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 MILITARY-VETERANS ADVOCACY INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Military-Veterans Advocacy Inc. (MVA) is a non-profit organization that litigates and advocates on behalf of service members and veterans. Established in 2012 in Slidell, Louisiana, MVA educates and trains service members and veterans concerning rights and benefits, represents veterans contesting the improper denial of benefits, and advocates for legislation to protect and expand service members' and veterans' rights and benefits. It also provides continuing legal education to attorneys practicing in the field of veterans' and service members' rights and benefits.

This case involves a question that has the potential to affect every individual seeking veterans' benefits from the Department of Veterans Affairs: the proper application of the benefit-of-the-doubt rule, which privileges the claimant when the evidence on any material issue is in "approximate balance." 38 U.S.C. § 5107(b). That principle recognizes the difficulty that veterans face in proving matters that can be fraught with both historical and medical uncertainty. It embodies the non-adversarial, pro-claimant nature of the veterans' benefits system. And it reflects a societal judgment that it is better to err on the side of providing benefits to those who sacrificed their own interests on behalf of the nation. Under the Federal

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[1] The parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

Circuit's interpretation of § 5107(b), however, that societal judgment is not being given meaningful effect. MVA has an interest in seeing that the statute is interpreted and applied consistent with its text, with the intent of Congress, and with the pro-veteran purpose behind it.

INTRODUCTION AND SUMMARY OF ARGUMENT

When the evidence on any issue material to a veteran's claim for benefits is mixed, "[b]y tradition and by statute, the benefit of the doubt belongs to the veteran." *Gilbert v. Derwinski*, 1 Vet. App. 49, 54 (1990). This principle dates to the post-Civil War era. *Id.* at 55. It has been codified in VA's regulations since before World War II. *See, e.g.*, 38 C.F.R. § 2.1075 (1938) (citing "general policy of resolving all reasonable doubts in favor of the claimant"). And, since 1988, it has been embodied in the statutes governing VA's adjudication of claims. The current statute provides: "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).

Petitioner Joe Lynch, like countless veterans before him, provided VA with evidence supporting his claim to benefits—in this case, an increased rating for his disabling post-traumatic stress incurred as a result of his service in the United States Marine Corps. But Mr. Lynch wasn't given the benefit of the doubt. For more than twenty years, the Federal Circuit has

afforded veteran claimants less than the full benefit assured to them by the statute.

VA and the Veterans Court applied the precedent set by *Ortiz v. Principi*, 274 F.3d 1361 (Fed. Cir. 2001), denying Mr. Lynch the benefit of § 5107(b) by finding a preponderance of evidence against his claim. Pet. App. 45a, 56a-57a. A divided panel of the Federal Circuit affirmed this holding. Judge Dyk "dissent[ed] from the majority's conclusion that the preponderance standard is consistent with the statute." Pet. App. 33a. As he recognized, that standard "restricts the benefit-of-the-doubt rule to cases in which there is close to an evidentiary tie"—a higher bar than the "approximate balance" provided for in the statute. Pet. App. 33a.

The en banc Federal Circuit granted review on this question, but it failed to fix the problem. The en banc majority stated that it was "depart[ing] from *Ortiz*'s 'preponderance of the evidence' language." Pet. App. 11a. But it simultaneously reinstated the substance of the preponderance standard, permitting VA to deny the benefit of the doubt if the factfinder deems the evidence persuasive. The only standard of persuasion the majority endorsed was the very same one announced in *Ortiz*—persuasion by a preponderance of the evidence. Pet. App. 11a. Indeed, the majority took pains to emphasize that *Ortiz* "w[as] not wrongly decided" and that VA in this case had not erred by applying the preponderance standard. Pet. App. 12a.

Judge Reyna, joined by two other judges, dissented from this aspect of the en banc ruling. Pet.

App. 14a. As he recognized, the majority's "'persuasive evidence' standard" was simply *Ortiz* by another name. Pet. App. 14a. As Judge Reyna also recognized, "[t]he words of the statute are no mystery." Pet. App. 16a. Section 5107(b) does not impose a "preponderance" standard, a "persuasive" standard, or any other magic words that VA adjudicators can recite to absolve themselves of faithfully applying the benefit-of-the-doubt rule. But that is exactly what the Federal Circuit's contra-statutory test allows.

In the wake of *Lynch*, VA and the Veterans Court are doing exactly what they did under *Ortiz*: denying veterans the benefit of the doubt in mixed-evidence cases based on nothing more than a bare recitation that a preponderance of evidence is against the veteran. That practice is at odds with the statute, at odds with the intended non-adversarial nature of the veterans' benefits system, and at odds with the longstanding principle that those who "have borne the battle" on our nation's behalf deserve the benefit of the doubt from their government. This Court's intervention is necessary.

