No. 21-1453

IN THE

Supreme Court of the United States

JOE A. LYNCH,

Petitioner,

v.

DENIS R. MCDONOUGH,
SECRETARY OF VETERANS
AFFAIRS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF VIETNAM VETERANS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

Vietnam Veterans of America ("VVA") is a national nonprofit organization and is the only national veterans service organization congressionally chartered and exclusively dedicated to Vietnam-era veterans and their families. As the Vietnam war came to an end and years passed, it became clear that established veterans service organizations had failed to make issues of concern for Vietnam veterans a priority. In response, VVA founded Vietnam Veterans of America Legal Services ("VVALS") to assist veterans seeking benefits and services from the government. VVA has played a leading role in advocating for the creation of Judicial Review, championing the rights of veterans to challenge VA benefits decisions in court. In the 1990s, VVALS evolved into the current VVA Service Representative program that continues to represent and advocate for veterans today.

The issues in this case lie at the core of VVA's experience and expertise. VVA has a strong interest in promoting the pro-veteran application of 38 U.S.C.

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[1] The parties have filed blanket consents to the filing of amicus briefs in this case. Counsel for VVA notified counsel of record of their intention to file an amicus curie brief at least 10 days before the deadline to file the brief. No counsel for a party authored this brief in whole or in part, and no counsel or party other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

§ 5107(b) (the benefit-of-the-doubt rule); and is well positioned to aid the Court's understanding of how the rule fits within the full range of benefits Congress has provided to veterans, and how hundreds of thousands of veterans may be harmed if this Court fails to adopt an interpretation of the rule that accords with Congress's intent.

SUMMARY OF ARGUMENT

This case involves a question that affects a great number of veterans seeking benefits from the Veterans Administration ("VA"): the proper application of the benefit-of-the-doubt rule, a unique standard of proof that gives the benefit of the doubt to veterans when there is "an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter." 38 U.S.C. § 5107(b).

"This unique standard of proof is in keeping with the high esteem in which [this] nation holds those who have served in the Armed Services." *Gilbert* v. *Derwinski*, 1 Vet. App. 49, 54 (1990). The standard lies "at the farthest end of the spectrum" of possibilities in administrative or civil procedure. *Id.* It is one of the "singular characteristics of the review scheme Congress created for the adjudication of veterans' benefits claims," reflecting longstanding solicitude for veterans and "'plac[ing] a thumb on the scale in the veteran's favor.'" *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 440 (2011) (citation omitted).

Two decades ago, however, the Federal Circuit took its thumb off the scale. In *Ortiz* v. *Principi*, the court effectively struck the word "approximate" from the statute, holding that the benefit-of-the-doubt rule applies *only* when the evidentiary scales are in "equipoise." 274 F.3d 1361, 1364 (Fed. Cir. 2001).

Relying on *Ortiz* in the years since, the Board of Veterans' Appeals and the Court of Appeals for Veterans Claims have allowed the VA to defeat claims by showing nothing more than a bare preponderance of evidence against a veteran.

But when two things are in "equipoise," they are not "*approximate[ly]*" balanced—they *are* balanced. Thus, *Ortiz*'s "equipoise" standard is facially inconsistent with the plain meaning of the word "approximate" in § 5107(b). Moreover, the standard finds no support in the statute's legislative history and contravenes the surplusage and pro-veteran canons of statutory construction.

Presented the opportunity to overturn *Ortiz's* erroneous decision, the Federal Circuit doubled down. Although its *en banc* decision recognizes that *Ortiz* "could confuse because other cases link 'preponderance of the evidence' to the concept of equipoise," it nevertheless held that *Ortiz* was correctly decided. *Lynch* v. *McDonough*, 21 F.4th 776, 781 (Fed. Cir. 2021). In an attempt "to eliminate [*Ortiz's*] potential for confusion," the court set a new analytical framework—the persuasion of evidence standard—for applying the benefit-of-the-doubt rule under § 5107(b). *Id.* at 782. Yet, that compounds the confusion.

