No. 21-1453

IN THE

Supreme Court of the United States

JOE A. LYNCH,
Petitioner,

v.

ROBERT WILKIE,
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 *AMICI CURIAE* SWORDS TO PLOWSHARES AND CONNECTICUT VETERANS LEGAL CENTER IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, Swords to Plowshares ("Swords") and Connecticut Veterans Legal Center ("CVLC") respectfully submit this brief *amicus curiae* in support of Petitioner, Joe. A. Lynch.[1]

Amicus curiae, Swords, founded in 1974, is a community-based nonprofit organization that provides needs assessment and case management, employment and training, housing, and legal assistance to veterans in the San Francisco Bay Area. Swords promotes and protects the rights of veterans through advocacy, public education, and partnerships with local, state, and national entities. The Swords Legal Department targets its services to homeless and other low-income veterans seeking assistance with Department of Veterans Affairs ("VA") disability benefits, character of discharge determinations, and Department of Defense ("DOD") military discharge upgrades. *Amicus* Swords is, therefore, uniquely positioned to file this brief.

Amicus curiae CVLC created the nation's first medical-legal partnership co-located with the VA. CVLC's mission is to remove legal barriers to health care, housing, and income for veterans in recovery from homelessness and mental illness. As a part of this work, CVLC attorneys assist veterans in VA disability claims, character of discharge determinations,

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[1] This brief is submitted with the consent of both parties. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Counsel of record for the parties received timely notice of the intent to file this brief, and letters reflecting the consent of the parties have been filed with the Clerk.

and discharge upgrade petitions to the DOD. CVLC's Veterans Inclusion Project focuses on advocating for policy changes to create a more inclusive veterans benefit system for the most vulnerable low-income veterans: those who are living with mental illness, trauma, substance dependence, and homelessness; as well as those who have experienced military sexual trauma ("MST") and those who have been harmed by discrimination or other injustices in the DOD and VA systems. *Amicus* CVLC is, therefore, uniquely positioned to file this brief.

Amici curiae consider this case to be of critical importance to equitable access to justice for veterans, specifically to disability and healthcare benefits that VA, Respondent administers and provides. This *amicus* brief is designed to preserve and maintain the pro-veteran, nonadversarial adjudication process for disability benefits.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Federal Circuit's decision in *Lynch v. McDonough*, No. 20-2067 (Fed. Cir. 2021), is contrary to the text and purpose of 38 U.S.C. § 5107 and will severely prejudice the rights of veterans seeking service-connected disability benefits. Specifically, *Lynch* upheld the part of the holding in *Ortiz v. Principi*, 274 F.3d 1361, 1364 (Fed. Cir. 2001), that requires the evidence for and against the veteran to be "almost exactly or nearly equal" for the veteran to receive the benefit of the doubt. As explained more fully below, this evidentiary standard is contrary to Congressional intent, statutory language, and this Court's historic respect for the nonadversarial pro-veteran nature of the VA adjudication process. The application of this standard and the framework

underpinning it will result in innumerable veterans' being denied VA benefits that they have earned.

ARGUMENT

This case has implications reaching far beyond the compelling facts in *Lynch,* where a single Marine, disabled by his service to our country, has been denied life-improving benefits to which he is entitled. It also implicates this Court's precedent of honoring Congressional intent and this Court's historic posture of friendliness to our nation's veterans. Indeed, this case presents precisely the sort of systemic, precedent-setting question of exceptional importance that warrants this Court's review.

Almost 50 years ago, Appellant Joe Lynch donned the uniform of the United States Marine Corps, where he served for four years during the Vietnam conflict. As a young Marine, he experienced horrors the average American sees only in movies. He lived in the belly of a warship, with "coffin" bunks stacked three high. He helped evacuate civilians fleeing conflict zones. He witnessed fellow service members perish when a helicopter crashed onto his ship's flight deck. The trauma of these experiences haunted him at work and at home, leading to isolation and despair. For nearly 30 years, stigma led him to bear that burden without the benefit of professional help, despite his wife's encouragement. It was not until a group of his veteran peers endorsed the idea that he finally enlisted the help of a mental-health professional. Four different therapists diagnosed Mr. Lynch with service-connected post-traumatic stress disorder ("PTSD"). One of them found that his PTSD "severely limited" his work performance, his social interactions, and his quality of life. Another concluded that Mr. Lynch has "major impairment in several areas of functioning,"