ARGUMENT

I. The Federal Circuit's Interpretation of § 5107(b) Contradicts the Statutory Text and Defies Congress's Intent.

Consistent with the uniquely non-adversarial character of the veterans' benefits system, § 5107(b) is meant to provide "[a] unique standard of proof," unlike the standards that apply in criminal and civil litigation. *Gilbert*, 1 Vet. App. at 53-54. The evidentiary

threshold contemplated by the "approximate balance" language is "at the farthest end of the spectrum, beyond even the 'fair preponderance' standard." *Id.* at 54. Through this unique statutory standard, Congress has "place[d] a thumb on the scale in the veteran's favor." *Shinseki v. Sanders*, 556 U.S. 396, 416 (2009) (Souter, J., dissenting).

The Federal Circuit's *Ortiz*/*Lynch* rule takes the thumb off the scale and replaces it with a feather. By allowing VA factfinders to deny the benefit of the doubt if the persuasive effect of the evidence against the veteran tips the scales only ever so slightly, the *Ortiz*/*Lynch* rule denies veterans the benefit of the doubt in cases where the evidence is nonetheless "approximately balanced." It improperly imports a standard developed for the adversarial context of civil litigation into what is meant to be a non-adversarial system—and one in which most claimants are unrepresented by legal counsel. And, as Judge Reyna's dissent recognized, it allows VA to evade appellate review of its application of § 5107(b) by simply concluding in every close case that the agency is "persuaded" to deny the claim.

A. The *Ortiz*/*Lynch* Rule Reinstates the Flawed Preponderance of the Evidence Standard.

While purporting to fix any "confusion" created by *Ortiz*, the *Lynch* en banc majority in fact perpetuated it. Pet. App. 11a. The majority's interpretation of § 5107(b) denies the veteran the benefit of the doubt on an issue if the factfinder is "*persuaded* by the evidence to make a particular finding." Pet. App. 11a.

But that formulation fails to answer the critical question—what standard must the factfinder apply to judge whether he or she has been sufficiently persuaded? The only one apparently embraced by the *Lynch* majority is the same one adopted long ago in *Ortiz*: the factfinder is persuaded if a preponderance of the evidence is against the veteran.

That is certainly how the Secretary has interpreted *Lynch*. He has taken the position before the Veterans Court that, under *Lynch*, when "the Board determine[s] … that the preponderant evidence weigh[s] against the claim, it necessarily has determined that the evidence is not nearly equal and the benefit of the doubt rule has no application." *Sansbury v. McDonough*, No. 20-8639, 2022 WL 1078537, at *10 (Vet. App. Apr. 11, 2022) (quoting Secretary's brief). And the Veterans Court has accepted this interpretation of *Lynch*. In *Sansbury* and many other cases, it has approved of the Board's decision to deny the benefit-of-the-doubt rule based on a mere finding that the preponderance of the evidence is against the veteran's claim. *Id.* at *12; *see also, e.g.*, *Bowden v. McDonough*, No. 21-2992, 2022 WL 1222989, at *4-5 (Vet. App. Apr. 26, 2022) (affirming based on Board's finding of a preponderance of evidence against the claim); *Stevenson v. McDonough*, No. 20-6985, 2022 WL 1202742, at *4 (Vet. App. Apr. 22, 2022) (rejecting § 5107(b) argument because "the Board specifically found that the preponderance of the evidence was against the claim"); *Turner v. McDonough*, No. 21-0914, 2022 WL 1014149, at *5 (Vet. App. Apr. 5, 2022) (affirming based on Board's finding of a preponderance of evidence against the claim); *Watkins v. McDonough*, No. 20-5640, 2022 WL

593627, at *4 (Vet. App. Feb. 28, 2022) (Board properly denied benefit of the doubt where it "found that the preponderance of the evidence was against a finding" for the veteran).[2]

This is not an unfair reading of *Lynch*. Indeed, the *Lynch* majority expressly approved of *Ortiz*'s preponderance formulation. Pet. App. 11a (equating preponderance with persuasion). And its only expressed concern about that formulation was that it might be misunderstood to equate a preponderance standard with "the concept of equipoise." Pet. App. 11a. As Petitioner correctly notes (at 18 n.13), "[t]his purported *confusion* is of the majority's own making." The preponderance standard is not an equipoise standard. On the contrary, when the evidence is in equipoise—that is, when it is evenly balanced—then a party bearing the burden of proof has failed to show a preponderance of evidence in his favor. That is why this Court has repeatedly explained that the allocation of a preponderance burden on one party or the other has effect "only when the court finds the evidence in equipoise—a situation that should rarely arise." *Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.*, 141 S. Ct. 1951, 1963 (2021); *accord Medina v. California*, 505 U.S. 437, 449 (1992). Anything beyond a perfect balance—even so much as a "peppercorn" of evidence—will suffice to constitute a preponderance of