Like the preponderance standard, the persuasive evidence standard is not contemplated by the statute's text, and, in any event, is nothing more than the

preponderance of evidence standard expressed with a different word. Indeed, even post-*Lynch*, the VA's application of the benefit-of-the-doubt rule still largely relies on the preponderance of evidence standard.

By allowing the VA to prevail when it tips the scales just enough to show a preponderance of evidence, *Ortiz* ensured that the statutory benefit-of-the-doubt rule will have only minimal, if any, effect, leaving the weight of an increased burden on the veteran.

ARGUMENT

I. The Analytical Framework of the Preponderance of Evidence and Persuasive Evidence Standards is Unworkable.

In *Ortiz*, although the Federal Circuit recognized that 38 U.S.C. § 5107(b) requires only an "approximate balance" of proof to invoke the benefit-of-the-doubt in favor of the veteran, it did not impose the adjective "approximate" on the noun "balance." Instead, it analogized to baseball's "tie goes to the runner" rule, suggesting that the benefit-of-the-doubt rule is triggered only when the evidence is "too close to call." *Ortiz*, 274 F.3d at 1365. *Ortiz* thus assumes that evidence preponderating in one direction is not "too close to call." Not only is that assumption flawed, it is supported neither by the statute nor any precedents.

As the partial dissent in *Lynch* recognizes, preponderant evidence simply "means the greater weight of evidence." *Lynch* v. *McDonough*, 999 F.3d 1391, 1396 (Fed. Cir. 2021) (Dyk, J. dissenting). "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.'" *Id.* at 1397. By reframing the statute's

standard in terms of preponderance of evidence, *Ortiz* not only "departed from the clear language of the statute," it "impermissibly restricts the benefit-of-the-doubt rule to cases in which there is close to an evidentiary tie." *Id.*

Confronted with an admittedly "confusing" precedent in *Ortiz*, the *Lynch en banc* court articulated a new standard—*i.e.,* a "persuasive evidence" standard. But this standard is nothing more than a reformulation of the preponderance rule—a factfinder of the preponderance rule – a factfinder may deem evidence that preponderates in one direction "persuasive." Indeed, *Ortiz* contemplates *precisely* this result. *Ortiz*, 274 F.3d at 1365 ("[I]f the Board is *persuaded* that the preponderant evidence weighs either for or against the veteran's claim, it necessarily has determined that the evidence is not 'nearly equal' or 'too close to call,' and the benefit of the doubt rule therefore has no application.") (emphasis added). Put differently, preponderance of evidence "describe[s] a state of proof that *persuades* the factfinder[] that the points in question are more probably so than not." *Id.* (quoting Mueller & Kirkpatrick, Evidence § 3.3 (1995)) (emphasis added).

Accordingly, characterizing evidence as "persuasive" as opposed to preponderant is a distinction without a difference. As the *en banc* dissent notes, "the analytical structure underpinning the preponderant evidence rule in *Ortiz* not only

remains, but now girds the persuasive evidence standard." *Lynch*, 21 F.4th at 783 (Reyna J., dissenting).

Because the analytical framework of the persuasive evidence rule is the same as the preponderance standard, it is equally unworkable. Indeed, this standard, like the preponderance standard, is found nowhere in the statute and is "a far cry from the language contemplated by Congress." *Id.*

II. This Case Presents an Issue of Exceptional Importance Meriting Review Because the Vital Benefit-Of-The-Doubt Rule Has Been Misapplied to Veterans' Claims for Over Twenty Years

Not only is *Ortiz's* preponderance standard unworkable, it contravenes any reasonable interpretation of "approximate." As this Court has previously emphasized, "'[t]he solicitude of Congress for veterans is . . . long standing,' . . . [a]nd that solicitude is plainly reflected in the [Veterans' Judicial Review Act], as well as in subsequent laws that 'place a *thumb on the scale in the veteran's favor* in the course of administrative and judicial review of VA decisions.'" *Henderson*, 562 U.S. at 440 (emphasis added) (quoting, *United States* v. *Oregon*, 366 U.S. 643, 647 (1961); *Shinseki* v. *Sanders*, 556 U.S. 396, 416 (2009) (Souter, J., dissenting)). Unfortunately, for a crucial segment of veterans who should benefit most from § 5107's expression of this beneficence—namely, those

with substantial evidence both in their favor and against them, but who fall short of equipoise—that thumb has been withdrawn.

