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 Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF AMICUS CURIAE, THE NATIONAL LAW SCHOOL VETERANS CLINIC CONSORTIUM, IN SUPPORT OF CERTIORARI

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INTEREST OF AMICUS CURIAE[1]

The National Law School Veterans Clinic Consortium (NLSVCC) submits this brief in support of the position of Petitioner Joe A. Lynch. The filing of this brief was authorized by the Board of the NLSVCC, a 501(c)(3) organization.

NLSVCC is a collaborative effort of the nation's law school legal clinics dedicated to addressing the unique legal needs of U.S. military veterans on a pro bono basis. NLSVCC's mission is, working with like-minded stakeholders, to gain support and advance common interests with the Department of Veterans Affairs (VA), U.S. Congress, state and local veterans service organizations, court systems, educators, and all other entities for the benefit of veterans throughout the country.

NLSVCC exists to promote the fair treatment of veterans under the law. Clinics in the NLSVCC work daily with veterans, advancing benefits claims through the arduous VA appeals process. NLSVCC is keenly interested in this case considering the important disability benefits issue presented. It respectfully submits that creating one definition of "approximate balance" as it relates to the Benefit of the Doubt doctrine under

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[1] The parties received timely notice of amicus's intent to file and 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 amicus curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

38 U.S.C. § 5107(b) and 38 C.F.R. § 3.102 is critical to protecting the interests of our nation's veterans.

SUMMARY OF THE ARGUMENT

This case presents the opportunity to provide clear guidance about the meaning of 38 U.S.C. § 5107(b) and to re-enforce the pro-veteran canon that is integral to veterans' benefits law. Since the Federal Circuit's decision in *Ortiz v. Principi*, 274 F.3d 1361, 1364 (Fed. Cir. 2001), various VA adjudicators and judges, including those in Mr. Lynch's case, have gradually eroded the pro-veteran "Benefit of the Doubt" doctrine articulated in 38 U.S.C. § 5107(b). The problematic explanation of the standard presented in *Ortiz*, and the failure to overrule *Ortiz* in its entirety in *Lynch v. McDonough*, 21 F.4th 776 (Fed. Cir. 2021), have led to inconsistent case outcomes, further eroded veterans' trust in VA adjudicatory system, and prevented VA from fully accomplishing its mission to "care for him who shall have borne the battle, and for his widow, and his orphan." *About VA*, U.S. Department of Veterans Affairs, https://www.va.gov/ABOUT_VA/index.asp (Last updated Sep. 22, 2021). Therefore, this Court should grant certiorari, restore the meaning of the phrase "benefit of the doubt" to the standard Congress intended, require VA to update its guidance to adjudicators on the meaning of this doctrine, and require the Board of Veterans' Appeals (Board) to fully articulate its reasons for

discounting evidence in all cases where it finds the Benefit of the Doubt doctrine does not apply.

ARGUMENT

I. The Benefit of the Doubt doctrine in 38 U.S.C. § 5107(b) reflects Congress's intent for the VA system to be uniquely pro-claimant.

In the "strongly and uniquely pro-claimant" VA system,[2] the veteran is to be given the "benefit of the doubt" when there is an "approximate balance of positive and negative evidence regarding any issue material to the determination of a matter." 38 U.S.C. § 5107(b); *see also* 38 C.F.R. § 3.102 (2021). In *Gilbert*, the Court of Appeals for Veterans Claims (Veterans Court) explained this standard by analogizing it to baseball's "tie goes to the runner" rule: "If the ball clearly beats the runner, he is out and the rule has no application; if the runner clearly beats the ball, he is safe and, again, the rule has no application; if, however, the play is close, then the runner is called safe by operation of the rule that 'the tie goes to the runner.'" *Gilbert v. Derwinski*, 1 Vet. App. 49, 55 (1990).

A higher standard of proof, such as the preponderance of the evidence standard, undermines Congress's intent in creating the Benefit of the Doubt doctrine. *Wise v. Shinseki*, 26 Vet. App. 517, 531 (2014) citing

[2] *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998).

