20-2067

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JOE A. LYNCH,

Claimant - Appellant,

v.

ROBERT WILKIE,
Secretary of Veterans Affairs,

Respondent - Appellee.

On Appeal from the United States Court of Appeals for Veterans Claims,
No. 19-3106, Hon. Mary J. Schoelen

BRIEF OF AMICI CURIAE SWORDS TO PLOWSHARES AND CONNECTICUT VETERANS LEGAL CENTER IN SUPPORT OF CLAIMANT-APPELLANT

DLA PIPER LLP (US)

Stanley J. Panikowski
401 B Street, Suite 1700
San Diego, California 92101
Tel: (619) 699-2700

Attorneys for Amici Curiae
Swords to Plowshares
Connecticut Veterans Legal Center

November 2, 2020

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number	2020-2067
Short Case Caption	Lynch v. Wilkie
Filing Party/Entity	Swords to Plowshares, Connecticut Veterans Legal Center

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: November 2, 2020

Signature: /s/ Stanley J. Panikowski

Name: Stanley J. Panikowski

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
Swords to Plowshares		
Connecticut Veterans Legal Center		

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☐ None/Not Applicable ☐ Additional pages attached

Edward Hanover of DLA Piper LLP (US)	Jesse Medlong of DLA Piper LLP (US)	

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☑ None/Not Applicable ☐ Additional pages attached

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

Table of Contents

Page

Table of Authorities

Page(s)

Cases

Statutes

Other Authorities

I. STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae are two organizations that advocate for veterans and care deeply about the issues presented in this case.

Swords to Plowshares ("Swords"), founded in 1974, is a community-based not-for-profit organization that provides needs assessment and case management, employment and training, housing, and legal assistance to veterans in the San Francisco Bay Area. Swords promotes and protects the rights of veterans through advocacy, public education, and partnerships with local, state, and national entities. The Swords Legal Department targets its services to homeless and other low-income veterans seeking assistance with Department of Veterans Affairs ("VA") disability benefits, character of discharge determinations, and Department of Defense ("DOD") military discharge upgrades.

Connecticut Veterans Legal Center ("CVLC") created the nation's first medical-legal partnership co-located with the VA. CVLC's mission is to remove legal barriers to health care, housing, and income for veterans in recovery from homelessness and mental illness. As a part of this work, CVLC attorneys assist veterans in VA disability claims, character of discharge determinations, and discharge upgrade petitions to the DOD. CVLC recently launched the Veterans Inclusion Project, an initiative focused on advocating for policy changes to create a more inclusive veterans benefit system for the most vulnerable low-income

veterans: those who are living with mental illness, trauma, substance dependence, and homelessness; as well as those who have experienced military sexual trauma and those who have been harmed by discrimination or other injustices in the DOD and VA systems.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amici curiae certify that no party's counsel authored this brief in whole or in part, that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and that no person other than the amici curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. Each party consented to amici curiae filing a brief in this case.

II. INTRODUCTION

This appeal concerns more than a single Marine, disabled by his service to our country and denied the benefits to which he is entitled. It concerns how we as a country repay the debt we owe all our veterans. Indeed, this case presents precisely the sort of systemic, precedent-setting question of exceptional importance that en banc consideration is intended to address. Fed. R. App. P. 35(a)(2).

The American people and their elected representatives have made their commitment to honoring veterans' service clear by guaranteeing veterans life-long access to healthcare and benefits related to their service-connected disabilities. Those elected representatives also enshrined in law the principle that, in

determining a veteran's eligibility for benefits, the veteran be given "the benefit of the doubt" whenever there is an "approximate balance of evidence." 38 U.S.C. § 5107. In other words, when the call is close, the veteran should receive VA benefits. But the VA and the courts have watered down that mandate to where it applies only to break ties when the evidence is in "equipoise." That diluted standard failed Mr. Lynch. And he is not alone. Indeed, as the accounts of real veterans later in this brief show, even in cases where veterans present persuasive and even uncontroverted evidence, the VA's misapplication of the codified standard yields absurd denials.

These results contravene the VA's mission to care for our nation's veterans. The VA's abandonment of the intended meaning of "the benefit of the doubt" standard improperly cuts veterans off from that care. This Court has the ability to right this wrong not just for Mr. Lynch, but for all veterans whose cases the VA will hear by reversing, en banc, the interpretational error that led to this injustice.

