No. 2020-2067

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOE A. LYNCH,
Claimant-Appellant,

v.

ROBERT L. WILKIE, Secretary of Veterans Affairs,
Respondent-Appellee.

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

BRIEF OF RESPONDENT-APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Legislative Materials

Other Authorities

STATEMENT OF COUNSEL

Pursuant to Rule 47.5, respondent-appellee's counsel states that he is unaware of any other appeal in or from this action that previously was before this Court or any other appellate court under the same or similar title. Respondent-appellee's counsel is unaware of any case pending in this or any other court that may directly affect or be affected by this Court's decision in this appeal.

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STATEMENT OF THE ISSUES

1) Whether the Court's decision in *Ortiz v. Principi*, 274 F.3d 1361 (Fed. Cir. 2001) properly applied the statutory language in 38 U.S.C. § 5107(b).

2) Whether the appellant has failed to present a compelling justification for this Court to abandon the principles of *stare decisis* and overturn its decision in *Ortiz*.

STATEMENT OF THE CASE

I. Nature Of The Case

Claimant-appellant, Joe A. Lynch, appeals the United States Court of Appeals for Veterans Claims (Veterans Court) decision in *Joe A. Lynch v. Robert L. Wilkie, Secretary of Veterans Affairs*, No. 19-3106 (Vet. App. April 17, 2020).

Appx1-9.[1] In a memorandum decision, the Veterans Court affirmed the Board of Veterans' Appeals (board) decision that denied him entitlement to a rating in excess of 30 percent for his service-connected post-traumatic stress disorder (PTSD). Appx8.

II. Statement Of Facts And Course Of Proceedings Below

Mr. Lynch is a veteran who served on active duty in the United States Marine Corps from July 1972 to July 1976. Appx1.

On March 2, 2016, Mr. Lynch submitted to the Department of Veterans Affairs (VA) a claim of entitlement to PTSD, accompanied by a private physician's report describing "severe" impairments of his social and occupational functioning due to PTSD. Appx1-2. Mr. Lynch then underwent a VA PTSD examination in August 2016, after which the examiner noted that his disability picture did not match the level of impairment described by the private physician in March. Appx2. Nevertheless, the VA examiner diagnosed Mr. Lynch with PTSD, and VA granted his PTSD claim and a 30-percent disability rating. Appx2.

Mr. Lynch filed a notice of disagreement with this decision and submitted additional private psychological evaluations conducted by a second private physician in September 2016 and October 2016. Appx2. These reports contained descriptions of numerous symptoms attributed to Mr. Lynch's PTSD and detailed

[1] "Appx__" refers to pages in the Joint Appendix.

both his social and occupational impairments related to that condition. Appx2-3. The physician noted that, during these evaluations, Mr. Lynch described increased distance between himself and family members and an inability to "compete at work" or in his present environment. Appx3.

In July 2017, Mr. Lynch underwent an additional VA PTSD examination. Appx3. The examiner documented Mr. Lynch's symptomatology and noted that he experienced occasional decrease in work functioning. Appx3. The examiner also discussed the conflicting medical evidence of record, finding that while Mr. Lynch reported more severe symptomatology during the 2016 private evaluations, the private physician's conclusions regarding Mr. Lynch's disability picture "were more extreme than what was supported by available evidence." Appx 3.

On appeal, the board denied Mr. Lynch a disability rating in excess of 30-percent for his service-connected PTSD. Appx16. It reviewed each of the four psychiatric evaluation and examination reports, *see* Appx17-20, but found that his symptomatology did not manifest to a degree that warranted a higher rating. *See* Appx20-21. Although it considered the private examination reports, the board determined those examiners described impairment levels that did not match the symptoms reported by Mr. Lynch. Appx21. By contrast, it determined that the July 2017 VA examination report described a level of social and occupational

impairment that was in line with how Mr. Lynch described his work performance and interpersonal relationships. Appx21. In light of this evidence, the board made the factual finding "that the preponderance of the evidence is against the claim and entitlement to an initial rating in excess of 30 percent for PTSD is not warranted." Appx21 (citing 38 U.S.C. § 5107(b)).

Mr. Lynch subsequently filed an appeal to the Veterans Court, which affirmed the board's decision. Appx1. His primary argument was that the board misapplied section 5107(b) and erred by not finding he was entitled to the benefit of the doubt in adjudicating his claim.[2] Appx4. The Veterans Court rejected this argument, noting that the board "explicitly stated that it had considered the doctrine of reasonable doubt but found it did not apply here because 'the preponderance of the evidence is against the claim.'" Appx7. The court found the board's statement was "understandable and consistent with the law," citing *Ortiz*. *Id.*

The Veterans Court entered judgment on May 12, 2020. Appx14. On July 10, 2020, this Court received Mr. Lynch's notice of appeal. ECF No. 1.

