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

BRIEF OF AMICUS CURIAE TEXAS A&M UNIVERSITY SCHOOL OF LAW FAMILY AND VETERANS ADVOCACY CLINIC IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Texas A & M University School of Law Family & Veterans Advocacy Clinic (FVAC) submits this brief in support of the Petition for Writ of Certiorari filed on behalf of Petitioner Joe A. Lynch.[1]

The FVAC is a clinical program dedicated to families and military veterans, including our local homeless veteran population. In support of our veterans, we appreciate the opportunity to advocate in support of veterans who have been or will be denied proper review under the current improper interpretation of the "benefit of the doubt" rule espoused in 38 U.S.C., section 5107(b) when there is an "approximate balance" of a material issue.

SUMMARY OF THE ARGUMENT

Petitioner, Joe A. Lynch, is a Marine Corp veteran who served during the Vietnam Conflict and was

[1] Pursuant to this Court's Rule 37.2, all parties with counsel listed on the docket have consented to the filing of this brief. Counsel of record for all listed parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any 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.

wrongfully denied an increase in his disability rating for his PTSD. During his service, Petitioner witnessed many tragic events, including a horrific helicopter crash on the flight deck that killed several passengers.

Petitioner represents the untold number of veterans who have had their claims wrongfully decided under the preponderance of evidence standard adopted in *Ortiz* and its progeny.[2]

Veterans will continue to have claims erroneously decided as the Court of Appeals for the Federal Circuit, in the instant case, coined what can only be described as a game of semantics when it repealed the preponderance of evidence standard and replaced it with the "persuasive evidence" rule.[3]

This case presents an important question of federal law that should be resolved by the Supreme Court.

The congressional intent in enacting the "benefit of the doubt" rule was not to make the veteran prove the claim the same way they would in an adversarial hearing. Instead, when there exists an "approximate balance," Congress mandated the decision be made in favor of the veteran.[4]

> 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.

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[2] *Ortiz v. Principi*, 274 F.3d 1361 (Fed. Cir. 2001).

[3] *Lynch v. McDonough*, 21 F.4th 776, 781 (Fed. Cir. 2021).

[4] 38 U.S.C. § 5107(b).

> 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.[5]

The effect of the rulings in *Ortiz* and *Lynch* is a bias in favor of the Department of Veterans Affairs ("VA") and against the veterans who have sacrificed so much for our county. The preponderance of the evidence standard, or the newly minted persuasion of evidence rule, creates an adversarial system that goes against the clearly expressed congressional intent and the plain language of the statute—a statute that was enacted to reflect the recognition, honor, and respect we owe our veterans for their selfless service to our nation.

The VA, the bench, and the bar need guidance on the proper standard of evidence needed to deny a veteran's claim. Left in place, either the "preponderance of evidence" or the "persuasion of evidence" standards will have a profound effect on veterans' ability to receive proper procedural due process, resulting in erroneous adjudication of their claims.

Our veterans deserve the procedural guarantees created by Congress, and it is for this reason that the Supreme Court should review and reverse the decision in this case and overturn the precedent set in *Ortiz*.

[5] *Id*.

ARGUMENT

I. The Court of Appeals for The Federal Circuit Decided *Ortiz* and *Lynch* Incorrectly by Going Against Clear Congressional Intent and Public Policy Towards Our Nation's Veterans

A. The Longstanding Public Policy of Supporting our Veterans in Recognition of Their Service to Our Country Warrants the Granting of this Petition for Writ of Certiorari

President Abraham Lincoln aptly synopsized that our public policy was "to care for him who shall have borne the battle and for his widow and his orphan."[6] This statement solidified our country's commitment and public policy towards our debt owed to our veterans. In furtherance of this duty to our veterans, the VA was eventually created and tasked with this duty. As Secretary McDonough said of the VA, "Our department remains fully committed to fulfilling the sacred obligation that we have to those who serve in uniform."[7]

The congressional intent of providing veterans with the benefit of the doubt has become unworkable due to the rulings in *Ortiz* and *Lynch*, which clearly go

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[6] Abraham Lincoln, President of the United States, Second Inaugural Address (Mar. 4, 1865).