Jones v. Shinseki, 23 Vet. App. 382 (2010). Congress "never intended" the veterans' benefits system "to be adversarial or difficult for the veteran to navigate." 146 CONG. REC. S9213 (daily ed. Sept. 25, 2000) (statement of Sen. Rockefeller); *see also* Katrina J. Eagle & Benjamin P. Pomerance, *The Pro-Claimant Paradox: How the United States Department of Veteran Affairs Contradicts its Own Mission*, 23 Widener L. Rev. 1 (2017). Rather, the intent was to "place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 440 (2011). Moreover, this Court has reiterated Congress's intention that the VA system is meant to be something radically different from the traditional adversarial process of litigation. *Id*.; *see also* Michael P. Allen, *Justice Delayed*; *Justice Denied? Causes and Proposed Solutions Concerning Delays in the Award of Veterans' Benefits*, 5 U. Miami Nat'l Sec. & Armed Conf. L. Rev. 1, 12 (2015). For this reason, this Court has recognized a pro-veteran canon, whereby veterans' benefits statutes should be construed in the veteran's favor. *See Brown v. Gardner*, 513 U.S. 115, 118 (1994). To uphold the intent of Congress, this Court must avoid further erosion of the doctrine by overturning the Federal Circuit's decision in *Lynch*, which wrongfully maintained the analytical framework articulated in *Ortiz v. Principi*, 274 F.3d 1364 (Fed. Cir. 2001). *See Lynch v. McDonough*, 21 F.4th 776, 783-84 (Fed. Cir. 2021) (Reyna, J., concurring in part and dissenting in part).

A. The Benefit of the Doubt doctrine has been eroded by the Federal Circuit's decisions in *Ortiz* and *Lynch*.

Ortiz dealt a heavy blow to veterans. In *Ortiz*, the Federal Circuit analyzed the relationship between the Benefit of the Doubt doctrine, as codified in 38 U.S.C. § 5107(b) and its implementation in the governing regulation, 38 C.F.R. § 3.102. *Ortiz v. Principi*, 274 F.3d 1361, 1364 (Fed. Cir. 2001). The implementing regulation provides that a reasonable doubt arises when the positive and negative evidence are in "approximate balance." 38 C.F.R. § 3.102 (2021). When this happens, the court *should* apply the Benefit of the Doubt doctrine, and the veteran *should* prevail. *Id*. (emphasis added). However, in *Ortiz*, the Federal Circuit ruled that the Benefit of the Doubt doctrine is inapplicable if the evidence "preponderates" against the claimant. *Ortiz*, 274 F.3d at 1366.

In *Ortiz*, the Appellant argued that the Benefit of the Doubt doctrine can apply as Congress intended, even if there is a preponderance of the evidence against the claimant, when the evidence is in "approximate balance." *Id*. at 1364. In rejecting that argument, the Federal Circuit found that the term "approximate" was unambiguous and "generally understood to mean 'almost exact . . . close to . . . nearly the same.'" *Id*. In attempting to define the preponderance of the evidence burden, the three-judge panel determined the burden can be described as "more probably so than not," despite the burden not being "amenable to any mathematical formula, such as the often-recited 'fifty-one

percent/forty-nine percent' rule." *Id*. at 1365. With this determination, the Federal Circuit found no room for the Benefit of the Doubt standard when VA finds a preponderance of the evidence against the claimant. *Id*. at 1366.

In the case currently on appeal, the Federal Circuit reviewed and largely affirmed its reasoning in *Ortiz*. *Lynch v. McDonough*, 21 F.4th 776 (Fed. Cir. 2021). In the en banc decision, the majority rightfully departed from *Ortiz*'s use of "preponderance of the evidence" language in the context of the Benefit of the Doubt doctrine but erred in otherwise upholding the *Ortiz* analysis. The Federal Circuit concluded that the claimant receives the Benefit of the Doubt "if the positive and negative evidence is in approximate balance (which includes but is not limited to equipoise)." *Id*. at 781. However, the Federal Circuit failed to overturn *Ortiz* in its entirety, rejecting Mr. Lynch's argument that *Ortiz* incorrectly articulates an equipoise standard. *Id*. at 780. At the same time, the Federal Circuit recognized that, "in isolated cases," the Veterans Court "may" have articulated an equipoise threshold before giving the veteran the benefit of the doubt, in reliance upon *Ortiz*.