[2] Mr. Lynch also argued that the board failed to give appropriate weight to the private evaluation reports, and he asserted that if his case were assigned to another veterans law judge that his claim would have been granted. Appx4. The court rejected these arguments, Appx7-8, both of which Mr. Lynch has now waived by not raising them to this Court. *See Gant v. United States*, 417 F.3d 1328, 1332 (Fed. Cir. 2005) ("Arguments not made in the court or tribunal whose order is under review are normally considered waived.").

SUMMARY OF THE ARGUMENT

This Court should affirm the decision on appeal. Mr. Lynch's argument that *Ortiz* misinterpreted section 5107(b) (benefit of the doubt rule) is based on a misreading of the decision itself. Although he asserts that *Ortiz* created a strict standard by which a claimant must demonstrate that the record is in equipoise before receiving the benefit of the doubt, the Court did no such thing. Rather, *Ortiz* held that section 5107(b) does not apply where the evidence preponderates either for or against a claim for benefits. The Court's holding was consistent with the plain language of the statute, the ordinary meaning of the words employed by Congress, and the logical proposition that evidence on a decision cannot simultaneously be too close to call and probably favor one outcome over another.

Additionally, Mr. Lynch has failed to overcome the presumption in favor of adhering to prior precedent, particularly involving non-constitutional issues, and he has not demonstrated why the Court should revisit its decision. *Ortiz* did not involve any constitutional issues, and Mr. Lynch has not asserted that the decision (or the application thereof) has somehow infringed upon his rights. Moreover, he has neither established any flaws in the foundation of *Ortiz*, nor has he shown the decision to be unworkable in its application, factors which weigh against overturning prior precedent. Furthermore, the interpretation of section 5107(b) and the application of *Ortiz* have remained relatively uniform since the case was

decided in 2001, and there have been no subsequent developments that have changed the legal landscape such that *Ortiz* is outdated or no longer viable.

Because Mr. Lynch's challenge to *Ortiz* fails and he has made no other allegation of error in the Veterans Court's decision, it should be affirmed.

ARGUMENT

I. Standard Of Review

"This [C]ourt's jurisdiction to review decisions by the Veterans Court is limited." *Wanless v. Shinseki*, 618 F.3d 1333, 1336 (Fed. Cir. 2010). Pursuant to 38 U.S.C. § 7292(a), this Court may review a Veterans Court decision "with respect to the validity of a decision of the Court on a rule of law or of any statute or regulation . . . or any interpretation thereof . . . that was relied on by the Court in making the decision." It may not, however, "review the Veterans Court's factual findings or its application of law to facts absent a constitutional issue." *Singleton v. Shinseki*, 659 F.3d 1332, 1334 (Fed. Cir. 2011) (citing 38 U.S.C. § 7292).

In reviewing a Veterans Court decision, this Court must decide "all relevant questions of law, including interpreting constitutional and statutory provisions," and set aside any interpretation thereof "other than a determination as to a factual matter" relied upon by the Veterans Court that it finds to be: "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of

statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or (D) without observance of procedure required by law." 38 U.S.C. § 7292(d)(1). The Court reviews questions of statutory and regulatory interpretation *de novo*. *See Mayfield v. Nicholson*, 499 F.3d 1317, 1321 (Fed. Cir. 2007).

II. The *Ortiz* Opinion Properly Applied The Statutory Language In 38 U.S.C. § 5107(b)

Pursuant to 38 U.S.C. § 5107(b), in the VA claims adjudication process, "[w]hen 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." In this appeal, Mr. Lynch asserts that the Court misinterpreted this statutory language in *Ortiz v. Principi*, 274 F.3d 1361 (Fed. Cir. 2001), erroneously creating an equipoise-of-the-evidence standard that fails to give appropriate effect to the word "approximate" in the phrase "approximate balance of positive and negative evidence." *See, e.g.*, Appellant's Br. 12, 14, 16-34. However, *Ortiz* created no such narrow standard. Rather, the Court held that "the benefit of the doubt rule has no application in cases in which the [b]oard has found that a preponderance of the evidence is against the veteran's claim . . . ." *Ortiz*, 274 F.3d at 1363. In doing so, the Court interpreted section 5107(b) in a logical manner that comports with the canons of statutory interpretation and gives full effect to the statutory language.

In *Ortiz*, the veteran appealed VA's denial of benefits for what he asserted was an in-service back injury. 274 F.3d at 1363. "The only issue raised . . . on appeal [was] whether the benefit of the doubt rule can be applied in cases in which the [b]oard finds that a preponderance of the evidence is against the veteran's claim for benefits." *Id*. at 1364. The Court examined the definitions of the words "approximate" and "balance" and determined that, as used in section 5107(b), "evidence is in 'approximate balance' when the evidence in favor of and opposing the veteran's claim is found to be 'almost exact[ly or] nearly' 'equal.' Another way of viewing the statute is to consider that it applies when the determination whether the claimant is entitled to benefits is 'too close to call.'" *Id*. at 1364-65. Using a baseball analogy, the Court explained that if VA finds the positive and negative evidence submitted for a claim is "nearly equal" or "too close to call," the claimant should receive the benefit of the doubt under section 5107(b). *Id*. at 1365 (referring to the "tie goes to the runner" rule).