Ortiz has long been interpreted to mean that veterans get the benefit of the doubt only when there is an *even* balance of proof. See, *e.g.*, *Davis* v. *McDonough*, No. 20-3150, 2021 WL 3742378, at *2 (Vet. App. Aug. 25, 2021); *Parker* v. *Wilkie*, No. 18-5272, 2019 WL 4605721, at *2 (Vet. App. Sept. 24, 2019); *Skoczen* v. *Shinseki*, 564 F.3d 1319, 1324 (Fed. Cir. 2009) (describing the rule as an "equality of the evidence" standard). These decisions do nothing to address the bitter irony that veterans with substantial evidence approaching, but not reaching, equipoise—those most in need of the benefit-of-the-doubt rule—are the most harmed by the Federal Circuit's error.

At the heart of the issue is *Ortiz*'s and the Veterans court's interpretation of the term "approximate." Under either a broader or more narrow interpretation of "approximate," however, a bare preponderance of the evidence cannot be permitted to prevail against a veteran with favorable evidence roughly approaching equipoise. Without review and intervention by this Court, the vital pro-veteran thumb cannot press the scale if judicial arms remain pinioned by illogical precedent.

A. Congress Designed a Regime Uniquely Favorable to Veterans, Which Should Be

Reflected in the Proper Interpretation of "Approximate Balance."

This Court has long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant. *Henderson*, 562 U.S. at 440. That character must be accounted for when considering the meaning of "approximate balance" in § 5107(b).

Overall, this adjudicatory "process is designed to function throughout with a high degree of informality and solicitude for the claimant." *Walters* v. *Nat'l Assn. of Radiation Survivors*, 473 U.S. 305, 311 (1985). As this Court has previously recognized, the contrast between ordinary civil litigation "and the system Congress created for veterans is *dramatic*." *Henderson*, 562 U.S. at 431 (emphasis added). Unlike civil litigation, "[a] veteran faces no time limit for filing a claim, and once a claim is filed, the VA's process for adjudicating it at the regional office and the Board is *ex parte* and nonadversarial." *Id.* (citing 38 CFR §§ 3.103(a), 20.700(c) (2010)). Indeed, the VA "has a statutory duty to assist veterans in developing the evidence necessary to substantiate their claims[.]" *Id.* at 431–32 (citing 38 U.S.C. § 5103(a)).

This generous backdrop animates § 5107(b)'s mandate 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." Congress has almost never employed such a standard before,[2] and this overall favor toward veterans should be reflected in a broad interpretation of "approximate." The narrow definition espoused by *Ortiz* and its progeny betrays the spirit of this statutory scheme, and should be rejected. See, *e.g.*, *Hodge*,155 F.3d at 1362 ("[T]he Court of Veterans Appeals . . . has imposed on veterans a requirement inconsistent with the general character of the underlying statutory scheme for awarding veterans' benefits.").

B. *Ortiz* Incorrectly Found the Term "Approximate" to Be "Unambiguous on Its Face," When in Fact It Can Clearly Accommodate Multiple Meanings.

"As with any question of statutory interpretation, [the] analysis begins with the plain language of the statute." *Jimenez* v. *Quarterman*, 555 U.S. 113, 118 (2009). In this context, *Ortiz* defined "approximate" as "almost exactly or nearly equal," and it concluded that its meaning is "clear and unambiguous on its face." 274 F.3d at 1364. But as explained in Petitioner's brief, the term "approximate" is clearly susceptible to multiple widely accepted definitions. See Pet'r's Br. at 22-23. Given that the meaning of this relative term can span from "roughly similar" (*i.e.*, a ballpark

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[2] The only other statutory provision containing this language is 50 U.S.C. § 4215(a)(3), relating to eligibility for restitution for internment during World War II.

estimate) to "nearly the same" (*i.e.*, "virtually identical"), the term is decidedly ambiguous.

