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 A Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

BRIEF OF AMICUS CURIAE FEDERAL CIRCUIT BAR ASSOCIATION IN SUPPORT OF PETITIONER

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The Federal Circuit Bar Association (FCBA or Association) respectfully submits this amicus curiae brief in support of Petitioner.[1]

INTEREST OF THE AMICUS CURIAE

The Federal Circuit Bar Association is a national organization for the bar of the United States Court of Appeals for the Federal Circuit. Started in 1985, the FCBA was organized to unite different groups across the nation that practice before the Federal Circuit. One of the FCBA's primary purposes is to render assistance to the Court of Appeals for the Federal Circuit in appropriate instances by submitting its views on the legal issues before that court. The FCBA also has an interest in assisting this Court by submitting its views on cases that implicate subject matter within the appellate jurisdiction of the Court of Appeals for the Federal Circuit. These submissions further the FCBA's commitment to promoting the health of the legal system in furtherance of the public interest. It is with that interest in mind that the

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[1] Pursuant to Rule 37 of the Rules of the Supreme Court, counsel of record for all parties received notice at least 10 days before the due date of amicus curiae's intention to file this brief. All parties have consented. Consent of the Secretary and consent of Petitioner have been lodged with the Court. 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 amicus curiae made a monetary contribution to its preparation or submission.

FCBA submits this amicus brief in support of Petitioner.

Because the Respondent in this case is part of the federal government, FCBA members and leaders who are employees of the federal government have not participated in the Association's decision-making regarding whether to participate as an amicus in this litigation, developing the content of this brief, or the decision to file this brief.

SUMMARY OF ARGUMENT

This Court should grant certiorari to restore to veterans seeking benefits the generous standard of proof that Congress expressly provided them. By statute, veterans benefits claims are decided according to a standard of proof unique in American jurisprudence. Under 38 U.S.C. § 5107(b), the "benefit of the doubt" is afforded the veteran when the evidence is in "approximate balance" and the veteran wins. This lenient standard is markedly different from and lower than the more common standards of proof: evidence beyond a reasonable doubt, clear and convincing evidence, and preponderance of evidence.

Standards of proof reflect an allocation of the risk of error between the parties. For the more common standards, the risk of error is borne by the party with the burden of proof and increases as the stringency of the standard decreases. By contrast, in veterans benefits cases, in stating that the "benefit of the doubt" is afforded the veteran when the evidence

is in "approximate balance," the statute mandates that the risk of error is borne by the government, even though the veteran bears the burden of proof, and the veteran can succeed even if the evidence favors the government. This risk allocation reflects Congress's recognition, repeatedly confirmed by the courts, of the "special solicitude" granted veterans, those among us who have "performed an especially important service for the Nation, often at the risk of his or her own life." *Shinseki v. Sanders*, 556 U.S. 396, 412 (2009); *see also Henderson v. Shinseki*, 562 U.S. 428, 440 (2011); *United States v. Oregon*, 366 U.S. 643, 647 (1961).

This Court has recognized that the correct standard of proof "necessarily must be calibrated in advance" because "the litigants and the factfinder must know at the outset of a given proceeding how the risk of error will be allocated." As with all standards of proof, therefore, the standard of proof in ¶ 5107(b) must be correctly calibrated across the class of veterans benefits cases. It then must be correctly applied by factfinders, including the Board of Veterans' Appeals (Board). The Court of Appeals for Veterans Claims (Veterans Court), which reviews Board decisions, has recognized that the standard in § 5107(b) "is part of any decision of the Board." And the Veterans Court is specifically instructed in 38 U.S.C. § 7261(b)(1) to "take due account of the Secretary's application of [the standard of proof in] section 5107(b)." It is essential, therefore, that the standard of proof in § 5107(b) be correctly calibrated so that it can be applied in veterans benefits cases.

The Federal Circuit is the only appellate court that reviews cases from the Veterans Court. Yet it has

now twice construed the standard of proof in § 5107(b) at odds with the statute. First, more than twenty years ago, in *Ortiz v. Principi*, 274 F.3d 1361 (Fed. Cir. 2001), the Federal Circuit held that the standard of proof in § 5107(b) is not met when "the preponderance of the evidence is against the veteran's claim." And here, in *Lynch v. McDonough*, 21 F.4th 776 (2021), the en banc Federal Circuit re-articulated the standard as whether "the evidence persuasively favors one side or the other." In neither instance did the Federal Circuit articulate the standard from the perspective of giving the "benefit of the doubt" to the veteran when there is an "approximate balance of positive and negative evidence," as required by the statute.