Almost 50 years ago, Appellant Joe Lynch donned the uniform of the United States Marine Corps, where he served for four years in the waning days of the Vietnam conflict. As a young Marine, he experienced things the average American sees only in movies. He lived in the belly of a warship, with "coffin" bunks stacked three high. He helped evacuate civilians fleeing conflict zones. And he witnessed fellow service members perish when a helicopter crashed onto his ship's flight

deck. The trauma of these experiences haunted him at work and at home, leading to isolation and despair. For nearly 30 years, stigma led him to bear that burden without the benefit of professional help, despite his wife's encouragement. It was not until a group of his veteran peers endorsed the idea that he finally enlisted the help of a mental-health professional.

Three different therapists diagnosed Mr. Lynch with service-connected post-traumatic stress disorder ("PTSD"). One of them found that his PTSD "severely limited" his work performance, his social interactions, and his quality of life. Another concluded that Mr. Lynch has "major impairment in several areas of functioning," including "occupational and social" functioning. In sum, three mental health professionals agreed that Mr. Lynch suffers from service-connected PTSD, and two of those three concluded that Mr. Lynch's condition resulted in severe impairment of his work and social functions. It is also worth highlighting that the two clinicians who found Mr. Lynch's PTSD to be severe were treating him, while the other was assessing him for the purposes of his VA claim.

At that point, his fate was in the hands of the VA. But the VA failed Mr. Lynch. Rather than give the "benefit of the doubt" to Mr. Lynch and the evidence from two clinicians who observed his extreme symptoms, the VA instead credited the one psychologist who observed Mr. Lynch on a day when his symptoms seemed less severe. The VA's adoption of this lone voice of dissent was contrary

to its congressional mandate to treat him and other veterans with benevolent paternalism, as a father treats a son. *Collaro v. West*, 136 F.3d 1304, 1309–10 (Fed. Cir. 1998) (explaining that the veterans' benefits scheme is "supposed to be a nonadversarial, ex parte, paternalistic system for adjudicating veterans' claims"). Like any administrative agency, the VA must apply the law according to its mandates. That includes, among others, the Veterans Claims Assistance Act of 2000.

In passing the Veterans Claims Assistance Act of 2000, Congress chose the "approximate balance" standard for reviewing veteran benefits claims to ensure that veterans get the "benefit of the doubt." This standard, along with the U.S. Supreme Court's pro-veteran canon of construction, places a "thumb on the scale" for veterans. *Henderson v. Shinseki*, 562 U.S. 428, 440 (2011) (citing *Shinseki v. Sanders*, 556 U.S. 396, 416 (2009) (Souter, J. dissenting)); *see also Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (the Federal Circuit "and the Supreme Court both have long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant"). It represents a determination by our country's highest deliberative bodies that veterans should not be "denied benefits when science moves at a slower pace than suffering."[1]

[1] Chadwick J. Harper, *Give Veterans the Benefit of the Doubt:* Chevron, Auer*, and the Veteran's Canon*, 42 HARV. J.L. & PUB. POL'Y 931, 934 (2019).

Courts effectuate Congress's intent in part by applying "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson*, 562 U.S. at 441 (quoting *King v. St. Vincent's Hospital*, 502 U.S. at 220–221, n.9 (1991). The "benefit of the doubt" standard of 38 U.S.C. § 5107 is consistent with Congress's intent to favor veterans. But that standard has not been applied in line with its congressional purpose. The VA and the courts have whittled it down to nonexistence in all cases save that narrow set in which the VA finds the evidence for and against eligibility to be in perfect equilibrium—i.e., "equipoise."

The gradual erosion of the "approximate balance" standard is not a matter of mere academic concern. Its casualties are the men and women, sworn to defend our nation from enemies foreign and domestic, who return to us bearing scars both visible and unseen. At the time of this appeal, the United States remains in the longest period of continuous conflict in our history. As discussed below, record numbers of veterans arrive home with PTSD and traumatic brain injury ("TBI"). Some are survivors of military sexual trauma ("MST"), betrayed by their comrades in arms. Meanwhile the ranks of the VA's backlog swell. And increasing numbers of Sailors, Soldiers, Airmen, Guardsmen, and Marines are separated without veterans benefits for being unable to hide the impact of their trauma, or are retaliated against when seeking help for it.