[7] Dep't of Veterans Affairs Home Page, https://www.va.gov/icare/index.asp [https://perma.cc/9FQE-RTD8] (last visited June 14, 2022).

against the statutory language, congressional intent, and the pro-veteran canon.

An essential part of the Veterans' Judicial Review Act[8] is the underpinning of the congressional intent expressed by the senate committee as cited by Mr. Lynch and quoted in part below:[9]

> Thus, under the provision in the Committee bill, where on the basis of all the relevant evidence and element of a claim is neither *clearly* established nor *clearly* refuted, the benefit of the doubt is to be given to the claimant.[10]

Unfortunately, the system set up in furtherance of our policy to protect veterans is not living up to its obligations. It takes more than just stating that the VA is non-adversarial and pro-veteran. Actions speak louder than words. The VA should be instructed to follow the law and give the benefit of the doubt to a veteran when the evidence is neither clearly established nor clearly refuted and therefore in approximate balance.

The Supreme Court should grant the Petition for Writ of Certiorari to correct the travesty that has been caused by the rulings in *Ortiz* and *Lynch* which go against our duty to care for those who have defended our freedoms. This Court has the opportunity to right this wrong and provide guidance to the VA, the bench

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[8] Veteran's Judicial Review Act, 102 Stat. 4105 (1988) (codified as amended at 38 U.S.C. §§ 1-1602).

[9] 38 U.S.C. § 5107(b).

[10] S. Rep. No. 100-418, at 33 (1988) (italics added).

and the bar on how this regulation should be correctly interpreted.

If the Court finds the interpretation of approximate balance to be unworkable, then Amicus supports Petitioner's analysis arguing in favor of clear and convincing evidence as to the new standard for denying a veteran claim.

B. Congressional Intent and the Pro-Veteran Canon of Statutory Construction Mandate a Clarification of the *Approximate Balance* Rule adopted in Section 5107(a) & (b)

Ortiz provided improper guidance and instructions to the courts and to the Department of Veterans Affairs regarding the proper method of weighing evidence. Instead of placing a "thumb on the scale"[11] in favor of the veteran, *Ortiz* placed a brick on the scale in favor of the VA and against the veteran.

In the instant case, the Court of Appeals for the Federal Circuit acknowledged the misinterpretation, however, they chose not to correct it. Instead, by trying to redefine "preponderance of the evidence" to "persuasion of the evidence," the court did nothing except further muddy the waters.[12]

This Court has advised that the statutes providing benefits to veterans should always "be liberally

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[11] *Henderson v. Shinseki*, 562 U.S. 428, 440 (2011).

[12] *Lynch v. McDonough*, 21 F.4th 776 (Fed. Cir. 2021).

construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation."[13]

Unfortunately, the decisions in *Ortiz* and *Lynch* wrongly state that, if one side preponderates or persuades in one direction, that there is no way the approximate balance is invoked and, as a corollary, the benefit of a doubt will not apply. The veteran is called out at the plate with no meaningful means of redress.

Although the three-judge panel of the Federal Circuit affirmed the Court of Appeals for Veterans Claims decision in a divided opinion, Judge Dyk's partial dissent is instructive.[14] Judge Dyk stated that the preponderance of the evidence standard was at odds with the plain text of Section 5107(b):

> Because preponderant evidence may be found when the evidence tips only slightly against a veteran's claim, that standard is inconsistent with the statute's standard that the veteran wins when there is an "approximate balance" of evidence for and against a veteran's claim. "Approximate" is not the same thing as slight.
>
> *Ortiz's* holding effectively and impermissibly restricts the benefit of the doubt rule to cases in which there is close to an evidentiary

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[13] *Boone v. Lightner*, 319 U.S. 561, 575 (1943). *See also Brown v. Gardner*, 513 U.S. 115, 117-18 (1994) (stating, "rule interpretive doubt is to be resolved in the veterans' favor").

[14] *Lynch v. McDonough*, 999 F.3d 1361, 1396 (Fed. Cir. 2021).