including "occupational and social" functioning. In sum, two mental health professionals unanimously agreed that Mr. Lynch suffers from service-connected PTSD and concluded that Mr. Lynch's condition resulted in severe impairment of his work and social functions. Critically, the two clinicians who found Mr. Lynch's PTSD to be severe were treating him, while the other two were assessing him for the purposes of his VA claim. At that point, his fate was in the hands of the VA adjudicators. And the VA process failed Mr. Lynch. Rather than give Mr. Lynch the statutorily required "benefit of the doubt" and accept the evidence from two clinicians who documented his extreme symptoms, the VA credited the VA's psychological evaluations. The VA's adoption of these contradictory opinions was contrary to its congressional mandate to treat Mr. Lynch and other veterans with benevolence, as a parent treats a child. *Collaro v. West*, 136 F.3d 1304, 1309–10 (Fed. Cir. 1998) (explaining that the veterans' benefits scheme is "supposed to be a nonadversarial, ex parte, paternalistic system for adjudicating veterans' claims"); *see also Gilbert v. Derwinski*, 1 Vet. App. 49, 54 (1991) (providing that benefits adjudications carry a "unique standard of proof" that is "at the farthest end of the spectrum" of possibilities in administrative or civil procedure).

Like any administrative agency, the VA must apply the law according to its mandates. That includes, among others, the Veterans Claims Assistance Act of 2000. In passing the Veterans Claims Assistance Act of 2000, Congress chose the "approximate balance" standard for reviewing veteran benefits claims to ensure that veterans get the "benefit of the doubt." This standard, along with the U.S. Supreme Court's pro-veteran canon of construction, places a "thumb on

the scale" for veterans. *Henderson v. Shinseki*, 562 U.S. 428, 440 (2011) (citing *Shinseki v. Sanders*, 556 U.S. 396, 416 (2009) (Souter, J. dissenting)); *see also Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (the Federal Circuit "and the Supreme Court both have long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant"). The benefit of the doubt standard aptly represents a determination by our country's highest deliberative bodies that veterans should not be "denied benefits when science moves at a slower pace than suffering." Chadwick J. Harper, Give Veterans the Benefit of the Doubt: Chevron, Auer, and the Veteran's Canon, 42 Harv. J.L. & Pub. Pol'y 931, 934 (2019). Courts effectuate Congress's intent in part by applying "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 (quoting *King v. St. Vincent's Hospital*, 502 U.S. 215, 220–221, n.9 (1991)).

In practice, however, the "benefit of the doubt" standard required when there is an "approximate balance" in 38 U.S.C. § 5107 has not been applied in line with its congressional intent to favor veterans. The VA and the courts have whittled it down to nonexistence in all cases save that narrow set in which the VA finds the evidence for and against eligibility to be in perfect equilibrium—i.e., "equipoise." The erosion of the statutorily required consideration of an "approximate balance" is not a matter of mere academic concern. Its casualties are the men and women, sworn to defend our nation from enemies foreign and domestic, who return to us bearing scars both visible and unseen. The United States' longest period of continuous conflict in our history has only just ended. As discussed below, record numbers of veterans arrive home with PTSD and traumatic brain

injury ("TBI"). Some are survivors of MST, betrayed by their comrades in arms. Meanwhile the ranks of the VA's backlog swell. And increasing numbers of Sailors, Soldiers, Airmen, Guardsmen, and Marines are separated for being unable to hide the impact of their trauma, or are retaliated against when seeking help for it. These facts are undeniable. In aggregate they may blur together, more statistic than tragedy. But these are not just statistics; they are real men and women, heroes whose service forever altered their lives. Their stories illustrate not only the human cost of war but also the human cost of denying the congressionally mandated benefit of the doubt. They are living evidence of the error in *Ortiz v. Principi*, 274 F.3d 1361, 1366 (Fed. Cir. 2001), and its kin—an error that *Lynch* perpetuates. Justice for them demands that this Court restore to its full vigor the standard Congress enacted.