Such cases are by no means isolated; many of them simply do not make it to the level of a Veterans Court appeal. *See infra* Section II.A. A clear explanation of the "Benefit of the Doubt" doctrine is especially important in "close call" cases. As Judge Reyna explained in her partially dissenting opinion, the Federal Circuit correctly rejected the "preponderance of the evidence"

rule in its en banc decision but erred in replacing it with an equally problematic "persuasion of the evidence" standard rather than overruling *Ortiz* entirely. *Id*. at 782 (Reyna, J., concurring in part and dissenting in part). According to Judge Reyna, this means that "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.'" *Id*. at 783. This lack of required detail and clarity "disincentivizes the agency from fulfilling its duty to provide an adequate administrative record . . . and thus hinders appellate review." *Id*. Additionally, as noted by Judge Reyna, concurring in part and dissenting in part from the holding in *Lynch*, "we must be vigilant against the possibility that 'close cases' may evade review." *Lynch*, 21 F.4th at 783. The Veterans Court must generally review factual determinations, such as the balancing of evidence by the Board, under a clearly erroneous standard. *Russo v. Brown*, 9 Vet. App. 46, 50 (1996). If the reasoning behind the Board's decisions are not provided, a reviewing court is likely unable to make the determination that the reasoning was flawed. Therefore, to ensure that VA's decisions can be adequately reviewed and reduce the risk of arbitrary decision-making, this Court needs to clarify the meaning of the "benefit of the doubt," require the Board requires to identify "close call" cases and provide a framework for the Board to use that clearly rejects *Ortiz* and returns to the pro-veteran framework Congress intended.

A sample of cases from the Veterans Court illustrate why this Court should require the Board, in all cases, to explain how it weighed the evidence submitted and identify "close calls." A bare conclusion that the "benefit of the doubt" does not apply is not enough. In *Williams v. Brown*, decided before *Ortiz*, the Veterans Court required the Board to "provide a satisfactory explanation as to why the evidence was not in equipoise" so as to require the application of the Benefit of the Doubt doctrine, where "there is significant evidence in support of an appellant's claim." 4 Vet. App. 270, 273-74 (1993). The Veterans Court required VA to "show its work."

In contrast, in *De Ramos v. Peake*, decided approximately seven years after *Ortiz*, the Veterans Court denied benefits because it decided the "preponderance of the evidence" weighed against the claimant, who was seeking service connection for an acquired psychiatric disorder. *De Ramos v. Peake*, 2009 U.S. App. Vet. Claims LEXIS 89 (U.S. App. Vet. Cl. Feb. 5, 2009). The facts of *De Ramos* are comparable to those of *Williams*. In both cases, the veteran's military records contained some evidence of a psychiatric condition. *Williams* at 271 (noting no in-service treatment for "nervous disorder" but report of "depression or excessive worry" and "nervous trouble" on separation examination); *De Ramos* at *2 (mentioning in-service treatment in service for "anxiety reaction" but normal separation examination). Neither veteran sought to service-connect his mental health condition until years after separation. *Williams* at 271 (noting application for VA compensation 16

years post-discharge, which was denied); *De Ramos* at *2 (noting a VA regional office granted service connection for severe depressive neurosis 17 years post-discharge). In both cases, the Board decision relied heavily on the conclusions of a VA medical examiner to deny service connection, where conflicting medical and lay evidence existed. *Williams* at 271-72; *De Ramos* at *2-4, 6-8, 10-14. And in both cases, the Board affirmed the Regional Office's decision. *Williams* at 272; *De Ramos* at *4. In the pre-*Ortiz* case, the Veterans Court remanded the case to the Board for satisfactory application of the Benefit of the Doubt doctrine. *Williams* at 273-74. In the post-*Ortiz* case, however, the Veterans Court found that "the preponderance of the evidence was against the claimant" and therefore affirmed the Board's decision. *De Ramos* at *1, 15.