> tie, a proposition that the majority agrees would be contrary to the "approximate balance" language of the statute.[15]

Further support from the dissent in the En Banc Decision from Judge Reyna, joined by Judges Newman and O'Malley, made it clear that *Ortiz* was incorrectly decided.[16] They went on to criticize the majority's newly coined persuasive evidence standard as the equivalent of the preponderance of the evidence standard:

> The preponderance of evidence standard in *Ortiz* not only remains, but now girds the persuasive evidence standard. Not only is the persuasive evidence standard, like the preponderance rule, not contemplated by the statute, but its analytical framework has as provenance the now-estranged *Ortiz's* preponderant evidence rule. The result is a far cry from the language contemplated by Congress.[17]

The dissent goes on to explain how these "close cases" may evade review when the VA determines that the evidence "persuasively" forecloses a veteran's claim. The VA can make its determination without explaining that the case was in fact a close call and that

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[15] *Id*.

[16] *Lynch*, 21 F.4th at 782 (Fed. Cir. 2021).

[17] *Id.* at 783.

this outcome will disincentivize the agency from fulfilling its duty to provide an adequate record.[18]

The Federal Circuit has recognized that there is a need for clarification of the proper standard for how and when a veteran's claim can be denied under 5107(b).[19]

We look to this Court to clarify the errors in interpretation of the rules for the benefit of the doubt and approximate balance. A clear rule can help avoid needless appeals and help thousands of similarly situated veterans whose claims have been or will be denied using the erroneous rulings in *Ortiz* and *Lynch*.

II. The Court's Interpretation in *Ortiz* and *Lynch* Is Harmful to Veterans and Resonates with the Disabled Veterans of America slogan "Delay, Deny, Wait Till They Die"

A. Veterans Subjected to Constant Delays in The Claims Process—In No Small Part Due to This Improper Statutory Interpretation—Are at an Increased Risk of Suicide

By applying the *Ortiz* precedent, the Department of Veterans Affairs ("VA") and the U.S. Court of Appeals for Veterans Claims ("CAVC") use a single, subjective snapshot for "close calls" that force veterans to endure long claims and appeals processes, further burdening

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[18] *Id.*

[19] *Id.*

an overtaxed system and raising the risk of suicide among veterans.[20]

The VA is intended to act as a neutral arbitrator that applies rules and regulations liberally to assist veterans in accessing benefits.[21] However, due to the nature of VA claims, the evidentiary scales are continuously in flux with uncertainty and subjective judgments. Instead of giving the benefit of the doubt to the veteran, the *Ortiz* and *Lynch* precedents continue to provide erroneous guidance on the measure of the evidentiary standard required.[22,23] Applying these interpretations leads to continuous errors that are then appealed, adding to the delay of the administrative state and VA backlog.[24]

The claims impacted by the improper evidentiary standard include pain and psychological conditions such as PTSD, anxiety, and depression.[25] In prolonging the access to benefits for mental health disabilities and requiring veterans to relive trauma for an accurate evaluation of these conditions, the VA disability claims

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[20] *Ortiz*, 274 F.3d at 1361 (Fed. Cir. 2001).

[21] *See* 38 C.F.R. § 21.1032; 38 U.S.C. § 5103A (Congress requiring the VA to assist Veterans in the claims process).

[22] *Ortiz*, 274 F.3d at 1361 (Fed. Cir. 2001); *Lynch*, 999 F.3d at 1305 (Fed. Cir. 2021).

[23] *See* Stacey-Rae Simcox, *Thirty Years of Veterans Law: Welcome to the Wild West*, 67 U. Kan. L. Rev. 513, 526-27 (2019) (finding approximately 60% of cases overturned with judicial review due to unreasonable board decisions).

[24] Simcox, *supra* note 4.

[25] *Id.*

system increases the risk of suicide for veterans by exacerbating symptoms through retraumatization and causing further stress within what is intended to be a pro-veteran system.[26]

1. Uncertainty prevails with veteran disability claims, especially for mental health disorders, such that the application of *Ortiz* and *Lynch* conflicts with Congress's intent for processing claims.