These facts are undeniable. In aggregate they may blur together, more statistic than tragedy. But these are not just statistics; they are real men and women, heroes whose service forever altered their lives. Their stories, presented here, illustrate not only the human cost of war but also the human cost of denying the congressionally mandated benefit of the doubt. They are living evidence that the error of *Ortiz v. Principi*, 274 F.3d 1361, 1366 (Fed. Cir. 2001), and its kin has both legal and practical dimensions for veterans. Justice for them demands that this Court restore to its full vigor the standard Congress enacted for their benefit.

III. ARGUMENT

A. THIS APPEAL PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE AND AN EN BANC HEARING SHOULD BE GRANTED

En banc review is warranted because this case implicates "a question of exceptional importance." FRAP 35(a)(2). Other federal courts have found that a "question of exceptional importance exists" when it implicates "important systemic consequences for the development of the law and the administration of justice." *Watson v. Geren*, 587 F.3d 156, 160 (2d Cir. 2009). Both of those interests are implicated here.

This case presents especially pressing concerns because the manner in which this Court has applied the standard of review in cases like *Ortiz* (1) undermines the longstanding canon that courts must resolve interpretive doubt in favor of veterans;

and (2) results in the VA denying lifesaving benefits to many disabled veterans without justification. The amici use this opportunity to present the Court with illustrative examples of veterans who have been harmed by the misapplication of the benefit of the doubt rule. But before presenting those stories below, it is helpful to review the context in which these stories took place.

1. The Need to Support Our Veterans Is at Historic Levels

Having presided over the horrors of the Civil War, President Abraham Lincoln in his second inaugural address charged Americans to "care for him who shall have borne the battle, and for his widow, and his orphan."[2] The VA is one way we fulfill President Lincoln's sacred charge. The VA supports our veterans and their families by providing monetary disability benefits, including service-connected disability compensation and non-service-connected pension.[3] A significant number of veterans access these benefits. For example, a 2018 American Community Survey revealed that 2,451,100 working age veterans, nearly 28% of the working age veterans in the United States, had a service-

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

connected disability.[4] And, nearly 36% of post-9/11 veterans have a service-connected disability, compared to nearly 19% of all other veterans.[5] During fiscal year 2019 alone, 309,091 veterans began receiving compensation benefits for service-connected disabilities, with 49,743 of those veterans receiving compensation for service-connected PTSD.[6]

Moreover, a significant number of veterans suffer from PTSD and residual effects of TBI. These veterans must navigate an already daunting claims process. It is thus imperative that the VA truly give veterans "the benefit of the doubt," as Congress intended and commanded, in determining their eligibility for benefits.

The VA estimates that between 11% and 20% of veterans who served in Operations Iraqi Freedom and Enduring Freedom suffer from service-related

---

[4] William Erickson et al., Cornell University Yang-Tan Institute on Employment and Disability, *2018 Disability Status Report: United States* 51 (2020), https://www.disabilitystatistics.org/StatusReports/2018-PDF/2018-StatusReport_US.pdf.

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

[6] Veterans Benefits Administration, *Annual Benefits Report: Fiscal Year 2019* 75, https://www.benefits.va.gov/REPORTS/abr/docs/2019-abr-v2.pdf# (last updated July 2020).

PTSD,[7] a condition found to be a risk factor for suicidal ideation.[8] Similar rates exist for previous eras—roughly 12% of Gulf War veterans and 15% of Vietnam veterans have been diagnosed with PTSD.[9] Likewise, veterans as a whole are between 200% and 300% more likely to experience PTSD compared to the general adult population, and veterans as a whole are 300% to 500% more likely to experience PTSD compared to the general adult male population.[10]

Relatedly, the incidence of MST, which commonly leads to PTSD, continues to rise.[11] Veterans who have experienced MST already face myriad obstacles in the claims process, making the correct application of the standard of proof all the more important. In 2017, more than 5,200 service members reported experiencing sexual assault.[12] A 2018 report by the Office of Inspector General, which focused on the VBA's failure to meet its duty to assist MST survivors throughout the claims