Compounding its error, the court in *Lynch* recognized that its articulation of the standard in *Ortiz* was "confusing," but refused to overrule *Ortiz*, insisting it was "not wrongly decided." Instead, the Federal Circuit doubled down on its reasoning in *Ortiz*, stating that its "preponderance-of-the-evidence formulation" correctly "view[s] the issue as one of *persuasion*." In doing so, the Federal Circuit muddled the issue. It stated that it reframed the standard so it would not be confused with the preponderance of evidence standard of *Ortiz* but then based its reframing of the standard on *Ortiz*. The dissent rightly recognized that "the preponderant evidence rule in *Ortiz* not only remains but now girds the persuasive evidence standard." While the majority stated that was "not a correct characterization of the majority opinion," it nowhere explained why this is so.

This Court's review is warranted to ensure that veterans benefits claims are decided based on the correct standard of proof, so that veterans actually get the benefit of the doubt. Under the Federal Circuit's decisions, they do not. Worse yet, it is unclear what the standard of proof is, as the law has never recognized a "persuasive" evidence standard. Our nation's veterans deserve no less than that their benefits claims be decided based on a correct and clearly framed standard of proof. That decision should specifically address whether the evidence is in approximate balance such that the benefit of the doubt is afforded the veteran. This Court should grant certiorari and reverse.

ARGUMENT

I. THE STANDARD OF PROOF IS FUNDAMENTAL TO AMERICAN JURISPRUDENCE

All adjudicated matters, whether criminal, civil, or administrative, are decided according to standards of proof. While described as "one of the 'slipperiest member[s] of the family of legal terms,'" *Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (citation omitted), the standard of proof is an essential guide to deciding questions of fact. It "specifies how difficult it will be for the party bearing the burden of persuasion to convince the [factfinder] of the facts in its favor," *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 100, n.4 (2011).

Standards of proof also "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." *In re Winship*, 397 U.S. 358, 370 (1970). The standard of proof thus "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decisions." *Addington v. Texas*, 441 U.S. 418, 423 (1979). It reflects a value judgment of how the risk of an erroneous outcome will be borne between the parties.

Adopting a "standard of proof is more than an empty semantic exercise." *Tippett v. Maryland*, 436 F.2d 1153, 1166 (4th Cir. 1971) (Sobeloff, J., concurring in part and dissenting in part). "Since the litigants and the factfinder must know at the outset of a given proceeding how the risk of error will be allocated, the standard of proof necessarily must be calibrated in advance." *Santosky v. Kramer*, 455 U.S. 745, 757 (1982). It is "applied to the generality of cases, not the rare exceptions." *Id*., *citing Mathews v. Eldridge*, 424 U.S. 319, 344 (1976) (the standard of proof "is applied to the generality of cases, not the rare exceptions."); *see Microsoft*, 564 U.S. at 109 (describing a "variable standard of proof" as "unusual and impractical"). Applying the correctly calibrated standard of proof across a class of cases is "essential for the protection of life and liberty." *See Winship*, 397 U.S. at 362.

"Various standards of proof are familiar—beyond a reasonable doubt, by clear and convincing evidence, and by a preponderance of the evidence." *Microsoft*, 564 U.S. at 100, n.4. The differences between these standards are nuanced and how they affect decision-making and the ultimate outcome across all cases "may well be unknowable." *Id*. at 424-

425; *see also Winship*, 397 U.S. at 369-370 (Harlan, J. concurring) (the labels for the different standards of proof may be considered vague and "not a very sure guide to decision making"). This Court, however, has specifically rejected the proposition that there is only a "tenuous difference" between standards of proof. *Winship*, 397 U.S. at 367. Instead, the choice of the standard of proof for a particular issue reflects "a very fundamental assessment of the comparative social costs of erroneous factual determinations." *Id*. at 369-370 (Harlan, J. concurring).