These cases show the erosion of the Benefit of the Doubt standard over time – VA is no longer asked to explain its application of the standard and can avoid proper application altogether by plainly stating that the evidence weighs against the claimant. Moreover, VA's own guidance to its adjudicators shows why this Court needs to clarify the meaning of the Benefit of the Doubt standard. As of the date of writing this brief, VA's M21-1, Adjudications Procedure Manual, advises adjudicators to "[c]onsider reasonable doubt *only* when the evidence is in equipoise, *not* when the evidence weighs either in favor or against the claimant." M21-1 Part V, Subpart ii, Chapter 1, Section A.5.e, *Principles of Reviewing and Weighing Evidence: Considering Reasonable Doubt*, *available at* https://www.

knowva.ebenefits.va.gov (last visited June 13, 2022). The guidance at this section relies on *Ortiz* but makes no mention of the Federal Circuit's decision in *Lynch*. *Id.*; *see also* M21-1 Part X, Subpart v, Chapter 1, Section C.2.e, *Administrative Decisions: Evidence Thresholds, available at* https://www.knowva.ebenefits.va.gov (last visited June 13, 2022) ("In most cases, when the evidence for and against a claimant's position *is in equipoise*, VA resolves reasonable doubt as to the claimant's entitlement in the claimant's favor, as described in M21-1, Part X, Subpart v, 1.C.2.f.") (emphasis added). This is problematic.

B. The Benefit of the Doubt doctrine is inconsistently and arbitrarily applied at the Board of Veterans' Appeals.

As in the Veterans Court, the "preponderance of the evidence" and "equipoise" language articulated in *Ortiz* muddies the Benefit of the Doubt doctrine and creates inconsistent outcomes in similar cases before the Board of Veterans' Appeals. A sample of recent decisions made by the Board regarding post-traumatic stress syndrome (PTSD) show the lack of uniformity in these "close call" cases. These cases do not discuss the applicability of *Ortiz* or *Lynch* and provide very little analysis of why benefit of the doubt is not awarded to the veteran. These cases help illustrate why this Court should require VA, including the Board, to identify when the evidence is close, overrule *Ortiz* in its entirety, and update its guidance on the meaning of the "benefit of the doubt" to match Congress's intent.

In No. 16-55 021, 2020 WL 6751132 (BVA Aug. 5, 2020), the Board afforded the benefit of the doubt to a Veteran seeking a higher rating for post-traumatic stress syndrome (PTSD), citing to both *Gilbert* and *Ortiz*, and granted an increased rating from 50% to 70%. *Id*. at *6-7. The Board began by summarizing the diagnostic criteria for a 50%, 70%, and 100% rating for PTSD. *Id.* at *3-4. Then, the Board discussed the contents of multiple VA examinations from August 2012 to May 2019, discussing the symptoms the Veteran reported at each examination. *Id.* at *4-6. The Board also summarized the PTSD disability benefits questionnaire (DBQ), noting the symptoms and impairment the veteran reported. *Id*. at *5. Using the examinations, questionnaire and lay evidence, the Board found that the benefit of the doubt should be afforded to the veteran and awarded an increased rating from 50% to 70%. *Id.* at *6. The judge specifically noted that most of the medical records showed that the veteran struggled with moderate to severe symptoms consistent with PTSD, even though some examinations documented more mild symptoms. *Id*. The Board's explanation of how it weighed the evidence is crucial to understanding why it increased the veteran's disability rating.