This Court has held that "when evaluating claims, the VA must give veterans the 'benefit of the doubt' whenever positive and negative evidence on a material issue is *roughly* equal." *Henderson*, 562 U.S. at 432 (emphasis added) (quoting § 5107(b)). Contrary to *Ortiz* and the *en banc* decision, the word "roughly" does not connote the same level of precision as "nearly equal," and it is an obvious illustration of the term's ambiguity.

Given these disparate meanings, *Ortiz* and the *en banc* court should have looked to general canons of statutory construction, which are "useful in close cases, or when statutory language is ambiguous," *United States* v. *Monsanto*, 491 U.S. 600, 611 (1989), when construing the term "approximate." *Id*.

1. *Ortiz's* Narrow Interpretation and Application of the Preponderance Standard Renders the Term "Approximate" Superfluous.

As an initial matter, *Ortiz*'s "construction runs aground on the so-called surplusage canon—the presumption that each word Congress uses is there for a reason." *Advoc. Health Care Network* v. *Stapleton*, 137 S. Ct. 1652, 1659 (2017). The surplusage canon rejects the prospect of pointless words, and is employed to "help[] decide between competing

permissible interpretations of an ambiguous statute[.]" *Begay* v. *United States*, 553 U.S. 137, 153 (2008) (Scalia, J., concurring), *abrogated on other grounds by Johnson* v. *United States*, 576 U.S. 591 (2015).

Under *Ortiz*—including its invocation of the preponderance standard—"approximate" is a nullity. *Ortiz* defined "approximate" as "almost exactly or nearly equal," and determined that a preponderance of evidence against a veteran is sufficient for denial of a claim. If Congress had intended a bare preponderance (often expressed numerically as 51%) standard, it would not have used the term "approximate;" that it did so commands a contrary result to avoid the word becoming surplusage.

Notwithstanding *Ortiz*'s dismissiveness of numerical formulation, until a veteran reaches the 50% threshold, the preponderance of evidence dispositively weighs against him or her, and the veteran loses. Perversely, a veteran would lose even with "nearly equal" evidence. 274 F.3d at 1365. The *en banc* court maintains that "*Ortiz* explicitly gives force to the modifier 'approximate' as used in 38 U.S.C. § 5107(b)," *Lynch*, 21 F.4th at 780. Not so—the word does no work under *Ortiz*.

Rather than acknowledge the incompatibility of the preponderance standard with this "approximate balance" language—and perhaps in an attempt to avoid this surplusage problem—the *en banc* court

instead ostensibly attempts to carve out some space around the prospect of equipoise by interposing a "persuasive evidence" standard.

But this attempt fails because the "persuasive evidence" standard is not tethered to any legal authority or principle. While requiring more than a bare preponderance could give more force to the term "approximate," the court cannot invent standards out of whole cloth that are not grounded in settled principles of case law, executive regulation, or legislative edict. Ultimately, unless the notion of a "persuasive evidence" standard were linked with "clear and convincing evidence"—the next standard available when ratcheting above preponderance of the evidence, see infra Section II.C—it must be discarded in favor of a legally cognizable and practically administrable standard.

2. The Pro-Veteran Canon Supports a Broader Interpretation of "Approximate."

The pro-veteran canon further reinforces the broader interpretation of the term "approximate." This Court has repeatedly stressed that, in situations like this, "interpretive doubt is to be resolved in the veteran's favor." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). See also, *e.g.*, *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991) ("[W]e would ultimately read the provision in King's favor under the canon that provisions for benefits to members of the Armed

Services are to be construed in the beneficiaries' favor."); *Henderson,* 562 U.S. at 441 ("We have long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'") (quoting *King*, 502 U.S. at 220 n.9).

There is both poetic and policy-based justice that a veteran-friendly interpretation of § 5107's benefit-of-the-doubt provision is buttressed by the pro-veteran canon. Conversely, as troubling as the prospect of limiting § 5107 is, that perversion would only be compounded if the pro-veteran canon were deemed somehow unable to dictate the proper course here.