II. THE CORRECTLY CALIBRATED STANDARD OF PROOF MUST BE APPLIED IN DETERMINING VETERANS BENEFITS

Like other standards of proof, the standard when determining whether a veteran is entitled to VA benefits is foundational. The Veterans Court, the appellate tribunal responsible for reviewing all Board decisions, has recognized its primacy, stating that it is "part of any decision of the Board." *Roberson v. Shinseki*, 17 Vet. App. 135, 140 (2003). And Congress has specifically recognized its importance to both the Board and the Veterans Court, providing in 38 U.S.C. § 7261(b)(1) that within its scope of review of Board decisions, the Veterans Court is to "take due account of the Secretary's application of section 5107(b)."

"Where Congress has prescribed the governing standard of proof, its choice controls absent 'countervailing constitutional constraints.'" *Microsoft*, 564 U.S. at 100, *quoting Steadman v. SEC*, 450 U.S. 91, 95 (1981). "[T]he touchstone of [the] inquiry is, of course, the statute." *Schaffer v. Weast*, 546 U.S. 49, 56

(2005). And as with all burdens of proof, it must be correctly calibrated in advance across the class of veterans benefits cases. *Santosky*, 455 U.S. at 757.

That calibration must recognize that the veterans standard is different from and lower than any of the familiar burdens of proof: "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." 38 U.S.C. § 5107(b). The Veterans Court has recognized this difference, stating that this "unique standard of proof is lower than any other in contemporary American jurisprudence and reflects the high esteem in which our nation holds those who have served in the Armed Services." *Wise v. Shinseki*, 26 Vet. App. 517, 531 (2014), *citing Gilbert v. Shinseki*, 1 Vet. App. 49, 54 (1990). This Court, too, has recognized that "[t]he contrast between ordinary civil litigation . . . and the system that Congress created for the adjudication of veterans' benefits claims could hardly be more dramatic." *Henderson*, 562 U.S. at 429. This includes the different burdens of proof. In civil litigation, the plaintiff bears the risk of an erroneous outcome, while in determining veterans benefits claims, the VA "must give [veterans] the benefit of any doubt in evaluating th[e] evidence." *Id*. at 430.

"By requiring only an approximate balance of positive and negative evidence to prove any issue material to a claim for veterans benefits, 38 U.S.C. § 5107(b), the nation, in recognition of our debt to our veterans, has taken upon itself the risk of error in awarding such benefits." *Wise*, 26 Vet. App. at 531,

citing Santosky, 455 U.S. at 755 ("[I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants."). Thus, "[b]y tradition and by statute, the benefit of the doubt belongs to the veteran." *Id*.

The importance of this difference is reflected as well in the legislative history of the Veterans' Judicial Review Act (VJRA) of which § 5107(b) is a part. An explanatory statement accompanying the legislation demonstrates the views of the House and Senate Committees on Veterans' Affairs and states with respect to § 5107(b) that the Veterans Court must "examine the record of proceedings before the Secretary and [Board] and the special emphasis during the judicial process on the benefit of the doubt provisions of section 5107(b) as it makes findings of fact in reviewing [Board] decisions." This was specifically "intended to provide for more searching appellate review of [Board] decisions, and thus give full force to the 'benefit of doubt' provision." 148 Cong. Rec. S11,337, H9,003 (daily ed. Nov. 18, 2002).

The statute itself and the clear legislative history make plain the importance of providing the benefit of the doubt to the veteran by considering whether the evidence is in approximate balance. In another context, this Court has recognized legislative history and statutory language as establishing a "mood" by which matters are to be considered. *Universal Camera v. NLRB*, 340 U.S. 474, 486-487 (1951) ("It is fair to say that in all this Congress

established a mood. And it expresses its mood not merely by oratory but by legislation.") The mood Congress expressed here is one of beneficence to veterans, giving them the benefit of the doubt and awarding benefits when the evidence is just in approximate balance.

That mood is bolstered by "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221, n.9 (1991). Indeed, Congress chose to favor "those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943); *see Tilton v. Mo. Pac. R.R. Co.*, 376 U.S. 169, 171 (1964) (The system was intended to slant in favor of those that had been "called to the colors."); *Gambill v. Shinseki*, 576 F.3d 1307, 1316 (Fed. Cir. 2009) (Bryson, J., concurring) (the Court and the Federal Circuit "have long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant," *quoting Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998)).