The American people and their elected representatives declared their commitment to honoring veterans' service by enacting 38 U.S.C. § 5107, guaranteeing veterans life-long access to healthcare and benefits related to their service-connected disabilities. Those elected representatives also enshrined in law the principle that, in determining a veteran's eligibility for benefits, the veteran be given "the benefit of the doubt" whenever there is an "approximate balance of evidence." 38 U.S.C. § 5107. When the call is close, the veteran should receive VA benefits.

Casting this standard aside, the VA and the courts have diluted that evidentiary standard to apply only to break ties when the evidence is in "equipoise" under the "persuasion of the evidence" standard adopted by the Federal Circuit. This diluted standard falls short

of the standard intended by the Legislature and has failed Mr. Lynch, much as it has thousands of similarly situated veterans and stands to fail thousands more. The VA's abandonment of the intended "benefit of the doubt" standard improperly deprives veterans of the care to which they are entitled. This Court can right this wrong—not just for Mr. Lynch, but for all veterans whose cases the VA will hear—by reversing the interpretational error that led to this injustice.

I. THIS PETITION PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE AND REVIEW SHOULD BE GRANTED

A. The *Lynch* Dissent Correctly Found That *Ortiz* Was Wrongly Decided

The dissent below, led by Judge Reyna and joined by Judges Newman and O'Malley, aptly agrees with the majority's "decision to reject the preponderance of the evidence standard set in *Ortiz*" while disagreeing with its adoption of a "persuasion of evidence standard." *Lynch*, No. 20-2067 at 12. As succinctly stated in Lynch's petition for certiorari, "[a] finding that the evidence preponderates for or against a claim, at most, precludes a finding that the evidence is in even or perfect balance/equipose." Petition at 16-17. As the dissent notes, "*Ortiz* carries the potential for withholding benefits from veterans to which they are otherwise entitled." *Lynch*, No. 20-2067 at 13. The dissent further reflects that by "providing clarification, the court recognizes the remedial nature of veterans' benefits law, as intended by Congress—including through its statutory expression of the veterans' benefit-of-the-doubt rule." *Id.* Lynch's petition astutely notes that "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." Petition at 18 (citing *Medina v. California*, 505 U.S. 437, 449 (1992) (stating that preponderance-of-the-evidence burden matters "only in a narrow class of cases where the evidence is in equipoise").

As concisely stated by the dissent, the majority acknowledged that "the preponderance of the evidence formulation carries potential confusion" indicating that the prior standard was flawed. *Id.* Rather than use this opportunity to correct the applicable standard, the majority merely replaced "preponderance of the evidence" with a "persuasive evidence standard." Not only does this change fail to reduce confusion, the court doubled down on this departure from the legislative intent. As the dissent explains, "the analytical structure underpinning the preponderant evidence rule in *Ortiz* not only remains, but now girds the persuasive evidence standard." *Id.* The change neither effectuates legislative intent nor provides meaningful standards for VA adjudication of veteran's claims.

Below, the majority writes that "the benefit-of-the-doubt rule simply applies if the competing evidence is in 'approximate balance,' which they agreed with *Ortiz* means "nearly equal.'" *Lynch*, at 9. However, the dissent recognized the pitfalls of this standard: "if the VA internally recognizes the evidence is close but finds in the end that the evidence 'persuasively' precludes the veteran's claim, the VA does not need to disclose that the evidence may have been 'close'" because "[t]here is no requirement to do so." *Id.* at 14. More importantly, "[t]his shields such determinations from meaningful appellate review under § 5107(b)" which

"disincentivizes the agency from fulfilling its duty to provide an adequate administrative record in certain cases and thus hinders appellate review." *Id.* The dissent cites *In re Sang Su Lee*, 277 F.3d 1338, 1342 (Fed. Cir. 2002), where, in vacating the Patent & Trademark Office Board of Patent Appeals and Interferences' decision for failing to meet the adjudicative standards for review under the Administrative Procedure Act, the Federal Circuit established that "the agency tribunal must present a full and reasoned explanation of its decision" for judicial review to be meaningfully achieved. This requires that "[t]he agency tribunal . . . set forth its findings and the grounds thereof, as supported by the agency record, and explain its application of the law to the found facts." *Id.* at 14.