3. The Legislative History Supports a Broader Interpretation of "Approximate."

The statute's legislative history also is instructive. See *Candle Corp. of Am.* v. *U.S. Int'l Trade Comm'n*, 374 F.3d 1087, 1093–94 (Fed. Cir. 2004) ("[W]here textual ambiguity exists, 'we must look beyond the bare text . . . to the context in which it was enacted and the purposes it was designed to accomplish.'") (quoting *Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369, 377 (2004)). As discussed in Petitioner's brief, the Senate emphasized that

> where on the basis of all the relevant evidence an element of a claim is neither *clearly* established 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.

Veterans Administration Adjudication Procedure & Judicial Review Act, 110th Cong., 2d Sess., Sen. Report No. 100-418 at 33 (July 7, 1988) (emphasis added). This language does not align with the precision of *Ortiz*'s "almost exactly" definition; rather, it plainly states that, unless the evidence is "clearly" against a veteran, the veteran prevails.

The legislative history states that "[i]n such a beneficial structure there is no room for . . . adversarial concepts as cross examination, best evidence rule, hearsay evidence exclusion, or *strict adherence to burden of proof*." H.R. Rep. No. 100–963, at 13 (1988) (emphasis added). We invoke this same crucial notion: there is no room for the strict interpretation espoused by *Ortiz* and the *en banc* court's decision here, nor room for the "strict adherence to burden of proof" entailed in *Ortiz*'s preponderance standard.

C. A Bare Preponderance of the Evidence Cannot Defeat a Veteran Under Any Reasonable Interpretation of "Approximate."

Although *Ortiz*'s take on "approximate balance" is deeply problematic for the reasons discussed above and in Petitioner's brief, there is no reasonable definition that accommodates *Ortiz*'s preponderance

standard. This begs the question: For veterans that cannot muster a preponderance of evidence in their favor, and fall short of equipoise, what standard should be applied in determining whether or not to afford the benefit of the doubt? Since a bare preponderance of evidence against them cannot prevail, the logical next step is to consider whether there is clear and convincing evidence against them.

"Three standards of proof are generally recognized, ranging from the 'preponderance of the evidence' standard employed in most civil cases, to the 'clear and convincing' standard reserved to protect particularly important interests in a limited number of civil cases, to the requirement that guilt be proved 'beyond a reasonable doubt' in a criminal prosecution." *California ex rel. Cooper* v. *Mitchell Bros. Santa Ana Theater*, 454 U.S. 90, 93 (1981). And although "[t]he precise verbal formulation of th[e] standard varies, . . . phrases such as 'clear and convincing,' 'clear, cogent, and convincing,' and 'clear, unequivocal, and convincing' have all been used to require a plaintiff to prove his case to a *higher probability than is required by the preponderance . . . standard*." *Id.* at 93 n.6 (emphasis added). Thus, in our legal system, the next step ratcheting above a preponderance standard is clear and convincing evidence.

Perhaps recognizing this inescapable logic, the *Ortiz* court attempted to harmonize the preponderance standard with "approximate balance" by rejecting the obvious mathematical implications of

the preponderance standard—asserting that "[t]his burden of proof is not amenable to any mathematical formula, such as the often-recited 'fifty-one percent/forty-nine percent' rule." *Ortiz*, 274 F.3d at 1365. But the 51%/49% rule, as *Ortiz* terms it, is exactly what drives the preponderance standard. Putting aside on this fundamental view of the preponderance standard does not dispel the issue. And although *Ortiz* cites two cases in support, neither is availing.[3]

The concept of the 51%/49% rule is both intuitive and definitional: it corresponds with the notion that, at a certain tipping point, a fact becomes more likely than not, and crucially expresses the threshold boundary for persuasion under that lower burden of proof. Of course, the weight of evidence in a case cannot always literally be reduced to objectively determined probabilistic figures; determining if a fact is 61% vs. 63% likely may be impossible in many instances. Nevertheless, the concept of 51% vs. 49%