---

[7] *How Common is PTSD in Veterans?*, PTSD: National Center for PTSD, U.S. Department of Veterans Affairs, https://www.ptsd.va.gov/understand/common/common_veterans.asp (last visited Oct. 20, 2020) [hereinafter *How Common is PTSD]*.
[8] William Hudenko et al., *The Relationship Between PTSD and Suicide*, PTSD: National Center for PTSD, U.S. Department of Veterans Affairs, https://www.ptsd.va.gov/professional/treat/cooccurring/suicide_ptsd.asp (last updated Oct. 17, 2019).
[9] *How Common is PTSD*, *supra* note 7.
[10] *See id.*
[11] Office of Inspector General, Department of Veterans Affairs, *Veterans Benefits Administration: Denied Posttraumatic Stress Disorder Claims Related to Military Sexual Trauma* 1 (Aug. 21, 2018), https://www.va.gov/oig/pubs/VAOIG-17-05248-241.pdf.
[12] *Id.*

process, revealed that the VBA denied nearly 46% of MST claims. Of those denials, nearly 50% resulted from an improper assessment or failure to follow required procedures for processing these claims, such as failing to request a medical examination, evidence gathering issues, a failure to follow up with the veteran and offer the opportunity to provide additional information, and VBA staff's reliance on contradictory or insufficient medical opinions.[13]

In addition to the difficulties survivors of MST already face securing financial support for service-connected disability, many more face additional challenges resulting from accidental or intentional mischaracterization of their discharge status.[14] Many survivors are discharged from service with "bad paper"—that is, any discharge characterization that is less than honorable—as a result of reporting incidents of sexual assault.[15] Bad paper includes an administrative discharge due to a "personality disorder," or a less-than-honorable discharge characterization based on auxiliary misconduct charges stemming from the trauma of assault.[16]

---

[13] *Id.*

[14] *See Booted*, *Lack of Recourse for Wrongfully Discharged US Military Rape Survivors*, Human Rights Watch (May 19, 2016), https://www.hrw.org/report/2016/05/19/booted/lack-recourse-wrongfully-discharged-us-military-rape-survivors#_ftn3 (finding that the military frequently used "personality disorder" discharge as a means of removing MST survivors from service).

[15] *Id.*

[16] *Id.*

Unfortunately, and often unbeknownst to the veteran at the time of discharge, an administrative discharge based on "personality disorder" or any discharge characterized as less than honorable presents significant long-term hurdles for the veteran to obtain benefits.[17] "Veterans are required to show their discharge papers at virtually every juncture: when seeking employment, applying to school, trying to get health care at the VA, applying for a home loan or housing assistance, even getting a veteran license plate or a discount at a gym[,]" and having "bad paper" may disqualify the veteran from accessing these benefits.[18] Additionally, nearly 85% of veterans are honorably discharged, so those carrying a "bad paper" discharge may suffer significant stigma and consequences as they attempt to reintegrate into civilian life.[19] To make matters worse, veterans with "bad paper" discharges have a low likelihood of success in navigating the limited administrative recourse available to correct the potential mischaracterization of their discharge status.[20]

In addition, an increasing number of veterans also suffer from TBI. More than one in five veterans returning home from Operations Iraqi Freedom and

---

[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.* at fn. 3; *see also* Connecticut Veterans Legal Center, *Veterans Discharge Upgrade Manual* 21 (2011), https://law.yale.edu/sites/default/files/documents/pdf/Clinics/wirac_CTdischargeUpgradeManual.pdf.

Enduring Freedom experience TBI, usually caused by blasts, motor vehicle accidents, and gunshot wounds. Due in part to advances in combat medicine, these rates are nearly twice those of Vietnam veterans.[21] A March 2019 report by the Veterans Health Administration, reviewing data from national samples, likewise found that PTSD, depressive disorders, substance use disorders, and anxiety disorders were more prevalent in veterans with a history of TBI compared to those with no TBI.[22]

Ultimately, the data show that a significant number of veterans suffer severe mental health issues as a direct result of their service to this country.[23] Whether these veterans' claims for VA eligibility and benefits are evaluated fairly is of the utmost importance, especially given our nation's unconscionable rate of veterans suicide.[24] This nation has a moral obligation to ensure that the legal standard is