By contrast, the Court found that the analysis "is quite different" in a situation where VA makes a determination that the evidence preponderates either in favor of or against a claim. *Id*. It explained that a "preponderance of the evidence" determination requires a factfinder "'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" *Id*.

(quoting *In re Winship*, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring)). Put simply, "a preponderance of the evidence can be said to 'describe a state of proof that *persuades* the fact finders that the points in question are 'more probably so than not.'" *Ortiz*, 274 F.3d at 1365 (quoting Mueller & Kirkpatrick, Evidence § 3.3 (1995)) (emphasis in original).

Having defined the terms relevant to the sole issue on appeal, the *Ortiz* Court reasoned that "if the Board is persuaded that the preponderant evidence weighs either for or against the veteran's claim, it necessarily has determined that the evidence is not 'nearly equal' or 'too close to call,' and the benefit of the doubt rule therefore has no application." 274 F.3d at 1365. Accordingly, it held that a "preponderance of the evidence" determination necessarily precludes a determination that the evidence is also in "approximate balance," such that the benefit of the doubt rule would not apply. *Id*. at 1366.

In light of the *Ortiz* Court's analysis, Mr. Lynch's argument here that the Court improperly interpreted section 5107(b) must fail for three reasons.

First, the *Ortiz* Court's interpretation of section 5107(b) is consistent with the canons of statutory interpretation. The Court appropriately reviewed the plain language of the statute and adopted the ordinary meaning of the words used by Congress. *See Kingdomware Techs., Inc. v. United States*, ___ U.S. ___, ___, 136 S. Ct. 1969, 1976 (2016) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450

(2002)) ("In statutory construction, we begin 'with the language of the statute.'"); *Best Power Tech. Sales Corp. v. Austin*, 984 F.2d 1172, 1177 (Fed. Cir. 1993) (citing *Board of Educ. v. Mergens*, 496 U.S. 226, 237 (1990)) ("It is a basic principle of statutory interpretation, however, that undefined terms in a statute are deemed to have their ordinarily understood meaning. For that meaning, we look to the dictionary."). This is precisely what the *Ortiz* Court did in determining the meaning of the phrase "approximate balance" under the statute. *Ortiz*, 274 F.3d at 1364-65.

Second, the *Ortiz* Court reached a logically obvious conclusion: evidence cannot simultaneously be almost equal *and* be so imbalanced that it probably weighs in favor of one finding over another. The Court's rationale is consistent with how other circuits have recognized that where evidence preponderates in one direction it is not "too close to call." *See, e.g.*, *Pineda v. Hamilton Cty.*, 977 F.3d 483, 491 (6th Cir. 2020) (plaintiffs do not satisfy the preponderance-of-the-evidence burden "when, even after viewing the evidence in their favor, the record is in 'equipoise' or 'evenly balanced' on an essential element's existence"); *United States v. Alvarado-Guizar*, 361 F.3d 597, 602 (9th Cir. 2004) ("evidence in equipoise is not enough" to satisfy the higher preponderance of the evidence standard); *Maher Terminals v. Dir., Office of Workers' Comp. Programs*, 992 F.2d 1277, 1284 (3d Cir. 1993) (ALJ erred by finding in the plaintiff's favor because

"the evidence was in equipoise, which, by definition, means that the claimant did not carry her burden of proof by a preponderance of the evidence."); *Daniels v. Hadley Mem'l Hosp.*, 566 F.2d 749, 761 (D.C. Cir. 1977) (holding the district court erred in finding the evidence was in equipoise and did not preponderate in the plaintiff's favor; the record was "far from being 'in equipoise'" and "the evidence decisively supported the plaintiff's position").

Third, and contrary to Mr. Lynch's assertions, at no point did the *Ortiz* Court create an "equipoise-of-the-evidence" standard. The only time the word "equipoise" appears in the decision is where it ascertains the definition of the word "balance," at which point it distinguishes "balance" from the statutory "*approximate* balance" standard. 274 F.3d at 1364 (emphasis added). Not only did the Court not adopt an equipoise-of-the-evidence standard, it used several examples to illustrate that section 5107(b) does not require an exact balance of evidence. *Ortiz*, 274 F.3d at 1364-66 (describing the "approximate balance" standard as "almost exact[ly or] nearly" "equal," "too close to call," and "nearly equal").[3] This appears to be the same standard Mr. Lynch advocates for in his brief. *See* Appellant's Br. 22 (citing *Garre v. Geryk*, 145 A.2d 829, 831 (Conn.