Moreover, the error in applying this standard is readily apparent from the Federal Circuit's affirmance of a decision that is based expressly on a preponderance of the evidence as its sole justification for finding that the evidence was not in approximate balance. *See id*. at 5 ("The Veterans Court rejected Mr. Lynch's assertion that he was entitled to the benefit of the doubt and affirmed the Board's decision, reasoning that "the doctrine of reasonable doubt . . . d[oes] not apply here because the preponderance of the evidence is against the claim."). If the evidence were objectively characterized at a 49% likelihood, that claim both would be approximately in balance and would lose by a preponderance of the evidence. At bottom, the standard applied below is not in line with the legislative intent and warrants review by this Court.

B. There Is a Historic and Growing Need to Honor Our Commitment to Veterans

The United States has a longstanding history of providing post-service care to those who have bravely served our country.[2] Federal commitment to provide for veterans' needs dates back to the First Continental Congress's decision in 1776 to allocate pensions to those who were disabled in service during the Revolutionary War.[3] During the Civil War, the federal government began to provide disability benefits not only to veterans but for their widows and dependents as well, and by 1924 the government had expanded these benefits to cover veterans' disabilities that were not service related.[4] President Hoover established the modern VA in 1930 by consolidating the pre-existing veterans' agencies into a unified federal administration. *Id.* Since then, the federal government has systematically acted to expand the benefits available to our veterans and has dramatically broadened the definition of qualifying disabilities. *Id.* The purpose of the various agencies that have been tasked with providing veterans' benefits has been the same throughout this country's history: to serve and honor

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[2] U.S. Department of Veterans Affairs, VA History Office, https://www.va.gov/HISTORY/VA_History/Overview.asp (last updated May 27, 2021) (explaining that the roots of the VA can be traced back to 1636 when Plymouth Colony provided support to veterans disabled in conflicts with indigenous peoples).

[3] Jean Nudd, Using Revolutionary War Pension Files to Find Family Information, National Archives, https://www.archives.gov/publications/prologue/2015/summer/rev-war-pensions.html (last updated May 7, 2020).

[4] U.S. Department of Veterans Affairs, VA History Office, https://www.va.gov/HISTORY/VA_History/Overview.asp (last updated May 27, 2021).

America's veterans.[5] Disability benefits go to the heart of this purpose as, by ensuring that veterans are not financially burdened by disabilities acquired during their military careers, the country can honor their service.[6] The present-day VA supports our veterans and their families by providing monetary disability benefits, including service-connected disability compensation and non-service-connected pensions.[7]

Historically, a significant number of America's veterans access these benefits, and the increasing need for these benefits is staggering. For example, a 2018 American Community Survey revealed that of 2,451,100 working age veterans, nearly 28 percent had a service-connected disability.[8] Nearly 36 percent of post-9/11 veterans have a service-connected disability, compared to nearly 19 percent of all other veterans.[9] During fiscal year 2020 alone, 258,644 veterans began receiving compensation benefits for service-connected

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[5] U.S. Department of Veterans Affairs, About VA, https://www.va.gov/ABOUT_VA/index.asp (last updated Sept. 22, 2021).

[6] Congressional Budget Office, Veterans' Disability Compensation: Trends and Policy Options (Aug. 2014), *available at* https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/45615-VADisability_OneCol_2.pdf.

[7] The Veterans Health Administration is the largest integrated healthcare network in the United States with 1,255 health care facilities serving 9 million enrolled Veterans each year. *About VA*, U.S. Department of Veterans Affairs, https://www.va.gov/ABOUT_VA/index.asp (last updated Apr. 8, 2018).

[8] William Erickson et al., Cornell University Yang-Tan Institute on Employment and Disability, *2018 Disability Status Report: United States* (2020), *available at* https://www.disabilitystatistics.org/StatusReports/2018-PDF/2018-StatusReport_US.pdf.