[2] Even more troubling, as Petitioner notes (at 5 n.6), VA's internal adjudication manual retains the "equipoise" standard that the *Lynch* majority plainly rejected. So, too, have some Veterans Court decisions. *See, e.g.*, *Hicks v. McDonough*, No. 20-8264, 2022 WL 1223015, at *4 (Vet. App. Apr. 26, 2022).

the evidence. Pet. App. 33a; *see, e.g.*, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (preponderance standard requires proof only that something is "more likely than not").

And therein lies the problem with the *Ortiz*/*Lynch* rule. A peppercorn does not tip the scale so far as to take it out of "approximate balance" for purposes of § 5107(b). Had Congress wanted to impose a preponderance standard on VA to defeat a veteran's claim, it certainly could have done so. Instead, Congress chose the words "approximate balance." By allowing a mere preponderance of evidence to defeat the benefit-of-the-doubt rule, the *Ortiz*/*Lynch* rule deprives Congress's statute of virtually any pro-veteran effect. If there is just enough evidence on an issue to tip the scales ever so slightly against the veteran the benefit-of-the-doubt rule will not apply, and the issue will be decided against the veteran. The only "doubt" that can be resolved in favor of the veteran is uncertainty about which way to tip an evenly balanced scale. That is not what Congress intended, and it is not what the Federal Circuit en banc majority claimed to want. *See* Pet. App. 11a. But it is the regime mandated by the *Ortiz*/*Lynch* rule.

B. The *Ortiz*/*Lynch* Rule Employs Adversarial Concepts in a Non-Adversarial System.

Not only does the *Ortiz*/*Lynch* rule fail to give effect to Congress's words. It fails to recognize the unique nature of the veterans' benefits system as a whole. As this Court has explained, "the process prescribed by Congress for obtaining disability benefits

does not contemplate the adversary mode of dispute resolution utilized by courts in this country." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 309 (1985); *see also Sanders*, 556 U.S. at 412 (VA "adjudicatory process is not truly adversarial"). It is wholly unlike civil litigation—even civil litigation involving the government. There are no statutes of limitations, no formal res judicata effects, no rules of evidence. *See Walters*, 473 U.S. at 309-10. And claimants are forbidden from paying a lawyer to help them at the original claim stage. 38 U.S.C. § 5904(c)(1). Even at the Board level, less than one quarter of claimants are represented by legal counsel. *See* U.S. Dep't of Veterans Affairs, Board of Veterans' Appeals, *Annual Report – Fiscal Year (FY) 2021* at 39, https://tinyurl.com/mr37rknt.

Simply put, this system is not intended to function like a court. It is intended "to function throughout with a high degree of informality and solicitude for the claimant." *Walters*, 473 U.S. at 311. And agency adjudicators are not intended to function as a judge or jury. They are not merely neutral arbiters of evidence but are commanded by statute to assist the claimant in obtaining and developing evidence to support the claim. 38 U.S.C. §§ 5103(a), 5103A. And they are obligated by regulation to "render a decision which grants every benefit that can be supported in law." 38 C.F.R. § 3.103(a).

A standard of proof developed in the context of litigation—where parties are truly adversaries, where rules of discovery and evidence constrain the record, and where the factfinders are emphatically *not* obligated to favor either side—makes no sense in this

non-adversarial context. It is particularly incongruous to employ a standard that requires opposing parties to "share the risk of error in roughly equal fashion." *Addington v. Texas*, 441 U.S. 418, 423 (1979); *see infra* Part II. The veteran is not supposed to share any "risk" with the government. He is supposed to receive "the benefit of the doubt." 38 U.S.C. § 5107(b).

C. The *Ortiz/Lynch* Rule Allows VA to Evade Its Statutory Obligation—and Appellate Review.

The *Ortiz/Lynch* rule is also problematic because it allows VA to essentially ignore § 5107(b)—and to do so in a way that prevents effective appellate review of whether the agency is abiding by the statute. Judge Reyna identified the problem: "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.'" Pet. App. 15a. VA can simply state that it is persuaded—or that a preponderance of evidence is against the claim. There is, under current Federal Circuit precedent, no requirement that the agency recite what evidence is on each side of the proverbial scale.