---

[21] *Traumatic Brain supra* note 11.
[22] Greer, *supra* note 12.
[23] *See How Common is PTSD, supra* note 7 (finding that veterans suffering from PTSD may experience symptoms including anger, depression, chronic pain, substance misuse, sleep problems, suicidal ideations, grief, and more).
[24] After adjusting for age, the 2017 rate of suicide among female veterans was 220% greater than the rate among non-veteran women. The 2017 rate of suicide among male veterans was 130% greater than the rate among non-veteran men. *See* Office of Mental Health and Suicide Prevention, *2019 National Veteran Suicide Prevention Annual Report* 16 (Sept. 2019), https://www.mentalhealth.va.gov/docs/data-sheets/2019/2019_National_Veteran_Suicide_Prevention_Annual_Report_508.pdf.

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

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

As suggested above, statutory provisions concerning veterans' benefits reflect "[t]he solicitude of Congress for veterans" and are intended to "place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions." *Henderson*, 562 U.S. at 440; *see also Hodge*, 155 F.3d at 1362 (explaining "that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant"). Congress's intent is given voice by the courts' interpretive "canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson*, 562 U.S. at 441.

The standard set forth in 38 U.S.C. § 5107 is a further example of Congress's intent to favor veterans. The statute requires the VA to "give the benefit of the doubt to" veterans where "there is an approximate balance of positive and negative evidence regarding any issue material to the determination." 38 U.S.C. § 5107. Interpreted in favor of veterans, *Brown v. Gardner*, 513 U.S. 115, 118 (1994), the statute requires the VA to apply a standard of proof lower than equipoise of the evidence for establishing disability claims and higher than preponderance of the evidence for denying claims. The *Ortiz* standard is therefore

insufficiently deferential towards veterans because it confines the "benefit of the doubt" standard to instances where the evidence is in equipoise. *See Ortiz*, 274 F.3d at 1366.

Conflation of the approximate-balance standard with a preponderance of the evidence is not only grammatically inconsistent. It also defies the black-and-white evidence of Congress's intent. If Congress had intended that the VA find by a preponderance of the evidence against a veteran's claim to deny it, Congress could certainly have said so. Indeed, a Bloomberg search for the term "preponderance of the evidence" in the U.S. Code reveals that Congress has used it 143 times. By contrast, Congress has used the term "approximate balance" only twice. The terms are not only different on their faces. Their difference is deliberate, as evidenced by Congress having used both. By avoiding the preponderance standard in this context, Congress clearly indicated its intent that a different standard be applied.

This Court, sitting en banc, should not only reverse the decision below but also the panel decision misinterpreting the approximate-balance standard in *Ortiz* and other cases, which eroded a longstanding interpretive canon by failing to place a thumb on the scale in favor of veterans. *Henderson*, 562 U.S. at 440 (citing *Shinseki v. Sanders*, 556 U.S. at 416 (Souter, J. dissenting)).

3. The Standard in *Ortiz* Produces Unconscionable Results

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

K.P. – U.S. Navy Veteran

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

In June 2013, over thirty years later, after struggling with the effects of his service, K.P. applied for service-connected disability compensation for PTSD and major depressive disorder ("MDD") stemming from his experience witnessing the violent race riot while in the Navy. At that time of his application, K.P. had experienced the profound effects of PTSD and MDD, which had left him homeless, living in Oakland, California on General Assistance, and trying to

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

F.A. – U.S. Army Veteran

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

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

F.A.'s attorney located his company commander, who swore out a statement detailing F.A.'s combat-related injury. The VA finally granted F.A. service connection for the TBI disability connected to his service in Vietnam.

E.H. – U.S. Navy Veteran

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

Swords helped E.H. apply for and receive service connection for her PTSD based on her MST. The VA's examinations revealed and recorded debilitating symptoms. Tormented and isolated, E.H. was unable at times even to perform basic functions such as eating, sleeping, or maintaining personal hygiene. Her suicidal ideations haunted her. These details were among the "totality of the

evidence" the VA purported to consider in finding E.H.'s disability—which had at times left her jobless, friendless, and homeless—was only 50% disabling. On appeal, Swords provided ample evidence, including in the VA's own examinations, of symptoms justifying a higher rating. No "benefit of the doubt" was afforded, and the appeal was denied. And E.H., who had joined the Navy to defend her country from its enemies, met them instead in the Navy's own ranks, and found her country unwilling to recognize the agony she suffered.