[9] *Profile of Post-9/11 Veterans: 2016*, U.S. Department of Veterans Affairs (March 2018), *available at* https://www.va.gov/vetdata/docs/SpecialReports/Post_911_Veterans_Profile_2016.pdf.

disabilities, with 36,285 of those veterans receiving compensation for service-connected PTSD.[10]

The VA estimates that between 11 percent and 20 percent of veterans who served in Operations Iraqi Freedom and Enduring Freedom suffer from service-connected PTSD,[11] a condition found to be a risk factor for suicidal ideation.[12] Similar rates exist for previous eras—roughly 12 percent of Gulf War veterans and 15 percent of Vietnam veterans have been diagnosed with PTSD.[13] Likewise, veterans as a whole are between 200 percent and 300 percent more likely to experience PTSD compared to the general adult population, and veterans as a whole are 300 percent to 500 percent more likely to experience PTSD compared to the general adult male population.[14] In addition to suicidal ideation, these veterans are likely also to experience depression, chronic pain, and substance abuse.[15] Veterans suffering from PTSD are three to five times more likely to suffer from depression than those

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[10] Veterans Benefits Administration, *Annual Benefits Report: Fiscal Year 2020*, Annual Benefits Report (ABR) - Fiscal Year 2020 (va.gov) (last updated June 2021).

[11] How Common is PTSD in Veterans?, PTSD: National Center for PTSD, U.S. Department of Veterans Affairs, https://www.ptsd.va.gov/understand/common/common_veterans.asp (last visited Oct. 20, 2020) [hereinafter How Common is PTSD].

[12] William Hudenko et al., The Relationship Between PTSD and Suicide, PTSD: National Center for PTSD, U.S. Department of Veterans Affairs, https://www.ptsd.va.gov/professional/treat/cooccurring/suicide_ptsd.asp (last updated Oct. 17, 2019).

[13] How Common is PTSD, supra note 11.

[14] *See id.*

[15] U.S. Department for Veteran Affairs, PTSD: National Center for PTSD, https://www.ptsd.va.gov/index.asp (last updated May 26, 2022).

without PTSD,[16] whereas men with PTSD are two times more likely to abuse substances than their peers who do not suffer from PTSD.[17]

Relatedly, the incidence of MST, which commonly leads to PTSD, continues to rise.[18] Veterans who have experienced MST already face myriad obstacles in the claims process, making the correct application of the standard of proof all the more important. In 2017, more than 5,200 service members reported experiencing sexual assault.[19] A survey of veterans receiving VA care found that 32.4 percent (141,365) of female veterans and 1.9 percent (77,309) of male veterans reported experiencing MST during their service.[20] Since 2011, the VA has seen the number of female and male veterans who receive outpatient mental health care for MST cases rise by 158 percent and 110

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[16] U.S. Department for Veteran Affairs, PTSD: National Center for PTSD, Depression, Trauma, and PTSD, https://www.ptsd.va.gov/understand/related/depressoin_trauma.asp (last updated March 23, 2022).

[17] U.S. Department for Veteran Affairs, PTSD: National Center for PTSD, PTSD and Problems with Alcohol Use, https://www.ptsd.va.gov/understand/related/problem_alcohol_use.asp (last updated March 23, 2022).

[18] Office of Inspector General, Department of Veterans Affairs, Veterans Benefits Administration: Denied Posttraumatic Stress Disorder Claims Related to Military Sexual Trauma 1 (Aug. 21, 2018), *available at* https://www.va.gov/oig/pubs/VAOIG-17- 05248-241.pdf.

[19] *Id.*

[20] Office of Inspector General, Department of Veterans Affairs, Challenges for Military Sexual Trauma Coordinators and Culture of Safety Considerations (Aug. 5, 2021), *available at* https://www.oversight.gov/sites/default/files/oig-reports/VA/VAOIG-20-01979-199.pdf [hereinafter Challenges for Military Sexual Trauma Inspectors].

percent, respectively.[21] Despite this increase in treatment, an estimated two-thirds of MST events go unreported when they occur, leaving veterans seeking disability compensation for PTSD based on MST without the usual evidence of an incident that is associated with other types of military trauma.[22] When veterans submit MST-based claims, around 30 percent are denied.[23] A 2019 report found that, of the MST claims denied by the VA, 57 percent were denied improperly based on processing errors, and of the denied requests, 73 percent did not receive the recommended second-level review that may have rectified this error.[24] Even when veterans receive adequate care from the VA in response to their experience with MST, they still report readjustment problems after concluding their military service.[25]

An increasing number of veterans also suffer from TBI. More than one in five veterans returning home from Operations Iraqi Freedom and Enduring Freedom experience TBI, usually caused by blasts,

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[21] *Id.*

[22] Office of Inspector General, Department of Veteran Affairs, Improvements Still Needed in Processing Military Sexual Trauma Claims (Aug. 5, 2021), *available at* https://www.va.gov/oig/pubs/VAOIG-20-00041-163.pdf [hereinafter Improvements Still Needed in Processing Military Sexual Trauma Claims].