The Veterans Court is obligated by statute to "take due account of the Secretary's application of section 5107(b) of this title." 38 U.S.C. § 7261(b)(1). But the Veterans Court (and other reviewing courts) will have difficulty fulfilling that obligation. Pet. App. 15a. Indeed, as the examples above (at 6-7) demonstrate, the Veterans Court is frequently presented with a

Board decision that does no more than summarize the evidence and conclude that a "preponderance" is against the veteran. The Veterans Court has no way of discerning whether the evidence might in fact have been in "approximate balance" before the agency resolved the dispute against the veteran—and thus no way of judging whether the agency faithfully adhered to § 5107(b). "If revision of the [applicable] standard of proof can be achieved thus subtly and obliquely, it becomes a much more complicated enterprise for a court of appeals to determine whether … the required standard has or has not been met." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 376 (1998). The pragmatic implications of the *Ortiz*/*Lynch* rule provide further reason for this Court to grant certiorari.

II. The Question Presented Is Important and Recurring.

If the Federal Circuit's ruling stands, veterans will be denied their rights under the law. That alone is sufficient reason for this Court to grant review. But certiorari is especially warranted given the significant negative impact of the *Ortiz*/*Lynch* doctrine.

That impact is quantitative. The benefit of the doubt rule applies to every "issue material to the determination of a matter" in a claim for benefits. 38 U.S.C. § 5107(b). The interpretation of that rule thus has the potential to affect the resolution of every single claim for veterans' benefits. The numbers bear out that sweeping impact. A Westlaw search of rulings by the Board of Veterans' Appeals—which does not report its decisions by name—reveals more than 20,000

cases citing *Ortiz* in the two decades that it was the leading precedent on § 5107(b). Now, in just the six months since the Federal Circuit's ruling, the Board has cited the en banc *Lynch* opinion more than 900 times.

Each of these thousands of cases represents a veteran (or his widow, or his child) who might have received a different outcome if VA had been abiding by the law that Congress wrote. And each of those individuals deserved a proper consideration of the evidentiary record and whether the scales truly tipped in favor of denying the claim—or whether, as the Federal Circuit's case law allows, the advantage to the government was no more than "a mere peppercorn." Pet. App. 33a. It is impossible to say how many of these claimants would have received the benefit of the doubt under a proper legal standard. But it is possible to correct that standard now and ensure that future claimants' rights are vindicated.

It is also critical to do so. As this Court has explained, a standard of proof is essentially a judgment about which party should bear the risk of a factfinder getting things wrong in a case with mixed evidence. "The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington*, 441 U.S. at 423; *see also Santosky v. Kramer*, 455 U.S. 745, 755 (1982) (selection of standard of proof is a "societal judgment about how the risk of error should be distributed between the litigants").

The preponderance standard that the Federal Circuit has endorsed—by name in *Ortiz* and by substance in *Lynch*—is employed when society has a "minimal concern" in the outcome of the dispute. *Addington*, 441 U.S. at 423. It does not "express[] a preference for one side's interests." *Herman & MacLean*, 459 U.S. at 390. Rather, it is used when "we view it as no more serious in general for there to be an erroneous verdict in [one side's] favor than for there to be an erroneous verdict in [the other side's] favor." *In re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring).

Enshrining this indifference into veterans law is contrary to the text of § 5107(b), which expressly codifies a preference for the veteran to prevail when evidence on an issue is close. As the Veterans Court once recognized, the intent of the statute is "that society has through legislation *taken upon itself the risk of error*" in veterans-benefits determinations. *Gilbert*, 1 Vet. App. at 54 (emphasis added). A statutory interpretation that shirks the obligation society has assumed is also contrary to the "special solicitude" that Congress (and our country) has for veterans. *Sanders*, 556 U.S. at 412 ("A veteran, after all, has performed an especially important service for the Nation, often at the risk of his or her own life."). Veterans' benefits statutes should be read and applied with an "equitable obligation" in mind, based on the judgment "that those who served their country are entitled to special benefits from a grateful nation." *Procopio v. Wilkie*, 913 F.3d 1371, 1386-87 (Fed. Cir. 2019) (en banc) (O'Malley, J., concurring).

In short, our society—and our law—cares a great deal about whether the veteran or the government bears the risk of error. The *Ortiz*/*Lynch* rule, in allowing VA to prove a proposition by only a bare majority of persuasive effect, subverts that preference. The rule ensures that there will be a significant number of veteran losses that do not reflect the truth. *See, e.g.*, *Lego v. Twomey*, 404 U.S. 477, 493 (1972) (Brennan, J., dissenting) (allowing preponderance standard for judging admissibility of confessions "will necessarily result in the admission of more involuntary confessions than would be admitted were the prosecution required to meet a higher standard"). This Court should overturn the *Ortiz*/*Lynch* rule.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Court should grant certiorari.

Respectfully submitted,

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