Congress included a benefit of the doubt rule to allow close calls to be processed in favor of the veteran.[27] The burden-shifting in the initial claim process starts with the Veteran's burden of providing evidence to support a possible claim.[28] This burden then shifts to the VA as a burden of persuasion to disprove the claim according to the established rating schedule and guidelines. For a claim to be denied, the evidence must weigh against the Veteran in a way that is outside the approximate balance.[29] When there is uncertainty due to failings of the rating schedules and medical

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[26] Maureen Murdoch et al., *Long-term Outcomes of Disability Benefits in US Veterans with Posttraumatic Stress Disorder*, 68 Arch Gen Psychiatry 1072 (2011) (discussing the long-term outcomes of VA disability benefits for Veterans with PTSD).

[27] 38 U.S.C. § 5107.

[28] *Id.*

[29] *See Lynch*, 999 F.3d 1391 (Fed. Cir. 2021).

evaluations, Congress intended the ambiguity to be resolved in favor of the Veteran.

The VA disability system includes a complex rating schedule that requires examiners to assign a percentage of disability based on the medical diagnosis, objective medical data, qualitative reports, and subjective judgment on the effect the disability has on the veteran.[30] While the rating system is viewed as a comprehensive tool for evaluating *physical* disabilities, the rating system for *psychological* disabilities, including Mr. Lynch's PTSD, is based on a "general rating formula for mental disorders" as a versatile measure.[31] Therefore, uncertainty prevails when assigning a quantitative measure of effect to a qualitative issue, which is then further clouded by the subjective nature of VA disability claims.

This is not to say that there is no quantitative data for assessing pain or mental health disorders. Qualitative assessments for mental health can include the number of medications, dosage, incidents of self-medication, number of clinic visits, frequency of visits, episodic social interactions history, occurrence of panic

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[30] *See Saunders v. Wilkie*, 886 F.3d 1356 (Fed. Cir. 2018) (holding pain without an accompanying medical diagnosis can be a functional impairment to qualify for disability benefits, remanding to the Board for factual findings under the correct legal standard).

[31] *Mauerhan v. Principi*, 16 Vet. App. 436, 443 (U.S. 2002) (applying Chevron deference to the Secretary's rule allowing for symptoms outside the DSM-IV diagnostic criteria to be considered for mental health disability ratings).

attacks, flashbacks, or catatonia. Pain or the effect of physical disabilities may also use similar metrics. However, to obtain this data requires the veteran to seek treatment for the mental or physical condition and to have access to health care. In some instances, a veteran may not seek health care, even when available through the VA, due to the veteran being homeless, lacking transportation, due to the Warrior's Ethos or feelings of shame, all of which may prevent meaningful access to healthcare.[32] Absence of such medical evidence, the VA examiner will have to rely on the claimant's self-reported anecdotal evidence in lieu of the examiner's own knowledge.

Due to the difficulty in providing quantitative medical evidence for how pain and psychological symptoms affect daily life, a diagnosis of a mental health disorder may come with conflicting evidence that creates incertitude and the close calls anticipated by Congress within the statute. In practice, the *Ortiz* or *Lynch* interpretation of "approximate balance" takes the close calls and allows for that small window of balance to shrink to "50% and a mere peppercorn" against the veteran. An already difficult and complex claims process is simplified into a single number and invalidates the veteran's experience by taking the close call and calling it an out.

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[32] There are approximately 37,352 Veterans that are currently homeless and have limited access to regular health care or clinic visits. Dep't Hous. & Urban Dev., *2020 Annual Homeless Assessment Report to Congress* 52 (2021).

2. The time spent adjudicating and processing claim appeals that fail under the *Ortiz* standard unnecessarily adds to a backlogged VA system.

The purpose of VA claims system is to ensure veterans can access the benefits of their military service and that the application of rules and regulations has met the minimum requirements.[33] However, the VA has a backlog of claims and appeals, creating a long wait for veterans to access disability benefits.[34] In addition, the VA appeals process is lengthy and does not function as a quality control measure.[35] The claims that fall within the approximate balance of evidence should be approved but are denied under the *Ortiz* and *Lynch* precedents and must be appealed for a chance at a correction that cannot come.