[3] Notably, neither the board nor the Veterans Court below applied an equipoise standard to Mr. Lynch's claim. *See* Appx7; Appx21 ("Accordingly, the Board finds that the preponderance of the evidence is against the claim and entitlement to an initial rating in excess of 30 percent for PTSD is not warranted.").

Sup. Ct. of Errors 1958), for the proposition that "[t]he word 'approximately' is in its nature indefinite. It means 'nearly,' 'about,' or 'close to'").

For these reasons, the Court should reject Mr. Lynch's argument as it is based on a misreading of the *Ortiz* decision. *Ortiz* did not create an equipoise-of-the-evidence standard, but instead held that "the benefit of the doubt rule has no application in cases in which the [b]oard has found that a preponderance of the evidence is against the veteran's claim . . . ." 274 F.3d at 1363.

III. Mr. Lynch Has Failed To Present A Compelling Justification For This Court To Abandon The Principles Of *Stare Decisis* And Overturn *Ortiz*

"The doctrine of *stare decisis* enhances predictability and efficiency in dispute resolution and legal proceedings, by enabling and fostering reliance on prior rulings." *Lighting Ballast Control LLC v. Philips Elecs. N. Am. Corp.*, 744 F.3d 1272, 1281 (Fed. Cir. 2014) (en banc), *vacated on other grounds by Lighting Ballast Control LLC v. Universal Lighting Technologies, Inc.*, ___ U.S. ___, 135 S. Ct. 1173 (2015). The burden of persuasion to overturn a precedential decision lies with the party challenging the decision's continued viability. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 413-14 (2010). Courts will not depart from the doctrine without compelling or special justification. *Id*. (citing *Dickerson v. United States*, 530 U.S. 428, 443 (2000); *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991)).

Mr. Lynch has failed to present adequate justification for the Court to overturn *Ortiz* for the reasons that follow.[4]

A. The *Ortiz* Precedent Has "Special Force" Because It Resolved Non-Constitutional Issues

"[*S*]*tare decisis* in respect to statutory interpretation has 'special force,' for 'Congress remains free to alter what we have done.'" *J.R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–173 (1989)); *see also Shady Grove Orthopedic*, 559 U.S. at 413-14 ("[A] party seeking to overturn a *statutory* precedent bears an even greater burden, since Congress remains free to correct us . . . and adhering to our precedent enables it do so . . . .") (emphasis in original). The same is true "for precedents that resolve non-constitutional issues . . . ." *Lighting Ballast Control*, 744 F.3d at 1282 (quoting *J.R. Sand & Gravel*, 552 U.S. at 139). The appellant in *Ortiz* did not raise any constitutional arguments, and the Court did not address any constitutional issues in that appeal. As noted above, the Court determined that the sole issue before it was whether the statutory benefit of the doubt rule applies in cases where the board has determined the evidence preponderates against a claim. *Ortiz*, 274 F.3d at 1364.

[4] Although we respond herein to Mr. Lynch's request for the Court to disregard *stare decisis* and overturn *Ortiz*, "unless and until [*Ortiz* is] overturned en banc or through Supreme Court intervention," the panel is bound by *Ortiz*. *Deckers Corp. v. United States*, 752 F.3d 949, 964 (Fed. Cir. 2014).

Here, Mr. Lynch did not argue before the board, the Veterans Court, or this Court that *Ortiz* involved any constitutional issues, or even that the application of *Ortiz* raised a constitutional problem. By not raising this issue in his initial brief to this Court he has waived any constitutional argument. *See*, *e.g.*, *Singleton*, 659 F.3d at 1334 n.2 ("There is precedent for this court declining to hear arguments, even constitutional arguments, not raised to previous tribunals.") (citing *Solorio v. United States*, 483 U.S. 435, 451 n.18 (1987); *Smith v. West*, 214 F.3d 1331, 1334 (Fed. Cir. 2000)).

Congress is free to intervene and overturn *Ortiz* by statute if it disagrees with the Court's interpretation. *Lighting Ballast Control*, 744 F.3d at 1282. Indeed, Congress routinely enacts corrective legislation in direct response to judicial decisions. *E.g.*, H.R. REP. NO. 116-58, at 11 (2019) (purpose of Blue Water Navy Vietnam Veterans Act of 2019 was, in part, to avoid narrow interpretations of *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019), which "did not . . . define the term 'territorial sea'" in the context of herbicide exposure presumptions); H.R. REP. NO. 115-67, at 3 (2017) (purpose of Follow The Rules Act was to clarify congressional intent following *Rainey v. Merit Sys. Prot. Bd.*, 824 F.3d 1359 (Fed. Cir. 2016)); H.R. REP. NO. 109-72, at 172 (2005) (purpose of REAL ID Act was, in part, to "address[] a number of judicial review anomalies improperly favoring

criminal aliens that were created by court decisions interpreting changes to the INA in 1996").