The approximate balance standard in § 5107(b) thus reflects Congress's value judgment that veterans should be awarded benefits even if the weight of the evidence does not favor such an award. This is the essence of the "benefit of the doubt" mandate—even if there is doubt when the evidence is "in approximate balance," the veteran, the party bearing the burden of proof, wins. This contrasts with the preponderance of evidence standard under which when the evidence is in "equipoise," the party bearing the burden of proof loses. *Goldman Sachs Grp., Inc. v. Ark. Teacher Ret.*

Sys., 141 S. Ct. 1951, 1963 (2021) (under the preponderance of evidence standard, when evidence is in "equipoise," the party bearing the burden of proof loses); *Medina v. California*, 505 U.S. 437, 449 (1992). Both the determination of whether the evidence is in "approximate balance" and the shift of the risk of loss from the veteran to the government must be reflected in the analytical framework of the standard of proof in veterans benefits cases. Because the standard of proof in § 5107(b) is foundational to veterans benefits determinations, it is essential that its analytical framework is correct.

III. THE CURRENT ANALYTICAL FRAMEWORK OF THE STANDARD OF PROOF IN VETERANS BENEFITS CASES SHOULD BE CORRECTED

Because the Federal Circuit has exclusive jurisdiction over appeals from the Veterans Court, it is essential that the Federal Circuit correctly analyze § 5107(b). 38 U.S.C. § 7292(c). The Federal Circuit's analyses of the statute, however, does not reflect the language of the statute. Its decisions confuse the approximate balance standard with the different preponderance of evidence standard and do not reflect either the statutory mandate in section 7261(b)(1) that "due account" be taken "of the Secretary's application of § 5107(b)" or the value judgment of Congress and the courts of beneficence to veterans. Because this is the only court that can correct the errors of the Federal Circuit in addressing § 5107(b), amicus requests that the Court accept the petition and correct the analytical underpinnings of the standard of proof in the veterans statute. This is the appropriate case to do so because the analytical

framework of the standard was directly addressed by the en banc Federal Circuit, thus conclusively setting the standard for all future cases unless this Court steps in to reverse.

A. The Preponderance of Evidence Standard Adopted by the Federal Circuit in *Ortiz* Is Wrong

More than twenty years ago, in *Ortiz*, the Federal Circuit directly addressed the standard of proof in § 5107(b), holding that "the benefit of the doubt rule has no application in cases in which the Board has found that a preponderance of the evidence is against the veteran's claim." 274 F.3d at 1363 (Fed. Cir. 2001). The court rejected the veteran's argument that "even if the preponderance of the evidence is against such a claim, the evidence may nevertheless be in 'approximate balance,' thus triggering the benefit of the doubt rule." *Id*. at 1364. In doing so, the Federal Circuit focused exclusively on the preponderance of evidence standard, stating that when "the preponderant evidence weighs either for or against the veteran's claim," the benefit-of-the-doubt rule in § 5107(b) "has no application." *Id*. at 1365. As a result, the Federal Circuit identified the standard of proof not by what it is (if the evidence is "approximately balanced," the "benefit of the doubt" goes to the veteran and the veteran wins), but by what it is not (if the preponderance of evidence supports the government, the veteran loses).

This replacement by the Federal Circuit in *Ortiz* of the approximate balance standard with the preponderance of evidence standard is inconsistent with the language of the statute. The statute tells the

factfinder exactly *what* evidence to consider ("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") and exactly *how* to consider it ("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"). 38 U.S.C. § 5107(b). It also ignores that Congress specifically instructed the Veterans Court to "take due account of the Secretary's application of [the standard of proof in] section 5107(b)." 38 U.S.C. § 7261(b)(1).

Per the statutory language, therefore, the factfinder must expressly consider whether there is an approximate balance of evidence and, if so, give the benefit of the doubt to the veteran. This is the standard of proof. Applying the preponderance of the evidence standard is not the same thing.

The Federal Circuit's adoption of the preponderance standard in *Ortiz* is also inconsistent with this Court's precedent. "Since the litigants and the factfinder must know at the outset of a given proceeding how the risk of error will be allocated, the standard of proof necessarily must be calibrated in advance." *Santosky*, 455 U.S. at 757. That calibration, that is, the correct allocation of the risk of error, is a fundamental purpose of standards of proof. *Id*. at 755. After calibrating the standard, applying the correct standard across a class of cases is "essential for the protection of life and liberty." *See Winship*, 397 U.S.

at 362. This is no less true in veterans benefits cases than it is in all other types of cases.