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[3] Regarding *In re Winship*, Justice Harlan's concurring comment does not attack the 51%/49% rule, but instead expresses his view that the preponderance test is not about mechanically tallying the quantity of evidence, but rather about whether the evidence supports the existence of a fact more probably than its nonexistence. 397 U.S. 358, 37 (1970) (Harlan, J., concurring). This in no way dislodges the 51%/49% rule. Similarly, *Sargent* v. *Mass. Acc. Co.* discusses generalized mathematical probabilities of how something may or may not have occurred. 307 Mass. 246, 250 (1940). It does not reject the 51%/49% rule; in fact, its focus on weighing evidence to determine if a fact is more likely than not fits squarely within the 51%/49% rule.

is more intuitive, embodying the idea that even roughly balanced evidence favors one side slightly more than the other. That is not an absurd mathematical exercise, but rather (as *Ortiz* admits) an often-recited rule[4] that is critical in the context of statutory schemes involving equipoise or, as here, an approximate balance of evidence.

For these reasons, the preponderance standard has no place here—and the *en banc* court's unsupported attempt at rebranding the standard changes nothing. Thus, in cases where the evidence is "approximately balanced," with a veteran falling short of equipoise, a finding against the veteran should only be based upon clear and convincing evidence.[5]

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[4] See*, e.g.*, *Nat'l Lime Ass'n* v. *EPA*, 627 F.2d 416, 453 n.139 (D.C. Cir. 1980) ("[T]he standard of ordinary civil litigation, a preponderance of the evidence, demands only 51% certainty.") (quoting *Ethyl Corp.* v. *EPA*, 541 F.2d 1, 28 n.58 (D.C. Cir. 1976));*Turpin* v. *Merrell Dow Pharms., Inc.*, 959 F.2d 1349, 1357 n. 2 (6th Cir. 1992) ("Reduced to a percentage, [the preponderance standard] requires proof of one's case to at least 51 percent of the evidence.").

[5] In the event the Court does not agree that clear and convincing evidence is the logically applicable standard, it is still indisputably the case that a bare preponderance of the evidence cannot coexist with the "approximate balance" provision. The only other option is a reframing of what the *en banc* court tried to accomplish with its unmoored "persuasive evidence" standard—somehow maintaining the "weightier" side of the preponderance spectrum while holding that the "lighter" end cannot prevail against veterans with favorable evidence

III *Lynch* Introduces Further Confusion at the VA, Impacting Hundreds of Thousands of Veterans.

The Federal Circuit purported "to eliminate the potential for confusion going forward" by attempting to clarify the preponderance evidence standard articulated in *Ortiz*. See *Lynch,* 24 F, 4th at 781. It did the opposite. The VA's application of the benefit-of-the-doubt rule post-*Lynch* has been uneven at best. And, in close cases, misapplying the benefit-of-the-doubt doctrine will lead the VA to wrongfully deny a veteran the benefits he or she has earned. Given the sheer volume of claims before the VA, the Court should adopt an interpretation of § 5107(b) that is faithful to what Congress intended.

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approaching 49%. For instance, perhaps 60% against a veteran would not amount to clear and convincing evidence, but still constitutes a "weightier" preponderance indicating the veteran is not close enough to equipoise to cross the protective "approximate balance" threshold. On the other hand, perhaps 46% in favor of a veteran is close enough to be considered roughly balanced, and the 54% against the veteran is not a substantial enough preponderance to prevail. It may be the *en banc* court's opinion attempted to accomplish such an approach, but if so, it failed. It offered no principled way for courts or the VA to determine the proper thresholds to apply, and it may ultimately prove to be an impossible task to draw such distinctions within the preponderance framework—hence, the preferability of the clear and convincing evidence standard.