Unfortunately, however, not all Board decisions provide the same level of detail in their analysis of the evidence. Some erroneously continue to rely on *Ortiz*'s "preponderance of the evidence" standard in explaining the "Benefit of the Doubt" doctrine. Some cite *Ortiz* only in passing, without legal analysis of how *Ortiz* applied to the facts of the case at hand. These issues

result in inconsistent results in "close-call" cases, particularly where the conclusions in a VA medical examination are inconsistent with other, otherwise credible, evidence. For example, in Case No. 17-10 612, 2021 WL 5751109 (BVA Oct. 6, 2021), the Board denied a rating increase for PTSD from 50% to 70%. While the Board cites to *Ortiz* earlier in the decision, it does not analyze how *Ortiz* applies to the facts of the case. Nonetheless, the Board ultimately concluded that "the preponderance of the evidence" did not warrant a 70% disability rating for PTSD. The Board reviewed medical records from VA psychiatry visits, examinations, and telehealth records from October 2014 to July 2020. *Id*. at *8-12. The Board also reviewed lay evidence, including testimony from the veteran during the hearing, two statements from the veteran's wife, a statement from the veteran's son, and a statement from the veteran. *Id.* at *8, 10. The Board stated that "the Veteran's mental health treatment records, as well as the VA examination reports, are highly probative, as the VA examiners and the Veteran's VA therapists are trained in the mental health field and competent to report the overall state of the Veteran's mental health." *Id.* at*12. However, rather than focusing on the degree to which the evidence showed "occupational and social impairment with deficiencies in most areas," as required for a 70% rating, the Board relied on contradictory evidence of specific symptoms, or lack thereof, to deny an increased rating. *Id.* at *12-15. In particular, the Board downplayed the evidence of suicidal ideation by reasoning that these symptoms presented during "an isolated period of time" and improved with medication. *Id.*

at *13. Repeating the same type of error identified by the Federal Circuit in *Buchanan v. Nelson*, the Board relied on the failure of the medical records to corroborate certain symptoms, such as the veteran's self-reported history of violent outbursts and his wife's report that he discussed suicide several times a day and occasionally neglected his hygiene, to undercut the credibility of the lay statements. *Id.* at *12; *see also Buchanan v. Nelson,* 451 F.3d 1331 (Fed. Cir. 2006) (remanding where both the Veterans Court and Board erred by (1) concluding that lay evidence in veteran's service medical records lacked credibility because it was not corroborated by medical evidence and (2) requiring corroboration of lay evidence). As a result, the Board found that the Benefit of the Doubt rule did not apply and denied an increased rating. *Id*. at *15.

Looking again at whether the evidence warranted a 70% disability rating for PTSD, the Board in No. 15-10 668, 2020 WL 5242634 (BVA May 28, 2020), denied an increased rating for the period from May 2015 to October 2019 but granted the increased rating for the period beginning October 28, 2019. *Id*. at *8-11. For both decisions, the Board relied primarily on the VA examiner's conclusion about the level of the veteran's social and occupational impairment. *Id.* For the first period, the record contained evidence, including the veteran's sworn testimony, of symptoms that could warrant a 70% rating. This included evidence that, at the time of the hearing, the veteran had been unemployed for nearly a year and half due to his PTSD, that his depression rendered him unable to leave his home

for up to a week at a time, that he was not sleeping, that he was unable to establish relationships with others, and that his productivity had "markedly decreased." *Id*. at *8-10. However, rather than focusing on whether the evidence showed "occupational and social impairment with deficiencies in most areas," the Board cited the lack of evidence of certain symptoms, such as suicidal ideation and obsessional rituals, to determine that the "preponderance of the evidence" was against the veteran. *Id.* at *10. The Board explicitly recognized that the Veteran's statements were credible but determined that "the specific examination findings of trained health care professionals and documented medical treatment records are of greater probative weight than the more general lay assertions" and therefore denied the request for an increased rating. *Id*. at *11. Yet, in finding that the health care professionals' opinions should be afforded greater probative weight, the Board did not discuss the credentials of the health care professionals or specific methods used during the evaluations that lend greater probative weight to their opinions. *Id.* at *8-11; *see also* Yelena Duterte, *Duty to Impair: Failure to Adopt the Federal Rules of Evidence Allows the VA to Rely on Incompetent Examiners and Inadequate Medical Examinations*, 90 UMKC L. Rev. 511 (2022) (identifying common shortcomings in VA medical examinations and proposing that VA remove from the record C&P examinations that do not comply with the Federal Rules of Evidence).