Between December 17, 2001 (the date on which this Court issued the *Ortiz* decision), and October 30, 2020, Congress has passed and the President has signed 103 public laws originating from the Senate and House Veterans Affairs Committees that pertain to a range of veterans issues.[5] None of these 103 bills amended section 5107(b) or otherwise legislatively overturned *Ortiz*. Thus, contrary to Mr. Lynch's assertion that "convincing Congress and the President to revise a statute is no mean feat," Appellant's Br. 40, Congress has not lacked opportunities to act if it believed the *Ortiz* court misinterpreted section 5107(b). *See Lighting Ballast Control*, 744 F.3d at 1283 ("There has been no legislative adjustment of the *Cybor* procedure, despite extensive patent-related legislative activity during the entire period of *Cybor*'s existence."). In sum, Congress knows how to legislatively overturn a court decision, it has done so in the past, but it has declined to overturn this Court's interpretation of section 5107(b), which weighs against overturning *Ortiz*.

[5] Quick Search, Library of Congress, https://www.congress.gov (using the "More Options" tab under the search bar on the home page, search for "Laws" from Congresses 107-116 that originated with the Veterans' Affairs Committees of the House and Senate).

B. The Factors For Considering Whether To Depart From The Principles Of *Stare Decisis* Militate Against Overturning *Ortiz*

Even if the Court were inclined to consider overturning *Ortiz* despite its "special force" as a statutory precedent, none of the traditional factors favor departing from precedent in this case. This Court has outlined three factors for determining whether it would be appropriate to depart from its precedent: "[1] when subsequent cases have undermined [its] doctrinal underpinnings; [2] when the precedent has proved unworkable; or [3] when a considerable body of new experience requires changing the law . . . ." *Lighting Ballast Control*, 744 F.3d at 1283 (internal quotations and citations omitted). Given the body of law generated subsequent to *Ortiz*, none of these factors weigh in favor of overturning that decision.

1. The Doctrinal Underpinnings Of *Ortiz* Remain Undisturbed

This Court's post-*Ortiz* decisions involving section 5107(b) have not undermined the doctrinal underpinnings of the decision. To the contrary, the court has routinely followed the *Ortiz* holding and its reasoning. In *Fagan v. Shinseki*, the Court quoted *Ortiz* for the proposition that the benefit of the doubt doctrine "has 'no application where the Board determines that the preponderance of the evidence weighs against the veteran's claim'" but "applies when the evidence is in 'approximate balance' or 'almost exactly equal.'" 573 F.3d 1282, 1287 (Fed. Cir. 2009) (quoting *Ortiz*, 274 F.3d at 1364, 1366). Much like in *Ortiz*, the *Fagan*

court affirmed a Veterans Court decision involving the denial of a claim where "the preponderance of the evidence weighed against service connection." *Fagan*, 573 F.3d at 1289. Since *Fagan*, the Court has not deviated from this interpretation. *E.g.*, *Carpenter v. Wilkie*, 802 F. App'x 591, 592 (Fed. Cir. 2020) ("[Section] 5107(b) applies only when the evidence is approximately in equipoise. Here, the [b]oard did not determine that the evidence was approximately equal but rather that 'the preponderance of evidence is against the claim.'"); *Allen v. McDonald*, 652 F. App'x 983, 987-88 (Fed. Cir. 2016) ("[T]he [b]oard did not err in declining to apply the benefit of the doubt rule" where it "did not find that there was . . . an 'approximate balance'" of evidence.); *Thompson v. McDonald*, 580 F. App'x 901, 906 (Fed. Cir. 2014) (benefit of the doubt rule does not apply where "[t]he [b]oard found that the evidence weighed against each of [the veteran's] claims").

To be clear, the Court has issued decisions that could be interpreted as requiring an *exact* balance rather than an *approximate* balance of evidence. However, any perceived deviation is an anomaly rather than a departure from the interpretation set forth in *Ortiz*. For example, in *Skoczen v. Shinseki* the Court stated that the benefit of the doubt rule could be thought of "as a 'burden of persuasion,' in that the evidence must rise to a state of equipoise for the claimant to 'win.'" 564 F.3d 1319, 1324 (Fed. Cir. 2009). But this passage is nothing more than dicta, as the issue before the Court was whether the Veterans Court properly

construed section 5107(a) rather than section 5107(b). *Id*. at 1321 ("In this veterans appeal, we are asked to provide the proper interpretation of 38 U.S.C. § 5107(a) (2006). Because the [Veterans Court] correctly construed the statute as imposing evidentiary responsibilities on the claimant as well as the [VA], we affirm.").