A. The Benefit-of-the-Doubt Rule is the Bedrock of VA Disability Adjudications.

In Fiscal Year (FY) 2020, more than 250,000 U.S. veterans began receiving disability benefits to compensate them for diseases, injuries, or deaths incurred or aggravated during their military service. U.S. VETERANS BENEFITS ADMIN., *Annual Benefits Report*, FY2020 at 70. The average veteran receiving compensation benefits had six service-connected disabilities such as tinnitus, hearing loss, limited range of motion, and post-traumatic stress disorder. *Id.* Vietnam-era veterans made up 28% of recipients and their dependents made up roughly two-thirds of dependent-recipients. *Id.* at 72.

Unfortunately, not all veterans receive the compensation they are entitled to immediately. If after a specialist at a VA regional office initially adjudicates a claim and the veteran is not pleased with the result, the veteran may request a higher-level review at the regional office, filing a supplemental claim at the regional office, or appealing directly to the Board of Veterans' Appeals. See 38 U.S.C. § 5104C(a)(1); 38 C.F.R. § 19.2(d). In FY2021, the Board of Veterans' Appeals docketed 74,834 appeals under the Appeals Modernization Act ("AMA") and received an additional 47,853 legacy appeals.[6] DEP'T OF VETERANS AFFAIRS, *Board of*

[6] The Veteran Appeals Improvement and Modernization Act (AMA) of 2017 (Pub. L. 115-55) was intended to modernize the

Veterans' Appeals Annual Report Fiscal Year (FY) 2021 (December 2021) at 31. The Board issued 20,494 AMA decisions in FY2021 that decided a total of nearly 50,000 issues, allowing approximately a quarter, denying a third, and remanding a third. *Id*. at 38 (the remaining issues were resolved as "other"). If a veteran is still dissatisfied with the outcome of his or her claim following the administrative appeal, a veteran may appeal the case to the Court of Appeals for Veterans Claims. 38 U.S.C. § 7261.

The benefit-of-the-doubt rule applies to "any issue material to the determination of a *matter*" including the existence or degree of a disability or its service connection. See, 38 U.S.C. § 5107(b) (emphasis added). Accordingly, the VA may consider if and how the rule applies numerous times throughout a single adjudication. See, *e.g.*, *Title Redacted by Agency*, No. 10-36 095A, 2022 WL 1637061, at *5–7 (Bd. Vet. App. Mar. 31, 2022) (applying the benefit-of-the-doubt test to find that the criteria for a disability rating of 20% for right knee injury was met; the criteria for a service connection to obstructive sleep apnea was not met; and the criteria for a service connection to irritable bowel syndrome as a secondary service-connected anxiety disorder was met).

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claims and appeals process of the legacy system. In contrast to the linear appeals process of the legacy system, the AMA includes three decision review options for disagreements with benefits decisions. See Pet'r's Br. 5.

Thus, ensuring that the VA applies the correct standard of proof is critical, given that the agency potentially applies the benefit-of-the-doubt rule hundreds of thousands of times in a single year.

B. *Lynch* Has Created More, Not Less, Confusion at the VA.

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

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

his psychiatric condition" despite finding the Board's decision "imperfect").

C. Misapplication of the Benefit-of-the-Doubt Rule Potentially Results in the Denial of Benefits to Deserving Veterans

The practical effect of putting a bare preponderance standard on the VA is immeasurable. It places the burden on the veteran to shoulder a greater portion of the risk of error. As this Court has explained, a standard of proof is effectively a judgment about which party should bear the risk of a factfinder being wrong in a case of mixed evidence. *Addington* v. *Texas*, 441 U.S. 418, 423 (1979). Under a preponderance evidence standard of proof, litigants "share the risk of error in roughly equal fashion." *Addington*, 441 U.S. at 423. Society has "a minimal concern" in the outcome of disputes governed by this standard, *id.*, thus, the standard need not "express[] a preference for one side's interests." *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 390 (1983). This is certainly not the case with veterans' claims.

Cases of mixed evidence are precisely those that could (and, recognizing Congress's largesse towards veterans, should) be resolved in the veteran's favor with the correct application of the approximate balance test. Yet, under the standard articulated in *Lynch*, if the VA is "persuaded" by the evidence against a veteran's claim, despite the evidence being in approximate balance, the agency would wrongfully

deny the veteran's claim. The end result is that a significant number of veterans will be denied benefits the statute entitles them to receive.