Ultimately, Veterans Law Judges and Regional Office adjudicators are inconsistently awarding probative

value to the same or similar evidence presented in cases that come before them. Because of the lack of one true standard, adjudicators apply the Benefit of the Doubt doctrine differently. This is a direct product of the erosion of the Benefit of the Doubt doctrine in *Ortiz* and *Lynch*, and, as illustrated above, can be particularly problematic in cases where several medical examinations exist.

II. The misapplication of the Benefit of the Doubt doctrine furthers distrust between veterans and VA and increases the likelihood of harm to those veterans most in need of VA's services.

As an integral part of a system intended to be pro-claimant, the Benefit of the Doubt doctrine was designed to ease the burden on veterans seeking VA benefits. However, "[t]he problem with the non-adversarial process is that the VA often ignores or misapplies its regulations." Hugh McClean, *Delay, Deny, Wait Till They Die: Balancing Veterans' Rights and Non-Adversarial Procedures in the VA Disability Benefits System*, 72 SMU L. Rev. 277, 280 (2019). As a result, a culture of distrust exists between many veterans and VA. *Id*.

Multiple factors, including constant delays in the system and continuous denials of claims, have contributed to the negative outlook veterans develop toward VA. *Id*. at 281. This outlook is epitomized in the common refrain of "Delay, Deny, Hope That I Die," which

emphasizes the way veterans view the operation, productivity, and sympathy of VA. *Id*. Unfortunately, due to the delay in processing claims and denials based on misinterpretations of the law, including the Benefit of the Doubt doctrine, many veterans die while they are awaiting decisions from VA. *Id*.; *see also 60 Minutes: Delay, Deny, and Hope That I Die* (CBS television broadcast Jan. 19, 2019). This negative outlook and deficit of trust between veterans and VA has been an issue in the system historically. These traits are harmful to not only current claimants, but to prospective veteran claimants as well. *Id*. If a veteran has the mindset that a claim will be denied regardless of the evidence in the file, the veteran may be deterred from even filing a claim – contrary to the mission of VA to care for who served our nation..

In a 2014 White House review of VA, Rob Nabors, then-Deputy White House Chief of Staff, stated, "it is clear that there are significant and chronic systemic failures that must be addressed by the leadership at VA." Chicago Tribune, *White House review of Veterans Administration finds 'corrosive culture'* (June 27, 2014), https://www.chicagotribune.com/nation-world/ct-xpm-2014-06-27-chi-white-house-review-veterans-administration-20140627-story.html. Nabors found that VA operates with minimal accountability and transparency and often ignores suggestions for improvement. *Id*.

To its credit, VA is aware of the problem, and its leadership has made promises, over several years, to make navigating the system easier for veterans. Kelly Kennedy, *Veterans face crisis of confidence with VA,*

secretary says, The War Horse, Feb. 3, 2022. For example, former Secretary Robert McDonald, from 2014 to 2017, created the Office of Veterans Experience (VE), in efforts to improve communication and accountability between VA and veterans. *Id*. McDonald noted the VE was explicitly designed to combat the 'us versus them' mentality of veterans. *Id*. Additionally, former Secretary David J. Shulkin, from 2017 to 2018, wrote in a 2018 New York Times op-ed, "[a]s I prepare to leave government, I am struck by a recurring thought: It should not be this hard to serve your country," upon his departure from the position. David J. Shulkin, *Privatizing the V.A. Will Hurt Veterans*, N.Y. Times, Mar. 28, 2018; *see also* David Shulkin, *It Shouldn't Be This Hard To Serve Your Country: Our Broken Government and the Plight of Veterans* (2019).