The unique role of the VA is to serve and assist veterans in the claims process.[36] The VA is meant to

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[33] Veteran's Judicial Review Act, 102 Stat. 4105 (1988) (codified as amended at 38 U.S.C. §§ 1-1602).

[34] U.S. Dep't of Veterans Affairs, Bd. of Veterans' Appeals, *Annual Report: Fiscal Year 2018*, 25 (2018).

[35] *Why Are Veterans Waiting Years on Appeal?: A Review of the Post-Decision Process for Appealed Veterans' Disability Benefits Claims:* Hearing before the Subcomm. on Disability Assistance and Mem'l Affairs of the Comm. on Veterans' Affairs, 113th Cong. 22 (2013) (statement of Laura H. Eskenazi, Executive-in-Charge of the Board of Veterans' Appeals, "[t]he adequacy of medical examinations and opinions, such as those with incomplete findings or supporting rationale for an opinion, has remained one of the most frequent reasons for remand.").

[36] 38 U.S.C. § 5103A (creating a duty for the VA to assist claimants).

provide an "informal" and "non-adversarial" process for a "special class of citizens" because of their service and sacrifice.[37,38] The VA appeals system and the CAVC do not guarantee a judicial review, and therefore can only supply the most basic check on the quality of decision-making by VA examiners and adjudicators. With *Ortiz* and *Lynch*, for claims that were in approximate balance, but the evidence appeared to persuade even slightly in the wrong direction, a veteran would need to appeal for a chance for the benefit of the doubt rule to apply. Even then, the claimant can only succeed if the appeals board applies a different standard or CAVC believes there was an egregious error.[39]

The current wait time for a veteran's medical appeal to be resolved is approximately seven years.[40] In the aftermath of the *Lynch* decision in December 2021, the preponderance of the evidence has continued to be

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[37] *See Henderson v. Shinseki*, 562 U.S. 428, 431 (2011) (quoting *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985), "The VA's adjudicatory process is designed to function throughout with a high degree of informality and solicitude for the claimant."); *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1036 (9th Cir. 2012) (citing *Walters*, 473 U.S. at 323-24) ("We emphasize, as the district court did, that Congress purposefully designed a non-adversarial system of benefits administration. . . .).

[38] *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006).

[39] 38 U.S.C. § 7261(a)(4) (standard of review for material issue of fact is "clearly erroneous").

[40] *Manage a Legacy VA Appeal*, Dep't of Vet. Aff. (last updated March 26, 2021) https://www.va.gov/decision-reviews/legacy-appeals/ [https://perma.cc/7Z7Z-3VHS]. *See also* Annual Report, *supra* note 26.

interpreted as the evidentiary standard and as a synonym for approximate balance and nearly equal.[41] Since *Ortiz* was decided in 2001, the benefit of the doubt rule can derail a disability claim at every step because of the improper statutory interpretation permeating the fact-finding process.[42]

3. The burden of *Ortiz's* improper evidentiary standard has a disparate impact on vulnerable veterans and increases the risk of suicide.

Ortiz allows for the subjective nature of the evaluation process to make or break an approval for a claim. Unfortunately, the subjective evidence and judgment used to evaluate pain and psychological disabilities leave the veteran to the whims of the unchecked examiners and evaluators. This introduces issues of personal bias and discrimination that cannot be undone through the appeal process unless the decision was clearly erroneous. By delaying and denying veterans disability benefits that they have rightly earned, the VA raises the risk of suicide for the veterans they are meant to serve.

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[41] *Sansbury v. McDonough*, No. 20-8639, 2022 U.S. Vet. App. Claims LEXIS 545, at *32 (Vet. App. Apr. 11, 2022) (finding a preponderance of the evidence against the Veteran even though the evidence" has most nearly approximated" the criteria).

[42] *See* Simcox, *supra* note 4 (noting the evidentiary standard" serve[s] as the factual predicates a veteran may need to establish in order to prevail on the ultimate disability claim questions").