The allocation of the risk of error under the veterans statute is borne by the government. *Wise*, 26 Vet. App. at 531 ("the nation, in recognition of our debt to our veterans, has taken upon itself the risk of error in awarding such benefits.") That allocation was improperly shifted to veterans under the preponderance standard adopted in *Ortiz*, 274 F.3d at 1365 ("If, however, the Board determines that the preponderance of the evidence is against the veteran's claim, then it necessarily has been persuaded to find in favor of VA.")

Another problem with the Federal Circuit's *Ortiz* decision became evident when factfinders considered whether the evidence was in "equipoise," a concept rooted in the preponderance standard. *Goldman Sachs*, 141 S. Ct. at 1963; *Medina*, 505 U.S. at 449. In *Fagan v. Shinseki*, the Federal Circuit, citing specifically to *Ortiz*, stated that the benefit-of-the-doubt rule does not apply "when the evidence was not in 'equipoise.'" 573 F.3d 1282, 1287 (Fed. Cir. 2009), *citing Ferguson v. Principi*, 273 F.3d 1072, 1075 (Fed. Cir. 2001). Evidence not in "equipoise," however, can be "approximately balanced." Thus, the same veteran could lose under the preponderance standard of *Ortiz* (because the evidence was not, like a balanced see-saw, in "equipoise") and win under the benefit-of-the-doubt rule (because the evidence was not like a balanced see-saw, but was "in approximate balance").

By adopting the preponderance standard, the Federal Circuit's *Ortiz* decision is contrary to the statutory language and the risk of error Congress specifically placed on the government. The class of veterans benefits cases should be decided based on the correct standard to avoid wrong results. *See Winship*, 397 U.S. at 362. Amicus respectfully submits that the Federal Circuit's *Ortiz* decision should be overruled.

B. The Federal Circuit in *Lynch* Repeated the Errors in *Ortiz*, Without Overruling It

In addition to being contrary to the statute and its allocation of risk to the government, the en banc Federal Circuit itself conceded in *Lynch* that *Ortiz's* "preponderance-of-the-evidence formulation" "could confuse because other cases link 'preponderance of the evidence' to the concept of equipoise." *Lynch v. McDonough*, 21 F.4th at 781. Following *Ortiz*, the Federal Circuit itself repeatedly linked those concepts, stating that when the evidence is not in equipoise, the veteran is not entitled to benefits. *See Fagan*, 573 F.3d at 1287, *citing Ferguson*, 273 F.3d 1072, 1075 (Fed. Cir. 2001); *see also Coleman v. Wilkie*, 836 Fed. Appx. 891 (Fed. Cir. 2020); *Melver v. Wilkie*, 788 Fed. Appx. 714 (Fed. Cir. 2019); *Woods-Calhoun v. McDonald*, 652 Fed. Appx. 968 (Fed. Cir. 2016); *Thompson v. McDonald*, 580 Fed. Appx. 901 (Fed. Cir. 2014); *Kalan v. Shinseki*, 546 Fed. Appx. 958 (Fed. Cir. 2013); *Stevens v. Shinseki*, 428 Fed. Appx. 979 (Fed. Cir. 2011); *Juan v. Shinseki*, 407 Fed. Appx. 444 (Fed. Cir. 2011). The Federal Circuit in *Lynch* also conceded that under the *Ortiz* standard, there are "necessarily" scenarios in which "the

evidence is not in equipoise [and favors the government such that under *Ortiz*, the veteran loses] but nevertheless is in approximate balance [such that under the statute, the veteran wins]." 21 F.4th at 781.

Thus, not only did the Federal Circuit recognize in *Lynch* that through its *Ortiz* decision it had improperly linked the standard in § 5107(b) to the concept of equipoise embedded within the preponderance standard, it recognized that different outcomes would "necessarily" occur depending on whether the standard identified in *Ortiz* or the standard identified in the statue was applied. *Id*.

Notwithstanding these problems, the Federal Circuit repeated *Ortiz*'s fundamental mistake, stating 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." *Id*.; *see also id.* at 781-82 ("the benefit-of-the-doubt rule does not apply[] when the evidence persuasively favors one side or the other.") Thus, while purporting to disavow the *Ortiz* standard, the Federal Circuit repeated its core error in adopting its new "persuasive" standard based on *Ortiz*.