Furthermore, the Court has subsequently cited *Skoczen* for the proposition that "[s]ection 5107(b) requires that the VA give the veteran the benefit of the doubt when the evidence regarding any issue material to his claim is in *relative* equipoise." *Burden v. Shinseki*, 727 F.3d 1161, 1169-70 (Fed. Cir. 2013) (emphasis added). Although the term "relative equipoise" does not appear in section 5107(b) or *Ortiz*, the Court has viewed the phrase as synonymous with the statutory "approximate balance" standard. *See Dulin v. Mansfield*, 250 F. App'x 338, 341 (Fed. Cir. 2007) ("Under [section 5107(b)], where the pertinent evidence is in relative equipoise, or 'approximate balance,' a claimant enjoys the benefit of the doubt and his or her claim for service connection will be granted.").

In sum, over the nearly twenty years following *Ortiz*, this Court has reaffirmed rather than undermined the doctrinal underpinnings of that decision.

2. Mr. Lynch Has Not Demonstrated That *Ortiz* Has Proved To Be Unworkable

The entirety of Mr. Lynch's argument is based on the incorrect premise that the *Ortiz* Court failed to give appropriate weight to the word "approximate" in the

phrase "approximate balance of positive and negative evidence" under section 5107(b). As we demonstrated above, the *Ortiz* Court's definition of that term comports with the canons of statutory interpretation and does not impose a strict equipoise standard. Rather, *Ortiz* held that the benefit-of-the-doubt doctrine does not apply when the evidence preponderates against the veteran's claim.

Contrary to assertions by Mr. Lynch and the amici, *Ortiz* has not served as a tool to prevent deserving veterans from obtaining VA benefits. The board has repeatedly and correctly applied *Ortiz* in veterans' favor over the years.[6] *E.g.*, *Names Redacted By Agency*, BVA A20-008701, 2020 BVA LEXIS 62883 (May 15, 2020) ("[T]he [b]oard finds the evidence is in approximate balance, and thus service connection for a bilateral hearing loss is warranted." (citing *Ortiz*, 274 F.3d at 1364); *Names Redacted By Agency*, BVA 19-195554, 2019 BVA LEXIS 146248, at *12 (Dec. 19, 2019) ("[T]he preponderance of the evidence is in favor of this appeal, the benefit-of-the-doubt rule is for application, and entitlement to compensation . . . is warranted." (citing 38 U.S.C. § 5107(b); *Ortiz*, 274 F.3d at 1364)); *Names Redacted By Agency*, BVA 12-09712, 2012 BVA LEXIS 6109, at *14 (Mar. 15, 2012) ("The [b]oard finds that the preponderance of the evidence is

[6] These decisions are not offered for their binding authority but to illustrate the continued viability of the interpretation set forth in *Ortiz*. *See* 38 C.F.R. § 20.1303 ("Although the Board strives for consistency in issuing its decisions, previously issued Board decisions will be considered binding only with regard to the specific case decided.").

in favor of assigning an effective date for service connection for PTSD of February 27, 2002," more than six years earlier than the previously assigned effective date of May 18, 2008"); *Names Redacted By Agency*, BVA 09-31693, 2009 BVA LEXIS 21442, at *24-25 (Aug. 24, 2009) ("In view of the above factors, the [b]oard finds that the evidence of additional psychiatric disability . . . is in relative equipoise. Applying the benefit-of-the-doubt rule, compensation . . . is warranted for additional acquired psychiatric disability . . . ." (citing 38 U.S.C. § 5107(b); *Ortiz*, 274 F.3d 1361); *Names Redacted By Agency*, BVA 04-25523, 2004 BVA LEXIS 54860, at *45 (Sept. 16, 2004) ("In light of the testimony, but limited objective findings, the evidence for and against assignment of a 10 percent rating is in relative equipoise. With application of the doctrine of reasonable doubt (38 U.S.C. § 5107(b); [*Gilbert v. Derwinski*, 1 Vet. App. 49 (1990)]; *Ortiz*, *supra*.), a 10 percent rating is warranted.").

This is not to say that *Ortiz* has been perfectly implemented in every board decision. But the remedy for correcting those errors lies in the judicial review process specifically created to provide veterans with a forum to challenge those decisions. *See Abbs v. Principi*, 237 F.3d 1342, 1348 (Fed. Cir. 2001) (quoting H.R. REP. NO. 100-963, at 4 (1988)) ("One of the purposes of creating the Veterans Court was to '[e]stablish an *independent* [c]ourt' to review decisions of the [b]oard.") (emphasis in original). This is a far less extreme approach to ensuring

that section 5107(b) is properly applied than invalidating a near twenty-year-old precedential opinion that has been cited over 500 times since its publication.[7]

Moreover, the interpretation of "approximate balance" put forth by Mr. Lynch is impractical, and it would require the Court to selectively omit parts of the definition of "approximate." Mr. Lynch insists that Congress "envisioned a standard of proof lower than equipoise-of-the-evidence for veterans, and conversely, higher than preponderance-of-the-evidence for the Department." Appellant's Br. 13, 19-20, 28-30. The Court should reject this interpretation for three reasons.