The incumbent VA Secretary, Denis McDonough, is extremely aware of the negative outlook that veterans have on the system and has continuously vowed to make changes and enhance transparency between VA and claimants. *See*, *e.g.*, *Veterans Day 2021: Townhall Q&A with Secretary McDonough* (YouTube video Nov. 11, 2021) (characterizing VA claims process himself as, "frustrating, time-consuming, a hassle, and sometimes traumatic"). *See also* Kennedy, *supra* (describing Secretary McDonough's desire for culture change at VA such that veterans will no longer preach about a delay and deny system). As Secretary McDonough stated in a November 11, 2021, Veterans Day Question & Answer Segment:

> "We cannot make veterans be their own advocates. [P]resident [Biden] said to me, 'you have to fight like hell for the vets, you have to be the number one advocate for veterans.' "

Id.

Despite these efforts, the sentiment Secretary McDonough holds has not reached all VA adjudicators and judges. A disconnect still exists between the agency's goal of being pro-claimant and the reality experienced by many veterans attempting to navigate the VA system, especially those who lack representation. For *pro se* veterans, especially those with mental health issues, navigating the system is difficult enough, without the added stress of continuous appeals and not receiving the benefit of the doubt in the manner Congress intended. The failure to properly apply the Benefit of the Doubt doctrine to the claims of veterans, like Mr. Lynch, further advances the negative view that veterans have of VA. Clarification and proper application of the benefit of the doubt standard would go a long way toward renewing veterans' trust in the VA system.

A. The proper application of the Benefit of the Doubt doctrine is especially important for *pro se* veterans.

Many veterans file claims for disability benefits with VA without attorney representation. Unfortunately, many *pro se* veterans struggle to understand ambiguous regulations and navigate the incredibly

complex VA claims system. William L. Pine & William F. Russo, *Making Veterans Benefits Clear: VA's Regulation Rewrite Project*, 61 Admin. L. Rev. 407, 408 (2009). Veterans who do not receive legal assistance often become so frustrated with the claims system that they cease fighting their cases or do not file at all. Steve Walsh, *Without Help Navigating Benefits Can Be Overwhelming For Veterans*, NPR.org (Jan. 14, 2015, 3:18 AM), https://www.npr.org/2015/01/14/374055310/indiana-s-veterans-service-officers-operate-on-a-shoe-string.

In 2020, 41% of petitions and 23% of appeals filed with the Veterans Court were filed by veterans without representation. *Fiscal Year 2020 Annual Report October 1, 2019, to September 30, 2020,* United States Court of Appeals for Veterans Claims, http://www.uscourts.cavc.gov/documents/FY2020AnnualReport.pdf. If the claims system functioned as intended, the large number of *pro se* veterans might not be a concern. However, statistics have shown that veterans represented by attorneys achieve significantly better results than veterans who proceed through the claims process *pro se*. *Department of Veterans Affairs (VA) Board of Veterans' Appeals Annual Report Fiscal Year (FY) 2020*, https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2020AR.pdf. According to the Board's Annual Report for 2020, claimants whose appeals were represented by lawyers had the highest allowance, at 40.9%, while *pro se* claimants had the lowest allowance rate of 26.2%. *Id.* Additionally, *pro se* claimants had the highest denial rates at the Board, at 29.2%, when compared to veterans represented by attorneys or Veterans Service

Organizations. *Id*. Taken together, the significant number of *pro se* veterans and the statistics that demonstrate the disadvantage experienced by *pro se* claimants highlight the need for VA to properly apply the Benefit of the Doubt doctrine.