[23] VANews, Military Sexual Trauma Survivors See Increased Claim Grant Rates (Aug. 6, 2021), https://news.va.gov/93019/military-sexual-trauma-survivors-see-increased-claim-grant-rates/.

[24] *See* Improvements Still Needed in Processing Military Sexual Trauma Claims, supra note 20.

[25] *See* Challenges for Military Sexual Trauma Inspectors, supra note 18 (finding that female veterans who suffer from MST and receive treatment suffer readjustment problems after their service, including struggling to find new employment).

motor vehicle accidents, and gunshot wounds. Due in part to advances in combat medicine, these rates are nearly twice those of Vietnam veterans.[26] A March 2019 report by the Veterans Health Administration, reviewing data from national samples, likewise found that PTSD, depressive disorders, substance use disorders, and anxiety disorders were more prevalent in veterans with a history of TBI compared to those with no TBI.[27] Furthermore, suffering from multiple TBIs, which veterans may experience throughout their service, is linked to progressive neurodegenerative conditions that may emerge later in life.[28]

Ultimately, the data show that a significant number of veterans suffer severe mental health issues as a direct result of their service to this country.[29] Whether these veterans' claims for VA eligibility and benefits are evaluated fairly is of the utmost importance, especially given our nation's unconscionable rate of veterans suicide.[30] The judiciary has an obligation

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[26] Office of Research and Development, U.S. Department of Veterans Affairs, VA Research on Traumatic Brain Injury (TBI), https://www.research.va.gov/topics/tbi.cfm (last visited May 31, 2022).

[27] Nancy Greer et al., *Prevalence and Severity of Psychiatric Disorders and Suicidal Behavior in Service Members and Veterans With and Without Traumatic Brain Injury: Systematic Review*, J Head Trauma Rehabil., 35(1):1-13 (Jan. 1, 2020)

[28] Traumatic Brain supra note 26.

[29] *See* How Common is PTSD, supra note 11 (finding that veterans suffering from PTSD may experience symptoms including anger, depression, chronic pain, substance misuse, sleep problems, suicidal ideations, grief, and more).

[30] After adjusting for age, the 2017 rate of suicide among female veterans was 220 percent greater than the rate among non-veteran women. The 2017 rate of suicide among male veterans was 130 percent greater than the rate among non-veteran men.

to ensure that the legal standard is properly applied in these claims, since veterans' access to healthcare and monetary benefits can mean the difference between life and death.

C. The VA's Mandate Is to Give Veterans the Benefit of the Doubt

In 1988, Congress enacted 38 U.S.C. § 5107 to codify the historic rule giving veteran-claimants the benefit of the evidentiary doubt:

> 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* (emphasis added).[31]

As discussed above, this standard reflects "[t]he solicitude of Congress for veterans." *Henderson*, 562 U.S. at 440. Moreover, Congress's intent has been given voice by the courts' interpretive "canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Id.* at 441. The statute plainly requires the VA to apply a standard of proof lower than equipoise of the

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See Office of Mental Health and Suicide Prevention, 2019 National Veteran Suicide Prevention Annual Report 16 (Sept. 2019), *available at* https://www.mentalhealth.va.gov/docs/datasheets/2019/2019_National_Veteran_Suicide_Prevention_Annual_Report_508.pdf

[31] 38 U.S.C. § 5107(a) (emphasis added).

evidence for establishing disability claims and higher than preponderance of the evidence for denying claims. *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

Since the enactment of 38 U.S.C. § 5107, the VA and some courts have eschewed the evidentiary standard Congress intended. In these cases, courts have replaced "approximate balance" with a different standard where the veteran receives the benefit of the doubt only when the evidence is perfectly balanced. *Lynch* perpetuates this line of cases and the renunciation of the evidentiary standard Congress intended, as any claim where the evidence is not in equipoise (or better) would not be considered "persuasive." The complicated and imperfect process for claiming VA benefits is fraught with administrative and factual challenges often involving conflicting medical and psychological professional opinions. It is nearly impossible to imagine a scenario where the evidence is perfectly balanced in an otherwise close case. Accordingly, the *Ortiz* and *Lynch* standard is insufficiently deferential towards veterans because it confines the "benefit of the doubt" standard to instances where the evidence is in equipoise. *See Ortiz*, 274 F.3d at 1366. Instead, the *Ortiz* and *Lynch* standard eviscerates the plain language of the standard articulated in 38 U.S.C. § 5107.