L.R. – U.S. Marine Corps Veteran

L.R. enlisted in the Marine Corps at only 19. In good health upon arriving at Camp Lejeune in 1973, L.R. soon developed serious neurological symptoms including convulsions, dizzy spells, and heart palpitations. His mental health deteriorated rapidly. He suffered from depression, anxiety, insomnia, dizziness, blurry vision, and brain numbness. Overwhelmed by his symptoms, distressed by his worsening condition, and disillusioned with an institution that minimized his ailments, L.R. went AWOL three times, resulting in an other-than-honorable discharge.

The VA then systematically denied L.R. the benefits he earned while serving in the Marine Corps. In 2012, L.R. filed a claim for service connection for several conditions he developed in service. L.R. argued that he is eligible for VA benefits because he was "insane" at the time he went AWOL. The VA Regional Office

denied L.R.'s claim, concluding that his psychiatric symptoms were not documented in his military records. Through various appeals, L.R. supplemented the record with significant medical evidence and guided the VA to where it could obtain further documentation. The Board of Veterans' Appeals held that L.R. failed to establish "by a preponderance of the evidence . . . that he was insane" when he went AWOL. "Preponderance of the evidence," of course, is not the "approximate balance" standard Congress codified. Nonetheless, on that basis, the VA denied L.R.'s benefits claim, and Amicus Swords continues to fight for L.R.'s eligibility today.

A.B. – U.S. Navy Veteran

The VA's abuse of the "benefit of the doubt" standard is particularly evident in cases where it denies benefits because a veteran fails to provide conclusive evidence of service connection. For instance, A.B. is a Navy veteran who served as a boiler technician on naval ships in the 1970s. Although the dangers of asbestos were not as well understood as they are now, every sailor knows that fire is the greatest threat aboard ship. Asbestos kept the flames at bay. As part of his duties, A.B. was responsible for maintenance requiring him to remove layers of asbestos, repair the equipment beneath, and then repack the asbestos until the next repair. Asbestos was everywhere. The air was thick with it as they welded and cut. A.B. recalls using exhaust fans to clear the asbestos by blasting it down the passageways

as if they were wind tunnels, leaving him and his shipmates "swimming" in asbestos. The Navy provided no protective gear.

After leaving the Navy, A.B. developed COPD, laryngeal polyps, and a lung tumor. The scarring in his right lung was so severe that the upper third of it had to be removed. Now he can barely walk upstairs without running out of breath. His larynx polyps must be assessed every six months for malignancy. Beginning in 2014, the VA has refused to grant service connection for these conditions. Although the VA has granted service connection in factually similar cases, it continues to deny A.B. because, as a smoker, he has no definitive proof that asbestos, and not smoking, caused his conditions. Amicus CVLC has argued to the VA that A.B.'s conditions should be deemed service connected because a lack of conclusive proof should be resolved in favor of granting benefits, not denying them, under the standard set by Congress. The VA has refused to give A.B. the "benefit of the doubt," though, and his BVA appeal languishes to this day.

E.F. – U.S. Marine Corps Veteran

Like many other veterans, E.F., a Marine Corps veteran of the Vietnam era, has not received a level of support commensurate with his service and has not received the "benefit of the doubt" regarding his claims for service-connected disability. In 2012, E.F. filed for service-connected compensation based on PTSD and anxiety related to incidents of sexual assault he suffered while in service. The

VA reviewed E.F.'s case and assigned him a 70% disability rating. In 2014, the VA reversed course and severed E.F.'s disability rating, despite his PTSD diagnosis, claiming there was insufficient in-service evidence of MST.

E.F. appealed the severance through CVLC. After two years of waiting, he finally received his hearing in July 2020. E.F. provided difficult and moving testimony regarding his sexual assault and continuing symptoms, only to have the judge request that E.F. repeat his entire testimony because of an error with the recording device. After requiring E.F. to relive the trauma of his sexual abuse yet again via a second round of testimony, the VA denied E.F.'s appeal, reasoning that the case was too close to call. In other words, the VA identified an "approximate balance" but did not give the tie to the runner. As a result of the VA decision, E.F. today has no income and depends on HUD VASH for housing support.