And while recognizing the problems with *Ortiz*, the Federal Circuit stated that it was "not aware of any case that improperly applied *Ortiz* in an outcome dispositive manner," 21 F.4th at 782, n.5. But under *Ortiz* (and now *Lynch*), there is no way to identify the cases in which the standard was improperly applied in an outcome dispositive manner because neither the agency nor the court is required to determine whether the evidence is approximately equal on both sides. So

long as the court is ultimately "persuaded" by the government's position, its task ends there—even if the evidence is close and more or less even on both sides.

C. The Analytical Framework of the Veterans Standard of Proof Should Be Corrected To Require Factfinders To Articulate Whether the Evidence Is in Approximate Balance

In adopting its new "persuasive" standard in *Lynch*, the Federal Circuit did not provide its parameters, other than stating that *Ortiz* was not wrongly decided and that as a "corollary, evidence is not in 'approximate balance' or 'nearly equal,' and therefore the benefit-of-the-doubt rule does not apply, when the evidence persuasively favors one side or the other." 21 F.4th at 781-82. The dissent in *Lynch* pointed out this inconsistency, 21 F.4th at 783, to which the majority responded: "That is not a correct characterization of the majority opinion." *Id.* at 781, n.4. The majority, however, never explained why this is so and, problematically, never identified the parameters of its new "persuasive" standard. Those parameters are unknown because a "persuasive" standard is neither identified in the statute nor recognized in the case law. *Microsoft*, 564 U.S. at 100, n.4 (identifying the familiar standards of proof: beyond a reasonable doubt, clear and convincing evidence, and preponderance of the evidence.)

This Court has instructed that "standards of proof necessarily must be calibrated in advance." *Santosky*, 455 U.S. at 757. By not explaining how its

new "persuasive" standard is different from the *Ortiz* preponderance standard or explaining what it means at all, the Federal Circuit has not calibrated its new standard. Further, like the preponderance standard in *Ortiz*, the Federal Circuit's new "persuasive" standard in *Lynch* is unmoored from the statute, which addresses "approximate balance," not "persuasion." In addition, as in *Ortiz*, the Federal Circuit has incorrectly apportioned the risk of loss. Instead of considering whether the evidence is in "approximate balance," thus giving the benefit of the doubt to the veteran and allocating the risk of loss to the government as the statute mandates, the Federal Circuit's "persuasive" standard in *Lynch* tells factfinders that if they are "persuaded" by evidence in favor of the government, the veteran does not get the benefit of the doubt, thus allocating the risk of loss to the veteran. Because of these errors, amicus submits that the analytical framework of the standard in § 5107 should be corrected.

Consistent with the statute and the correct allocation of risk, under a proper analytical framework, factfinders should simply determine whether the evidence is in approximate balance: is it a close case, with close to equal evidence on both sides. Not only is that articulation consistent with § 5107(b), it complies with § 7261(b)(1), which mandates that "due account" be taken of "the Secretary's application of section 5107(b)." The "Secretary's application of section 5107(b)" means just that—factfinders must apply the approximate balance standard so that findings based on that standard can be reviewed by the Veterans Court. This is especially important here, where the Federal Circuit is precluded by statute

from reviewing factual determinations in veterans benefits cases. 38 U.S.C. § 7292(d).

Under the new *Lynch* standard, however, a factfinder can determine that "the evidence 'persuasively' forecloses a veteran's claim" even if "the evidence may have been 'close'" or in approximate balance.[2] *Lynch*, 21 F.4th at 783 (dissent).

The standard of proof applies in thousands of veterans benefits cases each year. This Court should step in to fulfill Congress's promise that veterans are awarded benefits if the evidence is in approximate balance, and not denied simply because the decisionmaker finds that the government's evidence is "persuasive."

CONCLUSION

The FCBA thus supports the Petitioner and requests that the Court grant the petition for a writ of certiorari.

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[2] That evidence in "approximate balance" is "close," is supported by multiple dictionary definitions of "approximate": Oxford English Dictionary: "nearly correct or exact; close in value or amount but not precise"; Webster's New International Dictionary: "situated or drawn very near or close together; near to correctness; nearly exact; not perfectly accurate"; The American Heritage Dictionary: "almost exact, correct, complete or perfect; very similar; close together; to come near"; and Funk & Wagnall's Comprehensive Standard Dictionary: "to approach or cause to approach closely without exact coincidence; nearly, but not exactly accurate or complete; near."

Respectfully submitted,

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