Conflation of the approximate-balance standard with preponderance of the evidence also defies Congress's clear expression of its intent. If Congress had intended that the VA find by a preponderance of the evidence against a veteran's claim to deny it, Congress could certainly have said so. Indeed, a Bloomberg search for the term "preponderance of the evidence" in the U.S. Code reveals that Congress has used it 143 times. By contrast, Congress has used the

term "approximate balance" only twice. The terms are not only different on their faces. By deliberately avoiding the preponderance standard in this context, Congress clearly indicated its intent that a different standard be applied. This Court should correct the misinterpretation of the approximate-balance standard, as articulated in the decision below and in *Ortiz*, and remand for reconsideration in light of the correct standard.

D. The Standards in *Ortiz* and *Lynch* Yield Unconscionable Results

The misapplication of the benefit-of-the-doubt rule is not speculative or theoretical. It imposes grave consequences on deserving veterans. It defies the will of Congress. It perpetuates an ongoing injustice and error of law. It is thus precisely the sort of precedent-setting issue of exceptional importance justifying Supreme Court review. The following examples—representative, but representing only a fraction of those affected—demonstrate the consequences of misapplying the benefit-of-the-doubt rule and underscore the exceptional importance of this appeal and the need for Supreme Court review.

K.P.–U.S. Navy Veteran

We start by highlighting the plight of K.P., an African American Navy veteran who faithfully served from 1972 to 1979, when he was honorably discharged. While serving his country, he witnessed a violent race riot that occurred while his ship, the USS Coral Sea, was docked in Japan.

In June 2013, over thirty years later, after struggling with the effects of his service, K.P. applied for service-connected disability compensation for PTSD and major depressive disorder ("MDD") stemming from

his experience witnessing the violent race riot while in the Navy. At that time of his application, K.P. had experienced the profound effects of PTSD and MDD, which had left him homeless, living in Oakland, California on General Assistance, and trying to survive on a $150 monthly payment. To support his application, K.P. submitted extensive VA medical evidence documenting his diagnosis for both PTSD and MDD along with a medical opinion from his treating VA doctors that these disabilities were the direct result of his experience in the race riots. He also provided a statement detailing his experience during the race riot, a corroborating statement from a fellow veteran who was present, and one published newsletter and one book excerpt from a published account of the riot. K.P. provided other lay statements from those in his life who attested to how his behavior changed after the riot. Finally, K.P. provided his military personnel file confirming his contemporaneous service aboard the USS Coral Sea and the ship's logs showing it was docked in Japan when and where the riots took place. The VA recounted all of this evidence in its decision but, incredibly, deemed it insufficient. The VA conceded his medical diagnoses and their linkage to the events in Japan. They also addressed the breadth of corroborating evidence of the race riot. Far from placing a thumb on the scale for K.P.'s benefit, the VA essentially ignored the evidence and denied his claim. Only after remand from the Board of Veterans Appeals did the VA finally recognize the absurdity of that result and ultimately grant service connection for K.P.'s PTSD at a disability rating of 70% rating—a disastrous four and a half years after his initial application, and more than 40 years after his horrific experience in Japan.

F.A.–U.S. Army Veteran

Another Vietnam veteran, F.A., served in the United States Army from March 1966 to April 1969, when he was honorably discharged. He was awarded the U.S. Army Air Medal for acts of heroism or meritorious achievement while participating in aerial flight. The circumstances of his battlefield injury are harrowing. While serving in Vietnam during the Tet Offensive, F.A. was driving a fellow soldier when a rocket-propelled grenade struck their Jeep. He was medically evacuated to the base hospital where he remained unconscious for 12 hours. Fortunately, this decorated veteran survived. But not surprisingly, the attack left him struggling with debilitating symptoms of TBI.