G.H. – U.S. Army Veteran

We turn now to another Vietnam-era Army veteran who suffered pervasive racial discrimination and racially motivated violence during his time in uniform. While still in service, G.H. began to suffer from significant symptoms that VA clinicians diagnosed as related to MDD and PTSD. In 2009, G.H. applied for disability connected to his service during the Vietnam War. In 2015—six years after his application—the VA denied his claim for lack of evidence showing a nexus between his diagnosed medical conditions and his service. Afterward, G.H.

worked to obtain a comprehensive forensic psychological evaluation from a clinical psychiatrist with over 30 years of experience. Although the psychiatrist determined that the traumatic events G.H. suffered while in service "precipitated and exacerbated" his MDD and PTSD symptoms, and with no medical or nonmedical evidence to the contrary, the VA denied both the PTSD and MDD claims, asserting that the evidence was insufficient to verify the in-service events and stressors themselves.

Sadly, in the decade since, G.H.'s health has sharply declined. At one point he had to be hospitalized for extreme depression requiring electro convulsive therapy. Later, he suffered a stroke. His dire financial straits have caused him to lose his home to foreclosure. To this day, the VA has not corrected this injustice. With no evidence to the contrary presented, G.H. unquestionably did not receive the benefit of the doubt owed to him. As a result, despite his service, G.H. faces a bleak financial future with his health in decline.

I.J. – U.S. Army Veteran

Finally, I.J. is another victim of the VA's failure to apply the benefit of the doubt when confronted with "inconclusive" evidence. I.J. is an Army veteran who was involved in an accident and witnessed multiple acts of violence while in service.

After service, I.J. received a comprehensive forensic psychological evaluation from Yale School of Medicine's Department of Psychiatry, which confirmed a diagnosis for MDD, schizoaffective disorder, and those conditions' connection to I.J.'s service. The Yale examination report contained all of the medical evidence necessary to confirm the service connection of I.J.'s disabilities. But a year and a half later, the VA requested a compensation and pension exam despite knowing that it could be detrimental to I.J.'s mental health and could aggravate his suicidal ideations. The exam results were inconclusive. Instead of giving the veteran the benefit of the doubt and accepting the findings of the Yale examination, however, the VA denied service connection. CVLC appealed the denial to the BVA, which remanded the case for more evidence. In the meantime, I.J. has no income and depends on public assistance for housing.

* * *

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

IV. CONCLUSION

Our veterans, after being injured in service to their country, should not be in a position of being denied the benefits we owe them. It is indefensible that the agency charged with supporting them continually fails them—even when instructed by our nations' lawmakers to provide our veterans with every benefit of the doubt. We owe our veterans more. Amici curiae therefore respectfully ask this Court to review the decision below en banc, answer the questions presented in Mr. Lynch's favor, and reverse the VA's decision, reinstating the standard Congress prescribed for our veterans' benefit.

Dated: November 2, 2020

DLA PIPER LLP (US)

By: */s/ Stanley J. Panikowski*

Stanley J. Panikowski
401 B Street, Suite 1700
San Diego, California 92101
Tel: (619) 299-2700

Attorneys for Amici Curiae

Swords to Plowshares and
Connecticut Veterans Legal Center

FORM 19. Certificate of Compliance with Type-Volume Limitations **Form 19**
July 2020

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 2020-2067

Short Case Caption: Lynch v. Wilkie

Instructions: When computing a word, line, or page count, you may exclude any items listed as exempted under Fed. R. App. P. 5(c), Fed. R. App. P. 21(d), Fed. R. App. P. 27(d)(2), Fed. R. App. P. 32(f), or Fed. Cir. R. 32(b)(2).

The foregoing filing complies with the relevant type-volume limitation of the Federal Rules of Appellate Procedure and Federal Circuit Rules because it meets one of the following:

☑ the filing has been prepared using a proportionally-spaced typeface and includes 5,786 words.

☐ the filing has been prepared using a monospaced typeface and includes _____ lines of text.

☐ the filing contains _____ pages / _____ words / _____ lines of text, which does not exceed the maximum authorized by this court's order (ECF No. _____).

Date: November 2, 2020

Signature: /s/ Stanley J. Panikowski

Name: Stanley J. Panikowski

Save for Filing