Moreover, there is a significant number of veterans suffering from PTSD. The recent conflicts in Iraq and Afghanistan alone have resulted in roughly 500,000 veterans being diagnosed with PTSD, as was Mr. Lynch. Miriam Reisman, *PTSD Treatment for Veterans: What's Working, What's New, and What's Next*, 41, 10 P & T: A Peer Reviewed Journal for Formular Management, 623, 623-634 (2016). Over 271,000 Vietnam veterans were still suffering from PTSD 40 years after the war had ended. Charles R. Marmar, MD; William Schlenger, PhD; Clare Henn-Haase, PsyD; et al, Course of Posttraumatic Stress Disorder 40 Years After the Vietnam War: Findings from the National Vietnam Veterans Longitudinal Study, *JAMA Psychiatry*, 2015;72(9):875-881. Veterans suffering from PTSD due to their time in service frequently suffer "problems with attention, working memory, learning, and executive functioning" that can make understanding ambiguous regulations and filling out paperwork difficult. Contessa M. Wilson, *Saving Money, Not Lives: Why the VA's Claims Adjudication System Denies Due Process to Veterans with Post-Traumatic Stress Disorder and How the VA Can Avoid Judicial Intervention*, 7 Ind. Health L. Rev. 157, 163 (2010). Furthermore, the infamous delays and frustrations that riddle VA disproportionately affect

veterans suffering from PTSD and can result in increased suicide risk, substance abuse, and homelessness. *Id.* To fulfill VA's goal and mission of being a pro-claimant, non-adversarial system supporting veterans, VA needs to ensure that statutes such as 38 U.S.C. § 5107(b) are applied liberally in favor of veterans, as Congress intended.

B. By denying "close calls" under the Benefit of the Doubt doctrine, especially in cases involving PTSD or other mental health claims, VA is furthering the culture of mistrust, possibly leading to higher suicide rates.

Denying close calls, especially regarding PTSD and other mental health claims, may be increasing attitudes of mistrust in VA, an agency that is supposed to support and care for veterans. This is especially true when the standard that is supposed to weigh in favor of veterans is instead used against them. Feelings of betrayal and hopelessness have the possibility of increasing the veteran suicide rate among veterans. The suicide rate for veterans is 1.5 times higher than that of non-veteran adults. Office of Mental Health and Suicide Prevention, 2020 National Veteran Suicide Prevention Annual Report, https://www.mentalhealth.va.gov/docs/Datasheets/2019/2019_National_Veteran_Suicide_Prevention_Annual_Report_508.pdf. The rate of suicide among VHA patients with a mental health or substance use disorder diagnosis was 57.2 per 100,000 – more than double the rate among those

without these diagnoses. Office of Mental Health and Suicide Prevention, *supra.* Veterans diagnosed with PTSD, specifically, have a 58% higher risk of suicide compared to veterans without PTSD. Heather R. Johnson, Veterans with PTSD at a Higher Risk of Suicide (Sep. 29, 2020), https://www.psychiatryadvisor.com/home/topics/anxiety/ptsd-trauma-and-stressor-related/vets-with-ptsd-at-a-higher-risk-of-suicide.

As an agency with a commitment to serve and honor America's veterans, preventing veteran suicide is one of VA's top priorities. VA Research on Suicide Prevention, https://www.research.va.gov/topics/suicide.cfm (Last updated Jan. 15, 2021). These priorities need to be reflected in the way *all* VA adjudicators and judges apply the Benefit of the Doubt doctrine, especially regarding mental health claims. No veteran should feel neglected, unseen, unbelieved, or betrayed by the very agency tasked with caring for them. Furthermore, veterans dealing with mental health disorders should not feel such fear of or frustration at the claims process that they do not receive, or even seek, the treatment and compensation they need. A standardized application of the Benefit of the Doubt doctrine will help ensure Veterans are provided the equitable treatment and respect they earned and deserve.

CONCLUSION

This case raises significant concerns for veterans seeking VA disability benefits, particularly those

suffering from the invisible wounds of war, like PTSD. The inconsistency of the definition of "approximate balance" within the VA adjudicatory system places veterans who are seeking disability benefits at a distinct disadvantage in a system that was designed instead to provide them with the "benefit of the doubt." This issue is significant to veterans, the proper functioning of the VA system, and society in general. *Amici* respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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