTSD warrants a rating in excess of 50% prior to March 23, 2021. Accordingly, the Board finds that the benefit-of-the-doubt rule is not applicable as the evidence is not in approximate balance, and entitlement to increased ratings for PTSD is not warranted."); Title Redacted by Agency, No. 12-19 376 2022 WL 1637295, at *6

(Bd. Vet. App. Mar. 31, 2022) ("In reaching the above conclusions, the Board has considered the applicability of the benefit of the doubt doctrine. However, as the law as well as the preponderance of the probative evidence is 24 against the claim, the Board finds that that [sic] this doctrine is not applicable in the instant appeal."); Title Redacted by Agency, No. 22018873, 2022 WL 1614709, at *8 (Bd. Vet. App. Mar. 30, 2022) ("[A]s the preponderance of the evidence is against the claim, the Board finds that the doctrine is not for application.") (citing *Lynch*; *Ortiz*).

Likewise, the Veterans Court has struggled to make sense of *Lynch*. The court has remanded some, but not other appeals in light of the decision, and has been inconsistent in its reasoning. See *Hopkins v. McDonough*, No. 21-1519, 2022 WL 443023, at *3 (Vet. App. Feb. 14, 2022) ("[T]he Board considered the . . . pre-*Lynch* articulation of the doctrine. While such an analysis will not always – perhaps even not most of the time – necessitate a remand because one can assess the Board's decision as a whole under the *Lynch* formulation, we think this case requires remand," where determining the cause of a disability would have required "speculation"); *Akins v. McDonough*, No. 20-8787, 2022 WL 702386, at *1 (Vet. App. Mar. 9, 2022) (remanding in light of *Lynch* without explaining how the development may require a change in the Board's analysis); *Hicks v. McDonough*, No. 20-8264, 2022 WL 1223015, at *6 (Vet. App. Apr. 26, 2022) (citation omitted) (concluding remand was not

> warranted because "it is clear that 'the Board made extensive findings that show it was persuaded that [the veteran] was not entitled to a disability rating greater than [50%]' for 25 his psychiatric condition" despite finding the Board's decision "imperfect").

Brief of Amicus Vietnam Veterans of America 23-25.

C) If Clear-and-Convincing-Evidence Is Not the Applicable Standard for Denying VA Claims, Then an Intermediate Standard Between Preponderance-of-the-Evidence and Clear-and-Convincing Evidence Must Be Formulated

As argued, the Federal Circuit's persuasive-evidence formulation defines no standard at all or, at best, only one equivalent to the inapplicable preponderance-of-the-evidence standard. Pet. 19-21. A clear and easily applicable standard must be devised.

Even assuming arguendo (but not conceding) that clear-and-convincing-evidence should not be the governing standard for denying VA claims, as argued by the Secretary, (BIO 15-16), then a new intermediate standard must be formulated, one lying between the preponderance-of-the-evidence and the clear-and-convincing-evidence standards. The Secretary does not propose one, ignoring the crucial questions of how and to what extent the persuasive-evidence

formulation demands more than the preponderance-of-the-evidence standard.

CONCLUSION

For the reasons set forth here, and in the petition, petitioner respectfully asks that certiorari be granted.

Respectfully submitted,

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