First, none of the cited authority even suggests "approximate" is limited to "less than" equal or even. Not only does Mr. Lynch acknowledge as much in his brief, he cites the very decision he seeks to overturn in doing so. *See* Appellant's Br. 19 n.7 ("In general, *approximate* means "more or less" of the referenced subject. *Ortiz*, 274 F.3d at 1364 (quoting *Webster's New World Dictionary* 68 (3d ed. 1988) definition of *approximate*).").

Second, the premise of his argument, that the pro-claimant canon compels such a reading, *see* Appellant's Br. 19 n.7, fails to acknowledge that section 5107(b), in and of itself, lowers the evidentiary burden on individuals seeking entitlement to VA benefits. *See* S. REP. NO. 100-418, at 32 (1988) (noting the

[7] Total citations of *Ortiz* listed in the Lexis Advance database.

purpose of codifying VA's reasonable doubt rule in the Veterans' Judicial Review Act, Pub. L. 100-687, 102 Stat. 4105 (1988), was "to ensure that the VA's . . . practice of making every effort to award a benefit to a claimant is not abandoned"); *see also Tech. Licensing Corp. v. Videotek, Inc.*, 545 F.3d 1316, 1327 (Fed. Cir. 2008) (noting the preponderance of the evidence standard is "the usual civil law standard for proof of a fact"); *Maher Terminals*, 992 F.2d at 1284 (holding that where the evidence was in equipoise the plaintiff failed to satisfy the higher preponderance of the evidence burden).

Third, Mr. Lynch's interpretation would necessarily lead to cases where VA is compelled to grant benefits to a veteran despite the preponderance of the evidence demonstrating that the veteran has not established entitlement to benefits. Congress could not have intended to establish a benefits regime that grants benefits to applicants when the preponderance of evidence disproves their entitlement. Mr. Lynch's "higher than preponderance-of-the-evidence" standard for denying benefits claims also fails to clarify how much evidence is sufficient to reject a claim. His preferred statutory construction could create a rule where *any* evidence, regardless of its probative value, could satisfy this criterion and thus entitle any claimant to VA benefits. This would lead to greater inconsistency at the administrative level, and it would leave no clear guidance for reviewing courts on an appropriate standard of review.

In addition, adopting such an unworkable standard would be a net detriment to VA and the veteran community. Requiring VA to determine whether a veteran should be awarded benefits where the evidence preponderates against an entitlement, but does not preponderate quite enough, will require VA to devote more of its scarce resources to the claims adjudication process. The end result would provide little certainty of an appreciable benefit to any particular veteran, but would impair VA's ability to provide timely adjudication decisions to the veteran community as a whole. Mr. Lynch's proposed evidentiary standard would thus hinder rather than promote Congress's pro-veteran policies.

The *Lighting Ballast Control* Court rejected a similarly unworkable proposal when considering whether to overturn *Cybor Corp. v. FAS Technologies, Inc.*, 138 F.3d 1448 (Fed. Cir. 1998) (en banc), which at the time was a 15-year-old opinion that established the appellate standard of review for determining "claim construction" in patent cases. 744 F.3d at 1276. The Court considered the arguments in favor of overturning the *Cybor*, but found that "reversing *Cybor* or modifying it [in the proposed manner] ha[d] a high potential to diminish workability and increase burdens by adding a new and uncertain inquiry, not only on appeal but also in the trial tribunal." 744 F.3d at 1283-1284.

In short, Mr. Lynch's interpretation is unsupported, illogical, and one that "would produce results that were not merely odd, but positively absurd." *United*

States v. X-Citement Video, Inc., 513 U.S. 64, 69 (1994) (rejecting a statutory construction that would impose criminal liability far beyond what Congress could have intended).

3. The Post-*Ortiz* Caselaw Has Remained Consistent

Over nearly twenty years, this Court has not departed from the interpretation of section 5107(b) outlined in *Ortiz*, and most recently relied on that interpretation on November 23, 2020. *Coleman v. Wilkie*, No. 20-1882, 2020 U.S. App. LEXIS 36873, at *7 (Fed. Cir. Nov. 23, 2020) (quoting *Fagan*, 573 F.3d at 1287) ("Th[e benefit of the doubt] doctrine does not apply where 'the Board determines that the preponderance of the evidence weighs against the veteran's claim or when the evidence is not in equipoise.'"). And, as argued above, rare inconsistent interpretations or applications of *Ortiz* do not require this Court to manufacture a new interpretation of a statute that has not been amended since November 2000. Where VA's final decisions contain error, claimants have a remedy through the courts. *See* 38 U.S.C. §§ 7252(a) and 7292(a). If the Veterans Court has inconsistently interpreted or applied *Ortiz* in precedential opinions, this Court need only restate that *Ortiz* remains good law and is binding on the Veterans Court. *See Briggs v. Pa. R. Co.*, 334 U.S. 304, 306 (1948) ("[A]n inferior court has no power or authority to deviate from the mandate issued by an appellate court.").