Discrimination is an unfortunate reality of American society. Veterans that do not fit within the masculine, able-bodied, heteronormative, and light-complected vision of the American G.I. are more likely to face discrimination in the military and as veterans.[43] The same bias and discrimination that occurs in society at large and among the ranks can affect the VA claims process.[44] The incident rate for military sexual assault and harassment continues to be a problem disproportionately affecting women serving in the military.[45] Additionally, the service-connected disabilities that are related to discrimination and military sexual trauma have a disparate impact on veterans of color, women, and LGBTQ veterans. These disabilities are then subjected to further bias in the VA claims system because of the subjective nature of the process.

The VA's annual report shows a steady rise in the rate of veterans dying by suicide.[46] According to the most recent data, approximately 17.2 veterans die by

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[43] U.S. Dep't of Def., *Notification and Federal Employee Antidiscrimination and Retaliation Act (No FEAR Act Report)* (2019).

[44] Gov't Accountability Off., GAO-20-83, *VA Health Care: Opportunities Exist for VA to Better Identify and Address Racial and Ethnic Disparities* (2019) (finding health disparities and outcomes in the VA according to race, ethnicity, and gender).

[45] U.S. Dep't of Def., Sexual Assault Prevention and Response Office, *Annual Report on Sexual Assault in the Military* (2013).

[46] U.S. Dep't of Veterans Affairs, *2021 National Veteran and Suicide Prevention, Annual Report* 25 (2022).

suicide each day.[47] The emotional, psychological, and physical trauma servicemembers experience in the military often leads to PTSD, anxiety, and depression.[48] Furthermore, the delay and denial of VA disability claims directly correlate to an increased risk of poverty and homelessness.[49] The combined risk of suicide that comes with psychological disorders, issues with emotional self-regulation, and a lack of stability due to poverty, homelessness, and issues navigating the VA system, means the improper statutory interpretation in *Ortiz* has serious consequences for a vulnerable group of people. The veteran suicide rate is directly affected by the improper statutory interpretation of *Ortiz* and *Lynch*.

Uncertainty is inherent in veteran disability claims due to the subjective and qualitive nature for a quantitative disability rating. By strictly applying a higher evidentiary burden to veterans than what Congress intended, *Ortiz* has the effect of necessitating appeals that further burden the overtaxed VA system. Furthermore, the subjective nature of disability claim evaluation leaves room for bias that can affect the balance of the evidence.

The use of non-treating examiners results in the VA taking a "snapshot" of the veterans health on a given day and then applying that "snapshot" to the evidentiary scales to see if it is "more likely than not"

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[47] *Id.*

[48] Murdoch, *supra* note 12, at 1078.

[49] *Id.*

that the evidence "preponderates" in one direction. However, the scales never stop moving due to the oscillation and subjective nature of pain, claimants effect, and the judgment of examiners.

Accordingly, the approximate balance should be viewed as the constant movement of the scales when the evidence on both sides is so close that it makes it impossible to settle on an exact measurement. Congress was aware of the subjective nature of the medical evaluation process. Therefore, Congress intended for these wobbly, close calls to be settled in favor of the veteran.

III. Congress Did Not Intend for Veterans Claims to Take Place in An Adversarial System

A. The Veterans' System was designed to be a Non-Adversarial System and the VA has the Duty to Assist the Veteran in Claim Development

In theory, the intention of Congress to place the veterans claims in a non-adversarial system sounds like an optimal solution. The veteran submits the claim, and the VA has the duty to assist them. The veteran does not, however, have the same rights as a claimant under the Social Security Administration ("SSA") system or the Workers' Compensation system. The veteran lacks the right to cross-examine the alleged experts whose opinions are being given more weight than the treating physician.

In 2017, the SSA had a treating physician rule[50] whereby, in most instances, a treating physician's opinion was given controlling weight. While that provision changed in 2017,[51] the treating physician can still be given controlling weight in the overall evaluation of a claim.

Our veterans deserve to have the same protections afforded SSA claimants under the APA's hearing provisions which give the claimants the opportunity to challenge an expert's competence and to cross-examine the creditability of expert witness during hearings.[52]

If this were implemented, it could help offset the effects of the VA medical examiners having more weight given to them than a treating physician. The VA medical examiners see the veteran once and only get a snapshot of how the veteran was doing on a particular day. Adding the ability to question the examining physicians could help an untold number of veterans.