In August 2015, F.A. filed a claim for service connection for his disabling TBI residuals. To support his claim, he submitted: a letter from his treating VA doctor documenting his current TBI symptoms and opining on the nexus between those symptoms and the 1968 rocket attack on his military convoy; VA medical records showing his current TBI diagnosis; an excerpt of his service treatment records describing his lengthy loss of consciousness and hospitalization following the rocket attack; and F.A.'s detailed sworn statement attesting to the service-connected event and his persistent TBI symptoms. In a result that defies belief and belies any "thumb on the scale," the VA twice denied F.A.'s service-connection claim for lack of corroboration of his in-service combat-related injury. Luckily, F.A.'s attorney located his company commander, who swore out a statement detailing F.A.'s combat-related injury. The VA finally granted F.A. service connection for the TBI disability connected to his service in Vietnam.

E.H.–U.S. Navy Veteran

Another poignant example comes from E.H., a veteran who was raped twice while serving in the U.S. Navy. She was sexually assaulted by a shipmate and was later raped by an unknown assailant who inflicted significant physical injuries on her. The attacks were devastating. Afterward, E.H. struggled with fear, insomnia, hypervigilance, and nightmares. She grew suspicious of others and their motives. These and a host of other PTSD symptoms made forging close relationships nearly impossible. At that point, E.H. had no one to confide in. She considered taking her own life. Upon leaving the military, she continued to struggle in relationships and at work. She was unable to hold down a job. She dropped out of school. She survived a year without a home. Then, she became a client of *Amicus* Swords to Plowshares.

Swords helped E.H. apply for and receive service connection for her PTSD based on her MST. The VA's examinations revealed and recorded debilitating symptoms. Tormented and isolated, E.H. was unable at times even to perform basic functions such as eating, sleeping, or maintaining personal hygiene. Her suicidal ideations haunted her. These details were among the "totality of the evidence" the VA purported to consider in finding that E.H.'s disability—which had at times left her jobless, friendless, and homeless—was only 50% disabling. On appeal, Swords provided ample evidence, including in the VA's own examinations, of symptoms justifying a higher rating. No "benefit of the doubt" was afforded, and the appeal was denied.

E.F.–U.S. Marine Corps Veteran

Like many other veterans, E.F., a Marine Corps veteran of the Vietnam era, has not received a level of support commensurate with his service and has not received the "benefit of the doubt" regarding his claims for service-connected disability. In 2012, E.F. filed for service-connected compensation based on PTSD and anxiety related to incidents of sexual assault he suffered while in service. The VA reviewed E.F.'s case and assigned him a 70% disability rating. In 2014, the VA reversed course and severed E.F.'s disability rating, despite his PTSD diagnosis, claiming there was insufficient in-service evidence of MST.

E.F. appealed the severance through CVLC. After two years of waiting, he finally received his hearing in July 2020. E.F. provided difficult and moving testimony regarding his sexual assault and continuing symptoms, only to have the judge request that E.F. repeat his entire testimony because of an error with the recording device. After requiring E.F. to relive the trauma of his sexual abuse yet again via a second round of testimony, the VA denied E.F.'s appeal, reasoning that the case was too close to call. In other words, the VA identified an "approximate balance" but did not give the tie to the runner.

After further appeals, E.F.'s case was remanded, resulting in an additional VA exam in which he was required to give testimony regarding his sexual assault. The examiner found that E.F. had a diagnosed mental health disorder, had consistently attended MST group therapy for years, and had supplied a statement from a fellow service-member corroborating his own story. But because this veteran was not sufficiently "emotional" in recounting his sexual trauma, the examiner found his claim of MST "uncorroborated," and recommended

against service connection, even though the examiner could not conclude that MST did not occur. VA is poised to once again deny the claim by placing the burden on the veteran to persuade. E.F. has had no income since 2014 and depends on HUD VASH for housing support.

* * *

Each of these stories represents a discrete personal tragedy. Someone who made the admirable decision to join our armed forces suffered an injury as a result of their service. An important factor in their decision to join was an understanding that they would not have to face such injuries alone, that the American people and their government would take care of them. But when they returned home with battered bodies and minds, they were left to fight these battles alone. They are the flesh-and-blood cost of failing to apply the standard Congress created.

CONCLUSION

This court should grant the petition for certiorari.

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