In its amicus brief, Military-Veterans Advocacy Inc. offered a string cite of Veterans Court decisions that misstated the standard outlined in *Ortiz*, but applied the correct standard. *See* Br. at 8. As this Court explained in *James v. Wilkie*, "[w]hen determining whether a court committed legal error in selecting the appropriate legal standard, we determine which legal standard the tribunal *applied*, not which standard it recited." 917 F.3d 1368, 1373-74 (Fed. Cir. 2019) (citing *See Int'l Custom Prods., Inc. v. United States*, 843 F.3d 1355, 1359 (Fed. Cir. 2016)). To this point, while the Veterans Court may have *misstated* the correct legal standard in the cases cited, it did not *misapply* the *Ortiz* holding.

In *Holland v. Wilkie*, despite remanding the matter due to the board's failure to provide an adequate statement of reasons and bases, the Veterans Court held the board's finding "that 'the preponderance of the evidence is against [appellant's] claim'" was not clearly erroneous, and so the board's "conclusion that the 'benefit of the doubt doctrine is not for application in the instant case' [was] correct." No. 18-1315, 2019 U.S. App. Vet. Claims LEXIS 121, at *5-6 (Jan. 29, 2019). In *Mayhue v. Shinseki*, the Veterans Court discussed the equipoise standard in the context of 38 C.F.R. § 4.3, not 38 U.S.C. § 5107(b), and nevertheless cited *Schoolman v. West*, 12 Vet. App. 307, 311 (1999), for the proposition that "where the preponderance of the evidence is against an appellant's claims, 'the benefit of the doubt doctrine does not apply.'" 24 Vet. App. 273, 282 (2011).

The *Jones v. Shinseki* decision involved the remand of a matter due to the board's failure to consider all relevant evidence. 23 Vet. App. 382, 394 (2010). Although the Veterans Court referenced an equipoise-of-the-evidence standard, it did so as part of a footnote containing dicta. *Id*. at 388 n.1 ("We need not address these issues here, but do note that in the veterans benefits system the benefit of the doubt as to 'any issue material to resolution of the claim' goes to the veteran if the evidence is in equipoise, and the 'burden of nonpersuasion' is with VA." (citing *Ortiz*, 274 F.3d at 1364) (internal citation omitted)). Even so, the Veterans Court was correct: it stands to reason that if the benefit of the doubt rule must be applied where the evidence is "almost exact[ly or] nearly" even, *Ortiz*, 274 F.3d at 1364, it undoubtedly applies where the evidence is in equipoise.

In *Chotta v. Peake*, "[t]he issue . . . before the [c]ourt [was] the parameters of the duty to assist where the Secretary revises a previously final decision," and so the Veterans Court's misstatement of the benefit of the doubt rule was dicta and not dispositive. 22 Vet. App. 80, 86 (2008). In *Sateren v. Shinseki*, the court referenced an equipoise standard, but it does not appear that the appellant was seeking application of the benefit of the doubt rule. No. 08-3858, 2010 U.S. App. Vet. Claims LEXIS 1347, at *5 (July 26, 2010). Nevertheless, had the court applied an equipoise-of-the-evidence rule, any error would have been harmless in light of the board's determination "that the preponderance of the evidence was

against [the appellant's] claim." *Id*. Similarly, in *Moreno v. Shinseki*, the court repeatedly referred to section 5107(b) as the "equipoise standard," but found no error in the board's decision where "it considered the 'doctrine of reasonable doubt,' but [determined] that it was not for application because the preponderance [of] evidence was against the claim." No. 07-1801, 2009 U.S. App. Vet. Claims LEXIS 173, at *3 (Feb. 27, 2009).[8]

In light of the above, Mr. Lynch has not demonstrated that any of the *Lighting Ballast Control* factors support his argument, and he has not offered any compelling or special justification for overturning *Ortiz*. The Court should not give any further consideration to abandoning the principles of *stare decisis* in this matter and let the *Ortiz* decision stand.

CONCLUSION

For the foregoing reasons, this Court should affirm the Veterans Court's April 17, 2020, decision.

[8] Military-Veterans Advocacy, Inc. also cites *Rucker v. Brown*, 10 Vet. App. 67, 73 (1997), but *Rucker* predates *Ortiz* by four years and therefore could not have "applied *Ortiz* in [a] narrow fashion." Br. at 8.

Respectfully submitted,

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December 7, 2020

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d), I certify under penalty of perjury that on this 7th day of December, 2020, a copy of the foregoing "Brief of Respondent-Appellee" was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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