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[50] 20 C.F.R. § 404.1527.

[51] 20 C.F.R. § 404.1520(c).

[52] Hugh B. 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 (2019).

IV. In *Ortiz* And *Lynch* the Court Failed to Account for The Military's Culture of Stigma Around Mental Health Conditions and Its Chilling Effect on Veterans

It is the bottom of the ninth inning and the pitcher is beginning to feel the strain on his arm. Does the pitcher give up? No. He grits his teeth and finishes the game. There are—after all—no ties in baseball.[53] This allegory should resonate with the majority of veterans, who also learned to never give up or let on that they were. Military service is not akin to sandlot baseball, it is the real deal, and the stakes can be life and death.

A. The Military Culture of Resilience Uniquely Affects Service Member Attitudes Around Reporting Mental Health and Other Medical Conditions Even Long After They Have Left the Service

The culture of the military is one of resilience to a fault where service members are expected to perform their duties without complaining and hide or minimize mental and physical illness and injury to remain combat-effective. One particular harm caused by the decision in *Ortiz*,[54] and subsequently in *Lynch*,[55] is that the court failed to account for the mental conditioning to which every military member is subjected in

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[53] Official Playing Rules Committee, Official Baseball Rules § 7.01(b) (2021).

[54] *Ortiz*, 21 F.4th at 776.

[55] *Lynch*, 274 F.3d at 1361.

the military service. One often hears expressions like "suck it up" or "embrace the suck" echoed on military movies.[56] What many do not know is that these are legitimate expressions used daily across all branches of our military; these expressions extend to both mental and physical ailments that will often affect service members after their service obligation has ended and they have returned to civilian life.

During their military service, the military culture is such that service members are taught—not explicitly, but rather by example—that reporting health conditions to a health professional may be detrimental to their career. For example, in 2018, the Pentagon announced that personnel who were considered non-deployable would be involuntarily separated from the service.[57] This included many service members with "mental-health concerns" such as PTSD and "physical injuries."[58] The fear that reporting a health problem will lead to the end of their career likely follows many veterans into civilian life.

Additionally, service members who report mental illness or physical injury to their command healthcare team often find themselves sidelined, prohibited from

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[56] *See*, *e.g.*, Austin Bay, *Embrace the Suck: A Pocket Guide to Milspeak* (Pamphleteer Press, 2007).

[57] Dan Lamothe, *Pentagon Targets 'Non-Deployable' Troops for Removal in New Effort*, The Washington Post (Feb. 15, 2018, 4:24 PM), https://www.washingtonpost.com/news/checkpoint/wp/2018/02/15/pentagon-targets-non-deployable-troops-for-removal-in-new-effort/.

[58] *Id*.

performing different functions of their jobs such as carrying a weapon or performing physical activities. These restrictions will often lead to skill fade, poor evaluations, and ridicule by other members of the command who have similarly been conditioned to see mental illness and injury as a display of weakness.[59] Eventually, these restrictions may go so far as to result in an administrative separation or medical discharge. Sadly, these cultural norms continue into civilian life, leaving many veterans feeling undeserving of benefits.[60]

The VA is often seen as an extension of the military and, as such, veterans often feel uncomfortable sharing their story with a VA provider, and will often be much more forthcoming with a civilian provider.[61] This is particularly noticeable in the handling of VA disability claims for Military Sexual Trauma (MST). The VA frequently denies claims for PTSD as a result of MST due to the evidentiary hurdle introduced by *Ortiz* and largely upheld by *Lynch*.

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[59] *See*, *e.g.*, Casey MacGregor & MarySue V. Heilemann, *Deserving Veterans' Disability Compensation: A Qualitative Study of Veterans' Perceptions*, Health & Social Work, May 2017, at e86, e91-e92.

[60] *Id*.