For example, although Congress has attempted to make it easier for veterans to obtain compensation benefits after being exposed to toxic substances, see *e.g.*, The Agent Orange Act of 1991, Pub. L. No. 102-4 (1991) (codified as amended 38 U.S.C. § 101 *et seq*. 38 U.S.C. § 241; 38 U.S.C. § 1154), veterans and their survivors continue to struggle to demonstrate service-connection in instances where the medical literature has yet to definitively tie a particular disease to toxic exposure.[7] See Honoring Our Promise to Address

[7] For example, despite submitting three medical opinions—including one from a VA examiner tying a veteran's kidney disease and sarcoidosis to his exposure to Agent Orange during his service in Vietnam, the VA found that the preponderance of the evidence was against a veteran's claim for service-connected benefits. *Title Redacted by Agency*, No. 15-46 967, 2022 WL 1594185 at *4 (Bd. Vet. App. Mar. 27, 2022). The VA assigned more weight to a VA examiner's conclusion that the Veteran's sarcoidosis and chronic kidney/renal disease were "less likely than not" caused by Agent Orange exposure based on the examiner's "review of the medical literature." *Id.* at *3. See also *Title Redacted by Agency*, No. 15-24 191, 2022 WL 1435840, at *1 (Bd. Vet. App. Mar. 12, 2022) (denying a service-connected death benefit to the surviving spouse of a highly decorated Vietnam veteran who presented medical opinion that the veteran's Agent Orange exposure during his service could have caused the metastatic malignant melanoma that resulted in his death).

Comprehensive Toxics Act of 2021, H.R. 3967 117th Cong. (2021).

In another instance, the Board denied a widow's claim that her husband's lung disorder was caused by asbestos exposure while he was working in the boiler and engine room on the U.S.S. Oglethorpe from 1956 to 1959, despite receiving three private medical opinions in support of the service connection. *Title Redacted by Agency*, No. 16-45 912, 2022 WL 1450256, at *1–2 (Bd. Vet. App. Mar. 17, 2022). Although it assigned "some" probative value to his doctor's opinion that his lung damage was likely related to this asbestos exposure that occurred during his service, *id.* at *4, the Board found that there was "not an approximate balance of evidence as to warrant the application of the benefit-of-the-doubt rule" in light of a VA examiner's opinion that the veteran's COPD was not asbestos related. *Id.* at *6.

Similarly, the Board denied a veteran's service-connected disability claim for non-Hodgkin's lymphoma he argued developed as a result of exposure to ionizing radiation experienced during the cleanup of a nuclear test site. *Title Redacted by Agency*, No. 15-07 507, 2022 WL 1593537, at *1 (Mar. 25, 2022). Although non-Hodgkin's lymphoma is presumed to be associated with radiation exposure under certain circumstances, the Board explained that cleanup activities at the site did not trigger the legal presumption. *Id.* at *4 citing 38 U.S.C. § 1112(c) and 38 C.F.R. § 3.309(d). The veteran reported that he

wore no protective suits, masks, or gloves during the cleanup and submitted numerous medical opinions tying the disease to the radiation exposure. *Id.* at *2-4. Yet the Board found a single opinion finding that radiation was unlikely to have caused his cancer to be "probative" and "carry much weight." *Id.* at *4–6. Accordingly, the Board concluded that "[a]s most of the competent evidence persuasively weighs against the claim (that is to say, is neither in approximate balance nor nearly equal), the benefit-of-the-doubt rule is inapplicable." *Id.* at *7 (citing *Lynch*).

These claims exemplify the kinds of close cases the VA must resolve on a regular basis where although there may be a preponderance of evidence against the veteran's claim, the evidence is still in approximate balance and thus should be resolved in the veteran's favor. By continuing to apply a preponderance or persuasive evidence standard, the VA continues to wrongfully deny deserving veterans the benefit of the doubt, depriving them of well-earned compensation.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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