[61] *See*, *e.g.*, Kaylee R. Gum, Comment, *Military Sexual Trauma and Department of Veterans Affairs Disability Compensation for PTSD: Barriers, Evidentiary Burdens and Potential Remedies*, 22 Wm. & Mary J. of Women & The Law 689, 704 (2016) (discussing how veteran victims of sexual assault face evidentiary and personal barriers to receiving compensation for service-connected MST-induced PTSD).

B. Veterans Carry the Military Culture into Civilian Life and Understate the Severity of Their Conditions

Veterans leave the military fundamentally changed by the experience. A veteran does not leave years of training, conditioning, and indoctrination at the door when she leaves the service. Rather, veterans take that culture with them, and it influences their actions, or lack thereof, for life. It is no wonder, then, that veterans either understate the extent of—or altogether fail to report—their various illnesses, aches, and pains to the Department of Veterans Affairs. The following case studies are particularly illustrative of this premise:

K. C.—Texas Army National Guard Veteran

K. C. was severely injured while serving in the National Guard. One surgery after another left K. C. debilitated and in constant pain and impacted her mobility. She also suffers from PTSD because of the sexual harassment and racial discrimination she faced during her military service. Moreover, she faced command reprisals and was branded a "troublemaker" for reporting the sexual harassment and racial discrimination to her command, causing her to associate reporting her circumstances with negative consequences. Despite her pain and suffering, she told the VA examiner "I'm fine," when asked how she was feeling.

Because of her inclination toward understating her condition, K. C. was not granted the rating she was

truly entitled to despite clear medical evidence that she was more than likely suffering due to residuals of her military service. K. C. came to the Texas A&M Family and Veterans Advocacy Clinic for help with her disability compensation claim. Two years later, she is still waiting for her disability compensation to be increased commensurate to the life-altering disabilities she incurred because she followed the call to serve her country.

C. G.—U.S. Marine Corps Veteran

Gulf War Veteran C. G. was exposed to the horrors of modern twentieth-century warfare while deployed in Operation Desert Storm. From 1994 to 2004, he suffered in silence as his crippling insomnia and night terrors interfered with his ability to work. Following a visit to the VA in 2004, he was misdiagnosed and prescribed a medication which made his symptoms worse. Due to his condition, C. G. lost his job and—shortly thereafter—became homeless.

When asked why he suffered in silence for so long, and why he did not tell the VA about all of his PTSD symptoms, C. G. stated that he had always been told to "be a man," and "suck it up." He was ashamed of his mental health condition and saw it as a sign of weakness. He told VA personnel that there was "nothing wrong with [him]." As a result of his brave face and minimization of his mental health conditions, he was originally only granted a 70 percent disability rating.

In 2017, C. G. came to the Texas A&M University Family and Veterans Advocacy Clinic for help. He was participating in the Department of Housing and Urban Development's VA Supportive Housing, known as HUD-VASH, and still struggling to remain gainfully employed. With the assistance of the FVAC, he was able to receive compensation at the 100 percent rate due to his individual unemployability and his quality of life improved immensely. Despite the improvement in his financial and housing situation, however, C. G. continues to struggle with the life-altering symptoms of PTSD.

It is clear, then, that the military culture of gritting one's teeth and carrying out the mission at all costs has the unfortunate side effect of conditioning veterans not to state the full extent of their pain and suffering when being examined by VA physicians and—in extreme cases—to avoid seeking treatment for decades. The *Lynch* court's "persuasion of the evidence" rule stacks the deck against veterans who may understate the extent of their physical and mental ailments or hold back crucial details when being examined by a VA provider through no fault of their own.

CONCLUSION

Granting the Petition for Writ of Certiorari would give not only the Petitioner, but also countless future veterans, the opportunity to have their claims

evaluated under the congressionally mandated "approximate balance" standard as it was intended.

In baseball, the worst thing that could happen if a close call is improperly called out is that the series ends. The same is true for those suffering from PTSD, anxiety, and depression except veterans will not be able to return for another season. Congress could not have intended that veterans should be delayed and denied until they die, but that is what is happening and will continue to happen until *Ortiz* is overturned.

Therefore, Amicus Curiae respectfully requests that the Court grant the Petition for Writ of Certiorari.

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